



# The FBA Newsletter

Federal Bar Association, Dallas Chapter

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[www.fedbar.org/dallas.html](http://www.fedbar.org/dallas.html)

Fall 2013

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## Letter from the President

The federal courts need your advocacy. Even before the shutdown, the federal courts were suffering from the burdens imposed by sequestration. Court offices have lost 2,100 employees since July 2011, a process that sequestration has accelerated. I am proud to report that the Federal Bar Association's Government Relations Committee testified before the United States Senate on July 23 to advocate for increased court funding. That testimony was not a one-time event. The Federal Bar Association employs a lobbyist in Washington DC to advocate for up and down votes for new judges and increased funding for the judiciary and federal agencies. The Federal Bar Association can address these issues when others cannot. It is because of members like you that we can continue this advocacy. I urge you to please visit the Federal Bar Association website for sample letters to send to members of Congress to encourage them to pay attention to the problems facing our courts. Thank you for your dedication to the Federal Bar Association and its goals.

-Hamilton Lindley, Dallas Chapter President

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## June 27th Judicial Appreciation Lunch



The June 27, 2013 Judicial Appreciation Lunch and CLE had more than 100 attendees, including many court employees, judges and members of the bar. The luncheon provided the Court and staff an opportunity to be recognized for their diligent public service. Attorneys also received more than an hour of CLE from a panel of judges from the Northern District of Texas. Pictured above, from left to right are Melissa Kingston, Judge Harlan Hale, Judge Irma Ramirez, Judge Jane Boyle, Chief Judge Sidney Fitzwater, and Dallas Chapter President, Hamilton Lindley.

Pictured below are Melissa Kingston, Hamilton Lindley, Michael Stockham, FBA President Elect, and Karen Mitchell, Clerk of Court.



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## Upcoming FBA – Dallas Events

**November 19, 2013** – Bankruptcy law Section and Dallas Chapter CLE – Belo Mansion 9 a.m. – 1 p.m. (4 hrs. of CLE)

**February 26, 2013** – Technology in the Courtroom – Judge O’Connor’s Courtroom 12:00 p.m. – 1 p.m. (presented by Kathy Love).

*For more information on the above events, and to register, visit [www.fedbar.org/Chapters/Dallas-Chapter/Calendar.aspx](http://www.fedbar.org/Chapters/Dallas-Chapter/Calendar.aspx)*

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## Upcoming FBA – National Events

**October 16, 2013** – WEBINAR: Cyber Security for Lawyers & Recent Ethics Opinions about Cloud Computing

**November 6, 2013** – WEBINAR: Emergence of Mid-Size Law Firm

**November 15, 2013** – 15th Annual DC Indian Law Conference

**March 29, 2014** – 2014 Midyear Meeting

**April 10-11, 2014** – 39th Annual Indian Law Conference

**May 29-30, 2014** – 26th Annual Insurance Tax Seminar

*For more information on the above events, and to register, visit [www.fedbar.org/Calendar.aspx](http://www.fedbar.org/Calendar.aspx)*

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## CJA Panel Opportunities

There are several opportunities currently available for private attorneys to participate in representing indigent criminal defendants in the Dallas Division.

The CJA Advisory Committee encourages attorneys who are admitted to practice in the Northern District of Texas and have at least four years of experience, including some criminal law experience, to apply to become part of the CJA Panel. Attorneys who are fluent in Spanish are always needed.

An attorney who does not have sufficient experience to be a member of the CJA Panel but is interested in working with a panel member on one of their appointed cases may be eligible to be a member of the CJA “Associates Panel.” An associate must be licensed to practice in the Northern District of Texas. An associate may be assigned by the court to assist a CJA Panel member in a “second chair” capacity. The hourly rate for an associate is \$50, and the associate may be paid up to a maximum of \$500 per case. Prior service on the Associates Panel is not a requirement for membership on the CJA Panel, and service on the Associates Panel does not guarantee later admission to the CJA Panel.

To download the CJA Voluntary Panel Application for the Dallas Division, go to [www.ndtx.uscourts.gov](http://www.ndtx.uscourts.gov). If you have any questions about either of these opportunities, please call Tammy Shipley at (214) 753-2152 or email [tammy\\_shipley@txnd.uscourts.gov](mailto:tammy_shipley@txnd.uscourts.gov).

