

***Golf and Fuel:  
A Potentially Combustible Mixture Across Statutes and Jurisdictions***

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Imprecise language in the Bankruptcy Code and conflicting guidance from the Fifth Circuit has created confusion regarding what is a seemingly simple question: “what constitutes ‘value’ for purposes of section 548(c) of the Bankruptcy Code?”

Under 11 U.S.C. § 548(a)(1)(B), a bankruptcy trustee may avoid any transfer . . . of an interest of the debtor in property ... that was made or incurred on or within 2 years before the date of the filing of the [bankruptcy] petition, if the debtor voluntarily or involuntarily . . . received less than a *reasonably equivalent value* in exchange for such transfer or obligation; and . . . was insolvent on the date that such transfer was made. 11 U.S.C. § 548(a)(1)(B) (emphasis added).

The Bankruptcy Code provides an affirmative defense, however, for transferees who prove that they took the transfer in good faith and for value:

[A] transferee or obligee of such [an otherwise voidable] transfer or obligation that takes for *value and in good faith* has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave *value* to the debtor in exchange for such transfer or obligation.

11 U.S.C. § 548(c) (emphasis added). Value is defined as “property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor.” 11 U.S.C. § 548(d)(2)(A).

The Fifth Circuit, together with the Supreme Court of Texas, issued a labyrinthine series of opinions in 2015 and 2016 that provide important considerations for anyone engaged in a debate about the meaning of “value” in the Fifth Circuit. In *Janvey v. Golf Channel, Inc. (Golf Channel IV)*, the Fifth Circuit ultimately held that assessing value from an objective standpoint is the appropriate standard under the Texas Uniform Fraudulent Transfer Act (“TUFTA”). 834 F.3d 570, 573 (5th Cir. 2016). In its earlier holdings in this line of cases and in dicta of *Golf Channel IV*, however, the Fifth Circuit rejected consideration of the objective value provided by the transferee for purposes of the good faith for value defense and instead assessed whether the transfer provided value to the debtor, its estate, and its creditors.

Although the *Golf Channel* cases specifically dealt with TUFTA, the court reviewed case law interpreting Bankruptcy Code 548(c) and made notable comments though dicta that may impact practitioners engaged in disputes regarding fraudulent transfers under the Bankruptcy Code. The Uniform Fraudulent Transfer Act is based upon section 548 of the Bankruptcy Code,

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and thus, courts examine cases construing section 548 when interpreting and applying state fraudulent transfers laws like TUFTA. *Janvey v. Golf Channel (Golf Channel I)*, 780 F.3d 641, 645 (5th Cir. 2015), *opinion vacated and superseded on other grounds on reh'g Janvey v. Golf Channel, Inc. (Golf Channel II)*, 792 F.3d 539 (5th Cir. 2015) *certifying question to Janvey v. Golf Channel, Inc. (Golf Channel III)*, 487 S.W.3d 560 (Tex. 2016); *see, e.g., Hinsley v. Boudloche (In re Hinsley)*, 201 F.3d 638, 643 (5th Cir. 2000); *see also Bowman v. El Paso CGP Co.*, 431 S.W.3d 781, 786 n. 6 (Tex. App.-Houston [14<sup>th</sup> Dist.] 2014, pet. filed) (“Because the TUFTA’s concept of ‘value’ was adopted from the Bankruptcy Code, cases interpreting ‘reasonably equivalent value’ under the Bankruptcy Code are persuasive.”).

In *Golf Channel IV*, the court-appointed receiver for Stanford International Bank, Limited (“Stanford”) sought to recover, under Section 24.005(a)(1) of TUFTA, \$5.9 million in fraudulent transfers paid by Stanford to The Golf Channel, Inc. (“Golf Channel”) in exchange for television advertising services aimed at recruiting additional investors into Stanford’s now notorious multi-billion dollar Ponzi scheme. *Golf Channel IV*, 834 F.3d at 571. The U.S. District Court for the Northern District of Texas granted a motion for summary judgment by Golf Channel upon finding that it established the affirmative defense of receiving the payments “in good faith and for a reasonably equivalent value,” a defense similar to the good faith for value defense in Bankruptcy Code section 548(c). *Golf Channel IV*, 834 F.3d at 571; *see* Tex. Bus. & Com. Code § 24.009.

