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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.	WW-07-1313-MkMoD
)		
DAVID DOUGLAS TAYLOR and)	Bk. No.	05-49369-pbs
LINDA SUE TAYLOR,)		
)	Adv. No.	07-04025-pbs
Debtors.)		
_____)		
USAA FEDERAL SAVINGS BANK,)		
)		
Appellant,)		
)		
v.)	O P I N I O N	
)		
DON THACKER, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

Argued and Submitted on February 21, 2008
at Pasadena, California

Filed - June 20, 2008

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Hon. Paul B. Snyder, Bankruptcy Judge, Presiding.

Before: MARKELL, MONTALI and DUNN, Bankruptcy Judges.

1 MARKELL, Bankruptcy Judge:

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I. FACTS

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The facts of this case are not in dispute, and they present a common pattern. On August 30, 2005, the debtors bought a 2005 Toyota Camry for \$19,500, borrowing \$18,020 of the purchase price from USAA Federal Savings Bank ("USAA"). They granted USAA a security interest in the car to secure their loan.

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On September 15, 2005, to perfect its security interest, USAA filed an initial application for a certificate of title with the Idaho Department of Transportation. The application requested that the certificate of title, when issued, note USAA's security interest. Under Idaho law at the time, applications for certificates of title had to be accompanied by an affidavit that attested to an inspection confirming the car's Vehicle Identification Number ("VIN"). USAA did not provide such an affidavit.

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USAA corrected its error on September 20, 2005, when it submitted a new application for title, this time with the required VIN inspection affidavit. Under applicable Idaho law, USAA's security interest became perfected on September 20.

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On September 28, 2005, the debtors filed a chapter 7¹ bankruptcy petition. They continued to make their car payments to USAA.

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¹Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 as enacted and promulgated before the effective date (October 17, 2005) of the relevant provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23 (2005), and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 On February 23, 2007, approximately seventeen months after
2 debtors' bankruptcy filing, the debtors' trustee, Don Thacker,
3 filed a preference action against USAA under § 547. On February
4 28, 2007, USAA answered, raising the enabling loan defense under
5 § 547(c)(3).

6 On July 3, 2007, the trustee filed a motion for summary
7 judgment. Based on the undisputed facts, he contended that
8 perfection of the security interest in the car was preferential.

9 In defense, USAA invoked § 547(c)(3).² USAA contended that
10 although § 547(c)(3) gave it only 20 days to perfect its security
11 interest, Idaho law at the time gave it an additional 20 days to
12 complete the perfection requirements. IDAHO CODE ANN. § 49-510.
13 Put another way, USAA claimed that because it had made its
14 incomplete filing within § 547(c)(3)'s 20-day enabling loan
15 period, and then satisfied Idaho's relation-back statute when it
16 later submitted its completed VIN inspection affidavit, it should
17 receive the benefit of § 547(c)(3)'s defense. But the bankruptcy
18 court concluded that the enabling loan exception was not
19 applicable because the Idaho grace period did not apply to federal
20 preference law.

21 The bankruptcy court then turned to remedies. While the
22 trustee could have simply avoided the security interest and taken

23 ²At the times relevant here, § 547(c)(3) stated:

- 24 (c) The trustee may not avoid under this section a
25 transfer . . .
26 (3) that creates a security interest in property
acquired by the debtor—
27 (A) to the extent such security interest secures
new value . . . ; and
28 (B) that is perfected on or before 20 days after
the debtor receives possession of such property[.]

1 the car from the debtors and sold it, neither he nor USAA wanted
2 that outcome.

3 Citing § 550(a), the trustee sought a judgment for the value
4 of USAA's security interest in the debtors' car as of the date of
5 the debtors' bankruptcy filing. Although he might have elected to
6 confine his recovery to the avoidance given him by § 547, that
7 remedy would not have put the estate in the same position as it
8 would have been in had the perfection not occurred. For the
9 estate to benefit from a simple avoidance, the trustee would have
10 had to take the car from the debtors (and there is no doubt that
11 the car was property of the estate enabling him to do so),³ and
12 sell it for whatever it would fetch without the security interest
13 attached, and then distribute the proceeds to the debtors'
14 creditors. But seventeen months had passed since the debtors
15 filed bankruptcy. During that time, as noted, the debtors had
16 continued making their monthly payments to USAA.⁴ Also during
17 that time, the value of the car had declined, from \$19,500 at
18 filing to \$14,240. Were avoidance the only remedy, the estate
19 would not be in the same position as if the transfer had not
20 occurred, as it would not have been able to recover the payments
21 or the depreciation from USAA.⁵

22
23 ³The court took judicial notice of the fact that the debtors
24 had not exempted the car because they had used their applicable
automobile exemption on another vehicle.

