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More Money, More Problems: How Oklahoma's Novel Approach to Ponzi Scheme Clawbacks in Oklahoma Department of Securities ex rel. Faught v. Blair Means More Uncertainty for Investors

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NOTES

More Money, More Problems: How Oklahoma's Novel Approach to Ponzi Scheme Clawbacks in *Oklahoma Department of Securities* ex rel. *Faught v. Blair* Means More Uncertainty for Investors

I. Introduction

> *I believe Marsha's gotten maybe an eight or a ten year [jail] sentence out of this . . . my wife and myself have gotten life sentences out of this.*[1]

By the time Bernard Madoff's headline-grabbing Ponzi scheme (one of the largest ever discovered[2]) came crumbling down in late 2008,[3] certain investors of Oklahoman Marsha Schubert had already experienced first-hand the legal and personal repercussions of such a fraudulent endeavor.[4] While the monetary impacts of Schubert's and Madoff's respective schemes differ dramatically,[5] both instances prompt real questions about the current abilities

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1. *Anatomy of a Fraud: The Rogue Broker* (OETA television broadcast Sept. 21, 2010), *available at* http://www.investedok.org/documentaries/Anatomy-RogueBroker_ 1000.asp. Ponzi schemer Marsha Schubert pled guilty to one count of mail fraud in Oklahoma federal court and received a ten-year sentence. Jay F. Marks, *Former Investment Adviser Sentenced to 10 Years for Fraud*, OKLAHOMAN, Sept. 8, 2005, *available at* http://www.newsok.com/article/2910915?searched=marsha%20schubert%20 10%20years%20federal%20prison&custom_click=search.

2. Robert Lenzner, *Bernie Madoff's $50 Billion Ponzi Scheme*, FORBES (Dec. 12, 2008, 6:45 PM ET), http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in_rl_1212croesus_inl.html.

3. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Bernard L. Madoff for Multi-Billion Dollar Ponzi Scheme (Dec. 11, 2008), *available at* http://www.sec.gov/news/press/2008/2008-293.htm.

4. Temporary Restraining Order, Order Appointing Receiver, Order Freezing Assets and Order for Accounting at 1, Okla. Dep't of Sec. *ex rel.* Faught v. Schubert, No. CJ-2004-256 (Logan Cnty. Ct. Oct. 14, 2004), *available at* http://www.securities.ok.gov/ Enforcement/Orders/OrderInLineDisplay.asp?LinkAddress=TRO_SchubertAssociates_CJ-04-256.pdf& FileNo=05-031.

5. Currently, claims by Madoff to the Securities Investor Protection Corp. amount to $57.2 billion. Bob Van Voris, Phil Mattingly & Patricia Hurtado, *SIPC Tells Congress $57.2 Billion Madoff Victims Claims Exceed Its Funds*, BLOOMBERG (Sept. 24, 2010, 11:01 PM), http://www.bloomberg.com/news/2010-09-24/madoff-victim-claims-exceed-available-sipc-funds-letter-shows.html. The current clawback efforts in the Madoff case may even force certain owners of the New York Mets to consider selling some of their stake in the team to settle the clawback claim against them. Alison Leigh Cowan & Richard Sandomir, *Madoff Profits Fueled Mets' Empire, Lawsuit Says*, N.Y. TIMES, Feb. 4, 2011, *available at*

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of courts and regulators to handle the aftermath of the fraudulent endeavor known as the Ponzi scheme. The major controversy arises when attempting to reconcile the fact that some innocent investors lose up to their entire initial investment while others actually "profit" with returns on their investment capital (or at least believe such is the case while the scheme is still viable). In the end, investors who lost their investments are left wondering what relief is available to them, people involved with the perpetration of the fraud face civil and criminal charges,[6] and a different class of investors that actually made a return on their initial investment are confronted with the possibility of receivers or Bankruptcy trustees of the Ponzi-schemer's estate "clawing back" those profits as part of a plan to repay creditors.

An important and currently unresolved question asks: should winning investors who received a "profit" from a fraudulent Ponzi scheme be able to retain those funds disguised as earnings? Many courts accept the proposition that individuals who were fortunate to be winning investors in the Ponzi scheme should not be permitted to "enjoy an advantage over later investors sucked into the Ponzi scheme who were not so lucky."[7] But what if those investors had no knowledge of the scheme and simply sought out a risky investment, not a fraudulent one? In equitable terms, when the house of cards comes crumbling down, some may allege that the winning investors are unjustly enriched at the cost of losing investors.

As Madoff's victims continue to challenge the proposed plans to "clawback" their profits to repay a fraction of what the losing investors (those who never saw the return of their investment and/or a profit) lost, state courts are similarly faced with the need to navigate the same murky waters of fairness vis-à-vis fraudulent funds.[8] In early 2010, the Oklahoma Supreme Court implemented an original approach regarding the limited equitable relief to which losing investors and other creditors of such a

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http://www.nytimes.com/2011/02/05/sports/baseball/05mets.html?_r=1&hp. In the Schubert case, the allegations maintained that eighty-seven people lost more than nine million dollars while more than 150 people "made" about six million dollars in the scheme. *See* Okla. Dep't of Sec. *ex rel.* Faught v. Blair, 231 P.3d 645, 650 (Okla. 2010).

6. "An overlap between civil and criminal law is apparent in examining cases involving securities fraud. An individual violating securities statutes can be subject to civil and administrative proceedings, criminal prosecution, or dual civil and criminal actions." ELLEN S. PODGER & JEROLD H. ISRAEL, WHITE COLLAR CRIME IN A NUTSHELL 78 (4th ed. 2009).

7. *In re* United Energy Corp., 944 F.2d 589, 596 (9th Cir. 1991).

8. *See infra* Part III.B.

scheme are entitled when it decided *Oklahoma Department of Securities* ex rel. *Faught v. Blair*.[9]

In this case of first impression, the court established that a receiver or the Department of Securities "may proceed against the innocent investors to recover *unreasonable* profits received in excess of their investments in the Ponzi scheme"[10] under an unjust enrichment theory.[11] The issue after *Blair*, then, is if particular profits are not deemed unreasonable, will certain lucky winning investors be allowed to keep the tainted funds distributed to them as profit? In the court's quest to find the most equitable way to try to make defrauded investors whole, the Oklahoma decision may simply insert more gray into an already cloudy area.

This note examines the current controversies regarding Ponzi scheme clawbacks and the potential lack of equitable remedies under Oklahoma's latest judicial holding to make losing investors whole. Given the ambiguity of the Oklahoma Supreme Court's decision, any attempt to restore losing investors will be unpredictable and perhaps unmanageable. Part II of this note provides a brief history of Ponzi schemes and the consequences when they inevitably fail. Part III presents an overview of applicable law before the Oklahoma case and guiding trends from other states and federal decisions. Part IV discusses the facts, central issues, and ultimate holding in *Oklahoma Department of Securities* ex rel. *Faught v. Blair*.[12] Part V examines potential downstream effects stemming from the decision and presents questions of application. Also considered is the potential impact of the holding on the established pro rata scheme of distribution and the suggestions of legislators to provide Ponzi-specific legislation to help alleviate the particularly controversial area of clawbacks. Together these elements suggest that Oklahoma has implemented a standard of recovery that may create more potential problems than it solves. This note briefly concludes in Part VI.

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9. 231 P.3d 645 (Okla. 2010).

10. *Id.* at 649.

11. *Id.* at 663. The other elements of the case—namely the role of the Oklahoma Department of Securities/receiver—are beyond the scope of this note.

12. 231 P.3d 645.

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II. Ponzi Scheme Basics: Money, Lies, and Eventual Downfall

> *Without exception, the returns promised by Ponzi schemes are too good to be true.*[13]

The following section highlights the basics of a Ponzi scheme as well as the major pieces and players involved in the scheme. Roles within the scheme take on primary importance once the scheme collapses.

The term Ponzi scheme itself comes from the failed, fraudulent enterprise of Charles Ponzi during the 1920s.[14] Technically, the endeavor is defined as:

> [a] fraudulent investment scheme in which money contributed by later investors generates artificially high dividends or returns for the original investors, whose example attracts even larger investments. Money from the new investors is used *directly to repay or pay interest to earlier investors,* [usually] without any operation or revenue-producing activity other than the continual raising of new funds.[15]

The object of the scam may differ, but many (like the scheme run by Marsha Schubert) focus on the sale and trading of securities.[16] A scheme may begin as a legitimate enterprise and morph into a Ponzi scheme. Others (like Schubert's) are "classic" schemes where an initial lie becomes the

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13. David A. Gradwohl & Karin Corbett, *Equity Receiverships for Ponzi Schemes*, 34 SETON HALL LEGIS. J. 181, 217 (2010).

14. *See* Cunningham v. Brown, 265 U.S. 1 (1924).