Initially, the Fifth Circuit made an “Erie guess”<sup>2</sup> on the question of value and reversed the district court. The court analyzed precedent from fraudulent transfer cases in other states and under the Bankruptcy Code. *Golf Channel I*, 780 F.3d at 645. Based upon its review, the Fifth Circuit concluded that “[t]he primary consideration . . . is the degree to which the transferor’s net worth is preserved” and that value is viewed “‘from the standpoint of the creditors,’ not from that of a buyer in the marketplace.” *Golf Channel I*, 780 F.3d at 645 (citing *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006); *Stanley v. U.S. Bank Nat’l Ass’n (In re TransTexas Gas Corp.)*, 597 F.3d 298, 306 (5th Cir. 2010) (internal citations omitted)). Accordingly, the Fifth Circuit reasoned that the services provided by Golf Channel could not have provided value to Stanford’s creditors as a matter of law, since “Ponzi schemes by definition create greater liabilities than assets with each subsequent transaction.” *Golf Channel I*, 780 F.3d at 646.

Only three months later after a petition for panel rehearing, the Fifth Circuit vacated its holding in *Golf Channel I* and certified a question to the Supreme Court of Texas based upon what it perceived to be two seemingly conflicting provisions in TUFTA. *Golf Channel II*, 792 F.3d at 547. A comment from the Uniform Fraudulent Transfer Act (which Texas courts authorize referencing when considering provisions in TUFTA) indicates that value must be examined from a creditor’s viewpoint. Unif. Fraudulent Transfer Act § 3 cmt. 2. In possible tension with the above statement, TUFTA defines “reasonably equivalent value” by stating that such value “includes, without limitation, a transfer or obligation that is within the range of values for which the transferor would have sold the assets in an arm’s length transaction.” TEX. BUS. & COM. CODE § 24.004(d). This suggests that reasonably equivalent value requires a consideration of market value, rather than what a debtor’s creditors received from the transfer or obligation. Thus, a question was certified to help the Fifth Circuit determine what showing of “value” under TUFTA

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<sup>2</sup> An “Erie guess” is an attempt to predict what a state's highest court would decide if it were to address the issue itself. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

is sufficient for a transferee to prove that she provided reasonably equivalent value as required for the good faith for value defense.

In response, the Texas Supreme Court concluded that:

TUFTA's "reasonably equivalent value" requirement can be satisfied with evidence that the transferee (1) fully performed under a lawful, arm's-length contract for fair market value, (2) provided consideration that had *objective* value at the time of the transaction, and (3) made the exchange in the ordinary course of the transferee's business.

*Golf Channel III*, 487 S.W.3d at 564 (emphasis added). For purposes of the good faith for value defense in TUFTA, the Texas Supreme Court specified that value exists when "a transferee performs objectively valuable services or transfers goods in an arm's-length transaction at market-value rates." *Id.* at 577. Accordingly, although in order to constitute value a transfer must "confer some direct or indirect economic benefit to the debtor," this requirement "does not demand consideration that...can be sold to satisfy the debtor's creditors' claims." *Id.* at 575. In other words, the effect on creditors is not the be-all end-all in the analysis. As the court explains:

The purpose of fraudulent conveyance law is not to protect the debtor's creditors from all transfers that have no realizable economic benefit. Indeed, . . . the law actually tolerates some transfers that diminish the value of their claims by reducing the amount of leviable, saleable assets, such as transfers in exchange for services. In fact, the definition of value expressly includes a transfer made to satisfy an antecedent debt, even though satisfaction of the debt would deplete estate assets that might otherwise have been available for the benefit of creditors.

*Id.* at 576 (internal quotations and citations omitted).

The purpose of TUFTA is not simply to recompense creditors of a debtor that has engaged in fraudulent transfers, but also to provide protection to innocent transferees who provided reasonably equivalent consideration for such transfers. *Id.* at 573. Requiring a subjective evaluation of value from a creditor's vantage point would eviscerate the protection afforded to good faith transferees in certain categories of transactions, an effect that is not supported by the Bankruptcy Code or the policy behind the creation of the good faith for value defense. *Id.* at 576.

Following the Texas Supreme Court's lead, the Fifth Circuit changed its tune and reasoned that the existence of a Ponzi scheme does not change the "value" inquiry under TUFTA so long as "the services [provided] would have been available to another buyer at market rates" in the absence of the scheme. *Golf Channel IV*, 834 F.3d at 572 (quoting *Golf Channel III*, 487 S.W.3d at 570). Since *Golf Channel*'s television airtime would have been available to other buyers absent Stanford's purchase, the Fifth Circuit determined that the "advertising services had objective value . . . regardless of Stanford's financial solvency at the time" of the transaction. *Id.* (citing *Golf Channel III*, 487 S.W.3d at 581–82).

