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**A Receiver Lacks Standing to Recover Fraudulent Transfers under UFTA when Corporation has not been Adequately Cleansed from Fraudulent Actions of Ponzi Schemers**

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**Introduction**

A court-appointed receiver is charged with collecting the assets of an entity for the benefit of creditors. A receiver, however, only has standing to bring claims that the party in the receivership possessed.<sup>1</sup> In determining whether a receiver has standing to bring a claim, it is necessary to differentiate between the types of claims that can be asserted on behalf of a corporation.<sup>2</sup> *First*, there are actions that a receiver may bring directly against the principals of a corporation or the recipients of fraudulent transfers.<sup>3</sup> *Second*, are common law tort claims that can be brought against a third party, in the name of the corporation, to recover damages perpetrated by the corporation's own insiders.<sup>4</sup> For example, the Uniform Fraudulent Transfer

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<sup>1</sup> See *Freeman v. Dean Witter Reynolds, Inc.*, 865 So.2d 543, 549 (Fla. 2d DCA 2003).

<sup>2</sup> *Id.* at 551.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

Act (“UFTA”), as enacted in Florida, authorizes a receiver standing in the shoes of the corporation, to commence certain fraudulent conveyance actions against third parties.<sup>5</sup>

A receiver, however, lacks standing to bring claims on behalf of a corporation, where a receiver is unable to treat the corporation as a separate legal entity from the insiders who perpetrated the fraud.<sup>6</sup> Thus, in the case of a Ponzi scheme, where the enterprise that existed was fraudulent, an issue arises as to whether a receiver, acting on behalf of the company that managed the Ponzi scheme, has standing to bring such claims.<sup>7</sup> In such cases, a majority of courts have found that a receiver lacks standing to commence a fraudulent conveyance action because the corporation and insiders were functionally equivalent.<sup>8</sup> The only entities entitled to bring such claims are the individual customers who lost their assets.<sup>9</sup>

For example, in *Isaiah v. JPMorgan Chase Bank*, the United States Court of Appeals for the Eleventh Circuit held that a receiver lacked standing to commence an action against a financial institution for aiding and abetting a Ponzi scheme, because he represents the receivership and not the individuals who were the actual victims of the fraud.<sup>10</sup> Thus, since the receiver stands in the shoes of the corporation, the bad acts of the corporation remain inherently within the receivership.<sup>11</sup> Additionally, the court held that the court-appointed receiver could not recover a deposit made by its principals into various bank accounts within the same financial

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<sup>5</sup> See Fla. Stat. § 726.102(14); see also *Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1308 (11th Cir. 2020).

<sup>6</sup> *Freeman*, 865 So.2d at 551.

<sup>7</sup> *Id.* at 552.

<sup>8</sup> See *id.*

<sup>9</sup> *Id.* at 551.

<sup>10</sup> *Isaiah*, 960 F.3d at 1308.

<sup>11</sup> *Id.*

institution, because under UFTA, such a transaction was not a “transfer” within the meaning of the statutory language, regardless of whether such amounts were the subject of a Ponzi scheme.<sup>12</sup>

Part I of this memorandum addresses what qualifies as a “transfer” under the specific language of Florida’s enactment of the Uniform Fraudulent Transfer Act and why an intercompany transfer between two bank accounts cannot be deemed a transfer. Then, part II analyzes the claims that a receiver can bring and when a receiver lacks standing to bring such claims. Finally, Part III concludes with addressing who, if anyone, may actually have standing to recover the fraudulent transfers in those scenarios.