15. BLACK'S LAW DICTIONARY 1278 (9th ed. 2009) (emphasis added).

16. The Securities Act of 1933 broadly defines a security as:

> [A]ny note, stock, treasury stock, security feature, bond, debenture, evidence of indebtness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. § 77b(a)(1) (2006). This definition is the same in Oklahoma. *See* 71 OKLA. STAT. § 1-102 (2011). *See also* Okla. Dep't of Sec. *ex rel.* Faught v. Blair, 231 P.3d 645, 650 (Okla. 2010).

foundation for an entire web of deception.[17] Regardless of the beginning of the scheme, two classes of investors will exist when the enterprise fails: winning investors and losing investors. The winning investors are those who "profited" from the scheme by recovering their initial investment and receiving a "profitable" return on that investment. It is important to keep in mind that when dealing with a pure Ponzi scheme, there technically are no profits; newer investors' money is simply disguised and reshuffled as profit as there is usually no real underlying business venture.[18] Also, the very nature (and initial appeal) of a Ponzi scheme is to promise investors an inflated rate of return on their initial investment.[19] For example, Marsha Schubert promised her investors returns of 30%.[20] Conversely, the losing investors are those who lost some or all of their principal investment without the promised returns.[21] Often these downstream investors simply lose because of timing as they entered the scheme too close to its collapse to "earn" a return on their investment or any type of profit.[22]

The entire scheme, built by illusion upon illusion, will eventually fail. The exact cause of the failure may be attributed to events like the detection of the scheme by state or federal securities officials[23] or the fact that not enough new funds from investors are flowing in to keep the scam afloat, often because of a market downturn.[24] Once triggered, the downfall of the scheme follows distinct routes based on the particular set of facts of the case. An option in any route is the instigation of clawback claims as a means to make defrauded investors and creditors whole. Where circumstances allow, the remaining estate may become a debtor under the terms of the Bankruptcy Code (that is, the trustee will be charged with paying losing investors and

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17. *See* Plaintiff's Petition at 11, Okla. Dep't of Sec. *ex rel.* Faught v. Farmers & Merchs. Bank, No. CJ-2006-3311 (Okla. Cnty. Ct. Apr. 21, 2006).

18. *See* Mark A. McDermott, *Ponzi Schemes and the Law of Fraudulent and Preferential Transfers*, 72 AM. BANKR. L.J. 157, 158 (1998) (quoting Martino v. Edison Worldwide Capital, 189 B.R. 425, 437 n.17 (Bankr. N.D. Ill. 1995)).

19. *See id.* (quoting *Martino*, 189 B.R. at 437 n.17).

20. Marks, *supra* note 1.

21. *See* Miriam A. Cherry & Jarrod Wong, *Clawbacks: Prospective Contract Measures in an Era of Excessive Executive Compensation and Ponzi Schemes*, 94 MINN. L. REV. 368, 395 (2009).

22. *See* Gradwohl & Corbett, *supra* note 13, at 208-09.

23. *See, e.g.*, Okla. Dep't of Sec. *ex rel.* Faught v. Blair, 231 P.3d 645, 650 (Okla. 2010) (highlighting that the Schubert Ponzi scheme was discovered by the Oklahoma Department of Securities who then commenced action in district court for injunctive relief and the appointment of a receiver for Schubert and Associates).

24. Tom Lauricella, Aaron Lucchett & Amir Efrat, *Madoff Ran Vast Options Game*, WALL ST. J., Dec. 16, 2008, at A19.

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creditors of the estate).[25] The trustee will be able to incorporate the tools provided to it through the jurisdiction's Uniform Fraudulent Transfer Act (herein UFTA) to attempt to reclaim some of the transferred funds.[26] Alternatively, under section 547 of the Bankruptcy Code, a trustee can seek to recover not only the profits of the Ponzi scheme but also a winning investor's principal as a preference.[27]

In cases outside of the bankruptcy context, the investors in the scheme may bring individual suits under applicable state law or "petition a state court for appointment of a receiver to liquidate the operator's assets."[28] In the case that is the subject of this note, for example, the Oklahoma Department of Securities investigated the enterprise of Marsha Schubert after receiving an anonymous tip and, after uncovering evidence of the Ponzi scheme,[29] initiated action and moved forward with securing the appointment of a receiver.[30] This process is similar at the federal level.[31]

Next, the administrators of a state-based or federal securities[32] action or a court-appointed receiver will be able to look to a particular jurisdiction's UFTA to proceed against the winning investors through either a constructive or actual fraud approach.[33] Currently, forty-three states (including Oklahoma[34]) and the District of Columbia have adopted the UFTA.[35] Under

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25. *See* McDermott, *supra* note 18, at 158. Under 11 U.S.C. § 548, where the trustee can look to a jurisdiction's UFTA, the general maxim remains that

> [i]nvestors are never able to keep the profits distributed by the Ponzi scheme . . . the "profits" that are credited to the investor are nonexistent, as they arise not from an underlying business venture but instead from outright theft. To use a common maxim, if a Ponzi scheme robs Peter to pay Paul, Paul is not entitled to his misbegotten profits.

James Butler Cash Jr., *When Is an Equity Participant Actually a Creditor? The Effects of In Re AFI Holding on Ponzi Scheme Victims and the Good Faith Defense*, 98 KY. L.J. 329, 336 (2010).

26. *See* McDermott, *supra* note 18, at 160.

27. *See id.* at 181.

28. *Id.* at 158 n.8.

29. *Anatomy of a Fraud: The Rogue Broker*, *supra* note 1.

30. Temporary Restraining Order, Order Appointing Receiver, Order Freezing Assets and Order for Accounting, *supra* note 4, at 1.

31. *See* Gradwohl & Corbett, *supra* note 13, at 94.

32. Under federal securities law there is exclusive federal jurisdiction over equitable suits and an action at law when the suit is brought to enforce a liability or duty established by federal securities law. *See* Donell v. Kowell, 533 F.3d 762, 769 (9th Cir. 2008) (citing 15 § U.S.C. 77v(a), 78aa (2006)).

33. *See* McDermott, *supra* note 18, at 160.

34. Oklahoma's Uniform Fraudulent Transfer Act can be found at 24 OKLA. STAT. § 116 (2011).

http://digitalcommons.law.ou.edu/olr/vol64/iss4/10

such approach, the general maxim remains that a payment as profit above the initial investment is avoidable as a fraudulent transfer as "the money used for the underlying investments came from investors taken in by fraudulent representations."[36]

While it may seem "fair" for a winning investor in a UFTA Ponzi clawback to keep those profits seemingly made with his or her own money, at least when considering the situation solely as between the investor and the operator of the scheme, such a viewpoint "is not true as between him and either the creditors of or the other investors in the company."[37] After the scheme collapses, the Ponzi schemer himself does not retain the bulk of the funds. Instead the money obtained from the scam has already been redistributed to other investors (or spent by the schemer himself), a fact that makes a Ponzi scheme clawback effort remarkably problematic.

Significantly, using either approach regarding clawbacks available under the UFTA (and also through a jurisdiction's UFTA availability to bankruptcy proceedings), the investor will at least be divested of his or her fraudulent profit in a successful claim by a trustee or receiver.[38] Under a constructive fraud approach, the trustee can proceed with recovery of the "fictitious profits earned by the investor,"[39] while under an actual fraud claim the trustee can attempt to recover both the fictitious profits and the return upon the investor's initial investment.[40]

As *Blair* demonstrates, however, there is a third avenue of action available through equity-based claims such as unjust enrichment.[41] The cases discussed later in this note on the outcomes of such equity claims after the downfall of a Ponzi scheme reflect mixed results in terms of successful clawbacks, creating uncertainty for the various parties involved.

Nonetheless, *Blair* highlights the specific goal of a receiver: to "marshal and untangle a company's assets without being forced into court by every

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35. *Legislative Fact Sheet - Fraudulent Transfer Act*, UNIFORM L. COMMISSION, http://uniformlaws.org/LegislativeFactSheet.aspx?title+Fraudulent%20Transfer%20Act (last visited May 25, 2012). Many of those jurisdictions that have not adopted the UFTA have adopted the Uniform Fraudulent Conveyance Act. *See* McDermott, *supra* note 18, at 160. The distinctions among the UFTA, UFCA, and § 548 of the Bankruptcy Code are few; one of the main distinctions rests with their statutes of limitations. *Id.* at 160 n.15.

36. Jeff Sonn, *Ponzi Schemes – Picking Up the Pieces from a Fallen House of Cards*, 1755 PLI/CORP 443, 466 (Aug. 2009).

37. *Id.*

38. *See* Cherry & Wong, *supra* note 21, at 397.

39. McDermott, *supra* note 18, at 160.

40. *Id.* at 173.

41. Okla. Dep't of Sec. *ex rel.* Faught v. Blair, 231 P.3d 645, 651 (Okla. 2010).

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investor or claimant."[42] A receivership provides a "procedural vehicle to protect the underlying equitable rights . . . to funds that have been grossly mismanaged and dissipated by fraud."[43] The strength of the receivership rests in the accommodating procedural rules which provide effective protection of the equitable substantive rights at risk.[44] For all practical purposes, the receiver steps into the shoes of the now-defunct enterprise and handles payments to investors and creditors (including the losing Ponzi scheme investors).

In actuality, the ability of a receiver or trustee to reclaim funds is never simple, primarily due to the fact that most collapsed schemes have few physical or liquid assets remaining.[45] Instead the failed scheme's largest assets are usually the claims the estate has against the winning investors.[46] Hence, the trustee's or receiver's challenge is to sue those winning investors under the Bankruptcy Code or UFTA provisions, or to look to an equitable theory and, in the end, redistribute the funds to losing investors of the scheme and to other creditors.[47]

Such an action against a winning investor has been deemed a "clawback" in today's financial and legal vocabulary. "Clawing back" encompasses the method for recouping losses under specific circumstances where inherent unfairness should not be allowed to stand.[48] From the point of view of losing Ponzi scheme investors, clawbacks provide a real opportunity to see the return of some of their investment capital. Put succinctly, "clawbacks function to bridge the gap in remedies under prevailing law for addressing unfair enrichment."[49] The endgame for the receivers or trustees revolves around a goal of making creditors, including losing investors, whole—a difficult mission to accomplish in an inherently unfair situation. Ultimately, the underlying policy focuses on the amount of relief that can be provided as

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42. Gradwohl & Corbett, *supra* note 13, at 203 (quoting United States v. Acorn Tech. Fund, 429 F.2d 438, 443 (3rd Cir. 2005)).

43. *Blair,* 231 P.3d at 665; *see also* 12 OKLA. STAT. § 1554 (2011) (explaining that "[t]he receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, to collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the courts may authorize").

44. *See Blair*, 231 P.3d at 665.

45. McDermott, *supra* note 18, at 158.

46. *Id.*

47. *See id.* at 158-59.