25 ⁴At the hearing on the summary judgment, the court agreed
26 with debtors' counsel that the debtors needed the car for their
personal needs.

27 ⁵The postpetition payments were not preferences under § 547
28 because they occurred after, not during the 90 days before, the
(continued...)

1 USAA argued that the only remedy available was avoidance of
2 its security interest, which would give the estate a lien-free car
3 that the trustee could sell. It argued that the remedies provided
4 by § 550 - recovery of the property or a money judgment for its
5 value - were either futile or precluded by § 550(a)'s language.
6 Recovery was futile because it would have transferred the property
7 right (the security interest) to the trustee without also
8 transferring the contract rights governing its use. As USAA
9 argued, a security interest without a debt is an empty, valueless
10 concept. In addition, USAA also argued that a money judgment was
11 unavailable. It contended that since § 550(a) states that a money
12 judgment is available only "to the extent that a transfer is
13 avoided," and since a simple money judgment would not also avoid
14 its security interest as against the debtors, the language of
15 § 550(a) precluded the court's entering a money judgment.
16 The trustee responded that, for at least two reasons, simple
17 avoidance would not restore the estate to the position it would
18 have been in but for the preferential transfer. First, the value
19 of the car had declined since the filing, so a sale of the car
20 would have yielded less money to the estate. Second, because the
21 debtors had continued to make payments to USAA in the period
22 between their bankruptcy filing and the trustee's preference

24 ⁵ (...continued)
25 bankruptcy filing. 11 U.S.C. § 547(b)(4)(A). They were not
26 avoidable postpetition payments because the source of the
27 payments, the debtors' postpetition earnings from services, were
28 not "property of the estate," *id.* § 541(a)(6), and one of the
elements of avoiding postpetition transfers under § 549 is that
the transfer be "a transfer of property of the estate." *Id.*
§ 549(a).

1 petition,⁷ and (5) in such a way that it enables the creditor to
2 receive more than if the transfer had not been made. 11 U.S.C.
3 § 547(b)(1)-(5).

4 There is no question that USAA perfected its security
5 interest 21 days after debtors granted it. Under § 547, as it
6 existed at the time of the transaction, such perfection
7 constituted a transfer of the entire security interest as of that
8 day. 11 U.S.C. § 547(e)(2)(B). "Under the Code, a transfer of a
9 security interest does not occur until after all of the . . .
10 steps [related to perfection] are completed, and the interest is
11 perfected under state law." 4 NORTON BANKR. L. & PRAC. 3d § 66:11
12 (2008).

13 The other elements of a preference were also met. The
14 transfer of the security interest was made to USAA, a creditor on
15 an antecedent debt. An antecedent debt is a debt that arises
16 before the transfer, and here the debtors' borrowing of \$18,020 on
17 August 30, 2005 qualifies as the antecedent debt to which the late
18 act of perfection related. The perfection was complete eight days
19 before the debtors' bankruptcy filing, thus bringing it within the
20 90-day preference period.⁸ Finally, if a debtor is insolvent, as
21 were the debtors here, a secured creditor with valuable collateral
22 will always fare better than if that creditor were wholly
23 unsecured. A secured creditor receives dollar-for-dollar recovery

24
25 ⁷Section 547(b)(4)(B) extends this reachback period to one
26 year for insiders, as defined in § 101(31). There is no doubt
that USAA is not an insider in this case.

27 ⁸During this 90-day period, a debtor is presumed to be
28 insolvent, 11 U.S.C. §547(f). That presumption applies here since
USAA presented no evidence to the contrary.

1 on that portion of its claim that is secured, as opposed to the
2 less-than-100% recovery the same creditor would have received if
3 the claim had been unsecured. See Comm. Of Creditors Holding
4 Unsecured Claims v. Koch Oil Co. (In re Powerine Oil Co.), 59 F.3d
5 969, 972 (9th Cir. 1995), cert. denied, 516 U.S. 1140 (1996). The
6 trustee thus met his burden of showing the elements of a
7 preference. 11 U.S.C. § 547(g).