## Chief Judge Houser Reappointed to Lead the NDTX Bankruptcy Court

Aaron "Will" Browning (aaronberl0@yahoo.com)  
Extern to Judge Harlin DeWayne Hale, United States Bankruptcy Judge

Barbara J. Houser, the Chief Bankruptcy Judge for the Northern District of Texas has been reappointed to another 14 year term, effective January, 20, 2014. She was sworn in by Fifth Circuit Judge Catherina Haynes on May 16, 2013.

The Northern District of Texas covers a very large geographic area and has divisions in Dallas, Fort Worth, Amarillo, Abilene, Lubbock, San Angelo, and Wichita Falls. There are 6 bankruptcy judges in the district: Judge Houser, Judge Jones, Judge Lynn, Judge Hale, Judge Nelms, and Judge Jernigan.

Bankruptcy judges serve for 14-year terms. A merit selection panel composed of judges, practitioners, and/or academics screens applicants, interviews potential candidates, and then makes recommendations of the best qualified to the circuit's judicial council. The judicial council then reviews the recommendations before forwarding a list of names to the circuit judges. Through a majority vote of the circuit judges, the candidate is appointed as a bankruptcy judge. Judge Houser was first appointed under this process in January, 2000.

Houser was born in Scottsbluff, Nebraska in 1954. She attended the University of Nebraska and received her Bachelor of Science degree with honors in 1975. She was admitted to the Texas Bar and received her Law degree from Southern Methodist University in 1978. While attending SMU, she was the case note and comment editor for the Southwestern Law Journal. Houser joined Locke, Purnell, Boren, Laney, and Neeley in Dallas and later became a shareholder in 1985. She joined Sheinfeld, Maley, and Kay P.C. in 1988 as the shareholder in charge of the Dallas office.

On January 20, 2000, Houser was sworn in as the first female bankruptcy judge in the Northern District by Chief Judge Carolyn Dineen King of the 5th Circuit. The room reserved for her investiture was filled to capacity. She joined the American Bankruptcy Institute in 2003, and has served as a co-chair for ABI's Alternative Dispute Resolution Committee. Judge Houser served as President of the National Conference of Bankruptcy Judges and assumed office on October 21, 2009. In 2011 she received the Distinguished Alumni Award for Judicial Service from the Dedman School of Law at SMU. Judge Houser was elected to ABI's Board of Directors April 15, 2011.

"Chief Judge Barbara Houser is a leader among bankruptcy judges, not only in the 5th circuit, but also nationally. Her energy level is apparently boundless. Judges like me often call on her for her sound advice and I'm sure glad the circuit has reappointed her to another term.", said Judge Hale, one of the other bankruptcy judges in the North District.

## Changes to Rule 45 Effective December 1, 2013

Laura Warrick (laura.warrick@haynesboone.com)  
Associate at Haynes and Boone, LLP

Significant changes to Rule 45 will take place on December 1, 2013. According to the Judicial Conference Committee, the amendments are intended to: (1) simplify the subpoena process; (2) address the transfer of subpoena-related motions; (3) resolve conflicting interpretations of the travel restrictions for trial as they relate to party and party officer witnesses; and (4) emphasize the preexisting requirement that all parties should receive notice of a subpoena that requires a document production.

Some noteworthy changes to Rules 45 and 37 include:

- Permitting service of a subpoena at any place within the United States (Rule 45(b)(2));
- Confirming in the Committee notes that no subpoena is required for depositions of parties or party officers, directors or managing agents, and that the geographical limits that apply to subpoenas do not apply to those depositions (see Rule 37(d)(1)(A)(i));

- Making the court where an action is pending the “issuing court” for a subpoena (Rule 45(a)(2));
- Providing that a subpoena must be enforced in the district where compliance with subpoena is required, even though the court that issued the subpoena may be in a different district (Rule 45(d)-(e));
- Allowing for the transfer of subpoena enforcement matters back to the issuing court if the person subject to the subpoena consents or if the enforcement court finds exceptional circumstances (Rule 45(f));
- Reorganizing the structure of Rule 45 to emphasize that if a subpoena commands only production of documents or the inspection of premises before trial, other parties must be provided with notice before the subpoena is served, and requiring that the notice include a copy of the subpoena (Rule 45(a)(4));
- Consolidating and simplifying various subpoena provisions relating to the place of compliance with a subpoena in a new Rule 45(c);
- Resolving conflicting case law (the “*Vioxx*” issue) to clarify that a party or party officer can only be compelled by subpoena to travel more than 100 miles to testify at trial if the party or party officer resides, is employed, or regularly transacts business in person in the state (Rule 45(c)(1));
- Stating that the failure to comply with a court order related to a subpoena may be treated as contempt in either the issuing court or the enforcement court (Rules 37(b)(1); 45(g));

The Committee notes that the proposed amendments to Rule 45 and 37 have received broad support in the legal community. To access the full text of the proposed amendments and relevant Committee notes, visit the following link: <http://www.gpo.gov/fdsys/pkg/CDOC-113hdoc29/pdf/CDOC-113hdoc29.pdf>.

