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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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|---------------------------------|---|----------------------|------------------|
| In re:                          | ) | BAP No.              | NV-07-1266-JuKPa |
|                                 | ) |                      |                  |
| AVI, INC.,                      | ) | Bk. No.              | 04-14779-LBR     |
|                                 | ) |                      |                  |
| Debtor.                         | ) | Adv. No.             | 06-01121-LBR     |
|                                 | ) |                      |                  |
| _____<br>WOODS & ERICKSON, LLP, | ) |                      |                  |
|                                 | ) |                      |                  |
| Appellant,                      | ) | <b>O P I N I O N</b> |                  |
|                                 | ) |                      |                  |
| v.                              | ) |                      |                  |
|                                 | ) |                      |                  |
| WILLIAM A. LEONARD, Chapter 7   | ) |                      |                  |
| Trustee,                        | ) |                      |                  |
|                                 | ) |                      |                  |
| Appellee.                       | ) |                      |                  |
| _____                           | ) |                      |                  |

Argued and Submitted on February 21, 2008  
at Phoenix, Arizona

Filed - June 13, 2008

Appeal from the United States Bankruptcy Court  
for the District of Nevada

Hon. Linda B. Riegler, Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: JURY, KLEIN and PAPPAS, Bankruptcy Judges.

1 JURY, Bankruptcy Judge:

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3 This appeal is from a \$38,354.30 judgment rendered under  
4 11 U.S.C. § 550(a)(1) and (2)<sup>1</sup> against a transferee of  
5 unauthorized postpetition transfers avoidable under § 549. During  
6 the postpetition period, appellant law firm, Woods & Erickson  
7 ("W&E"), received an unauthorized legal fee and later assisted the  
8 debtor in selling what it knew to be an undisclosed asset for \$1  
9 million and received some of the proceeds from the transferee for  
10 payment of further fees.

11 W&E, among other arguments, assigns error to the bankruptcy  
12 court's ruling that a trustee may recover from a subsequent  
13 transferee under § 550 without having separately avoided the  
14 transfer to the initial transferee. This is a matter of first  
15 impression in the Ninth Circuit upon which two other circuits are  
16 divided. We hold that a trustee, subject to the requirement of  
17 establishing avoidance, may prosecute an action to recover from a  
18 subsequent transferee under § 550 without having earlier avoided  
19 the initial transfer. Additionally, the court did not err in  
20 ruling that it had jurisdiction and that W&E did not act in good  
21 faith without knowledge of avoidability of the several transfers.  
22 Accordingly, We AFFIRM.

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25 <sup>1</sup> Unless otherwise indicated, all chapter, section and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
28 enacted and promulgated prior to the effective date of The  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, 119 Stat. 23, because the case from which this  
appeal arises was filed before its effective date (generally  
October 17, 2005).

1 **I. FACTS**

2 The debtor, AVI, Inc., a wholly owned subsidiary of Air Vegas  
3 Enterprises, Inc. ("AVEI"), operated an air sightseeing business  
4 flying over the Grand Canyon.<sup>2</sup> It filed a chapter 11 case on  
5 April 30, 2004, in the face of apparent discord between James  
6 Petty, who owned forty-seven percent of AVEI, and Philip and Wayne  
7 Hoffman, who owned forty-nine percent. The debtor owed delinquent  
8 aircraft lease payments to Pacific Aircraft Finance, LLC ("PAF"),  
9 of which entity the Hoffmans were officers and directors.

10 Appellant W&E, which had represented both AVEI and debtor,  
11 with the assistance of attorney James Swindler, prepared debtor's  
12 chapter 11 petition and schedules and represented debtor when they  
13 were filed. The schedules omitted debtor's ownership of  
14 transferrable intangible Grand Canyon flight allocations issued by  
15 the Federal Aviation Administration. The certificate owned by  
16 debtor authorized it to conduct a total of 5927 commercial air  
17 tours in the Grand Canyon National Park Special Flight Rules Area  
18 during each calendar year.

19 On May 18, 2004, W&E moved to withdraw as attorney of record  
20 for debtor on account of a conflict of interest predating the  
21 filing of the chapter 11 case. The court authorized W&E's  
22 withdrawal by order entered June 22, 2004. Thereafter, James  
23 Swindler and the firm of Allf Paustian & Szostek represented AVI.

24 Soon after the case was filed, PAF and the Hoffmans attacked

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26 <sup>2</sup> As the parties did not supply a comprehensive record, we  
27 have exercised our discretion to examine the bankruptcy court's  
28 docket and imaged papers in Case No. 04-14779 and related  
adversary proceedings. Atwood v. Chase Manhattan Mortgage Co. (In  
re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003); Omoto v.  
Ruggera (In re Omoto), 85 B.R. 98, 100 (9th Cir. BAP 1988).

1 debtor on several fronts. One theory involved PAF's aircraft  
2 equipment lease rights under § 1110<sup>3</sup> with respect to nine C-99  
3 Beechcraft aircraft. A global settlement was reached, whereby  
4 debtor had the choice of either curing the PAF lease defaults and  
5 continuing to operate or returning the aircraft to PAF and  
6 presumably going into liquidation mode. The settlement parties  
7 addressed potential dismissal of the case by providing that, as  
8 relevant here, PAF and the Hoffmans would "support" a request for  
9 dismissal if the aircraft were surrendered and certain payments  
10 made.<sup>4</sup>

11 Despite the settlement provision about dismissal, the motion  
12 to approve the compromise that was sent to all creditors, which  
13 the court approved on September 20, 2004, did not refer to the

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14  
15 <sup>3</sup> This section entitled "Aircraft equipment and vessels"  
16 generally provides, with certain exceptions, that the rights of an  
17 aircraft equipment lessor such as PAF to take possession of its  
18 equipment in compliance with the lease and enforce any of its  
19 other rights or remedies under the lease is not limited by the  
20 provisions in the Code or by any power of the court. Thus, absent  
21 a timely cure of any default, a lessor may recover aircraft  
22 equipment prior to any formal assumption or rejection of the  
23 lease, and unimpeded by the automatic stay. The statute provides  
24 for a sixty-day cure period for defaults under a lease. See  
25 § 1110.