8 The burden of establishing a defense under § 547(c)(3) is on
9 the creditor, 11 U.S.C. §547(g), and that defense applies if the
10 creditor extends credit and takes a security interest to enable
11 the debtor to acquire property. 11 U.S.C. § 547(c)(3)(A). As in
12 effect at the time of this transaction, the defense also required
13 perfection of the security interest within 20 days of its
14 creation. 11 U.S.C. § 547(c)(3)(B).⁹

15 As noted above, it is undisputed that the perfection happened
16 21 days after the creation of the antecedent debt, one day beyond
17 § 547(c)(3)(B)'s limit. USAA, however, contends that it should
18 benefit from the grace period provided under IDAHO CODE ANN. § 49-
19 510 (2005) to bring its perfection back within the then-applicable
20 20-day period of § 547(c)(3).

21 Section 547(c)(3) is exacting. Even if the antecedent debt
22 was a purchase-money debt that enabled the debtor to acquire
23 property, perfection of a security interest in that newly acquired
24 property more than 20 days after funding the purchase-money loan
25 is preferential. Fitzgerald v. First Sec. Bank of Idaho, N.A. (In

26
27 ⁹At the time the petition in this case was filed, the
28 enabling loan period under Section 547(c)(3) was 20 days. BAPCPA
extended the time period to 30 days. BAPCPA, Pub. L. 109-8,
§ 1222, 119 Stat. 23, 174 (2005).

1 re Walker), 77 F.3d 322, 323-24 (9th Cir. 1996). But Idaho law in
2 2005 was less exacting. It allowed a creditor 20 days to make its
3 filing with the state agency, and an additional 20 days to correct
4 filing mistakes or to complete the paperwork. IDAHO CODE ANN. § 49-
5 510 (2005).¹⁰

6 In essence, Idaho law set out two 20-day periods. In the
7 first, the secured creditor had 20 days to make an initial filing.
8 If that filing was complete, then the creditor was perfected as of
9 the date of "creation". But if that filing was not complete, the
10 secured creditor had an additional 20 days to complete or correct
11 it. If the completion or the correction was accomplished within
12 this 20-day period, the perfection date would then be deemed to be
13 the initial date of filing.

14 Section 547(c)(3) also contained an initial 20-day relation-
15 back period. But it did not contain the additional grace period
16 to make corrections that Idaho law did. This normally would be

17 ¹⁰The statute stated, in pertinent part:
18

19 A lien is perfected as of the time of its creation
20 if the transaction is notarized and if the filing is
21 completed with the department or an agent of the
22 department within twenty (20) calendar days thereafter;
23 otherwise, as of the date of the filing with the
24 department or an agent of the department. If the title
25 application is incomplete or if the supporting documents
26 are incomplete or missing, the title application and
27 supporting documents as submitted will be returned to
the lienholder or his successor, agent or assignee for
correction and, if the application is not resubmitted in
a complete form, including completed supporting
documents, to the department or to the agent of the
department within twenty (20) days of their having been
returned to the lienholder or his successor, agent or
assignee, the original date of receipt by the department
or agent of the department shall be void.

28 Idaho law has since changed to eliminate the grace period
altogether. See IDAHO CODE ANN. § 49-510 (2007).

1 the end of the analysis, as federal law controls the dates for
2 purposes of avoidance under § 547. USAA argues, however, that the
3 Idaho statute's grace period did not "extend" the filing period
4 but instead "preserve[d]" it. This distinction, USAA argues,
5 renders inapplicable those decisions of the Supreme Court, the
6 Ninth Circuit, and this panel that hold that state law cannot
7 extend the time period. Fidelity Financial Servs., Inc. v. Fink,
8 522 U.S. 211, 213-15 (1998); In re Walker, 77 F.3d at 323; Long v.
9 Joe Romania Chevrolet, Inc. (In re Loken), 175 B.R. 56, 60 (9th
10 Cir. BAP 1994).