## **I. Determining if a “Transfer” Under UFTA has Occurred**

### ***A. Defining “Transfer” Under UFTA***

The Uniform Fraudulent Transfer Act provides that creditors may avoid a debtor’s fraudulent transfers to the extent necessary to satisfy the creditor’s claim.<sup>13</sup> To prevail on a claim of actual fraud, a creditor must demonstrate (1) there was a creditor to be defrauded, (2) a debtor intending fraud, and (3) a transfer of property which could have been applicable to the payment of the debt due.<sup>14</sup> Currently, UFTA defines a “transfer” as “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or interest in an asset.”<sup>15</sup> Although the definition of transfer is broad, the statute explicitly requires the plaintiff to show that the debtor either disposed of his asset or relinquished some interest in that asset.<sup>16</sup>

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<sup>12</sup> *See id.* at 1305.

<sup>13</sup> Fla. Stat. § 726.108(1)(a); *Isaiah*, 960 F.3d at 1302.

<sup>14</sup> *Wiand v. Lee*, 752 F.3d 1194, 1199–1200 (11th Cir. 2014).

<sup>15</sup> Fla. Stat. § 726.108(1)(a); *Isaiah*, 960 F.3d at 1302.

<sup>16</sup> *Isaiah*, 960 F.3d at 1302.

In determining whether a transfer was made with actual intent to defraud a creditor, courts look to “badges of fraud” that indicate whether fraud has occurred.<sup>17</sup> These badges of fraud include whether, for example, the transfer was to an insider, the debtor remained in control of the property after the transfer, the transfer was of substantially all the debtor’s assets, or the debtor was insolvent or became insolvent shortly after the transfer was made.<sup>18</sup> However, proof that a transfer was made in furtherance of a Ponzi scheme generally establishes actual intent to defraud under UFTA, without the need to consider whether the badges of fraud are present.<sup>19</sup> Thus, a determination that a corporation was operated as a Ponzi scheme is in itself enough to qualify any transfers made to or from the receiverships as qualifying transfers made to defraud creditors under UFTA.<sup>20</sup>

#### ***B. Application of “Transfer” Definition in the Context of Intercompany Transfers***

The Eleventh Circuit found that a routine bank deposit, however, is not a transfer under UFTA.<sup>21</sup> Under UFTA, whether a transfer has occurred hinges on if the debtor has relinquished some interest or control over the asset.<sup>22</sup> Intercompany transfers clearly do not fall within such standard.<sup>23</sup> That is, because, at all relevant times, the accountholder had access to the funds it deposited – i.e., it never relinquished control.<sup>24</sup>

Similarly, the definition of “transfer” under the Bankruptcy Code also excludes ordinary deposits.<sup>25</sup> Under section 101(54) of the Bankruptcy Code, a “transfer” is defined as “(A) the

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<sup>17</sup> *See Lee*, 752 F.3d at 1200.

<sup>18</sup> *Id.*

<sup>19</sup> *See id.* at 1201.

<sup>20</sup> *See id.*

<sup>21</sup> *See Isaiah*, 960 F.3d at 1302.

<sup>22</sup> *See Levine v. Weissing (In re Levine)*, 134 F.3d 1046, 1050 (11th Cir. 1998).

<sup>23</sup> *See Isaiah*, 960 F.3d at 1302.

<sup>24</sup> *See id.* at 1303.

<sup>25</sup> *In re Whitley*, 848 F.3d 205, 208 (4th Cir. 2017).

creation of a lien; (B) the retention of title as a security interest; (C) the foreclosure of a debtor's equity of redemption; or (D) each mode . . . of disposing or parting with —(i) property; or (ii) an interest in property.”<sup>26</sup> In determining that an ordinary deposit does not fall within the express language of the definition of transfer, courts have relied upon the fact that a deposit of money upon general account with a bank “creates an ordinary debt, not a privilege right of fiduciary character.”<sup>27</sup> And this “ordinary debt,” with the Bank’s corresponding obligation that the funds be available at the depositor’s will, corresponds with the notion that control of the money has never been relinquished by the depositor and thus the action cannot be deemed a transfer.<sup>28</sup>

## **II. A Court-Appointed Receiver Does Not Have Standing to Recover Fraudulent Transfers Under UFTA if the Action was Not Previously Owned by the Party in the Receivership**