26 <sup>4</sup> The Settlement Agreement provided:

27 Dismissal. After the Forbearance Termination Date,  
28 and in the event the Settlement Payment has not  
been paid to PAF, then PAF will support any request  
of the Debtor to dismiss the Bankruptcy Case,  
provided that contemporaneous with dismissal, PAF  
is indefeasibly paid \$128,000 in full satisfaction  
of the Lease Administrative Claim, without  
prejudice to its other surviving claims, and  
further provided the Debtor has surrendered the  
Aircraft and all Adequate Protection Payments have  
been made.

Settlement Agreement, § 2.12.

1 possibility of dismissal based on debtor's surrender of the  
2 aircraft.

3       Without giving notice to PAF or anyone else, debtor's  
4 attorney submitted a proposed order of dismissal, accompanied by a  
5 declaration of James Petty averring that the aircraft had been  
6 surrendered and the other conditions of the settlement satisfied.  
7 The court, without requiring notice to anyone and without  
8 assessing whether the interests of creditors and the estate  
9 favored conversion over dismissal, entered the order of dismissal  
10 on October 25, 2004.

11       After dismissal of debtor's case, W&E assisted debtor in the  
12 sale of the flight allocations and related intangibles to Maverick  
13 Helicopters for \$1 million without court authority in a  
14 transaction dated November 8, 2004. The transaction closed about  
15 November 22, 2004, and W&E was paid \$32,808.78 for fees from the  
16 proceeds.<sup>5</sup>

17       Prior to the sale, on November 4, 2004, PAF filed a motion  
18 seeking to have the dismissal vacated, asserting that the  
19 dismissal papers had amounted to a fraud on the court because  
20 notice to PAF had been intentionally omitted and the conditions of  
21 the settlement had not been satisfied, nor had the aircraft been  
22 surrendered within the meaning of the settlement agreement.<sup>6</sup> By

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23  
24       <sup>5</sup> In addition, W&E had received \$5,839.00 from debtor as  
25 payment for legal fees on April 30, 2004, without having been  
26 authorized to be employed as counsel pursuant to § 327 and without  
the court having authorized payment of fees.

27       <sup>6</sup> PAF's motion for "reconsideration" of the dismissal order  
28 invoked Fed. R. Civ. P. 60(b)(3) and (6), which permit the court  
to relieve a party from a final order on account of: "(3) fraud  
(continued...)

1 operation of Rule 8002(b)(4),<sup>7</sup> this motion tolled the time in  
2 which to appeal the dismissal order. PAF's motion was eventually  
3 granted on January 13, 2005, after the court concluded that the  
4 dismissal order was fatally defective for due process reasons.  
5 The order, which vacated and annulled the dismissal order and  
6 reinstated the case, was not appealed by W&E or anyone else.

7 W&E received notice of PAF's motion challenging the dismissal  
8 on or about November 5, 2004. Nevertheless, W&E, which asserts  
9 that it took care to satisfy itself that the chapter 11 case was  
10 dismissed, proceeded to assist in the sale of the flight  
11 allocations.

12 After the dismissal order was annulled, appellee William A.  
13 Leonard became the chapter 11, and then chapter 7, trustee. He  
14 commenced an adversary proceeding against Maverick Helicopters to  
15 avoid the transfer of the flight allocations as an unauthorized  
16 postpetition transfer under § 549. Leonard v. Maverick  
17 Helicopters, Inc., Adv. No. 06-01122-LBR (filed April 28, 2006).  
18 Simultaneously with filing the Maverick Helicopters avoiding  
19 action, the trustee filed five other actions to avoid and recover  
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22 <sup>6</sup>(...continued)  
23 ... , misrepresentation, or misconduct by an opposing party; ...  
24 or (6) any other reason that justifies relief." Fed. R. Civ. P.  
24 60(b), incorporated by Fed. R. Bankr. P. 9024.

25 <sup>7</sup> Rule 8002(b)(4) provides: "If any party makes a timely  
26 motion of a type specified immediately below, the time for appeal  
27 for all parties runs from the entry of the order disposing of the  
27 last such motion outstanding. This provision applies to a timely  
28 motion: ... (4) for relief under Rule 9024 if the motion is filed  
no later than 10 days after the entry of judgment." Fed. R.  
Bankr. P. 8002(b)(4).

1 various transfers, including the action against W&E that is the  
2 subject of this appeal.<sup>8</sup> A number of intertwined counterclaims,  
3 cross-claims, and third-party complaints ensued.

4 Maverick Helicopters and Petty ultimately settled with the  
5 trustee as part of a larger settlement that included some, but not  
6 all, of the other parties. The settlement was reached in October  
7 2007 and approved by the court as fair and equitable by order  
8 entered February 4, 2008. W&E did not participate in the  
9 settlement.

10 Before the trustee's avoidance action against Maverick  
11 Helicopters was settled, the action against W&E proceeded to trial  
12 on the count to avoid transfers under § 549 and to recover under  
13 § 550. W&E conceded that the \$5,839.00 postpetition transfer to  
14 it on April 30, 2004, was avoidable under § 549 and recoverable  
15 under § 550(a)(1).<sup>9</sup> The court determined in favor of W&E with  
16 respect to one other transfer. Finally, the court found that the  
17 trustee "met his burden" to demonstrate avoidance of the sale to  
18 Maverick Helicopters under § 549 and proceeded to address the  
19 consequent § 550 issues.

20 The court found that W&E was a transferee of funds from the  
21 sale of the flight allocations because the payment to W&E was  
22 traceable to the proceeds of that sale. Specifically, debtor  
23 immediately transferred the sale proceeds received from Maverick  
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26 <sup>8</sup> The other actions were: Leonard v. Richfield Props., LLC,  
27 Adv. No. 06-01118; Leonard v. Sid Petty Family Tr., Adv. No. 06-  
01119; Leonard v. Vista Airlines, Inc., Adv. No. 06-01120; Leonard  
v. James W. Petty, Adv. No. 06-01123.