48. *See* Cherry & Wong, *supra* note 21, at 410-11.

49. *Id.* at 414.

the receivers redistribute the funds "in either an attempt to make defrauded parties whole or to prevent unjust enrichment."[50]

III. Law Before the Case: The Varying Approaches to Ponzi Scheme Clawback Litigation

The relative lack of specific case law in Oklahoma dealing with Ponzi schemes, the claim of unjust enrichment within such a context, and the issue of the extent to which a receiver may pursue a winning investor require the court to look beyond the border of the state for guidance and existing (albeit non-binding) precedent. The issues are numerous. First, standing requirements must be met before a clawback claim can commence. In Oklahoma, these requirements are satisfied by both statute and accepted principles of equity.[51] Next, while the Tenth Circuit has declined to allow a receiver to clawback a winning investor's profits through a theory of unjust enrichment,[52] there is no consensus among the courts in general as to this issue and even less discussion as to any qualification of the amount that can be pursued by the receiver. Finally, Oklahoma's implementation of new standards in this context must be reconciled with previous state case law and broader policies accepting a pro rata scheme of distribution resulting from a receivership.

Central for the discussion here, ultimately, is the fact that no other state court has imposed a reasonable or unreasonable standard of the actual amount of recovery in an unjust enrichment-based clawback effort. Before *Blair*, cases involving such a claim fell into one of two camps: either the funds transferred to winning investors as profit above their principal were considered to have unjustly enriched winning investors or not.[53] A broad categorization of the applicable statutory provisions—be it through the Bankruptcy Code[54] or UFTA—shows a similarly streamlined approach:

> the courts that have adjudicated the rights of trustees and Ponzi investors have appropriately refused to allow investors to retain *any* profit . . . To analyze the entire set of transfers to an investor,

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50. Spencer C. Barash & Sara J. Chesnut, *Controversial Uses of the "Clawback" Remedy in the Current Financial Crisis*, 72 TEX. B.J. 922, 922 (2009) (emphasis added).

51. *See* Okla. Dep't of Sec. *ex rel.* Faught v. Blair, 231 P.3d 645, 661-65 (Okla. 2010).

52. *See* Johnson v. Studholme, 619 F. Supp. 1347, 1350 (D. Colo. 1985), *aff'd*, 833 F.2d 908 (10th Cir. 1987).

53. *See infra* Part III.B

54. "[B]ankruptcy courts can, at a minimum, require the return of any profits [investors] received from the investment." Cash Jr., *supra* note 25, at 330.

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> rather than focusing on the profit component, incorrectly assumes that there is something of value in a Ponzi scheme when in fact the whole series of transactions has been a sham.[55]

A. Ability to Bring Equitable Relief Claims Against Winning Ponzi Investors

Although the federal government often handles security offerings, the states still maintain an important position in many areas of securities regulation.[56] State laws concerning the fraudulent transfers of securities may still have considerable impact.[57] Not only are there securities violations from a Ponzi scheme itself, there are subsequent civil and/or criminal claims that result against the schemer himself and, downstream, against winning investors. *Blair* results from such litigation. In *Blair*, the court relied upon statutorily defined roles of the Oklahoma Department of Securities and the flexibility inherent in a receivership to clawback the funds in question through a theory of unjust enrichment.[58]

The controversies and ultimate decision to allow the Department of Securities to pursue clawback litigation contain elements worthy of their own study, extending beyond the scope of this note. However, the underlying equitable theme which the court relied upon built a foundation for the ultimate decision that is the focus of this note.

The Oklahoma Department of Securities is created and governed by statute.[59] Provisions of the Oklahoma Uniform Securities Act of 2004 grant powers to the Department of Securities as a government entity. Critical for this discussion are the civil enforcement powers under 71 Okla. Stat. § 1-603. Subsection A of the statute directs the administration to "maintain an action" in the Oklahoma court system if the Department administrator believes a person is engaging in acts or practices that would violate the Securities Act.[60] Subsection B allows the administrator to take certain enforcement measures, including the ability to "[o]rder such other relief as the court *considers appropriate*."[61]

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55. McDermott, *supra* note 18, at 168.

56. THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 305 (Thompson/West 6th ed. 2009).

57. *See id.* at 306.

58. *See* Okla. Dep't of Sec. *ex rel.* Faught v. Blair, 231 P.3d 645, 661-65 (Okla. 2010).

59. *See* 71 OKLA. STAT. § 1-601 (2011).

60. *Id.* § 1-603(A). Specific provisions of the Act applicable to a Ponzi-schemer include: offering or selling a security in an act or practice that "would operate as fraud or deceit upon another person." *Id.* § 1-501(3). Also, advising with untrue statements of material facts involved concerning the security offerings. *See id.* § 1-502(A)(2).

61. *Id.* § 1-603(B)(3) (emphasis added).

In *State ex rel. Day v. Southwest Mineral Energy, Inc.*,[62] for example, the Department of Securities brought suit alleging the defendants had offered and sold interests in oil and gas wells without proper securities registration, grossly overvalued their drilling costs, and questionably transferred funds to a corporate account.[63] The Department of Securities administrator, in addition to seeking specific injunctions, sought disgorgement (defined as "a mandatory order by the [c]ourt requiring those who obtain funds from investors or purchasers or lessees in violation of regulatory provisions, to 'disgorge' themselves of the illegally obtained profits"[64]) through powers established in the Oklahoma Securities Act.[65] Looking to similar decisions at the federal level[66] (a recurring practice in the effort to harmonize state and federal securities regulation), the court cited the United States Supreme Court in explaining, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."[67]

In Oklahoma the distinction between courts of equity and of law has been abolished[68] and the district courts enjoy unlimited original jurisdiction.[69] These facts subsequently led the court to declare "[o]nce the equity jurisdiction of the District Court has properly been invoked, the Court possesses the necessary power to *fashion appropriate remedies* . . . [this] includes the power to require 'disgorgement' of unlawful profits in appropriate cases."[70] While this case provides precedent for equitable actions charged by the Department of Securities, it does little to assuage the over-riding fairness concerns within the context of a Ponzi scheme as to whom should ultimately have to pay.

Day's interpretation establishing equitable powers in state securities actions was in line with the larger federal securities regulation scheme and considered prominent and recurring themes of securities regulation: efficiency and enforcement capabilities. Indeed, the *Blair* court subsequently recognized the *State* ex rel. *Day* decision as "consistent with federal courts'

62. 617 P.2d 1334 (Okla. 1980).
63. *Id.* at 1335.
64. *Id.*
65. *See id.*
66. *Id.* at 1336-37.
67. *Id.* at 1336 (citing Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)).
68. 12 OKLA. STAT. § 10 (1971) (repealed 1984).
69. OKLA. CONST. art. 7, § 7(a).
70. *State ex rel. Day,* 617 P.2d at 1338 (emphasis added).

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construction of the purpose of federal securities laws to divest a wrongdoer of ill-gotten gains by the equitable remedy of disgorgement."[71]

Besides the Department of Securities having the opportunity to maintain a clawback claim, the court-appointed receiver similarly has such an ability. In Oklahoma, although statute governs the appointment of a receiver, "in deciding questions arising under this head, the court must look for guidance to the established usages and customs heretofore prevailing in the courts of equity."[72] The issues that arise during the term of the receiver will thus be governed not by explicit statute but through the over-arching principles of equity.[73] Because a receiver "steps into the shoes" of the defunct enterprise, a plaintiff-receiver may only bring suit to address the injuries to the actual entity in receivership—in this case, the defunct Ponzi estate.[74]

The final element of the Oklahoma equity puzzle rests in the characterization of unjust enrichment. The equitable theory of unjust enrichment provides a basis for remedies through the essential principles of equity, justice, and good conscience.[75] In Oklahoma, unjust enrichment is specifically defined as:

> [a] right of recovery . . . [that] is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another ... [It] arises not only where an expenditure by one person adds to the property of another, but also where the expenditure saves the other from expense or loss.[76]

The controversy that the courts must subsequently resolve, however, is how to reconcile these central tenants of equity as established in Oklahoma with the fact that a particular clawback will result in a seemingly inequitable result for at least one of the parties to the Ponzi scheme.

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71. Okla. Dep't of Sec. *ex rel.* Faught v. Blair, 231 P.3d 645, 653 (Okla. 2010).
72. Ward v. Inter-Ocean Oil & Gas Co., 153 P. 115, 116 (Okla. 1915).
73. *See* Smoot v. Barker, 153 P.2d 227, 228 (Okla. 1944).
74. *See* Scholes v. Lehmann, 56 F.3d 750, 753 (7th Cir. 1995).
75. 66 AM. JUR. 2D *Restitution and Implied Contracts* § 9 (2011).
76. N.C. Corff P'ship v. OXY USA, Inc., 929 P.2d 288, 295 (Okla. Civ. App. 1992) (quoting 66 AM. JUR. 2D *Restitution and Implied Contracts* § 3 (1973)). Unjust enrichment can generally be identified where there is "[a] benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense." BLACK'S LAW DICTIONARY 1678 (9th ed. 2009).

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B. Divergent Clawback Approaches (but Predictable Results)

Although the Oklahoma court concluded that the unjust enrichment theory may stand as the basis for the clawback effort, there is little evidence of a consensus among the courts on this particular issue. Indeed, where courts have allowed an equitable theory to serve as the foundation for a clawback claim, there has been no mention of limiting such clawback in terms of reasonableness.

Within the Tenth Circuit, for example, the trial court in *Johnson v. Studholme*[77] declined the receiver's suit to utilize an unjust enrichment claim after the downfall of a Ponzi scheme,[78] focusing its analysis on what the receiver did not allege—that those winning investors in any way knew about or participated in the fraud.[79] Instead, the investors simply received the returns that they were promised,[80] and such investors were "purchasers for value" through their initial risky investments.[81] Ultimately the court held that the receiver, in attempting to meet the burdens of unjust enrichment as to the investors, did not present an instance where it would be inequitable for the defendants to keep the payments—one of the elements in satisfying an unjust enrichment cause of action.[82] *Johnson* stands for the proposition that Ponzi funds represent a zero sum game: either the funds representing profit serve to unjustly enrich an investor or they do not.