11 USAA's argument fails because of the well-settled rule that
12 what is relevant is not the first action a creditor takes to
13 perfect its security interest, but the last. Fink, 522 U.S. at
14 213-15. Indeed, this panel has previously stated that in
15 determining the time of perfection, a bankruptcy court should look
16 at the "last necessary act." In re Loken, 175 B.R. at 63-64. See
17 also In re Walker, 77 F.3d at 323-24, cited by Fink, 522 U.S. at
18 214 n.2 (resolving a circuit split in favor of a rule barring the
19 application of state relation-back periods for the time of
20 perfection under § 547(c)(3)).

21 Here, the last necessary act occurred on the twenty-first day
22 after attachment of USAA's security interest when USAA resubmitted
23 its documents to the Idaho Department of Transportation. While
24 that may be sufficient under Idaho law, it is too late for
25 § 547(c)(3). As a result, USAA failed to show that the 20-day
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1 requirement of § 547(c)(3) was met. Since it could not establish
2 its defense, it was not error to find an avoidable preference.¹¹

3 **1. The Remedy Was Appropriate and Within the Bankruptcy**
4 **Court's Discretion to Award.**

5 After the bankruptcy court found it could avoid the debtors'
6 transfer of a perfected security interest to USAA, it turned to
7 the appropriate remedy. It invoked § 550(a) to award money
8 damages in an amount equal to the value of the interest avoided in
9 lieu of making the avoidance permanent. This remedy allowed USAA
10 to retain its security interest on the car along with its contract
11 rights against the debtors.

12 USAA objected. It argued that the only recovery to which the
13 trustee was entitled was recovery of the avoided security
14 interest, because that was the only interest transferred. It then
15 contended that a security interest without a debt is valueless,
16 and thus money damages are not available on these facts. In
17 short, USAA argues that all that the trustee was empowered to do
18 was to avoid the security interest and then sell the car for the
19 benefit of the estate.

20
21 ¹¹On November 23, 2007, the trustee filed a motion for
22 sanctions under FED. R. BANKR. P. 8020. The trustee alleged that
23 USAA's arguments on the existence of a preference were frivolous
24 because the result was obvious. The trustee argued that USAA was
arguing in the face of long-established precedent without
distinguishing that precedent. The trustee further argued that
USAA's appeal with regard to recovery had no merit in light of the
bankruptcy court's extensive findings of fact and law.

25 On December 10, 2007, USAA responded that its appeal was not
26 sanctionable because the trustee failed to show that the appeal
was made in bad faith.

27 Although the issue is close, and we do not believe that Rule
28 8020 requires a showing of bad faith, cf. George v. City of Morro
Bay (In re George), 322 F.3d 586, 591-92 (9th Cir. 2003), the
award of sanctions is discretionary, and we decline to sanction
USAA or its counsel on this record.

1 We begin by examining § 550(a), which all parties agree
2 controls this discussion. That section provides, in relevant
3 part:

4 Except as otherwise provided in this section, to the
5 extent that a transfer is avoided under section 544,
6 545, 547, 548, 549, 553(b), or 724(a) of this title, the
7 trustee may recover, for the benefit of the estate, the
8 property transferred, or, if the court so orders, the
9 value of such property[.]

10 The plain language of this provision allows a trustee to recover
11 either "the property transferred" or "the value of such property"
12 rather than the property itself. Although there is no statutory
13 directive on when one recovery is preferred, it is clear that
14 there may only be one recovery. 11 U.S.C. § 550(d).

15 Generally, the purpose of § 550(a) is "to restore the estate
16 to the financial condition it would have enjoyed if the transfer
17 had not occurred." Aalfs v. Wirum (In re Straightline Invs.,
18 Inc.), 525 F.3d. 870, 883 (9th Cir. 2008) (internal quotation
19 marks omitted, but quoting both Acequia, Inc. v. Clinton (In re
20 Acequia, Inc.), 34 F.3d 800, 812 (9th Cir. 1994) and Morris v.
21 Kan. Drywall Supply Co. (In re Classic Drywall, Inc.), 127 B.R.
22 874, 876 (D. Kan. 1991)). In achieving this goal, courts have
23 liberally exercised their discretion and used the tools given by
24 the statute to ensure that the estate is made whole. See, e.g.,
25 Dobin v. Hill (In re Hill), 342 B.R. 183, 205 (Bankr. D.N.J.
26 2006); Wellington Apt., LLC v. Clotworthy (In re Wellington Apt.,
27 LLC), 350 B.R. 213, 247-48 (Bankr. E.D. Va. 2006) (if ordering a
28 return of the property transferred would require unwinding a
complex real estate transaction and would injure innocent third
parties, court would enter a money judgment); Bohm v. Dolata (In