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## Janvey v. Democratic Senatorial Campaign Comm., Inc.: Ponzi Schemes and Fraudulent Transfers Go Hand in Hand

Jay A. Ferguson (jaferguson@smu.edu), SMU Dedman School of Law – May 2014  
Judicial Extern to the Honorable Judge Harlin D. Hale

On March 18, 2013, the Fifth Circuit acted on its own motion and withdrew its opinion in *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 699 F.3d 848 (5th Cir. 2012) (“*Janvey I*”). In *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 188 (5th Cir. 2013), the Court corrected an error in *Janvey I* pertaining to the standing of a federal equity receiver and imputed knowledge. In addition, the Court analyzed the timeliness of claims under the Texas Uniform Fraudulent Transfers Act (“TUFTA”).

R. Allen Stanford (“Stanford”) perpetrated a large Ponzi scheme for approximately eight years utilizing a number of corporations (“Stanford Corporations”). *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 188 (5th Cir. 2013). Stanford, as well as his Chief Financial Officer, James Davis (“Davis”), were convicted of numerous federal crimes and are currently incarcerated. *Id.* at 189. On top of his criminal troubles, the Securities and Exchange Commission (“SEC”) filed a civil suit against Stanford for violations of federal securities law. *Id.*

At the request of the SEC, the District Court appointed a receiver, Ralph S. Janvey (“Receiver”) to “preserve the Stanford Corporations’ resources and pursue the Stanford Corporations’ assets that were in the hands of third parties as a result of fraudulent conveyances.” *Id.* The Receiver filed a fraudulent transfer suit against several political committees (“the committees”) under TUFTA, attempting to recover approximately \$1,800,000 in political contributions made by Stanford, Davis, and the Stanford Corporations during the pendency of the Ponzi scheme. *Id.* Thereafter, the Receiver moved for summary judgment on the TUFTA claims, and the District Court granted the motion. *Id.* As a result, the committees were ordered to give back the contributions made through fraudulent conveyances. *Id.*

### Standing and Knowledge in Ponzi-Scheme Cases

The Court began its opinion by correcting *Janvey I*. *Id.* at 190. In *Janvey I*, the Fifth Circuit held that “a federal equity receiver has standing to assert the claims of the investor-creditors of a corporation in receivership against third-party transferees who receive assets of the corporation that were fraudulently conveyed to them by the principal of a Ponzi scheme who owned the corporation . . . .” *Id.* The Court corrected the *Janvey I* opinion by holding that a federal equity receiver has standing to assert only the claims of the entities in receivership. Thus, a receiver can no longer assert the claims of the entities’ investor-creditors. *Id.*

The Court also discussed imputed knowledge and its effect on recovering assets fraudulently diverted to third parties. *Id.* The Court explained that knowledge of making the fraudulent conveyances of the funds of the

corporation by the Ponzi scheme principal is not imputed to the corporation. *Id.* Therefore, once the corporations are freed from the principal's coercion by appointment of a receiver, the corporations "may recover assets or funds that the principal fraudulently diverted to third parties" for which reasonably equivalent value was not given. *Id.*

#### The Committees' Timeliness Claims

The committees argued that the Receiver's TUFTA claims were untimely and therefore barred. *Id.* at 193. A fraudulent transfer claim is "extinguished" under TUFTA if it is not brought "within four years after the transfer was made ... or, if later, within one year after the transfer ... was or reasonably could have been discovered by the claimant." Tex. Bus. & Com. Code § 24.010(a)(1). The committees argued that the claims were untimely for two reasons. *Janvey*, 712 F.3d at 193.