However, as there is no clear-cut fault by the winning investors in a Ponzi scheme, the courts continue struggling to find a balance when both winning and losing innocent investors are caught in the crosshairs. For example, the court in *Chosnek v. Rolley*[83] found that Ponzi investors are not unjustly enriched "*so long as the returns do not exceed* the amount of the original investment."[84] Whether or not the investor "broke-even" is the measuring point here. In *Chosnek*, a losing investor of a Ponzi scheme brought an unjust enrichment claim against a certain group of winning investors in conjunction with the court-appointed receiver.[85] The Indiana court focused on the fact that the winning investors received their profits in good faith

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77. 619 F. Supp. 1347 (D. Colo. 1985), aff'd 833 F.2d 908 (10th Cir. 1987).
78. *Id.* at 1348.
79. *Id.*
80. *Id.*
81. *Id.* at 1349.
82. *Id.* at 1350.
83. 688 N.E.2d 202 (Ind. Ct. App. 1997).
84. *Id.* at 210 (emphasis added).
85. *Id.* at 204.

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while unaware of the underlying scam.[86] However, the ultimate holding is not an absolute bar to a clawback effort: "[t]o the extent of the *original investment*, such [returns] are not subject to claims made by later investors on the theory of unjust enrichment."[87] Thus an investor's original investment will avoid an unjust enrichment claim but the profits may not.

Successful clawbacks under a UFTA theory similarly present a uniform practice regarding the amount available for disgorgement: once the profits are classified as fraudulent under the UFTA, they are all fraudulent regardless of whether they happened to fall into the hands of an innocent investor. This perspective is accepted because of the illicit nature of a Ponzi scheme. Due to the commingling of funds, shoddy record keeping, and outright lies, it would prove tremendously difficult, if not impossible, to trace specific funds to affirm or disprove their origin. In *Donell v. Kowell*,[88] for example, the court not only noted the "largely uniform practice" of applying the UFTA to Ponzi-scheme related proceedings,[89] but also that the UFTA applies to those innocent investors who made a profit.[90] The simple, general rule remains that "to the extent innocent investors have received payments in excess of the amounts of principal that they originally invested, those payments are avoidable as fraudulent transfers."[91] The concept of equity arises even through this statutory analysis as the court finds it "more equitable to attempt to distribute *all recoverable* assets among the defrauded investors who did not recover their initial investments rather than to allow the losses to rest where they fell."[92]

C. The Outcome: Pro Rata Distribution and an Attempt to Make Defrauded Investors Whole

Once the receiver successfully claws back the profits from the scheme, a pro rata distribution system is widely accepted as the most equitable method to treat creditors of the estate. Tracing, which is not a remedy but a tool, is a way a particular claimant can distinguish his or her property within the estate of the offender (in this case the Ponzi-schemer).[93] Initially it would seem the

86. *Id.* at 210.
87. *Id.* at 210-11 (emphasis added).
88. 533 F.3d 762 (9th Cir. 2008).
89. *Id.* at 770.
90. *Id.* at 776.
91. *Id.* at 770.
92. *Id.* at 776 (emphasis added).
93. Claire Seaton Rosa, *Should Owners Have to Share? An Examination of Forced Sharing in the Name of Fairness in Recent Multiple Fraud Victim Cases*, 90 B.U. L. REV. 1331, 1336 (2010).

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best place to start to redistribute the funds would be through directly tracing the funds; however, the facts of the administration of a Ponzi scheme interfere and provide an insurmountable roadblock. Essentially, the commingling of funds and less-than-ideal record keeping of the scheme make it logistically impossible to directly trace each investor's funds. The Supreme Court's holding in this area in the case of *Cunningham v. Brown*[94] was summarized by one commentator thus:

> tracing presumptions cannot be justified (and must therefore be suspended) when the parties fighting over unidentifiable, commingled property are all victims of the same fraud . . . . In such a case, the money or other property is to be distributed pro rata among those who can show their money went into the account, but are unable to satisfy the tracing burden without the use of presumptions.[95]

This rule from *Cunningham* means that, in practice, all the victims would share the recovered money proportionate to their own losses.[96]

The Oklahoma case of *Adams v. Moriarty*[97] similarly held that more recent investors of a Ponzi scheme endeavor could not utilize tracing to reclaim their newly invested money and that the Department of Securities was allowed to move forward with a pro rata distribution scheme concerning the losing investors.[98] In 2003, James Adams deposited almost $400,000 of his retirement savings with the Hickman Agency; only nineteen days later, the firm was closed by the Department of Securities and Stephan Moriarty appointed receiver.[99] The Adamses eventually opposed the receiver's proposed plan to allocate the remaining funds from the Hickman Agency to investors on a pro rata scheme, arguing that as the last investors with the Hickman Agency they could trace their funds specifically.[100]

The Oklahoma Court of Civil Appeals ultimately rejected the Adamses' argument, instead accepting the Department of Security's citations of authority that "remaining assets must be distributed to victims on a pro-rata

94. 265 U.S. 1 (1924).
95. *Id.* at 1349 (citing *Cunningham*, 265 U.S. at 13).
96. *See id.*
97. 127 P.3d 621 (Okla. Civ. App. 2005).
98. *See id.* at 624-25.
99. Ron Jackson, *They Lost Everything: Victims of a Meeker Ponzi Scheme Are Pulling Their Lives Back Together Three Years Later*, OKLAHOMAN, Sept. 23, 2007, *available at* http://newsok.com/article/3131666.
100. *Adams*, 127 P.3d at 622.

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basis unless a particular creditor's assets are able to be specifically traced."[101] Since evidence could not be presented that those particular funds would be specifically traceable and distinguishable from monies deposited by other investors, the court upheld the pro rata scheme.[102] The court's rationale focused on the fact that if the most recent investors were allowed to claim the entirety of their investment, the earlier investors would be left with little or no monetary remedy.[103] Such a situation would result in further inequity and an outcome "not in accord with the rules established in similar cases."[104]

In general, the "pro rata rule for Ponzi schemes" will mean that the assets remaining from the defunct scheme will be dispersed to creditors on a pro rata basis unless there is a rare instance where a specific claimant can expressly trace his or her assets.[105] However, the very nature of a Ponzi scheme makes this a difficult feat, as once the funds from various investors are commingled into one account, "those assets lose their character as the peculiar assets of their investor."[106]

IV. Okla. Dep't of Sec. *ex rel.* Faught v. Blair

A. Facts and Procedural History

Marsha Schubert perpetrated a Ponzi scheme that attracted more than $200 million dollars in investments from December 1999 through October 2004.[107] Acting as a registered agent of the firm of Schubert and Associates, Schubert consistently made oral statements to investors that their money would be used in trading option accounts and in day trading accounts.[108] The investors relied on her verbal assertions that their accounts continued to hold hefty balances.[109] Schubert was, in actuality, depositing the newly "invested" money into both her personal bank accounts and the accounts of Schubert and Associates.[110] Despite her claims to investors otherwise, Schubert *never* used the monies in these accounts "to make any investment trades through the broker-dealers on behalf of the investors."[111] Because of her verbal reports of

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101. *Id.* at 624.
102. *Id.* at 625.
103. *Id.*
104. *Id.*
105. *See* Rosa, *supra* note 93, at 1350.
106. *Id.* at 1350-51.
107. Okla. Dep't of Sec. *ex rel.* Faught v. Blair, 231 P.3d 645, 650 (Okla. 2010).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*

success, many of Schubert's clients re-invested their purported profits.[112] Most of the money apportioned for day trading endeavors was instead transferred into Schubert's personal account and commingled with her personal funds.[113] In actuality, Plaintiff subsequently alleged that less than 1% of the money deposited was ever used to invest in option contracts, and no amount was used in day trading endeavors: in short, the only thing Schubert did was operate a classic Ponzi scheme.[114] In the end, the damage was clear: approximately eighty-seven people lost an aggregate of over nine million dollars while, on the flip side, over 150 people allegedly made about six million dollars from their investments with Schubert.[115]

As with any Ponzi scheme, Schubert kept the scam afloat by making payments to some of her investors at strategic times to prevent questions and discovery of the fraud.[116] After the Department of Securities received an anonymous tip in October of 2004 and began an investigation, [117] the Ponzi scheme came crumbling down.[118] The Department of Securities immediately began proceedings in Logan County for injunctive relief and the appointment of a receiver.[119] The court-appointed receiver proceeded with marshalling and protecting the assets "for the benefit of claimants and creditors of Marsh[a] Schubert and Schubert and Associates."[120] In an effort to accomplish the task, the receiver (in a joint action with the Department of Securities) brought suit in the District Court of Oklahoma county against 158 named defendants—those determined to have been paid a profit with funds from the Ponzi scheme.[121]

The initial petition by the receiver and Department of Securities asserted claims of unjust enrichment and fraudulent transfer and sought an equitable lien against the real and personal property purchased by investors with funds from the Ponzi scheme.[122] The claim of fraudulent transfer was later

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112. *Anatomy of a Fraud: The Rogue Broker*, *supra* note 1.

113. *Blair,* 231 P.3d at 650.

114. Plaintiffs' Petition at *7, Okla. Dep't of Sec. *ex rel.* Faught v. Mathews, No. CJ-2005-3796 (Okla. Cnty. Ct. May 11, 2005).

115. *Blair,* 231 P.3d at 650.

116. *See id.* One investor even explained that Schubert asked him what he thought he should have "earned" and immediately wrote a check to the investor above that value during a meeting in her office. *Anatomy of a Fraud: The Rogue Broker*, *supra* note 1.