Other courts agree with the Supreme Court of Texas’s rationale regarding value and apply the same reasoning to section 548(c) of the Bankruptcy Code. The Eleventh Circuit, for instance, held that “a determination of whether value was given . . . should focus on the value of the goods and services provided rather than on the impact that the goods and services had on the bankrupt enterprise.” See *McHenry v. Dillworth (In re Caribbean Fuels Am., Inc.)*, 688 Fed. Appx. 890 (11th Cir. 2017) (per curiam) (citing *In re Fin. Federated Title & Tr., Inc.*, 309 F.3d 1325, 1331-33 (11th Cir. 2002)). In *Caribbean Fuels*, the Eleventh Circuit followed the rationale of its earlier opinion, *In re Financial Federated Title*, and held that the standard for determining reasonably equivalent value is not whether the debtor “subjectively benefitted from the property it received” but rather “whether the property, goods, or services provided had objective value.” 688 Fed. Appx. at 894-95.

The debtor in *Caribbean Fuels* was an entity that provided fuel to ships in port. *Id.* at 892. The debtor and its principals entered into a lease of a residential home as co-tenants, under an agreement in which the debtor entity would pay twenty-five percent of the rent and the principals would pay the remaining seventy-five percent. *Id.* After the debtor filed its chapter 7 bankruptcy petition, the trustee sought, among other things, to avoid the rent payments made by the debtor as constructively fraudulent under 11 U.S.C. § 548(a)(1)(B). *Id.* at 892-93.

At trial, the trustee conceded that the rent payments were reasonable. *Id.* His sole contention was that no subjective value had been provided to the debtor from the lease. *Id.* at 892. After dismissing the trustee’s argument that subjective value is the relevant inquiry under 548 based upon the precedent set in *Financial Federal*, the Eleventh Circuit held that due to the lack of evidence showing otherwise, the objective value of the lease was reasonably equivalent to the amount of rent paid by the debtor. *Caribbean Fuels Am., Inc.*, 688 Fed. Appx. at 895.

Interestingly, the earlier *Financial Federal* case stemmed from a Ponzi scheme just like the *Golf Channel* cases. In such situations, the negative impact of requiring subjective value to the debtor is readily apparent — goods or services provided to a debtor embroiled in a Ponzi scheme could never result in a benefit to the debtor or its estate and thus never constitute value. By definition, a Ponzi scheme is driven further into insolvency with each transaction. Thus each and every person who provided services to the debtor, innocent or not, even for something as innocuous as utilities, would be subject to an avoidance action. See *Merrill v. Allen (In re Universal Clearing House Co.)*, 60 B.R. 985 (D. Utah 1986) (If the assessment of value required a subjective standard, “no one who in any way dealt with, worked for, or provided services to the debtors could prevent avoidance of any transfers they received.”). Rather than concluding that Congress intended to put the loss inherent in a Ponzi scheme on the person who dealt with the fraudulent bankrupt, *In re Ponzi*, 15 F.2d 113, 114 (D. Mass. 1926), the Eleventh Circuit found that there is no distinction between the people who provide goods or services to a Ponzi scheme and those who invest in the scheme. *Fin. Federated Title*, 309 F.3d at 1332 (citing *Universal Clearing House*, 60 B.R. at 999). “All were necessary to the success of the debtors’ scheme.” *Universal Clearing House*, 60 B.R. at 999. Thus, policy reasons were likely one driving force behind each of these decisions.

Notwithstanding its holding in *Golf Channel IV*, the Fifth Circuit clearly seemed to disagree with the Supreme Court of Texas’ rationale that that one man’s trash can be another man’s

reasonably equivalent value. See *Golf Channel IV*, 834 F.3d at 573. The Fifth Circuit distinguished its holding in *Golf Channel IV* from its prior holdings in fraudulent transfer cases based upon TUFTA's "reasonably equivalent value" definition. Unlike in TUFTA, there is no definition in the Bankruptcy Code for the phrase "reasonably equivalent value." See *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 535 (1994) ("Of the three critical terms 'reasonably equivalent value,' only the last is defined; 'value'") (internal citations omitted). The Fifth Circuit also blamed the binding nature of the Supreme Court of Texas's decision on its final holding. *Golf Channel IV*, 834 F.3d at 573. In reluctantly amending its holding to conform to the state court opinion, the Fifth Circuit clarified that *Golf Channel IV* in no way modified its earlier holdings on 548 or even similar UFTA provisions outside Texas. *Golf Channel IV*, 834 F.3d at 573 (the court's prior decisions adhered to "value from the creditor's point of view," and "[t]he binding effect of these prior decisions in their respective areas of law remains unaffected."). The Fifth Circuit seemed to repudiate the Texas Supreme Court's holding relative to cases that do not apply Texas law, even in the context of the transferee defenses.