28 <sup>9</sup> This transfer is not at issue in this appeal.

1 Helicopters to AVEI, which had only \$1,700 in the relevant bank  
2 account, and AVEI transferred \$32,808.78 to W&E.

3 The court also found that W&E was aware of the existence of  
4 the flight allocations at the time that it omitted them from  
5 schedules W&E prepared and filed and, in addition, found that W&E  
6 was aware of the potential avoidability of the transfer and of the  
7 pending motion to reconsider the dismissal at the time of the  
8 Maverick Helicopter transaction. Thus, it rejected W&E's defenses  
9 of good faith, lack of knowledge, and inequitable victimization.

10 Judgment was entered against W&E for \$38,354.30, plus  
11 prejudgment interest.<sup>10</sup> W&E timely appealed.<sup>11</sup>

## 12 II. JURISDICTION

13 The bankruptcy court had subject matter jurisdiction pursuant  
14 to 28 U.S.C. § 1334 over this core proceeding under  
15 § 157(b) (2) (E) and (H). We have jurisdiction under 28 U.S.C.  
16 § 158.

## 17 III. ISSUES

18 A. Whether the bankruptcy court abused its discretion in  
19 annulling the dismissal order and declining to insulate the sale  
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21 <sup>10</sup> Although the calculation of the precise sum is not  
22 obvious, any issue in that respect has been waived because the  
23 amount of the judgment has not been questioned on appeal.

24 <sup>11</sup> The trustee also alleged that the transfers could be  
25 avoided under § 544, which question was left open. The court made  
26 a Fed. R. Civ. P. 54(b) certification so that this appeal would be  
27 an appeal as of right from a final judgment under 28 U.S.C.  
28 § 158(a) (1), rather than a discretionary interlocutory appeal  
under § 158(a) (3). Fed. R. Civ. P. 54(b), incorporated by Fed. R.  
Bankr. P. 7054. While we could consider the appeal in either  
event, the subsequent jurisdiction of the court of appeals is  
affected by whether the underlying judgment is final or  
interlocutory. 28 U.S.C. §§ 158(d) & 1291-92.

1 from avoidance.

2 B. Whether a trustee, subject to the requirement of establishing  
3 avoidance, may prosecute an action to recover from a subsequent  
4 transferee under § 550 without having earlier avoided the initial  
5 transfer.

6 C. Whether the bankruptcy court erred in finding that W&E did  
7 not prove its good faith defense under § 550(b).

#### 8 IV. STANDARDS OF REVIEW

9 We review the bankruptcy court's decision to vacate an order  
10 of dismissal under the abuse of discretion standard. Turtle Rock  
11 Meadows Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081,  
12 1086-87 (9th Cir. 2000).

13 We review issues of statutory construction and conclusions  
14 of law de novo. Ransom v. MBNA Am. Bank, N.A. (In re Ransom),  
15 380 B.R. 799, 802 (9th Cir. BAP 2007).

16 We review factual findings such as those involved in a good  
17 faith determination for clear error. Figter Ltd. v. Teachers Ins.  
18 & Annuity Ass'n of Am. (In re Figter, Ltd.), 118 F.3d 635, 638  
19 (9th Cir. 1997).

#### 20 V. DISCUSSION

21 Bankruptcy Code § 549 authorizes the trustee to avoid a  
22 transfer of estate property that occurs after the commencement of  
23 the case.<sup>12</sup> The trustee's prima facie case requires proof of a  
24 transfer (1) of estate property; (2) that occurred after the  
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26 <sup>12</sup> Section 549 provides: "(a) Except as provided in  
27 subsection (b) or (c) of this section, the trustee may avoid a  
28 transfer of property of the estate—(1) that occurs after the  
commencement of the case; and (2) . . . . (B) that is not authorized  
under this title or by the court."

1 commencement of the case; and (3) that was not authorized by  
2 statute or the court. Vasquez v. Mora (In re Mora), 218 B.R. 71,  
3 73 (9th Cir. BAP 1998). Once the trustee establishes a prima  
4 facie case, to the extent that a transfer is avoided under  
5 § 549, the trustee may recover, for the benefit of the estate, the  
6 property transferred, or the value of such property, from the  
7 initial transferee or any subsequent transferee. See  
8 § 550(a) (1) and (2).<sup>13</sup>

9 Rule 6001 allocates the burden of proof regarding the  
10 validity of the transfers under § 549 to W&E. Fed. R. Bankr. P.  
11 6001.<sup>14</sup>

12 W&E assigns error to the bankruptcy court's ruling on several  
13 grounds. First, W&E contends the bankruptcy court lacked  
14 jurisdiction over debtor's property once its case was dismissed.  
15 Therefore, W&E argues, the court could not order the avoidance of  
16 transfers of debtor's property that was no longer property of  
17 debtor's estate. W&E also maintains that it was deprived of due  
18 process when the bankruptcy court reinstated the case, as if there  
19 had been no dismissal, on the premise that it had no notice of the  
20 order vacating the dismissal when it negotiated the sale of  
21 debtor's flight allocations. Next, W&E contends the court erred  
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23 <sup>13</sup> Section 550 provides: "(a) Except as otherwise provided in  
24 this section, to the extent that a transfer is avoided under  
25 section ... 549 ... of this title, the trustee may recover, for  
26 the benefit of the estate, the property transferred, or, if the  
court so orders, the value of such property, from - (1) the  
initial transferee of such transfer ... ; or (2) any immediate or  
mediate transferee of such initial transferee."

27 <sup>14</sup> Rule 6001 provides: "Any entity asserting the validity of  
28 a transfer under § 549 of the Code shall have the burden of  
proof." Fed. R. Bankr. P. 6001.