117. *Anatomy of a Fraud: The Rogue Broker*, *supra* note 1.

118. *Blair,* 231 P.3d at 650.

119. *Id.*

120. *Id.* (internal quotation marks omitted).

121. *Id.*

122. Plaintiffs' Petition, *supra* note 114, at *8-10.

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withdrawn, but the receiver and Department of Securities were granted a summary judgment on the unjust enrichment claim against the defendants.[123] The Oklahoma Supreme Court consolidated the various appeals and issued a single opinion.[124]

B. Issue and Holding

After a comprehensive review of the competing legal and equitable claims, a divided court[125] found that the Department of Securities had the ability to bring suit against the innocent winning investors of the Ponzi scheme.[126] Further, the opinion by Chief Justice James Edmonson held that the Department and receiver could proceed with claims against winning investors to recover the *unreasonable* profits surpassing their initial investments in the scheme.[127] Justice Winchester, writing for the three dissenters, found the ultimate holdings short of satisfactory, especially the lack of guidance regarding the court's unreasonableness standard.[128]

C. Rationale of the Court

After a brief discussion of the facts of Schubert's Ponzi scheme, the court addressed the question of equitable action and the amount of recovery from innocent investors in turn. First, the court noted the statutory beginnings of the Department of Securities before proceeding with an analysis of whether its specific action was within the bounds of powers either expressly granted or that may be fairly implied "for the due and efficient exercise of the powers expressly granted."[129] The analysis found a basis for the Department of Securities to seek equitable relief.[130] The appropriate relief would be disgorgement of the profits from a fraudulent scheme perpetrated by a Department of Security-regulated entity or requiring those holding the gains

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123. *Blair,* 231 P.3d at 651.
124. *Blair,* 231 P.3d at 651.
125. Justices Edmondson, Taylor, Opala, Colbert, and Reif comprised the majority, with Justices Hargrave, Kauger, and Winchester dissenting. Justice Watt did not participate in this decision. *Id.* at 670.
126. *Id.* at 658.
127. *Id*. at 663, 665.
128. *Id.* at 671 (Winchester, J., dissenting).
129. *Id.* at 652 (majority opinion) (alterations omitted) (citing Okla. Pub. Emps. Ass'n v. Okla. Dep't of Cent. Servs., 55 P.3d 1072, 1083-84 (Okla. 2002)).
130. *See id.*

to expel those funds not in an effort to compensate the victims, "but to deprive the wrongdoer of his ill-gotten gain."[131]

As a function of a state's police or regulatory authority,[132] the court reasoned, disgorgement furthers the public purposes and nature of securities law themselves when "the nature of the transaction between the Ponzi operator and innocent investor is inequitable and the innocent investor's right to the funds becomes merely possessory."[133] The court implicitly adopted the Department of Security's argument that the defendants, or winning Ponzi scheme investors, are nominal defendants (those that may have the funds and should be disgorged of them, even though no culpability is alleged[134]) when it held the district court had the necessary subject matter jurisdiction to rule as to the contending ownership claims of funds collected in the course of the Ponzi scheme.[135]

In terms of obtaining equitable relief from Ponzi scheme investors, the court declined to hold that the money distributed as profit is per se inequitable as a matter of law and must ultimately be determined by a finding of both fact and law.[136] Since an element of some wrongdoing is required to fulfill the present Oklahoma definition of unjust enrichment,[137] the court stated it will require the Department of Securities or receiver to show that the conduct of solely possessing profit from a Ponzi scheme on its face constitutes "active wrongdoing or possession against equity and good conscience sufficient to justify a constructive trust imposed by a District Court."[138] The court reasoned that these factors together lead to the conclusion that the profits of a Ponzi scheme "received by an innocent investor *may* represent unjust enrichment when a reasonably equivalent value has not been exchanged."[139] "Reasonably equivalent value," a statutory term of art, encompasses a situation wherein the Ponzi schemer's assets are of a lower value after a transfer to an investor,[140] not where there is an equal ratio of value "in" and value "out."

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131. *Id.* at 654 (quoting SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978) (internal quotation marks omitted)).
132. *Id.* at 655.
133. *Id.* at 656.
134. *See id.* at 657.
135. *Id.* at 658.
136. *Id.*
137. *See id.* at 658-59.
138. *Id.* at 659.
139. *Id.*
140. *See* McDermott, *supra* note 18, at 164. "Reasonably equivalent value," used to delineate constructive fraud, can be found in § 548 of the Bankruptcy Code and § 4 of the

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The *Blair* court adopted the rationale that the reasonably equivalent value within the context of a Ponzi scheme is a question of fact[141] and can be found through examining "the discrete transaction between the debtor and the defendant, *without* regard to the nature of the debtor's overall enterprise."[142] The court argued that the acceptance of this approach aligns with an equitable examination of particular factual circumstances of a specific case for adjudication.[143] The policy of clawing back funds from innocent investors as a blanket principle after such monies may have been spent is troublesome to the court, especially if only limited defenses may be available to an equity-based claim.[144] Considering all of these concerns, the court declined to adopt the Department of Security's argument that there should be a right to restitution notwithstanding the reasonableness of the return paid to the investor.[145] To adopt a per se rule would be contrary to equity, the court claimed, when the investor not only relied upon the counsel of a registered agent but also did not receive the promised artificially high rate of return on their initial investment.[146]

Yet assuming that the named defendants were unjustly enriched by unreasonably high rates of return on their initial investment as profit, the court-created rule holds that the Department of Securities may only clawback those profits reflective of artificially high dividends.[147] What will not be allowed is the attempt to reclaim those profits determined to have a "reasonable interest thereon"[148] as the court declined to hold that every investor who made a profit through a Ponzi scheme is, as a matter of law, unjustly enriched.[149] Instead, in the context of a Ponzi scheme, unjust

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UFTA. *Id.* Importantly, "[a]lmost all courts have held that a debtor does not receive reasonably equivalent value or fair consideration for any payments made to its investors which represent fictitious profits." *Id.* at 164-65. This is because there are no legitimate profits, or anything of value, to transfer. However, the courts that have found reasonably equivalent value present have reasoned that the "[p]ayments up to the amount of the initial investment are considered to be exchanged for 'reasonably equivalent value,' and thus not fraudulent, because they proportionally reduce the investors' rights to restitution." Sonn, *supra* note 36, at 468.

141. *Blair,* 231 P.3d at 660-61.

142. *Id.* at 660 (emphasis added) (quoting Rieser v. Hayslip (*In re* Canyon Sys. Corp.), 343 B.R. 615, 640-41 (Bankr. S.D. Ohio 2006) (citations omitted)).

143. *Id.* at 661.

144. *Id.* at 662.

145. *Id.* at 663.

146. *Id.*

147. *See id.*

148. *Id.*

149. *Id.* at 670.

enrichment will be found only where an "unreasonably high dividend"[150] is distributed to a winning investor.

In the dissenting opinion, Justice James Winchester recognized the challenges in balancing the competing interests involved.[151] Ultimately, the dissent argued, the holding "leaves the district court with unsatisfactory subjective standards to determine what profits are unreasonable."[152] Seeking guidance from *Johnson*, the dissent recognized there is no "neat answer" and that, instead, perhaps the best option would be to leave the parties as they are.[153] By implementing this standard and allowing the clawbacks to proceed, the dissent argued, investors must now take an additional risk when investing: a risk of "subsequent government intervention to take back the funds."[154] Although innocent investors are involved, the dissent noted that those individuals must assume responsibility for their own investigations and research before investing their money. [155]

V. Analysis: As the Scheme Falls, the Questions Build in Oklahoma Clawback Litigation

If the ultimate goal of a clawback effort is to make as many creditors as whole as possible, *Blair*'s new standard of unreasonableness may insert novel problems into an already fragmented area of law and equity. Alternatively, if the goal is to leave the parties as they stand, because they were not unjustly enriched by Ponzi profits, *Blair*'s holding will similarly fail to accomplish this objective. The court announced its standard of recovery with no guideposts for standardization that a district court could consider, while disregarding the possibility of a bright-line standard of recovery. While the flexibility of an equitable approach in clawback suits against winning Ponzi scheme investors may allow for courts to arrive at an outcome deemed fair (to the extent possible in the situation of a failed Ponzi scheme), the standard of unreasonableness presented in *Blair* may similarly produce another avenue for similarly-situated winning investors to be treated in different fashions. In addition, losing investors will recover less money if winning investors are allowed to keep more. Ultimately, both state and federal jurisdictions may be best served by the implementation of legislation specifically targeting

150. *Id.*
151. *Id.* at 671 (Winchester, J., dissenting).
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

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fraudulent endeavors such as the Ponzi scheme and enabling the courts to address Ponzi scheme clawbacks adequately.

A. Can a Reasonableness Standard Be Applied to an Inherently Unreasonable Ponzi Scheme?

As the dissenting opinion observes, the standard of unreasonableness concerning a clawback claim against a winning Ponzi scheme investor may present problems in practice.[156] Indeed the concept of reasonableness may be ill-suited for encompassing anything related to Ponzi scheme "profits." The method for actually calculating what will constitute unreasonable profits (within the broader context of an unfair, fraudulent scheme with no actual profits of course) is left unarticulated by the court in *Blair*, leaving little guidance for the lower courts in practice. From both the perspective of winning investors concerned that they will be forced to return funds and losing investors hoping to see the return of some of their investment, *Blair*'s standard might appear as nothing more than arbitrary.

In a statutory analysis of a clawback claim through the Bankruptcy Code, by comparison, reasonably equivalent value can be determined simply by the extinguishment of an antecedent debt.[157] This provides a built-in element for the court to analyze an amount of reasonableness by a strict

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156. *Id*.

