

## Alert

### Fifth Circuit Certifies ‘Good-Faith-for-Value’ Issue to Texas Supreme Court in *Golf Channel* Case

July 7, 2015

Is market value sufficient proof of reasonably equivalent value for purposes of the good-faith-for-value defense under Texas law? The U.S. Court of Appeals for the Fifth Circuit certified that question to the Texas Supreme Court on June 30, 2015, after vacating its earlier decision in *Janvey v. The Golf Channel, Inc.*, 2015 WL 3972216, at \*3 (5th Cir. June 30, 2015). The court’s controversial March 11, 2015 decision, 780 F.3d 641, held an advertising firm liable to a corrupt company’s receiver for \$5.9 million that the firm had received in good faith from the company.<sup>1</sup> In that decision, the court found the defendant’s advertising services to have provided “no value to the debtor’s creditors” and reversed the district court, which had dismissed the receiver’s complaint, relying on the defendant’s “affirmative defense that it received the payments in good faith and in exchange for reasonably equivalent value (the market value of advertising on the Golf Channel).” In the view of the district court, the defendant looked “more like an innocent trade creditor than a salesman perpetrating and extending the [debtor’s] Ponzi scheme.” 2015 WL 3972216, at \*2. Granting the defendant’s petition for rehearing, the Fifth Circuit also asked the Texas Supreme Court whether “value” under the Texas Uniform Fraudulent Transfer Act (“TUFTA”) should be measured from the standpoint of a debtor’s creditors or whether market value alone was sufficient to sustain the creditor’s affirmative defense. *Id.* at \*7.

#### Relevance

The issue certified to the Texas Supreme Court is important to creditors. The defendant in *Golf Channel* undeniably provided its advertising services in good faith and relied on the market value of its advertising services. According to the Fifth Circuit, “TUFTA was designed to strike a balance between protecting the creditors of an insolvent business while at the same time ensuring that third-party merchants and transferees (who, ironically, may also be creditors post-bankruptcy) would have an affirmative defense to protect their earnings.” Moreover, “where TUFTA draws a line between the various interested parties is the difficult question that Texas courts have yet to answer.” *Id.*

In framing the controversy, the Fifth Circuit noted that the relevant comment in the Uniform Fraudulent Transfer Act (“UFTA”) (UFTA § 3 cmt. 2), which is not codified in TUFTA, states that “value” is measured “from a creditor’s viewpoint.” *Id.* at \*4-5. In contrast, TUFTA’s statutory definition of “reasonably equivalent value” (Tex. Bus. & Com. Code § 24.004(d)) includes a “transfer ... that is within the range of values for which the transferor would have sold the assets in an arm’s length transaction,” suggesting that value is measured “from the perspective of a buyer in the general marketplace, not from the

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<sup>1</sup> See our April 1, 2015 *Alert* analyzing the Fifth Circuit’s earlier decision, “[Fifth Circuit Again Limits Meaning of ‘Value’ in Creditors’ Good Faith Fraudulent Transfer Defense.](#)”

perspective of creditors.” *Id.* at \*5. As noted in an earlier Fifth Circuit decision, the “good-faith” defense contained in Bankruptcy Code Section 548(c) was meant to “protect ... the [good faith] transferee from his unfortunate selection of business partners.” *In re Positive Health Management*, 769 F.3d 899, 903 (5th Cir. 2014).

We will continue to follow *Golf Channel* as it makes its way back to the Fifth Circuit.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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