1 as a matter of law in finding that the trustee could recover a  
2 transfer from a subsequent transferee, such as W&E, without first  
3 avoiding the debtor's initial transfer to Maverick Helicopters.  
4 Finally, W&E asserts the court erred in finding W&E did not prove  
5 its good faith defense because it was unaware of the avoidability  
6 of the transfers.

7 We address each of these arguments below.

8 **A. Lack of Jurisdiction Defense**

9 We reject W&E's argument that the court erred in  
10 retroactively vacating the dismissal because, as a matter of law,  
11 the court lost its jurisdiction over estate property during the  
12 interval between the entry of its order of dismissal and the entry  
13 of its order vacating and annulling the dismissal.<sup>15</sup>

14 **1. The Dismissal Did Not Comply With the Statutory**  
15 **Requirements**

16 Dismissal of a chapter 11 case must meet procedural and  
17 substantive requirements. Procedurally, § 1112(b) requires  
18 notice and a hearing. See § 1112(b).<sup>16</sup> Substantively, § 1112(b)  
19 establishes "a two-step analysis for dealing with questions of  
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21 <sup>15</sup> Section 349 addresses the effect of dismissal of a  
22 bankruptcy case. Generally, the purpose of the statute is to  
23 restore all property rights to their prepetition status. Aheong  
24 v. Mellon Mortgage Co. (In re Aheong), 276 B.R. 233, 239 (9th Cir.  
25 BAP 2002). Accordingly, upon dismissal, estate property such as  
debtor's flight allocations is revested in the debtor. See  
§ 349(b) (3).

26 <sup>16</sup> Section 1112(b) provides in relevant part: "[O]n request  
27 of a party in interest . . . , and after notice and a hearing, the  
28 court may convert a case under this chapter to a case under  
chapter 7 of this title or may dismiss a case under this chapter,  
whichever is in the best interests of creditors and the estate,  
for cause . . . ."

1 conversion and dismissal.” Nelson v. Meyer (In re Nelson), 343  
2 B.R. 671, 675 (9th Cir. BAP 2006). The first step is a  
3 determination whether cause exists for conversion or dismissal.  
4 The second step requires the court to apply a “balancing test” to  
5 choose between conversion and dismissal based upon the “best  
6 interests of the creditors and the estate.” Id.

7 Neither the procedural nor substantive requirements of  
8 § 1112(b) were met when the court dismissed the case. The debtor  
9 and PAF intended that the original compromise motion would give  
10 the necessary notice regarding dismissal. However, the notice  
11 that was given referred only to a dismissal following the debtor’s  
12 payment of \$3.2 million pursuant to the first alternative in the  
13 settlement, which did not occur. Moreover, the motion to approve  
14 the settlement did not refer to the possibility of dismissal based  
15 upon debtor’s surrender of the aircraft. The order approving the  
16 settlement did not refer specifically to the possibility of  
17 dismissal and was not served on all parties in interest until  
18 December 8, 2004, when debtor’s counsel discovered that it had not  
19 been previously served. The ex parte motion to dismiss was not  
20 noticed to anyone nor was the dismissal order served on all  
21 parties in interest. Finally, even though § 1112(b) requires the  
22 court to choose between conversion and dismissal, whichever is in  
23 the best interests of creditors and the estate, the court did not  
24 make this analysis before dismissing the case on the debtor’s ex  
25 parte motion.

26 **2. The Dismissal Order Was Subject To Reconsideration**

27 After ruling on and entering a dismissal order, bankruptcy  
28 courts have the equitable power to revisit the order by way of

1 reconsideration. Zurich Am. Ins. Co. v. Int'l Fibercom, Inc. (In  
2 re Int'l Fibercom, Inc.), 503 F.3d 933, 940 (9th Cir. 2007). This  
3 equitable power has been formalized in Rule 9024, which makes Fed.  
4 R. Civ. P. 60(b) applicable in cases under the Code. Id.; see  
5 also Geberegeorgis v. Gammarino (In re Geberegeorgis), 310 B.R.  
6 61, 66 (6th Cir. BAP 2004) (bankruptcy court authorized to set  
7 aside a final judgment or order including case dismissal orders  
8 under Rule 9024).

9 The Ninth Circuit has observed that the court's discretion to  
10 revisit past orders is broad in the absence of "vested" rights.  
11 Int'l Fibercom, 503 F.3d at 944. Moreover, Fed. R. Civ. P. 60(b)  
12 conditions all relief on "such terms as are just" which is  
13 understood to implicate equitable principles. 11 Wright & Miller,  
14 Fed. Prac. & Proc. § 2857. The application of equitable  
15 principles includes the question whether intervening equities make  
16 relief inappropriate, which is often couched in terms of whether  
17 "prejudice" would result from granting relief. Id. at nn.5-6; see  
18 also In re Staff Inv., Co., 146 B.R. 256, 263 (Bankr. E.D. Cal.  
19 1993) ("Intervening equities, potential hardship to other persons,  
20 and prejudice to a party can vitiate an otherwise strong argument"  
21 for Rule 60 relief).

22 While W&E has framed the issue as "jurisdictional," the real  
23 issue is whether the bankruptcy court abused its discretion by  
24 declining to insulate the \$1 million sale from avoidance following  
25 the grant of PAF's Fed. R. Civ. P. 60(b) motion.

26 Applying the conventional Fed. R. Civ. P. 60 analysis to the  
27 present appeal, the first question is whether PAF's motion was  
28 brought within a "reasonable" time; it plainly was "reasonably"

1 timely, having been filed within ten days of the entry of the  
2 dismissal order, and operated under Rule 8002(b)(4) to toll the  
3 time in which to appeal. The next question is whether intervening  
4 equities make vacating the dismissal inappropriate, to which the  
5 answer is easily in the negative. There could be no detrimental  
6 reliance when W&E acted to complete the \$1 million transaction  
7 with knowledge of PAF's pending motion to vacate the dismissal  
8 order based upon allegations of fraud by persons aligned with W&E.  
9 See Slyman, 234 F.3d at 1087; Great Pac. Money Markets, Inc. v.  
10 Krueger (In re Krueger), 88 B.R. 238 (9th Cir. BAP 1988).  
11 Moreover, although the bankruptcy court made no explicit findings  
12 of fraud, it found that W&E was aware of the existence of the  
13 flight allocations at the time it omitted them from the schedules  
14 that it prepared and filed. Accordingly, the bankruptcy court did  
15 not abuse its discretion by annulling the dismissal.