157. The Oklahoma court imposes the rationale presented in some federal bankruptcy-based clawback proceedings, relying on the Bankruptcy Code, that if reasonably equivalent value is exchanged in a particular transaction, it is not avoidable. *See* Paul Sinclair & Brendan McPherson, *The Sad Tale of Fraudulent Transfers: Part III*, 29 AM. BANKR. INST. J., Apr. 2010, at 1, 42. There are differences that must be taken into account between this statutory approach and the equity-based case the Oklahoma court is faced with. For one, the above-noted rationale takes into account the good faith defense presented in a statutory analysis and focuses the "reasonable" aspect on the rate of return only, not the cumulative "profits" standard the *Blair* court names. *Id.* at 45. Also, a strict statutory reading is devoid of the considerations of "good conscience" that an unjust enrichment analysis demands. *See* 66 AM. JUR. 2D *Restitution and Implied Contracts* § 9 (2011). While the federal decisions noting a "reasonable" element exist in the context of a bankruptcy statutory analysis, some still "detest the overreaching equitable outcome." Sinclair & McPherson, *supra* note 157, at 45. The rationales of a statutory analysis cannot be superimposed onto an equity-based claim without gaps. Ultimately, a bankruptcy proceeding "rests solely upon the application of federal bankruptcy law and does not purport to create any equitable right of action. The plaintiff argues that an equity receiver has the powers of a bankruptcy trustee. That adage has some utility, but it does not mean that the substantive provisions of the bankruptcy code are available for use in a non-bankruptcy receivership. The Bankruptcy Code is *sui generis.*" Johnson v. Studholme, 619 F. Supp. 1347, 1348-49 (D. Colo. 1985) (emphasis added), *aff'd* 833 F.2d 908 (10th Cir. 1987).

statutory reading. However, the unreasonableness of "profit" in terms of unjust enrichment demands a different equation when the "real world" facts are the very basis of the claim. While a strict statutory analysis may allow for a focus on the individualized transactions involved in the Ponzi scheme, a focus based in equity would require explicit attention paid to the nature of the overall enterprise.

First, current Ponzi profit is determined simply by the "netting" rule, whereby the trustee or receiver determines if a given investor was a net-winner or a net-loser in the enterprise.[158] Importantly, the receiver need not "match-up" every investment and payment and deal with the different players' "characterizations of the transfers"—instead, the concern is the difference between money in and money out.[159] "[Netting] may be the *only* workable rule in the typical Ponzi-scheme case, where documentation of transfers is less than complete, payments are sporadic and not always in accordance with the documentation of the investment, and neither the investor nor the debtor can recall precisely what the parties intended."[160] Even this task is not simple for a receiver, but it may become even more difficult with Oklahoma's unreasonableness benchmark because instead of simply determining a net winner or net loser, more information and analysis will be required to determine whether a net winner reaped a reasonable profit or not.

At first glance, it would appear that a comparable market analysis may be possible given the recorded prices of securities in a given market within a certain time-frame. Yet the Ponzi schemer doesn't adhere to the rules of operation that would make an analysis viable on a consistent basis. Ponzi schemers fail to maintain precise records,[161] tend to disregard laws or

158. McDermott, *supra* note 18, at 169.

159. *Id.*

160. *Id.* (emphasis added).

161. Indeed,

> [t]he most challenging task in a Ponzi scheme case is getting your hands around the books and records, so you are able to trace the collection and use of the investments to see what happened, where the money went, to whom, and what assets may exist. Often forensic accountants are needed to do this. Many times in these cases, there are two sets of books, or no books, or you find the books gone when you get there, or the computer is gone, or things have been erased.

Peter A. Davidson, Carl H. Loewenson, Jr. & Ralph A. Midkiff, *Recovering Lost Assets In Ponzi Schemes: An Immediate Look at the Legal, Governmental, and Economic Ramifications of the Bernard Madoff Ponzi Scheme of 2008*, 2009 ASPATORE SPECIAL REP. 4.

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regulations, and make their living with falsities, including the promise of an unrealistically high rate of return on an investment.[162]

While equity allows courts flexibility to consider factors of an individual case and set of circumstances,[163] its goals cannot be furthered if accurate facts of the case cannot be ascertained. Where the focus is a "classic" Ponzi scheme that preys upon the unwavering trust of one's neighbors and the only information exchanged between schemer and investor is vague, unconfirmed, and riddled with lies, the facts necessary for a comparative analysis of security prices, for example, may be nothing short of impossible.

In *Blair*, Marsha Schubert failed to provide standard or authentic investment statements to her investors or any of the necessary tax statements.[164] In one instance, an investor failed to receive a notice from Schubert for over four months[165] (granted any such statement would be fictitious as she never invested any of the money). Experts warn that investors should always receive written confirmation as to transactions regarding their accounts, something Schubert likewise failed to produce.[166] Like Schubert, schemers may instead make only verbal reports to investors as to what investments they made. In some extreme cases, a schemer could feasibly never identify a particular security to an investor—hence making a market comparison for the purposes of a "reasonableness" determination impossible on its face.

While the court need not prescribe every factor to be examined by a district court when determining whether or not a winning investor's profit was "unreasonable," an enunciation of basic guideposts might have resulted in more uniform treatment of winning investors. As it stands, *Blair*'s

162. Schubert promised returns of 30% to her investors in the scheme. Marks, *supra* note 1. Also to be considered is when a schemer promises a lower rate of return but consistently delivers that return, often against common sense: "In retrospect, with more complete information on Madoff's investments, the alleged returns now appear to be virtually—and in some cases, truly—impossible to achieve. Madoff informed investors that he returned an average of 15.7% per year since January 1996." Cherry & Wong, *supra* note 21, at 394. Indeed as Judge Richard Posner has noted,

> Only a very foolish, very naïve, very greedy, or very Machiavellian investor would jump at a chance to obtain a return on his passive investment of 10 to 20 percent a month . . . . It should be obvious that such returns are not available to passive investors in any known market, save from the operation of luck.

Scholes v. Lehmann, 56 F.3d 750, 760 (7th Cir. 1995).

163. "Equity is based upon the circumstances of the particular case before the court." Okla. Dep't of Sec. *ex rel.* Faught v. Blair, 231 P.3d 645, 661 (Okla. 2010).

164. Plaintiffs' Petition, *supra* note 114, at *8.

165. *Anatomy of a Fraud: The Rogue Broker*, *supra* note 1.

166. *Id.*

standard does little to assuage, and perhaps even intensifies, the fact that winning Ponzi scheme investors "even if innocent of any fraud themselves, are not in an equitably stronger position vis-a-vis the losing investors, and should not be permitted to benefit at the expense of the losing investor."[167] Established guideposts for unreasonableness would direct lower courts toward reliable information regarding the investments *actually* available and what role such facts should play. As the *Blair* dissent cautions, the broad conclusion of unreasonableness presents the risk of inviting appeals[168]—a risk that will require more judicial and administrative time and resources.

Perhaps the court's silence reflects the fact that, when dealing with a failed Ponzi scheme, there is no neat or logical answer. Searching for something "reasonable" or objective in an inherently unreasonable situation will yield nothing. For instance, the promised rate of return presented by the schemer to the investor would be a simple starting point. If the schemer grossly inflated the promised rate, perhaps an investor should have been on notice and the court could consider this an element of unreasonableness. However, the very nature of a Ponzi scheme would presuppose that the promised rate of return would be groundless in any financial reality, thus creating a presumption of unreasonableness across the board. As the Department of Securities has stated in its subsequent complaints regarding the winning investors on remand, the parties involved "did not *contract* for a *commercially reasonable* rate of interest."[169] The unreasonableness may begin at the very inception of the scam. Remembering the workings of a Ponzi scheme, all investors would be similarly situated in this regard, making a factor like this perhaps moot when attempting to determine an unreasonable profit.

What specific market conditions, then, could a finder of fact use and obtain after the fact (remembering the lack of proper records and false oral promises that often accompany a Ponzi scheme[170]) which would be of sufficient quality to be the basis of a decision affecting people's lives, perhaps years after the

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167. Cherry & Wong, *supra* note 21, at 403.

168. *Blair*, 231 P.3d at 671 (Winchester, J., dissenting).

169. Plaintiffs' Motion for Summary Judgment Against Defendants, Daniel and Crystal Jackson, and Brief in Support at 5, Okla. Dep't of Sec. *ex rel.* Faught v. Mathews, No. CJ-2005-3796, 2010 WL 3385969 (Okla. Cnty. Ct. Aug. 23, 2010) [hereinafter Plaintiffs' Motion for Summary Judgment Against Defendants, Daniel and Crystal Jackson] (emphasis added).

170. *See* Davidson, Loewenson & Midkiff, *supra* note 161; *see also Anatomy of a Fraud: The Rogue Broker*, *supra* note 1.

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"profits" are gone?[171] Many would simply find none. Here it is not only a matter of perspective, it is a matter of legal adequacy. Again, as the Department of Securities argues, "[t]he Court should not step in to restructure the investment agreement or contract, particularly in a situation such as this where the speculative nature of the fictitious enterprise *would prohibit* the formulation of an *obvious, equitable and objective rate of return*."[172]

More importantly, what should a finder of fact *not* consider when attempting to establish unreasonableness in a Ponzi-scheme profit? One investor may claim his or her profit should be defined in relation to the final profits of other investors as they all presumably bargained for inflated rates of return. Another may clamor that the unreasonableness of his or her return may only be satisfied by an objective, factual-based analysis of what the actual registered securities were doing in the time frame the schemer claimed to be investing. Yet again, the ability to locate objective, accurate information seems a monumental task when truthful records are nonexistent.

