

# Client Alert

June 2020

## Eleventh Circuit Shuts Down Receiver's Attempt to Recover Ponzi Scheme Losses from Bank

In recent years, receivers and bankruptcy trustees have sought to recover losses from banks and large businesses—who may be viewed as “deep pockets” for potential recoveries—based on evolving legal theories. Pursuant to one of these theories, trustees and receivers increasingly have alleged that routine banking activities can give rise to fraudulent conveyance liability—in many cases seeking to recover every single deposit made by a distressed entity into its own accounts at one or more financial institutions. A recent published decision from the United States Court of Appeals for the Eleventh Circuit, *Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296 (11th Cir. 2020), soundly rejected the notion that deposits and withdrawals from an ordinary deposit account constitute fraudulent transfers to the bank, and held that receivers lack standing to assert tort claims that the receivership entities would not be able to pursue.

The *Isaiah* case arose from an alleged Ponzi scheme. A state court-appointed receiver sued a bank where the receivership entities held accounts, seeking the return of amounts allegedly transferred into and among the receivership entities' accounts. The receiver also asserted common law tort claims against the bank for aiding and abetting breach of fiduciary duty, conversion, and fraud. The Southern District of Florida granted the bank's motion to dismiss, after staying discovery while the motion to dismiss was pending. The Eleventh Circuit affirmed on appeal.

### Fraudulent Transfer Requires Transferor to Relinquish Control

To determine whether deposits, withdrawals, or movements of funds between the receivership entities' accounts qualified as “transfers” under Florida's fraudulent transfer statute (which is analogous to the federal bankruptcy code), the court began with the premise that there must be a “transfer” as defined in the statute. While that term may be broadly defined, the court concluded it does not encompass routine deposits into an entity's own account. Likewise, it does not include ordinary account transfers among the entity's accounts at the bank. In so holding, the court considered the degree of control of the putative **transferor**—reasoning that, while an accountholder technically “may transfer title of funds to the bank when he makes a routine deposit into his bank account, the accountholder can still call upon the bank to return those funds on demand.” “The accountholder thus never relinquishes his interest in or control over the funds deposited into his bank account; rather he ‘retain[s] total control over’ and has ‘unfettered access to’ the full amount of his money in his account and can withdraw those funds at will.” Because the receiver had failed to make a prima facie case that a transfer occurred, the court did not need to reach the bank's “mere conduit” defense. The court's ruling on this issue should help to stem the tide of fraudulent transfer claims against banks for carrying out routine banking activities.

### Receiver Lacks Standing to Assert Tort Claims for Acts Perpetrated by the Receivership Entities

After briefing and oral argument, the Eleventh Circuit requested supplemental briefs on whether fraudulent acts of receivership entities are imputed to the receivership for purposes of the receiver's common law tort claims. The court found that they were, reasoning that, where the receivership entities are alleged to be “robotic tools of the Ponzi schemers,” they “cannot be said to have suffered any injury

from the Ponzi scheme that the [e]ntities themselves perpetrated.” Accordingly, a receiver lacks standing to bring such claims unless the receivership entity had at least one innocent officer, director, or stockholder. The court’s standing ruling could provide a useful defense not only for banks but also for professional service firms and other businesses accused of aiding and abetting a fraudulent scheme.

### **District Court Properly Stayed Discovery While Deciding the Motion to Dismiss**

The Eleventh Circuit also affirmed the district court’s decision to stay discovery pending resolution of the defendant’s motion to dismiss. The court confirmed that facial challenges to the legal sufficiency of a claim or defense should be resolved before discovery begins and noted that “the failure to consider and rule on these potentially dispositive pretrial motions can be an abuse of discretion.” Defendants litigating in the Eleventh Circuit may find this portion of the ruling particularly useful in their efforts to limit burdensome, costly discovery in cases that may be dismissed on the pleadings.

### **Contacts**

**Jamie Zysk Isani**  
jjsani@HuntonAK.com

**Dain A. De Souza**  
ddesouza@HuntonAK.com