16 While W&E's reliance upon Sewell v. MGF Funding, Inc. (In re  
17 Sewell), 345 B.R. 174 (9th Cir. BAP 2006), for its position is  
18 inapposite, the facts and holding of Sewell nonetheless fit within  
19 conventional Fed. R. Civ. P. 60 analysis. In Sewell, the court  
20 dismissed debtors' chapter 13 case because they failed to file  
21 required documents. Debtors later filed the missing documents  
22 together with a motion to reinstate the case. After the court  
23 signed the reinstatement order, but before it was entered on the  
24 docket, a foreclosure sale of the debtors' home was completed.

25 The Sewell debtors moved to set aside the foreclosure sale.  
26 The purchasers of the home filed a stay relief motion and sought  
27 to validate the trustee's sale. The debtors advanced two theories  
28 in support of their set aside motion. First, they reasoned if the

1 automatic stay was effective immediately upon the filing of a  
2 petition, then the automatic stay should also be effective as soon  
3 as the reinstatement order is signed, not entered. Second, they  
4 argued that the terms of the reinstatement order meant that the  
5 effects of the dismissal were also set aside, as if the automatic  
6 stay had never terminated. After weighing the equities, the  
7 bankruptcy court found that the reinstatement order was not  
8 effective until entered on the docket, based primarily on lack of  
9 notice to the affected parties. The bankruptcy court granted the  
10 purchasers' stay relief motion and denied debtors' set aside  
11 motion.

12 The Panel affirmed, ruling that the bankruptcy court had  
13 discretion to defer reimposing the stay in fairness to other  
14 parties in interest, just as it had discretion to grant  
15 retroactive relief from the automatic stay.<sup>17</sup> Id. at 179. Thus,  
16 although Fed. R. Civ. P. 60 is not mentioned in Sewell, the court  
17 applied equitable principles by considering the intervening  
18 equities that made debtors' request for relief inappropriate.

19 Moreover, to the extent that W&E seeks to collaterally attack  
20 the validity of that order vacating and annulling the dismissal,  
21 it cannot do so in this appeal because the order is final and the  
22 time to appeal has passed.

23 In sum, we conclude the bankruptcy court did not abuse its  
24 discretion in retroactively vacating the effects of the dismissal  
25 of debtor's case based upon debtor's failure to give proper notice  
26 of its request that is required under § 1112(b) and the lack of

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27 <sup>17</sup> The reinstatement order at issue in Sewell had none of the  
28 "annulled" language found in the Vacate Order here.

1 intervening equities that favored W&E. Therefore, once the court  
2 annulled the dismissal order, debtor's flight allocations were  
3 restored to their status as property of the estate as of October  
4 25, 2004. Their subsequent sale without court authorization  
5 rendered the transfer vulnerable to the trustee's avoidance powers  
6 under § 549, and the bankruptcy court clearly had jurisdiction  
7 over that avoidance action.

8 **B. Lack of Notice Defense**

9 We reject W&E's contention that its due process rights were  
10 violated on its theory that it did not have notice of the order  
11 vacating the dismissal when it proceeded with the negotiations and  
12 sale in reliance upon the dismissal order. Contrary to W&E's  
13 assertions regarding its lack of involvement in debtor's case,  
14 however, it was not an innocent bystander without notice. When  
15 W&E proceeded with the negotiations and sale of debtor's flight  
16 allocations, it had been served with notice of PAF's timely motion  
17 for reconsideration. Nothing prevented W&E from participating in  
18 the reconsideration hearing or taking other steps to protect its  
19 position. See Mullane v. Cent. Hanover Bank & Trust, Co., 339  
20 U.S. 306, 314 (1950) (notice reasonably calculated under all the  
21 circumstances to apprise the party of the pendency of the action  
22 and afford an opportunity to present objections is consistent with  
23 due process). Thus, W&E's knowledge of a dispositive motion prior  
24 to the sale of debtor's flight allocations sufficed as notice that  
25 the court might vacate the dismissal order and restore the parties  
26 to the positions they occupied before the dismissal. Put simply,  
27 W&E's due process rights were not violated under the circumstances  
28 here.

1 **C. Failure to Recover From the Initial Transferee Defense**

2 The bankruptcy court ruled that the trustee did not need to  
3 avoid the initial transfer from debtor to Maverick, or other prior  
4 transferees, before seeking recovery under § 550(a) from W&E. It  
5 relied upon the analysis articulated in Leonard v. Optimal  
6 Payments Ltd. (In re Nat'l Audit Def. Network), 332 B.R. 896, 914-  
7 916 (Bankr. D. Nev. 2005) (Markell, J.), for its decision. W&E  
8 contends the court erred in its ruling as a matter of law. We  
9 agree with the Nat'l Audit analysis.

10 In a scholarly decision, the Nat'l Audit court relied upon  
11 the Eleventh Circuit's 2005 decision that § 550(a) "does not  
12 mandate a plaintiff to first pursue recovery against the initial  
13 transferee and successfully avoid all prior transfers against a  
14 mediate transferee." IBT Int'l, Inc. v. Northern (In re Int'l  
15 Admin. Servs., Inc.), 408 F.3d 689, 708 (11th Cir. 2005) ("Int'l  
16 Admin. Servs."); Nat'l Audit, 332 B.R. at 915-16.