For example, as the Department of Securities has argued in subsequent filings of the Schubert clawback cases on remand, "[b]ecause options trading and day trading are so highly speculative and dependent on the trader's luck and skill at timing market fluctuations, it would *be impossible* to compare one trader's returns to another's in determining a reasonable investment profit."[173] Now courts must expend judicial time and resources to create a working set of factors that may be years in the making.[174]

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171. The *Blair* court recognized hardships of winning investors who are required to give the money they thought was actual profit back to the receiver or bankruptcy trustee: "Some investors who received 'fictitious profits' may have spent the money on education or other necessities many years ago. What else in equity and good conscience should plaintiffs who received money in good faith pursuant to an 'investment contract' have done?" *Blair,* 231 P.3d at 662 (quoting Johnson v. Studholme, 619 F. Supp. 1347, 1350 (D. Colo. 1985), *aff'd*, 833 F.2d 908 (10th Cir. 1987)).

172. Plaintiffs' Motion for Summary Judgment Against Defendants, Daniel and Crystal Jackson, *supra* note 169, at 5 (emphasis added).

173. *Id.* (emphasis added).

174. The Department has started to proceed with their clawback claims, attempting to implement the unreasonableness standard into their analysis. However the current claims present very high rates of return that perhaps will not require the courts to go into a more detailed analysis of factors as may be necessary when the rates of return as to "reasonableness" are not as obvious. *See* Plaintiffs' Motion for Summary Judgment Against Defendants, Daniel and Crystal Jackson, *supra* note 169, at 5 (alleging 311% rate of return on investment); Plaintiffs' Motion for Summary Judgment Against Defendants, Kenneth and Leslie Young, and Brief in Support at 3, 6, *Mathews*, No. CJ-2005-3796, 2010 WL 3385971 (alleging 61% rate of return on investment); Plaintiffs' Motion for Summary Judgment Against Defendants, K.R. and Dana Larue, and Brief in Support at 3, 6, *Mathews*, No. CJ-

Other state courts that have allowed clawback suits under an unjust enrichment theory have not taken the subsequent step the Oklahoma court did in *Blair* to qualify the clawback amount via a threshold of unreasonableness.[175] Like the court in *Chosnek*[176] that found that an innocent, winning investor is not unjustly enriched only to the point of receiving returns upon his or her original investment,[177] Oklahoma could have adopted a more streamlined approach. Other federal courts that have similarly allowed unjust enrichment-based clawbacks to proceed have kept to the standardized approach: the amount over the initial investment that can be classified as profit is subject to clawback[178] or the presence of any funds representing an unjust enrichment of any kind may be clawed back.[179]

Further, the larger policy goals of the Department of Securities and securities enforcement agencies as a whole that the Oklahoma court observes—to protect both the public and investors, to consider the promotion of "efficiency, competition, and capital formation"[180]—are not spared by this new clawback measure. Specifically in terms of efficiency, Ponzi scheme receivers or the Department of Securities itself (pending the particular case) in Oklahoma will seemingly have to go beyond the standard netting analysis expected in other jurisdictions, costing time and resources with the realistic possibility of not clawing back actual Ponzi profits. This may deter litigation; however, litigation is a valuable tool for receivers to seek some amount of recourse for losing investors (now creditors). Also, winning investors who consider their profits reasonable may hesitate or decline to enter into a settlement agreement with the receiver; instead, they may "roll the dice" to see if they will be allowed to retain the money pending a determination of unreasonableness.

2005-3796, 2010 WL 3385972 (alleging 246% rate of return on investment); Plaintiffs' Motion for Summary Judgment Against Defendants, Rod and Wanda Martin, and Brief in Support at 3, 6, *Mathews*, No. CJ-2005-3796, 2010 WL 3385974 (alleging 89% rate of return on investment).

175. Oklahoma was seemingly the first state court to implement this restriction of a Ponzi clawback amount as a court in sitting in equity as the opinion fails to cite another such jurisdiction that has accepted an unreasonableness profit qualification. Also, a Westlaw search as of January 13, 2011 failed to find another state court opinion accepting this standard in response to an equity-based claim.

176. Chosnek v. Rolley, 688 N.E.2d 202 (Ind. Ct. App. 1997).

177. *Id.* at 210-11.

178. *See,* Hecht v. Malvern Preparatory Sch., 716 F. Supp. 2d. 395, (E.D. Pa. 2010);

179. *See* Hays v. Adam, 512 F. Supp. 2d 1330, 1343-4 (N.D. Ga. 2007).

180. Okla. Dep't of Sec. *ex rel.* Faught v. Blair, 231 P.3d 645, 662-63 (Okla. 2010).

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Perhaps the Department of Securities, receiver and investors would be best served with the status quo at this point; the simple equation wherein "[a]ll [a winning investor] is being asked to do is to return the net profits of his investment—the difference between what he put in at the beginning and what he had at the end."[181] The Oklahoma standard in practice does not solve the existing clawback dichotomy of winning investor and losing investor. Instead, a new equation of losing investors, winning investors with unreasonable profit, and winning investors with reasonable profits will potentially increase the litigation and the problems of "unfairness" already showcased in existing clawback litigation.

B. Downstream Effects: Altering the Amounts in the Ultimate Pro Rata Distribution

If Oklahoma is to utilize an unreasonableness standard for Ponzi clawback litigation, a subsequent pro rata distribution scheme would be inherently skewed. From the perspective of losing investors and other creditors of the scheme, funds that should be distributed by the receiver in the hopes of breaking even on their initial investment may instead continue to sit with the winning investors. As already noted, the receiver bears a huge burden to locate and clawback these fraudulent or unjustly enriching funds. A subsequent concern now is that the money may be located, but an unreasonableness criteria may stand as a roadblock in distributing those funds to losing investors.

Pro rata has generally been the method adopted to bring winning and losing investors and other potential creditors of the estate into some semblance of parity.[182] But the ultimate degree of parity is dependent upon what the receiver is able to accumulate in the "pot" to distribute. Again, the Ponzi scheme provides specific problems that have made a pro rata distribution plan widely accepted because once-individual funds have been commingled beyond differentiation.[183] The rule established in *Cunningham*-that tracing presumptions cannot be allowed when the parties are all victims of the same fraud and the property is commingled to the point one's funds cannot be traced directly and thus a pro rata scheme is appropriate,[184]-might not seem reconcilable with the *Blair* unreasonableness standard. If a receiver cannot clawback as much money because Ponzi profit now in the hands of a

181. Cherry & Wong, *supra* note 21, at 403 (citation omitted).
182. *See id.* at 402.
183. *See* Rosa, *supra* note 93, at 1348.
184. *See id.*

winning investor is considered reasonable, less money is available for distribution ratably among the losing investors and other creditors.[185]

While tracing is technically still possible from a legal standpoint, the practical realities of a Ponzi scheme make the ability slim.[186] Because of such a practical matter, most of the distributions will be delegated to the accepted pro rata scheme. However the pro rata scheme will face new problems with an unreasonableness standard—ultimately affecting how much recovery a losing investor could see. For a simple example, assume a receiver has a balance of $100,000 that is available to distribute to losing Ponzi scheme investors. The claims for distribution submitted by those losing investors to the receiver equal $1,000,000. Under this brief example the pro rata percentage would equate to 10% (an amount that translates to 10 cents on the dollar). Now assume that the receiver's balance increases to $150,000. The pro rata percentage increases to 15% (or 15 cents on the dollar) of the loss of each investor. These incremental increases might not seem significant at first glance, but when these small amounts are compounded (perhaps even millions of times for each dollar invested in a scheme), the potential losses for an already losing investor add up quickly.

The *Blair* court strives for equity, but equity must be followed through the entire set of Ponzi scheme consequences. For instance, in early 2010 the Ohio federal district court in *Gordon v. Dadante*[187] held that while a pro rata plan would not be perfect, it was the *most* equitable method presented.[188] That court held that the innocent investors should share equally in the recovered, clawed-back funds because "equity demands *equal treatment*."[189] That principle could also be reflected through winning investors sharing equally by all contributing to the "pot" available for distribution, rather than some winning investors facing disgorgement and others not. Pro rata schemes have consistently been upheld at the federal level[190] for practical

185. *See* McDermott, *supra* note 18, at 164.

186. *See* Rosa, *supra* note 93, at 1349-50.

187. No. 1:05-CV-2726, 2010 U.S. Dist. LEXIS 1979 (N.D. Ohio Jan. 11, 2010).

188. *Id.* at *13 (emphasis added).

189. *Id.* at *18 (emphasis added).

190. *See, e.g.*, S.E.C. v. Byers 637 F. Supp. 2d 166 (S.D.N.Y. 2009); S.E.C. v. Drucker, 318 F. Supp. 2d 1205, 1207 (N.D. Ga. 2004). It is important to note here that:

> [B]ecause receivers are appointed as an exercise of equity, they are given wide latitude in proposing distribution methods for the remaining assets. Receivers are not limited to the requirements of the bankruptcy laws or any other distribution method. As long as their proposal satisfies the demands of equity and is approved as an act of the Court (within the limits of the Court's discretion) any proposed distribution method will be considered valid and enforceable against the objections of third parties.

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reasons as the Oklahoma court noted. When investors have lost everything, any amount they may recover is significant (both monetarily and psychologically). The unreasonableness standard goes beyond the immediate winning investor—it potentially further interferes with the subsequent treatment of losing investors and creditors.

C. Clarity Among the Confusion: The Need to Consider Ponzi-Specific Clawback Legislation

Quite simply, neither principles of equity nor current statutory provisions can fully encompass the maze of innocent people and transferred funds in Ponzi schemes. While no one can technically win when the scheme fails, courts have noticed the silence of legislatures as to the Ponzi scheme clawbacks and recognized that current tools at their disposal have significant shortcomings. The *Blair* court remarked that the Oklahoma legislature could not only assert that the Department of Securities is authorized to seek equity-based clawbacks against winning Ponzi scheme investors but also enunciate what would be the subsequent "rights and liabilities" of those winning and losing Ponzi investors.[191]

"The remedies provided under *the law* are less than satisfactory since it will be a matter of chance whether a particular innocent investor is a winning or losing investor."[192] The statutes used in clawback litigation were not explicitly written for such a purpose.[193] Specifically, under the UFTA problems can arise from the limited reach-back periods, as only those

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Ralph S. Janvey, Commercial Fraud Task Force on a Collision Course: Ponzi Schemes, Bankruptcy, Receiverships and Forfeitures (Am. Bankr. Inst., 21st Ann. Winter Leadership Conf., Dec. 3, 2009), *available* at 120309 ABI-CLE 355 (Westlaw).

