



H.S. Grace & Company, Inc.

## **Investment Fund Ponzi Scheme – Aiding and Abetting Claims Against Financial Institution**

Claims against banks and others for allegedly aiding and abetting fraud or aiding and abetting directors and officers in breaching their fiduciary duties are prevalent as a result of ongoing economic issues and business failures. The experience of H. S. Grace & Company's (HSG) team of active and former senior executives and board members enables us to evaluate these claims and the complex business structures and financial relationships involved and address both causation and complex affirmative defenses in these cases, such as *in pari delicto* defenses. We have set out below a summary of a representative case involving aiding and abetting claims against a financial institution in which Dr. Grace testified.

### **Allegations:**

Plaintiff, a bankrupt investment fund, sued defendant bank (HSG client) asserting that the bank had knowingly provided substantial assistance to the two controlling officers of the fund ("the controlling officers") in a massive looting, self-dealing Ponzi scheme that defrauded the fund out of tens of millions of dollars, and ultimately caused the fund to file for bankruptcy protection. Plaintiff contended that the controlling officers had diverted millions of dollars of the fund's assets to related entities, which they controlled, through the related entities' bank accounts maintained at the bank. Plaintiff asserted that the bank had (1) aided and abetted the two officers in their breaches of fiduciary duty and fraud and (2) committed civil RICO conspiracy by providing normal banking and wire transfer services to the related entities.

### **HSG Role:**

HSG's role in the case was to understand the structure and operations of the investment vehicle and its related entities and why the investment vehicle failed, and to analyze whether Plaintiff's claims regarding the actions of the two controlling officers with alleged possible assistance from the bank had any merit. After extensive analysis, HSG concluded (1) that the fraud was perpetrated by the two controlling officers because they were, in effect, the sole decision makers in the group of companies and acted as they wished, and (2) that the bank had no part in any alleged wrongdoing.

### **Outcome:**

Dr. Grace offered testimony at trial explaining the complex structure, roles, relationships and risks of the fund and its related entities, as well as testimony concerning the role and actions of the relevant state regulator. Dr. Grace's testimony demonstrated that the controlling officers dominated and controlled the entities. Dr. Grace also explained HSG's findings regarding the investment vehicle's failure and provided testimony regarding the normal and customary manner in which companies utilize banks and their banking services. This testimony was relevant to both causation issues in the case and to defendant's affirmative defenses of *in pari delicto* and imputation. At the conclusion of Plaintiff's presentation, counsel for the bank moved to dismiss the case. The bankruptcy judge recommended that all causes of action asserted by Plaintiff should be determined in favor of the bank and that Plaintiff should take nothing by its claims in the lawsuit.

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*H.S. Grace & Company, Inc. is a team of senior executives who diagnose and resolve critical corporate problems in business governance, operations, finance and control. With more than 1,000 years of experience, our goal is to help companies enhance shareholder value, protect reputation and their long-term ability to succeed, avoid and manage litigation, and navigate major changes such as mergers and acquisitions or bankruptcies. We often serve as consulting and testifying experts, identifying and analyzing critical business issues.*

### **Representative Issues Examined**

- Lender Liability
- D&O
- Corporate Split-off
- Family Trust
- Health Care
- Professional Services
- Intellectual Property
- International Structured Finance Transaction
- Fraud
- Pension Fund Investments
- SEC White Collar Defense
- Stock Option Backdating
- Oil & Gas
- Real Estate
- Fiduciary Issues
- Contract Dispute
- Fund Management
- Market Timing Allegations
- Financial Derivatives
- Portfolio Management
- Special Purpose Corporation

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