

For Mets owners, incompetence does not equal fraud

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By David Levine

The Wilpon family, co-owners of the [New York Mets](#), seems to be caught in a Shakespearean drama being played out on a Manhattan stage. Like Romeo, who proclaimed himself "fortune's fool," the Wilpons were foolish enough to be wooed by [Bernie Madoff's](#) Ponzi scheme. Since when, however, does foolishness equate to fraud under the law?

No matter how angry we are with Madoff, I question our legal right to scapegoat those of his investors who happen to be very rich.

For over a decade, the Wilpons invested a gold mine of precious assets comprising portions of their many enterprises with Madoff. The family was surrounded by some really smart professional advisers who eventually scratched their heads at the inexplicable performance of the investment returns. Some of these advisers left paper trails forecasting to the Wilpons that Madoff was too good to be true. But the Wilpons, preoccupied by their diverse business interests and an underachieving baseball team -- and this is important -- either overlooked, disregarded or ignored the alarms that had sounded.

Enter, stage left, the court-appointed guardian of all of the duped investors, [Irving Picard](#), vested with the thankless task of squeezing blood from a stone. And squeeze he has. There are anecdotes of very high net worth individuals who have been "convinced" to "repay" vast sums into the Madoff recovery fund, making a noticeable dent in the black hole of billions lost. I imagine that those individuals were hauled into a plush conference room with Mr. Picard's minions of eager young lawyers and told to pony up or face the expense or embarrassment (or both) of claims of the type now being waged against Messrs. Wilpon and their progeny.

And what exactly are those claims? That the Wilpons, by respecting Madoff's track record and reputation, by being fiercely loyal to the seemingly charitable Bernie, by turning a blind eye to the fuzzy and undocumented investment statements, by being too stubborn, or preoccupied or clueless or reckless or arrogant or incredulous, somehow enabled, aided, abetted and fostered -- and in fact participated in -- the Madoff Ponzi scheme.

The law tells us that fraud requires all types of active and devious knowledge of the fraudulent scheme. In the hundred pages of court documents, Mr. Picard skillfully paints the Wilpons as cheats and frauds, except that the facts as alleged strike this business lawyer as evidence that they neither cheated nor defrauded anyone but themselves. How, then, can they be compelled to pay money back? Isn't our civil legal system built on proof demonstrated by a preponderance of evidence? Or has righting a wrong supplanted that?

Critics claim that our jury system is rigged that way -- that once a lawyer is allowed to talk to a jury, human nature prevails over the technical application of the law, leading us to a system that compensates victims as long as we find someone to pay. Never mind that the someone in this case is a victim of the very Ponzi scheme he is accused of facilitating.

Is civil law at its core nothing more than a system to redress and re-balance inequities? Mr. Picard is depending on it. People are mad as hell at Bernie Madoff, and the Wilpons and others similarly situated have plenty of money and will continue to have plenty after the dust settles. The parties in this drama have agreed to mediate, and the mediator, [Mario Cuomo](#), will no doubt convince them that their respective positions are flawed, and that each is vulnerable to being whacked in the case's outcome, should it go to court.

Cuomo will end up compelling both sides to compromise, ultimately forcing the Wilpons to give back money even though they did nothing against the law. They were just foolish. And that is not yet against the law, even in a court of fools.

I am a little troubled by all this. Call me slow on the uptick, but I fail to recognize precisely what the Wilpons did to warrant being ordered to repay money they lost merely by stupidity or inattention. If I'm not smart enough to recognize the merits of Mr. Picard's claim, does that mean that I, too, may be complicit in Madoff's scheme?

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