191. Okla. Dep't of Sec. *ex rel.* Faught v. Blair, 231 P.3d 645, 670 (Okla. 2010). In terms of a Ponzi estate now in Bankruptcy proceedings, a recent court noted: "if Congress did not intend such a result when the debtor was involved in a Ponzi scheme, it should so specify in the Bankruptcy Code rather than leaving it to the courts to ignore what is clearly value and fair consideration under the conveyance statutes." *In re* Canyon Sys. Corp., 343 B.R. 615, 641 (Bankr. S.D. Ohio 2006).

192. Cherry & Wong, *supra* note 21, at 403 (emphasis added).

193. One frustrated court explained when trying to reconcile a Ponzi scheme within the context of the current Bankruptcy scheme:

> By forcing the square peg facts of a 'Ponzi' scheme into the round holes of the fraudulent conveyance statutes in order to accomplish a further reallocation and redistribution to implement a policy of equality of distribution in the name of equity, I believe that many courts have done a substantial injustice to those statutes and have made policy decisions that should be made by Congress.

In re Unified Commercial Capital, 260 B.R. 343, 350 (W.D.N.Y. 2001).

transfers made during the actual enumerated period are avoidable.[194] In Oklahoma the reach back period is four years,[195] as is the case with other UFTA jurisdictions.[196] Through the fraudulent conveyance laws, nothing "require[s] every innocent investor to surrender as fraudulent transfers any and all payments received by the investor from the scheme."[197] Thus, profits received outside of the statutory time frame will not be subject to clawback by the receiver and will not be part of the estate that can be distributed to creditors and losing investors. To make up for the shortfall, some recent scholars have suggested the implementation of contractual clawbacks.[198] While the UFTA approach provides a receiver an established route[199] to pursue clawbacks, it is not a perfect fit because of the very nature of a Ponzi scheme given that one single enterprise can run for years, if not decades.[200] The UFTA presents its own line in the sand that can cause practical problems for receivers and losing investors alike. If legislatures explicitly stated that the jurisdiction's fraudulent transfer statutes would not be eligible for use in Ponzi clawback claims, reach-back time frames would not be at issue. Conversely, a legislative body could unambiguously state that their jurisdiction's statutory provision is indeed available for use by an appropriate party for a Ponzi clawback claim. Regardless of the particular point of view

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194. *See id.*

195. Under Oklahoma's UFTA the time limit to a proceeding is four years "after the transfer was made or the obligation was incurred or, if later, within one (1) year after the transfer or obligation was or could reasonably have been discovered by the claimant." 24 OKLA. STAT. § 121(1) (2011).

196. While the UFTA reach back period remains at four years from the transaction date, § 548 of the Bankruptcy Code "allows avoidance of only those transfers made within one year prior to the petition date." McDermott, *supra* note 18, at 160 n.15.

197. Cherry & Wong, *supra* note 21, at 405.

198. *Id.* at 408-10.

199. *See, e.g.*, Donell v. Kowell, 533 F.3d 762, 767 (9th Cir. 2008) (noting the routine application of UFTA for bankruptcy-based Ponzi scheme clawbacks and extending the availability to receivers); Scholes v. Lehman, 56 F.3d 750, 756 (7th Cir. 1995) (explaining standing of receiver to proceed with UFTA claim under the implied provisions of the statute).

200. Schubert's scheme ran from December 1999 to October 2004, for example. Okla. Dep't of Sec. *ex rel.* Faught v. Blair, 231 P.3d 645, 650 (Okla. 2010). If her first investor invested in December 1999, that person would fall outside of the reach back period under UFTA. There are disputes as to how long Bernard Madoff's scheme actually lasted but the scheme appears to have lasted at least two decades. Ben Levisohn, *Madoff Pleads Guilty to Ponzi Scheme*, BLOOMBERG BUSINESSWEEK (Mar. 12, 2009, 4:05 PM ET), http://www.businessweek.com/bwdaily/dnflash/content/mar2009/db20090312_431966.htm.

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the legislature accepts, either option would streamline and standardize the potential litigation.

Besides problems with statutory approaches to Ponzi clawbacks, the central tenants of equity similarly cannot fully encompass the logistical and ethical concerns of Ponzi clawbacks. The *Blair* court, for instance, assumed that winning investors are only unjustly enriched when a threshold is crossed—not when they receive any "profit" from the scheme—even though all of the "profits" come from the same source. The effect of the *Blair* holding presents new avenues of questioning as it appears some winning investors will be unjustly enriched from the same Ponzi fund while other winning investors will not. Also, unjust enrichment, defined in Oklahoma as occurring when it would be against equity to "retain a benefit which has come at the expense of another,"[201] doesn't necessarily encompass the fact that two innocent groups of investors must contend with each other—rather than a culpable party. When receivers or trustees attempt to clawback the funds among equally innocent investors, a causal disconnect can result in the parties remaining as they are because the courts struggle to fit two groups of "round" investors into "square" holes. Certain courts like the Tenth Circuit in *Johnson* simply may fail to see how the winning investors were unjustly enriched and deny an opportunity for further relief for losing investors.[202]

Similarly, the tools of equity have trouble factoring in the differing points of view of winning investors, losing investors, and the Ponzi schemer himself in effectuating the necessary actions of clawing back profits. Restitution, on the one hand, is a remedy with the purpose of compensating the victims of security frauds for their losses,[203] while disgorgement is the requirement to disgorge funds obtained from his or her violation of securities laws.[204] Restitution itself "does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so . . . . It must be a realistic determination based on a broad view of the human setting involved."[205] Not surprisingly the facts of a Ponzi scheme can spin such a notion in circles without any clear answer—someone will ultimately have to lose in the end, and no option is more equitable than another.

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201. *See* N.C. Corff P'ship v. OXY USA, Inc., 929 P.2d 288, 295 (Okla. Civ. App. 1992) (quoting 66 AM. JUR. 2D *Restitution and Implied Contracts* § 3 (1973)).

202. 619 F. Supp. 1347, 1359 (D. Colo. 1985), *aff'd*, 833 F.2d 908 (10th Cir. 1987).

203. *See Blair,* 231 P.3d at 654.

204. *See id.* (explaining the role of disgorgement within the context of ill-gotten gains).

205. 66 AM.JUR. 2D *Restitution and Implied Contracts* § 3 (2011).

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Alternatively, if the purpose of disgorgement "is not to compensate the victims of the fraud, but to deprive the wrongdoer of his ill-gotten gains,"[206] again an unreasonableness standard frustrates such a purpose. The winning investor presumptively did not set out to perpetrate a fraud nor partake in an action for which they themselves should be punished (unless they were aware of the scheme or otherwise involved). Essentially, disgorgement does not solely deprive the Ponzi schemer himself, but the innocent he defrauded along the way. If, under an unreasonableness clawback standard a winning investor is not disgorged, however, the only people continually being punished are the losing investors.

Because there are currently no clear or concise judicial answers or equitable methods to address Ponzi clawbacks directly, the opportunity is ripe for legislatures to have their say. One option would be to limit the ability of a receiver or another entity from commencing a clawback claim against a winning investor unless a legal finding of culpability on the part of that investor is established. The central tension of disgorging innocent investors of money they received in good faith could be diffused by requiring a legal finding of culpability as a standardization of the process. Another option would be for the legislature explicitly to adopt a caveat emptor point of view through explicit legislation preventing the pursuit of clawbacks by a state agency like the Department of Securities. Investing is risky business, and the legislature may debate the merit of clawbacks effecting to restructure such agreements after-the-fact.

The current patchwork of law and equity has created inconsistent treatment of Ponzi scheme clawbacks.[207] The Oklahoma court sought to understand and work with the difficult facts of winning and losing investors being equally blameless, but their starting point may lead to unintended paths and corresponding problems. Both state and federal legislators can and should set the tone and put potential investors on notice as to the even more potentially risky investment they are about to make—they may be subject to clawbacks upon the discovery of the scheme or they may find themselves in a more lenient jurisdiction wherein they can increase their initial gamble in the securities market. As the *Blair* dissent noted, "the individual must be responsible for investigating before investing."[208] Legislators can use this opportunity to understand the real-world impact of these clawback claims and

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206. *Blair,* 231 P.3d at 654.

207. This appears to hold true also within the context of the Bankruptcy Code. *See* Mallory A. Sullivan, *When the Bezzle Bursts: Restitutionary Distribution of Assets After Ponzi Schemes Enter Bankruptcy*, 68 WASH. & LEE L. REV. 1589, 1632-33 (2011).

208. *Blair*, 231 P.3d at 671 (Winchester, J., dissenting).

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make a fact-based determination of the most efficient and equitable method to determine what claims certain parties have.

VI. Conclusion

Ponzi scheme clawbacks will never be "fair" to all the parties concerned because not enough money is available to go around. Winning investors, losing investors and receivers all have different points of view regarding clawback actions, and it would be impossible for all the parties to be satisfied with the outcome. Oklahoma's decision to impose an unreasonableness standard into this already complicated set of circumstances creates confusion and handicaps losing investors. This unreasonableness standard stands to complicate the accepted pro rata method of distribution and increases the need for a statutory definition of the rights of investors, creditors and interested government agencies. For now, instead of being left with more money as promised, Ponzi investors are simply left with more problems.

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