1 re Dolata), 306 B.R. 97, 137-38 (Bankr. W.D. Pa. 2004) (a money
2 judgment should be rendered when returning the property itself
3 would require partition); In re Classic Drywall, Inc., 127 B.R. at
4 877; see also 5 COLLIER ON BANKRUPTCY ¶ 550.02[5] (Alan N. Resnick &
5 Henry J. Sommer eds., 15th ed. rev. 2008) ("Factors considered by
6 courts in making this decision of whether to order recovery of the
7 property or its value include whether the property is recoverable,
8 whether the property has diminished in value by virtue of
9 depreciation or conversion, whether there is conflicting evidence
10 as to the value of the property and whether the value of the
11 property is readily determinable and a monetary award would result
12 in a savings to the estate.").

13 USAA argues for a rigid interpretation of § 550's remedial
14 powers.¹² Under its view of § 550(a), a bankruptcy court may
15 order recovery only of the security interest and not the value of
16 the security interest. Its argument relies on the grammar of the
17 first sentence of § 550(a): the option to recover the value of the
18 property transfer is available only "to the extent that a transfer
19 is avoided" Here, the bankruptcy court's judgment did not
20 avoid USAA's security interest. Instead, the court specifically
21 kept the security interest in place, and it leap-frogged to a
22 money judgment without any intervening avoidance.

23
24 ¹²USAA also argued that once avoided, a security interest is
25 void *ab initio* and cites Kelley v. Chevy Chase Bank (In re Smith),
26 236 B.R. 91, 100 (Bankr. M.D. Ga. 1999), for that proposition.
27 This overstates the power of avoidance. Avoidance under any of
28 the substantive sections does not destroy the security interest.
If it did, then the first part of § 550 would be nonsense, as it
would give the court an option that did not exist. Rather,
avoidance under § 547 here merely allows either the transfer of
the security interest or the value of the security interest to the
estate.

1 In making this argument, USAA cites opinions from one court
2 in the Middle District of Georgia. These decisions hold that when
3 a preferential transfer of a security interest transfers a lien,
4 not a vehicle, recovery should be limited to avoidance of the
5 security interest. Kelley v. Chevy Chase Bank (In re Smith), 236
6 B.R. 91, 100 (Bankr. M.D. Ga. 1999); Kelley v. General Motors
7 Acceptance Corp. (In re Farmer), 209 B.R. 1022, 1024-25 (Bankr.
8 M.D. Ga. 1997).

9 But neither of these cases states that a money judgment is
10 never appropriate in an avoidance action involving a consumer.
11 Indeed, the bankruptcy court in Farmer acknowledged that there may
12 be appropriate cases in which a monetary judgment was appropriate,
13 and that the selection of pure lien avoidance was that court's
14 considered judgment as to the best outcome. In re Farmer, 209
15 B.R. at 1025 ("While there are circumstances in which an award of
16 the value of the property transferred is appropriate, no such
17 circumstances exist in this instant case."). The issue thus
18 becomes whether the discretion exercised by the bankruptcy court
19 in choosing a monetary award was the appropriate remedy "to
20 restore the estate to the financial condition it would have
21 enjoyed if the transfer had not occurred." In re Straightline
22 Invs. Inc., 525 F.3d. at 883.

23 USAA's rigid interpretation of § 550(a) does not achieve this
24 goal. While USAA correctly identifies the objective of § 550(a),
25 it argues that this objective may be achieved only by transferring
26 the security interest to the bankruptcy estate. A more flexible
27 approach, which this panel adopts, focuses on matching the
28

1 recovery to the avoidance, and in such cases, the remedy chosen by
2 the bankruptcy court here ably satisfies this goal.