First, the committees argued that the Stanford corporations knew of both the donations to the committees and their fraudulent origins from the moment they were made. *Id.* Thus, the four-year period for bringing a fraudulent-conveyance action under TUFTA as well as the one-year period for filing suit after discovery of the fraudulent transfers elapsed before the Receiver was appointed in 2009. *Id.* The Court disagreed with this argument, holding that the Stanford Corporations were the "robotic tools of Stanford's Ponzi scheme," and therefore knowledge of the fraud could not be imputed to them while they were under Stanford's coercion. *Id.* Thus, the claims were not untimely on this basis. *Id.*

Next, the committees argued that the Receiver either discovered or reasonably could have discovered the donations to the committees more than a year before he filed suit. *Id.* The committees argued that when the donations were made they "were registered with a federal agency and reported in the public news media." *Id.* Thus, the committees claimed the donations could have been discovered. The Court rejected this argument as well, stating that under TUFTA a fraudulent conveyance claim does not accrue until the claimant knew or reasonably could have known both of the transfer and that it was fraudulent in nature. *Id.* at 194-95. The committees did not present any evidence to show that the Receiver knew or reasonably could have known about the fraudulent conveyances one year prior to filing suit. *Id.* at 193. Thus, the Court held that the claims were barred because the committees did not meet their burden of proof. *Id.*

By correcting its opinion in *Janvey I*, the Fifth Circuit aligned itself with other circuits that limit a federal equity receiver's standing to assert only the claims of entities in receivership. See *Scholes v. Lehman*, 56 F.3d 750 (7th Cir. 1995); *Donell v. Kowell*, 533 F.3d 762 (9th Cir. 2008). Accordingly, in the Fifth Circuit, a federal equity receiver no longer has standing to assert the claims of the entities investor-creditors. Furthermore, the Court made it clear that it will not impute knowledge of fraud to a corporation that is under the "coercion" of the fraud perpetrator.

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## Bankruptcy Filings on the Drop

By Aaron "Will" Browning (aaronberl0@yahoo.com)  
Extern to Judge Harlin DeWayne Hale, United States Bankruptcy Judge

The United States has seen a new trend in bankruptcy filings in the past year. This trend is downward and that is a positive development after years of economic turmoil. Home mortgage foreclosures, often a driving force in individual cases, have decreased. And, unemployment statistics have improved, no doubt affecting bankruptcy filings.

The bankruptcy courts in Texas and the U.S. have fewer cases. There were 1,311,602 bankruptcy cases filed in the United States from May 2011 through June 2012. However, in the time period from May 2012 to June 2013 there were only 1,137,978 total bankruptcy filings, which represents a 13% decrease. In fact, this is the most positive change for United States bankruptcy filings since the period from January 2008 through December 2008. In addition the total bankruptcy picture looks even brighter in the state of Texas; especially the Northern District of Texas.

The Northern District of Texas had a lower rate of bankruptcy filings for the past 12-month period. From August 2011 to July 2012 the court had 17,833 new cases filed. However, in the time period from August 2012 to July 2013 there were only 15,208 total new bankruptcy filings. This all means the Northern District of Texas had 14.7% fewer cases filed in the past 12 months. Pending bankruptcy numbers are also low. At the end of July 2013, the court had 30,399 pending cases. This number compares with the period ending the year of July 2012, when there were 31,766 cases pending. These figures for pending cases represent a decrease of 4.3%.

If one looks at the 3 divisions of the Northern District of Texas, one finds that bankruptcy filings were down the most in the Lubbock, Abilene, Amarillo, and San Angelo divisions. This division's filings were down by 22.5% in July 2013 and 29.9% in June 2013. That is nearly double the downward trend for either the Fort Worth division or the Dallas or Wichita Falls division, which were down 13 to 14%.

In addition to the decrease in cases, the number of Adversary Proceedings, lawsuits filed in or removed to bankruptcy courts, has fallen. In July 2013 there were only 102 pending proceedings. Yet in the same 12 month period ending July 2012, there were 644 pending cases. This represents a substantial decrease in the pending Adversary Proceedings.

Although filings have decreased, the Northern District continues to be busy. During the last year it had the most volume of cases of all the districts in the 5<sup>th</sup> Circuit. Whether these figures hold in a continually uncertain economy is unclear. However, if unemployment continues to decline and foreclosures abate one might surmise that individual bankruptcy filings will continue to slow.

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## ***ARTICLES NEEDED!***

Have an idea for an article that you would like distributed to the entire membership of the Dallas Chapter of the FBA? Contact the Dallas Chapter Secretary, Jason Bloom at [jason.bloom@haynesboone.com](mailto:jason.bloom@haynesboone.com).