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**Fraudulent Transfer Update:  
Important Developments on Many Fronts**

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## **FRAUDULENT TRANSFER UPDATE: IMPORTANT DEVELOPMENTS ON MANY FRONTS**

By M. Jermaine Watson, Esq. and Joseph J. Wielebinski, Esq.<sup>1</sup>

### **I. Introduction**

Fraudulent transfers and the litigation they generate have been and continue to be one of the more controversial aspects of bankruptcy proceedings for several reasons. First, fraudulent transfers often involve large dollar amounts and the resulting litigation serves to potentially undo transactions or seek recoveries based on those transactions which occurred many years prior. Second, fraudulent transfer recoveries are an effective and readily available tool that can often be the only means for creditors to obtain some distribution on their claim. Third, the resulting litigation is often hotly contested and the claims asserted often test the limits of the law.

This article will cover some of the “hot” issues in fraudulent transfer litigation including: (i) the Ponzi scheme presumption, (ii) “Inquiry Notice” of Fraudulent Activity; (iii) tax sales as fraudulent transfers; (iv) the safe harbor provisions of Section 546(e) preempting state law constructive fraudulent transfer law; and (v) whether debt incurred in a fraudulent transfer scheme may be non-dischargeable as “actual fraud.”

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In addition, this article will address some unique issues arising in connection with cross-border litigation and litigation involving foreign parties or assets. One of the key issues in these representations is complying with the federal rules and international law when serving non-U.S. parties and the extraterritorial reach of United States judgments arising from fraudulent transfer litigation.

## **II. Fraudulent Transfer Disputes**

### **A. Ponzi Scheme Presumption of Insolvency**

#### **1. *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 562 (Tex. 2016)**

In the Fifth Circuit, one fraudulent transfer case that has garnered significant attention and interest is the *Janvey* case. On April 1, 2016, the Texas Supreme Court handed down a decision that will likely mark the end of the Stanford International Bank, Ltd.'s ("Stanford") receiver's efforts to clawback payments from pre-receivership vendors. In doing so, the Fifth Circuit clarified what is needed to show "reasonably equivalent value" under the Texas Uniform Fraudulent Transfer Act ("TUFTA").<sup>2</sup> Moreover, the Fifth Circuit clarified that the so called "Ponzi scheme presumption" will not override the legitimate defenses of vendor's who provide actual and objective equal value to debtor.

The underlying lawsuit involved the Golf Channel, which provided advertising time on its network to Stanford. The parties stipulated that Stanford paid a market rate. Even so, the receiver asserted that, under TUFTA, the Golf Channel should be required to return the payments as Stanford could not have received reasonably equivalent value in exchange for the services provided by the Golf Channel due to Stanford's involvement in running a Ponzi scheme.

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<sup>2</sup> See *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 562 (Tex. 2016).

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