This sentiment by the Fifth Circuit however, does not comport with some of its preceding opinions and may be due to conflating (a) the requirement of reasonably equivalent value for purposes of determining whether a transfer is fraudulent with (b) the issue of whether value (or reasonably equivalent value) is present for purposes of the defense. As explained by the Fifth Circuit in an opinion prior to (and remarkably, not mentioned in) the *Golf Channel* cases:

In order to establish a *prima facie* case for avoiding a transfer as constructively fraudulent, the trustee must demonstrate that the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." This provision ensures that there is no great disparity between the value of the goods exchanged. But it does so, most importantly, from the perspective of the transferor: Did the transferor "receive[ ]" enough?

Compare this with the provision at § 548(c). Instead of inquiring into the possibility and extent of the debtor's loss, it provides a means by which the unwitting trading partner can protect himself. Received property can be retained "to the extent" that the "transferee ... gave value to the debtor." The provision looks at value from the perspective of the transferee: How much did the transferee "give"? *The concern here, quite properly, is for the transferee's side of the exchange, not the transferor's gain.*

Read in combination, §§ 548(a) and (c) are perfectly complementary. The first section affords creditors a remedy for the debtor's fraudulence or, as the case might be, mere improvidence; the second protects the transferee from his unfortunate selection of business partners.

*Jimmy Swaggart Ministries v. Hayes (In re Hannover Corp.)*, 310 F.3d 796, 802-03 (5th Cir. 2002) (internal citations omitted) (emphasis added); *accord Williams v. FDIC (In re Positive Health Mgmt)*, 769 F.3d 899, 903-044 (5th Cir. 2014) ("'[V]alue' under section 548(c) is measured from the transferee's perspective, and therefore [ ] whether the [transfers] had any actual value to [the debtor]'s enterprise was irrelevant . . . the court looks not to 'the transferor's gain,' but rather to

the value that the transferee gave up as its side of the bargain”); *Horton v. O’Cheskey (In re Am. Hous. Found.)*, No. 09-20232, 2012 WL 11851620 at \*6 (N.D. Tex. 2012), *judgment aff’d*, 544 Fed. Appx. 516 (5th Cir. 2013) (Under 548(c), “[i]t is undisputed that value is to be measured from the perspective of the” transferee); *Reinbold v. Morton Cmty. Bank (In re Mid-Illini Hardwoods, LLC)*, 576 B.R. 598, 609 (Bankr. C.D. Ill. 2017) (Under 548(c), “the question is not whether the debtor subjectively benefitted from the property it received; the operative question is whether the property, goods or services had objective value.”); *see also Jacoway v. Anderson (In re Ozark Rest. Equip. Co.)*, 850 F.2d 342, 344–45 (8th Cir. 1988) (since reasonably equivalent value is a means of determining if the debtor received a fair exchange in the market place, the inquiry presumes a hypothetical transaction by willing parties unconstrained by the particular financial circumstances of the debtor).

It is difficult to reconcile the *Hannover* case with the Fifth Circuit’s statements regarding 548(c) in the *Golf Channel* cases. For example:

The Supreme Court of Texas’s answer interprets the concept of “value” under TUFTA differently than we have understood “value” . . . under section 548(c) the Bankruptcy Code. . . . [U]nder section 548(c) of the Bankruptcy Code, we have inquired whether the consideration provided in exchange for a transfer conferred a tangible economic benefit on the debtor, not whether the consideration . . . had objective value in the abstract.

*Golf Channel IV*, 834 F.3d at 573; *c.f. Osherow v. Tex. Silica Logistics Joint Venture (In re FWLL, Inc.)*, No. 15-52071-CAG, 2018 WL 1684308, at \*18 (Bankr. W.D. Tex. Apr. 5, 2018) (stating, after applying the rationale from *Hannover* and *Positive Health Management* to a discussion of the good faith for value defense under 548(c), that for purposes of section 24.009(a) of TUFTA “Texas applies the similar analysis that bankruptcy law applies to a good faith defense under § 548(c).”)

The split of authority related to whether “value” and/or “reasonably equivalent value” should be determined from the creditor’s viewpoint for purposes of transferee defenses requires that any practitioner dealing with this issue carefully examine the case law addressing this topic. This is especially true in the Fifth Circuit, where conflicting statements in the Circuit’s cases will require anyone embroiled in these issues to tread cautiously.