17 The Eleventh Circuit in Int'l Admin. Servs. particularly  
18 relied on Judge Schwarzer's Richmond Produce decision resolving a  
19 Northern District of California bankruptcy appeal, which held that  
20 a trustee who demonstrates that a transfer is avoidable "may seek  
21 to recover against any transferee, initial or immediate, or an  
22 entity for whose benefit the transfer is made" and which explained  
23 that an interpretation of § 550 mandating actual avoidance of  
24 initial transfers "conflates [the Bankruptcy Code's] avoidance and  
25 recovery sections." Kendall v. Sorani (In re Richmond Produce  
26 Co.), 195 B.R. 455, 463 (N.D. Cal. 1996) (Schwarzer, J.), quoted  
27 with approval, Int'l Admin. Servs., 408 F.3d at 706; accord,  
28 Durkin v. Shields (In re Imperial Corp. of Am.), 1997 WL 808628,

1 at \*4 (S.D. Cal. 1997); Crafts Plus+, Inc. v. Foothill Capital  
2 Corp. (In re Crafts Plus+, Inc.), 220 B.R. 331, 335-38 (Bankr.  
3 W.D. Tex. 1998). Judge Markell was persuaded by, and adopted, the  
4 Int'l Admin. Servs. and Richmond Produce analyses. Nat'l Audit,  
5 332 B.R. at 916.

6 The contrary line of authority upon which W&E relies is based  
7 on a divided 1992 decision of the Tenth Circuit that interpreted  
8 § 550 to require a trustee to avoid the transfer to the initial  
9 transferee before proceeding against subsequent transferees.  
10 Weinman v. Simons (In re Slack-Horner Foundries Co.), 971 F.2d  
11 577, 580 (10th Cir. 1992) (2-1 decision) ("Slack-Horner"); Enron  
12 Corp v. Int'l Fin. Corp. (In re Enron Corp.), 343 B.R. 75, 79-80  
13 (Bankr. S.D.N.Y. 2006); Greenwald v. Latham & Watkins (In re  
14 Trans-End Tech., Inc.), 230 B.R. 101, 104 (Bankr. N.D. Ohio 1998).

15 Thus, the two courts of appeals that have analyzed the issue  
16 have reached diametrically different conclusions. In the absence  
17 of a controlling Ninth Circuit decision, we agree with the  
18 analyses in the Eleventh Circuit's Int'l Admin. Servs. decision,  
19 Judge Schwarzer's Richmond Produce decision, and Judge Markell's  
20 Nat'l Audit decision.

21 Section 550(a) provides that "to the extent a transfer is  
22 avoided under section ... 549 ... the trustee may recover ... the  
23 value of such property from—(1) the initial transferee ... or (2)  
24 any immediate or mediate transferee ...."

25 As with all issues of statutory interpretation, we begin with  
26 the words of the statute; if they are clear, we must apply the  
27 statute by its terms unless to do so would lead to absurd results.  
28 United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241-42

1 (1989). We look not only to the language of the statute, but also  
2 to "the specific context in which the language is used, and the  
3 broader context of the statute as a whole." Hough v. Fry (In re  
4 Hough), 239 B.R. 412, 414 (9th Cir. BAP 1999) (citation omitted).  
5 Given the number of courts expressing divergent views about the  
6 statute's proper interpretation, we might conclude that § 550(a)  
7 is indeed ambiguous. However, we review the statute anew to  
8 determine whether an ambiguity exists.

9 One question is whether the qualifier "to the extent that a  
10 transfer is avoided" in the preambular portion of § 550(a) has  
11 implications for whether there must be a prior avoidance action.  
12 A narrow plain language debate can be found in the bankruptcy  
13 court decisions in Crafts Plus+ and Enron. The Crafts Plus+ court  
14 reasoned that the term "is avoided" is in present perfect tense in  
15 concluding that there is no requirement of a temporally antecedent  
16 avoidance. In Enron, the opposite conclusion was reached by  
17 construing the word "avoided" as being in the past tense. Compare  
18 Crafts Plus+, 220 B.R. at 335, with Enron, 343 B.R. at 81 & n.3.

19 We must take into account that the Ninth Circuit has  
20 construed § 550(a)'s "to the extent" language does not provide a  
21 defense to a transferee, but rather "simply recognizes that  
22 transfers sometimes may be avoided only in part, and that only the  
23 avoided portion of the transfer is recoverable." Official  
24 Unsecured Creditors Comm. v. U.S. Nat'l Bank (In re Sufolla,  
25 Inc.), 2 F.3d 977, 982 (9th Cir. 1993). This, however, does not  
26 answer the question whether there must be a prior avoidance  
27 determination.

28 The prior avoidance question was directly confronted by Judge

1 Schwarzer in Richmond Produce, where, reasoning from Sufolla and  
2 the language of § 550(a), he rejected the contention that the  
3 trustee was required to have successfully avoided the transfer to  
4 the initial transferee (who had been discharged in his own  
5 bankruptcy) before proceeding against a subsequent transferee. It  
6 was sufficient that the trustee prove in the action against the  
7 subsequent transferee that the transfer was avoidable. Richmond  
8 Produce, 195 B.R. at 463, aff'g 151 B.R. 1012, 1016 n.5 (Bankr.  
9 N.D. Cal. 1993). Judge Schwarzer specifically rejected the Tenth  
10 Circuit's Slack-Horner decision as "unpersuasive in light of  
11 contrary holdings in this circuit and Judge Seymour's telling  
12 dissent in Slack-Horner itself." Richmond Produce, 195 B.R. at  
13 463 n.6; accord, Richmond Produce, 151 B.R. at 1016 n.5 (Slack-  
14 Horner "not persuasive").

15       Moreover, the legislative history of § 550(a) indicates that  
16 the qualifying language "to the extent that" was designed to  
17 incorporate the protection of transferees in §§ 549(b) and 548(c)  
18 and simply recognizes that transfers sometimes may be avoided only  
19 in part, and only that part is recoverable. Sufolla, 2 F.3d at  
20 982; Richmond Produce, 195 B.R. at 463; Crafts Plus+, 220 B.R. at  
21 335.

