

Joe Wielebinski and Matthias Kleinsasser for Law360: Ponzi Ruling Complicates Texas Fraudulent Transfer Litigation

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Winstead PC attorneys Joe Wielebinski and Matthias Kleinsasser wrote an article published by *Law360* about the recent opinion issued by the Fifth Circuit in Janvey v. GMAG LLC, the latest of several opinions addressing Texas Uniform Fraudulent Transfer Act issues arising out of the Stanford International Bank Ponzi scheme. An excerpt is below:

"The U.S. Court of Appeals for the Fifth Circuit and the Texas Supreme Court have issued several recent opinions addressing Texas Uniform Fraudulent Transfer Act issues arising out of the Stanford International Bank Inc. Ponzi scheme.

On Oct. 8, the Fifth Circuit issued its latest opinion in *Janvey v. GMAG LLC*, reaffirming and clarifying that a transferee on inquiry notice of fraudulent conduct must conduct a diligent investigation to be able to rely on TUFTA's good faith affirmative defense, rather than arguing that such an investigation would have been futile.

What is the gist of the latest Janvey opinion?

Ralph S. Janvey, the Stanford International Bank receiver, sued Gary D. Magness and various affiliated entities to recover \$79 million under an actual fraudulent transfer theory. A jury found that the Magness parties had inquiry notice as of October 2008 that Stanford International Bank was engaged in a Ponzi scheme.

The jury also found, however, that further investigation by the Magness parties into this scheme would have been futile. Based on the jury's findings, the district court held that the Magness parties had met their burden to rely on TUFTA's Section 24.009(a) affirmative defense, which allows a transferee to defeat liability by showing it received an actual fraudulent transfer in good faith and in exchange for reasonably equivalent value.

Actual or inquiry notice is generally sufficient to negate good faith, but inquiry notice will not negate good faith if the transferee conducts a diligent investigation that fails to uncover fraudulent conduct. Inquiry notice is defined as "knowledge of facts relating to the transaction at issue that would have excited the suspicions of a reasonable person and led that person to investigate."

Until recently, whether a transferee who did not conduct a diligent investigation could retain its good faith defense by demonstrating that an investigation would have been futile was an open question. Initially, the Fifth Circuit concluded that the Texas Supreme Court would not hold that a futility exception exists under Texas law.

The Fifth Circuit subsequently vacated that opinion upon Magness' request that the futility exception question be certified to the Texas Supreme Court. In December 2019, the Texas Supreme Court held futility does not excuse a transferee on inquiry notice from conducting a diligent investigation.

Applying the Texas Supreme Court's decision to the facts, the Fifth Circuit held that the Magness parties did not conduct a diligent investigation into fraudulent conduct and were not entitled to TUFTA's affirmative defense. Because the Fifth Circuit provided no guidance on this issue, the main question left unanswered is what, precisely, does a diligent investigation require?

[Read the full article.](#)

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