3 This flexible approach, which reviews the bankruptcy court's
4 decision as to remedy under an abuse of discretion standard, is
5 grounded in a common sense reading of § 550(a). As the Supreme
6 Court has stated, "It is well established that 'when the statute's
7 language is plain, the sole function of the courts – at least
8 where the disposition required by the text is not absurd – is to
9 enforce it according to its terms.'" Lamie v. United States Tr.,
10 540 U.S. 526, 534 (2004) (quoting Hartford Underwriters Ins. Co.
11 v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (in turn
12 quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241
13 (1989)). This plain meaning, however, must take into account the
14 context of the statute we are called upon to interpret.

15 "[S]tatutory language cannot be construed in a vacuum. It is a
16 fundamental canon of statutory construction that the words of a
17 statute must be read in their context and with a view to their
18 place in the overall statutory scheme." Davis v. Mich. Dep't of
19 Treasury, 489 U.S. 803, 809 (1989).

20 Here, we are required to construe § 547(b) with § 550(a). As
21 we decided above, the trustee has shown that the perfection of the
22 security interest in the car met all of the elements of § 547(b),
23 and that there were no defenses available under § 547(c). Under
24 such circumstances, § 547(b) indicates that the trustee "may avoid
25 [the] transfer" Section 550(a) then provides that "to the
26 extent that a transfer is avoided . . . , the trustee may recover
27 . . . the property transferred, or, if the court so orders, the
28 value of the property"

1 We hold that this language gives the trustee, subject to the
2 discretion of the court, the ability to seek either the property
3 transferred (in this case, the security interest) or its value
4 (here, \$18,020).¹³ Otherwise, the first part of § 550(a) would be
5 superfluous; after avoidance under § 547, it would make little
6 sense to reaffirm that avoidance in § 550(a). We think the
7 difference means that after establishing the right to avoidance
8 under § 547 - or any of the other avoiding powers enumerated in
9 § 550(a) - the trustee may ratify that avoidance and seek the
10 property transferred or ignore the transfer and seek a substitute
11 remedy: a monetary judgment for the value of the property
12 transferred. In making this choice, the trustee will be guided by
13 whichever remedy better serves the goal of placing the estate in
14 the same financial position it would have been in but for the
15 transfer.

16 This option aspect is also reaffirmed by § 550(d), which
17 limits the trustee to a single satisfaction. Section 550(d)
18 precludes the trustee from recovering both the property
19 transferred and its value (which could occur if the property had
20 been transferred by the initial transferee). If § 550(a) were
21 read as USAA suggests, there would be a conflict between the two
22

23 ¹³USAA contends that the value of the security interest in the
24 trustee's hands is zero, since avoidance would transfer only the
25 security interest to the estate, and would not also transfer any
26 contract rights associated with that security interest. Morris v.
27 St. John Nat'l Bank (In re Haberman), 516 F.3d 1207, 1210 (10th
28 Cir. 2008). Put simply, USAA asserts that having rights to a
security interest without also controlling the related contract
rights means that the security interest has no value. We think,
however, that the value recovered should be the value to the
creditor of its security interest at the time of the transfer, in
this case \$18,020.

1 remedies specified in § 550(a) - after the avoidance required by
2 USAA, § 550(d) would preclude the trustee's request for a money
3 judgment since the trustee's avoidance and recovery of the
4 property would constitute its single satisfaction. Put another
5 way, to give effect to all of the words in § 550(a), the trustee
6 has to have a meaningful choice between recovering the property
7 transferred and its value, and USAA's interpretation denies that
8 choice. We thus decline to adopt USAA's interpretation here.

9 USAA's argument does not mesh with congressional intent, as
10 noted by Judge Leif Clark:

11 The effect of the qualifying phrase "to the extent that
12 a transfer is avoided" is "that liability is not imposed
13 on a transferee to the extent that a transferee is
14 protected under a provision such as section 548(c)." 124
15 Cong Rec H11097 (daily ed. Sept. 28, 1978); S17414
16 (daily ed. Oct. 6, 1978); (remarks of Rep. Edwards and
17 Sen. DeConcini). This suggests that "avoided" in § 550
is not in the past tense, but instead the present
perfect. That is, § 550 does not require that the
transfer be avoided in a temporally antecedent and
separate procedure, but simply recognizes the
limitations placed on recovery by the safe harbors for
certain transfers found in provisions such as § 548(c).