22       A provision that may seem ambiguous in isolation is often  
23 clarified when only one of the permissible meanings produces a  
24 substantive effect that is compatible with the rest of the law.  
25 United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.,  
26 Ltd., 484 U.S. 365, 371 (1988) (statutory construction is a  
27 holistic endeavor). Therefore, we do not view § 550 in isolation  
28 and examine the statutory framework for avoidance and recovery

1 actions.

2 The concepts of avoidance and recovery are separate and  
3 distinct. Sufolla, 2 F.3d at 982; Lippi v. City Bank, 955 F.2d  
4 599, 605 (9th Cir. 1992); Richmond Produce, 195 B.R. at 463; S.  
5 Rep. No. 95-989, at 90 (1978) reprinted in 1978 U.S.C.C.A.N. 5787,  
6 5876; H.R. Rep. No. 95-595, at 375-76 (1977) reprinted in 1978  
7 U.S.C.C.A.N. 5963, 6331.

8 Section 549, which addresses postpetition transfers, focuses  
9 on the transfer and contains nothing that defines the proper  
10 defendant. Avoidability is an attribute of the transfer and not  
11 the party. Richmond Produce, 195 B.R. at 463 citing Sufolla, 2  
12 F.3d at 982; Int'l Admin. Servs., 408 F.3d at 707 (“[T]he  
13 distinction between initial transferee and mediate transferee for  
14 avoidance purposes is irrelevant[;] defendants need only be  
15 transferees.”); Crafts Plus+, 220 B.R. at 338 (“§ 547 focuses  
16 exclusively on the transfer, not the creditor or beneficiary”).  
17 There is also nothing in § 549 that links the trustee’s avoidance  
18 power to recovery from the transferees.<sup>18</sup>

19 That the concepts are distinct and separate statutory  
20 remedies is also supported by their separate statute of limitation  
21 periods. Section 549(d) provides that an action under that  
22 section may not be commenced after the earlier of – (1) two years  
23 after the date of the transfer sought to be avoided; or (2) the  
24 time the case is closed or dismissed. The statute of limitation

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25  
26 <sup>18</sup> We note that there may be instances where avoidance of a  
27 transfer is a sufficient remedy making it unnecessary for the  
28 trustee to seek relief under § 550. See Suhar v. Burns (In re  
Burns), 322 F.3d 421, 427 (6th Cir. 2003) (remedy of recovery is  
necessary only when remedy of avoidance is inadequate).

1 in § 549 relates only to the transfer and not the transferee.  
2 Notably, the statute does not refer to the "initial" transfer.

3 Section 550(f) provides that an action or proceeding under  
4 § 550 may not be commenced after the earlier of –(1) one year  
5 after the avoidance of the transfer ... or (2) the time the case  
6 is closed or dismissed. Thus, while § 550(f)(1) indicates that  
7 the statute of limitations commences "after the transfer is  
8 avoided" it, too, does not state "after the initial transfer is  
9 avoided."

10 Because Congress made the concepts of avoidance and recovery  
11 separate and distinct, we are persuaded that the trustee need not  
12 first avoid a transfer from the initial transferee when seeking  
13 recovery from a subsequent transferee under § 550. See Int'l  
14 Admin. Servs., 408 F.3d at 706 (observing that "[a]n  
15 interpretation of § 550 mandating actual avoidance of initial  
16 transfers 'conflates ... avoidance and recovery sections'").  
17 Under this view, we perceive no impediment to giving effect to the  
18 different statutes of limitations for avoidance under § 549 and  
19 recovery under § 550. Each statute of limitation has meaning  
20 depending upon which remedy the trustee seeks.

21 For example, while avoidance is a necessary precondition to  
22 any recovery under § 550, it is permissible, but not mandatory, to  
23 bring an avoidance action and a recovery action in one suit.<sup>19</sup>  
24 Richmond Produce, 195 B.R. at 463; Crafts Plus+, 220 B.R. at 338;  
25 Enron, 343 B.R. at 82. Thus, if the trustee seeks to avoid a

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27 <sup>19</sup> This is what the trustee did here. The complaint against  
28 W&E alleges § 549 and § 550 in count I. Thus, the question of  
avoidance was squarely at issue and necessarily decided.

1 transfer and recover the property or its value in the same  
2 adversary proceeding, assuming the avoidance is timely and  
3 established, then the recovery action will necessarily be within  
4 the one year pursuant to § 550(f). Alternatively, if the trustee  
5 prosecutes a separate adversary proceeding for avoidance and then  
6 a subsequent adversary proceeding for recovery, the avoidance  
7 action is subject to the statute of limitations under § 549(d) and  
8 § 550(f) is applicable to the recovery adversary proceeding. In  
9 short, there may be strategic reasons for a trustee to seek  
10 avoidance and recovery in the same adversary proceeding as opposed  
11 to separate adversary proceedings.

12 Furthermore, the line of cases exemplified by the Eleventh  
13 Circuit's Int'l Admin. Servs. decision, as well as Richmond  
14 Produce and Nat'l Audit within the Ninth Circuit, offers a  
15 construction of § 550 that avoids absurd results and is consistent  
16 with the purpose of the statutory framework. Specifically, in  
17 Int'l Admin. Servs. the debtor, its principal and his associates  
18 transferred estate assets more than 100 times among twenty-three  
19 entities. In rejecting the position W&E now asserts, the Eleventh  
20 Circuit surmised that "any streetwise transferee would simply re-  
21 transfer the money or asset in order to escape liability." Int'l  
22 Admin. Servs., 408 F.3d at 704. The court noted that a mandate of  
23 an actual avoidance prior to seeking recovery from a subsequent  
24 transferee would then be an exercise in futility. Id. at 708; see  
25 also Slack-Horner, 971 F.2d at 581 (dissenting opinion). Our  
26 interpretation protects the trustee from attempts to impede  
27 recovery and also affords flexibility when a transferee or its  
28 assets have disappeared.

