

Litigator of the Week: David Sheehan of Baker Hostetler

By Andrew Longstreth

In the course of his career, David Sheehan of Baker Hostetler has served as both trustee and counsel to the trustee in various liquidation proceedings under the Securities Investor Protection Act. In the granddaddy of all liquidations--the bankruptcy of Bernard L. Madoff Investment Securities--he's representing the trustee, his partner Irving Picard. 60 Minutes correspondent Morley Safer dubbed him Picard's "bloodhound"; we prefer calling him "the man behind The Man."

That's the role he likes best, Sheehan told us Thursday. "I like being counsel because I get to argue all of these cases," he said.

Sheehan made perhaps his most important argument last month before Manhattan federal bankruptcy court judge Burton Lifland. The issue was how to compensate burned Madoff investors. Throughout the nearly four-hour hearing, which Sheehan called "exhilarating," he urged Judge Lifland to adopt Picard's "cash in/cash out" approach, in which investors who put more money into BLMIS than they took out would be eligible to share in what Picard recovers. Those who took out more than they put in, on the other hand, would not. According to the New York Law Journal, Sheehan also asked Judge Lifland to reject an argument by lawyers for so-called "net winners," who want their clients' final BLMIS

account statements, dated Nov. 30, 2008, to serve as a basis for compensating victims.

"The last customer statement, being the concoction of a fraudster, is not something on which you can rely," Sheehan said at the hearing.

On Monday, in a 34-page decision, Judge Lifland acknowledged the "compelling arguments" on both sides, but he ultimately favored Sheehan's position. "The BLMIS books and records expose a Ponzi scheme where no securities were ever ordered, paid for, or acquired," wrote Judge Lifland. "Because 'securities positions' are in fact nonexistent, the trustee cannot discharge claims upon the false premise that customers' securities positions are what the account statements purport them to be."

Sheehan told us that while he sympathized with all of Madoff's victims, he wanted to give a voice to the net losers. "We were focused on...those who didn't even get their own money back," he said.

Judge Lifland's decision, he added, is the most important to come out of the liquidation proceedings so far. But Lifland's opinion won't be the last word. Sheehan told us that it's almost certain that there will be an expedited appeal to the U.S. Court of Appeals for the Second Circuit--more opportunity for the man behind The Man to have some fun.