### ***A. Role of the Court-Appointed Receiver***

While a receivership is typically created to protect the rights of creditors, the receiver is not the class representative for creditors and receives no general assignment of rights from the creditors.<sup>29</sup> Rather, the receiver is limited to bringing only those actions previously owned by the party in the receivership.<sup>30</sup> These include “actions that the corporation, which has been ‘cleansed’ through receivership, may bring directly against the principals or the recipients of fraudulent transfer of corporate funds to recover assets rightfully belonging to the corporation and taken prior to the receivership.”<sup>31</sup> Thus, while the receiver has standing to recover assets rightfully belonging to a corporation, this only applies when the actions of the corporation can be

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<sup>26</sup> 11 U.S.C. § 101(54) (2018).

<sup>27</sup> N.Y. Cty. Nat’l Bank v. Massey, 192 U.S. 138, 145 (1904).

<sup>28</sup> See *In re Whitley*, 848 F.3d at 209; see also *Isaiah*, 960 F.3d at 1303.

<sup>29</sup> See *Freeman*, 865 So.2d at 549.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at 551.

separated from the actions of a rogue employee.<sup>32</sup> If this separation has not been adequately established, the receiver cannot pursue claims otherwise owned directly by the creditors.<sup>33</sup>

### ***B. Standing of the Court-Appointed Receiver***

The receivership entities that the court-appointed receiver represents cannot assert a tort claim against a third party for aiding and abetting a Ponzi scheme because the entity itself was not injured.<sup>34</sup> Rather, it was the individual investors who actually suffered the loss.<sup>35</sup> The Eleventh Circuit held in *Isaiah* that because the state court order in the case specifically authorized and empowered Isaiah to file suit to recover only property of the receivership entities that *actually belonged* to the receivership entities, any claims of aiding and abetting belong to the defrauded investors and not the receivership entity.<sup>36</sup> Thus, Isaiah did not have standing to pursue a claim.<sup>37</sup>

### **III. A Corporation does not have Standing to Recover Fraudulent Transfers Under UFTA if it has not been “Cleansed” of the Sins of its Predecessor**

Courts have found that whether a claim can be made on behalf of a receivership depends on whether the corporation is found to have been “cleansed” through receivership, or whether the fraud and intentional torts of the insiders can be separated from the corporation itself.<sup>38</sup>

#### ***A. Cleansing Through Receivership***

“Where a corporation is operated by a Ponzi scheme, it is still in the eyes of the law a separate entity with rights and duties.”<sup>39</sup> When assets that are meant to be used for the

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<sup>32</sup> *See id.*

<sup>33</sup> *See id.* at 549.

<sup>34</sup> *See Isaiah*, 960 F.3d at 1308.

<sup>35</sup> *See id.*

<sup>36</sup> *See id.*

<sup>37</sup> *See id.*

<sup>38</sup> *Freeman*, 865 So.2d at 551.

<sup>39</sup> *Lee*, 753 F.3d at 1202.

corporation's stated purpose are transferred for an unauthorized purpose to the detriment of the defrauded investors, the corporation itself is harmed because the defrauded investors are tort creditors of the corporation.<sup>40</sup> Although the corporation may have participated in the fraudulent transfers prior to receivership, once the individual tortfeasor is removed and a receiver is appointed, the corporation becomes entitled to the return of its assets that had been diverted for unauthorized purposes, e.g., to perpetrate a Ponzi scheme.<sup>41</sup> Thus, for example, a corporation had standing to sue under UFTA when investor funds were fraudulently diverted to the defendant "for the lease of a luxury car."<sup>42</sup> The corporation became a creditor of the Ponzi schemer at the time he fraudulently diverted investor funds for his personal use because, as UFTA requires, the corporation had a 'claim' against him.<sup>43</sup>