1           The shortfall of strictly construing § 550 also becomes  
2 apparent when applied under the circumstances here. The trustee  
3 commenced an adversary proceeding against Maverick, the initial  
4 transferee. The trustee and Maverick's settlement was after the  
5 trustee's judgment against W&E. The settlement agreement  
6 specifies that it is a compromise of disputed claims and does not  
7 constitute an admission, express or implied, of liability by any  
8 party. Therefore, we cannot conclude that the transfer here was  
9 "actually avoided" because the settlement specifically renounced  
10 liability.

11           Under a strict construction of § 550, the trustee would be  
12 precluded from pursuing subsequent transferees after settling with  
13 an initial transferee who does not admit liability. In turn,  
14 trustees would have little incentive to partially settle avoidance  
15 actions, thereby running up the costs of litigation and causing  
16 further delay. Congress could not have contemplated this outcome  
17 in enacting § 550. See Lehigh Valley Coal Co. v. Yensavage, 218  
18 F. 547, 553 (2d Cir. 1914) (statutes "should be construed, not as  
19 theorems of Euclid, but with some imagination of the purposes  
20 which lie behind them."). Simply put, the statute should be  
21 interpreted to provide flexibility and avoid an absurd result,  
22 especially in cases that involve multiple transfers or settlements  
23 as in this case.

24           Finally, our conclusion is consistent with case law that has  
25 disallowed automatic recovery from a subsequent transferee  
26 following the avoidance of an initial transfer through a  
27 stipulated judgment or default when the transferee had not been a  
28 party to the underlying avoidance proceeding. For example, in Dye

1 v. Sachs (In re Flashcom, Inc.), 361 B.R. 519 (Bankr. C.D. Cal.  
2 2007), the trustee settled with the debtor's principal, who  
3 stipulated that the transfer was avoidable as a preference. At  
4 issue was whether the stipulation, which avoided the transfer,  
5 precluded the non-settling subsequent transferees from raising  
6 defenses to the avoidability of the transfer as a preference. The  
7 bankruptcy court concluded that the transferees had a  
8 constitutional right to defend the preference claim before they  
9 could be deprived of their property. The court opined that if the  
10 rule were otherwise, trustees could negotiate settlements that  
11 could later be leveraged into recoveries against other defendants.  
12 Id. at 525 n.7; See also Thompson v. Jonovich (In re Food & Fibre  
13 Prot., Ltd.), 168 B.R. 408, 416 (Bankr. D. Ariz. 1994) (trustee  
14 who obtained a default judgment against the initial transferee was  
15 required to prove every element of preference or fraudulent  
16 transfer against the subsequent transferee and not just that  
17 subsequent transferee was a transferee against whom recovery was  
18 appropriate).

19 Accordingly, in construing the plain language of § 550 and  
20 the statutory framework as a whole, we conclude that Congress  
21 intended avoidance as one remedy and recovery as another. Thus,  
22 we hold that a trustee is not required to avoid the initial  
23 transfer from the initial transferee before seeking recovery from  
24 subsequent transferees under § 550(a)(2). This view of § 550 is  
25 compatible with the avoidance sections.

#### 26 **D. Good Faith Defense**

27 Section 550(b)(1) provides a safe harbor defense to some  
28 transferees who have acted in good faith. Schafer v. Las Vegas

1 Hilton Corp. (In re Video Depot, Ltd.), 127 F.3d 1195, 1199 (9th  
2 Cir. 1997) (initial transferees are subject to strict liability  
3 while subsequent transferees may assert the good faith defense).  
4 The elements of the "good faith" defense are (1) good faith, (2)  
5 for value,<sup>20</sup> and (3) without knowledge of the voidability of the  
6 transfer. Mosier v. Goodwin (In re Goodwin), 115 B.R. 674, 676  
7 (Bankr. C.D. Cal. 1990). The burden of proving the defense is  
8 upon W&E. Hayes v. Palm Seedlings Partners-A (In re Agric.  
9 Research & Tech. Group, Inc.), 916 F.2d 528, 535 (9th Cir. 1990).

10 The Ninth Circuit in Hayes observed that there is no precise  
11 definition of good faith, but courts look to what the transferee  
12 objectively "knew or should have known" rather than examining what  
13 the transferee knew from a subjective standpoint. Id. at 535-36.  
14 see also Jobin v. McKay (In re M & L Bus. Mach. Co.), 84 F.3d  
15 1330, 1338 (10th Cir. 1996) (same); Brown v. Third Nat'l Bank (In  
16 re Sherman), 67 F.3d 1348, 1355 (8th Cir. 1995) (same).  
17 Transferees also have a duty to investigate if there is sufficient  
18 information to put the transferee on notice that something is  
19 wrong. Bonded Fin. Servs., Inc. v. Eur. Am. Bank, 838 F.2d 890,  
20 897-98 (7th Cir. 1988).

21 W&E contends it adequately discharged its duty to inquire.  
22 Woods examined the settlement agreement and the dismissal order,  
23 verified that the settlement payment was in fact issued to the  
24 settling parties, and made further inquiries from debtor's  
25 bankruptcy counsel and Maverick's counsel. W&E further argues

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27 <sup>20</sup> The court found that debtor was not the obligor and never  
28 received fair consideration for the legal services because debtor  
never retained W&E as counsel or special counsel.

1 that the motion for reconsideration was insufficient to put W&E on  
2 notice that the transaction might be voided as a matter of law.

3 As noted by the bankruptcy court, W&E was representing debtor  
4 prior to and at the time of its chapter 11 filing and it had a  
5 duty to ensure the schedules were correct. The court further  
6 found that W&E had notice of the motion for reconsideration prior  
7 to the closing of the sale. PAF's motion put W&E on notice that  
8 the dismissal of debtor's case may have been improper. Further,  
9 PAF specifically requested the court to reinstate the case in its  
10 motion. Regardless of the reason for reinstating debtor's case,  
11 these facts were sufficient to put W&E on inquiry notice that the  
12 transfer might be avoidable.

13 We conclude that the record supports the bankruptcy court's  
14 finding that W&E did not prove its good faith defense and,  
15 therefore, we perceive no clear error in its ruling.

16 **VI. CONCLUSION**

17 For these reasons, we AFFIRM.

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