However, this principal only stands when "[t]he money it receives from investors [is] used for the corporation's stated purpose."<sup>44</sup> If the corporation's sole purpose is to promote the Ponzi scheme, this principal does not apply because it is impossible to prove the corporation served any other legitimate purpose.<sup>45</sup>

### ***B. Separating a Corporation from its Insiders***

Unless the corporation in receivership has at least one honest member on the board of directors, or an innocent stockholder, the fraud and intentional torts of the insiders cannot be separated from the corporation itself, and the corporation cannot be said to be an entity separate

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Sale v. Ferrari Financial Services, Inc., No. 19-23563-CIV-MORENO, 2020 WL 5750502, at \*4 (S.D. Fl. Sept. 25, 2020).

<sup>43</sup> *Lee*, 752 F.3d at 1202–03.

<sup>44</sup> *Id.* at 1202.

<sup>45</sup> *See Isaiah*, 960 F.3d at 1306.



and distinct from the individual tortfeasors.<sup>46</sup> In *Freeman*, the court-appointed receiver was unable to establish that NorthAmerican, the receivership entity, was “freed . . . from the spell” of the Grazianos, the insiders who actually committed the fraud.<sup>47</sup> Thus, because Mr. Freeman was unable to show that any honest person existed within NorthAmerican, who was not at all times simultaneously under the control of the Grazianos, he was unable to establish that there was any injury suffered by NorthAmerican in its capacity as a corporation.<sup>48</sup> As said torts cannot be separated from the receivership entities, the receivership as a whole is liable for the actions perpetrated on behalf of the Ponzi scheme, and it cannot recover.<sup>49</sup>

### ***C. Standing to Recover***

While the corporation and the receiver of the corporation both lack standing to recover any fraudulent transfers perpetrated by the Ponzi scheme, this does not leave investors entirely without remedy.<sup>50</sup> While the corporation did not suffer injury as a result of the Ponzi scheme, individual customers who suffered injury based on their coerced investments may have a right to pursue claims that allegedly aided and abetted that scheme.<sup>51</sup> To allow otherwise would essentially “usurp the claims that properly belong to those creditors.”<sup>52</sup> This emphasis on allowing only individual creditors to pursue tort claims against third parties limits the role of court-appointed receivers in this realm and dismantles the receivership entity when it comes to third party liability. However, it does assure individual investors that there are potential means for recovery.

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<sup>46</sup> See *Freeman*, 865 So.2d at 551.

<sup>47</sup> See *id.* at 551–52.

<sup>48</sup> *Id.* at 552.

<sup>49</sup> *Id.*

<sup>50</sup> See *Isaiah*, 960 F.3d at 1307.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1310.

## Conclusion

Although a court-appointed receiver is generally provided to protect the rights of creditors, an individual's role as a receiver is limited to standing in the shoes of the receivership as an entity.<sup>53</sup> Therefore, unless a corporation is said to have been cleansed of the sins of its predecessor, any fraudulent claims against a third party cannot be made either by the corporation itself or the court-appointed receiver.<sup>54</sup> Furthermore, while a determination of who has standing is relevant in an analysis of recovering under UFTA, the fraudulent transfers looking to be recovered must also fall within the statutory definition of a transfer.<sup>55</sup>

Henceforth, while neither a court-appointed receiver, nor the corporation itself, have standing to bring a common law tort action against a third party for aiding and abetting a Ponzi scheme, individual creditors in their capacity as defrauded investors have standing to pursue these claims if the transfer qualifies as a relinquishment of funds by the fraudster.<sup>56</sup>

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<sup>53</sup> *Id.* at 1308.

<sup>54</sup> *Id.* at 1306.

<sup>55</sup> Fla. Stat. § 726.102(14).

<sup>56</sup> *See Freeman*, 865 So.2d at 553; *see Fla. Stat. § 726.102(14)*; *see also Isaiah*, 960 F.3d at 1302.