18 Crafts Plus+, Inc. v. Foothill Capital Corp. (In re Crafts Plus+,
19 Inc.), 220 B.R. 331, 335 (Bankr. W.D. Tex. 1998).¹⁴

20 Against this background, the Ninth Circuit has indicated,
21 once a trustee demonstrates the right to avoid a transfer, "[the]
22 trustee must then establish the *amount* of recovery under
23 § 550(a)." Acequia, Inc. v. Clinton (In re Acequia, Inc.), 34

24
25 ¹⁴It has been noted that Judge Clark was in error: Section
26 550(a) does not use the present perfect tense. Enron Corp. v.
27 Int'l Fin. Corp. (In re Enron Corp.), 343 B.R. 75, 81 n.3 (Bankr.
28 S.D.N.Y. 2006). If it did, it would say "to the extent that the
trustee has avoided." But the point of grammar is irrelevant to
the point made here: Section § 550(a) gives an estate a choice
between the actual property transferred or its value.

1 F.3d 800, 809 (9th Cir. 1994) (emphasis in original).¹⁵ Under this
2 view, § 550 specifies who is liable for repayment of the avoided
3 or avoidable transfer, and empowers the trustee to recover the
4 property transferred or its value for the benefit of the estate.
5 Joseph v. Madray (In re Brun), 360 B.R. 669, 672 (Bankr. C.D. Cal.
6 2007).

7 Here, were the security interest avoided, and no more, USAA
8 would be an unsecured creditor for the unpaid amount of its loan.
9 The estate would hold the security interest under § 551, but as
10 long as the debtors made their payments, or otherwise avoided
11 default, the security interest could not be foreclosed. This
12 would create an awkward situation in which the debtors would
13 retain a car encumbered by a security interest in favor of the
14 trustee, with, however, secured obligations running to and
15 controlled by USAA. As long as the debtors wish to retain the
16 car, and the trustee does not wish to sell it, this state of
17 affairs does not assist the trustee, the estate, or the debtors'
18 creditors.

19 The trustee's chosen remedy is more in line with the goal of
20 placing the estate in the position it would have been in if the
21 transfer of the security interest had not occurred. Cf. In re
22 Straightline Invs., Inc., 525 F.3d at 883. Instead of avoiding
23 the security interest as to USAA, the trustee elected to take a
24 money judgment against USAA in the amount of the security

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26 ¹⁵Put another way, § 550 "enunciates the separation between
27 the concepts of avoiding a transfer and recovering from the
28 transferee." S. REP. No. 95-989, at 90 (1978) reprinted in 1978
U.S.C.C.A.N. 5787, 5876; H.R. REP. No. 95-595, at 375 (1977)
reprinted in 1978 U.S.C.C.A.N. 5963, 6331.

1 interest's value as of the filing date. This effectively reversed
2 the effect of USAA's late perfection. If affirmed, USAA would
3 have to give up the value it acquired from perfection (since the
4 security interest would have been good outside of bankruptcy
5 against other creditors under Idaho law). This option also keeps
6 the security interest and the obligations it secured in the same
7 entity - USAA.

8 This more flexible interpretation of § 550(a) is also in line
9 with those decisions allowing the trustee to recover the value of
10 an avoided transfer from mediate and intermediate transferees even
11 if the actual transfer is not set aside as to the initial
12 transferee. As the Eleventh Circuit has stated, in those
13 circumstances a strict interpretation of § 550(a) creates a "harsh
14 and inflexible result that runs counterintuitive to the nature of
15 avoidance actions." IBT Int'l, Inc. v. Northern (In re Int'l
16 Admin. Servs., Inc.), 408 F.3d 689, 704 (11th Cir. 2005); see also
17 Woods & Erickson (In re AVI, Inc.), BAP No. NV-07-1266 (9th Cir.
18 BAP, June 13, 2008). The Eleventh Circuit quoted a decision of
19 the District Court for the Northern District of California, which
20 in turn quoted the Seventh Circuit's decision in In re Deprizio
21 for the proposition that "[t]he 'to the extent' language [in
22 Section 550(a)] simply recognizes that transfers sometimes may be
23 avoided only in part, and that only the avoided portion of a
24 transfer is recoverable." Kendall v. Sorani (In re Richmond
25 Produce Co.), 195 B.R. 455, 463 (N.D. Cal. 1996) (citing Levit v.
26 Ingersoll Rand Fin. Corp. (In re V.N. Deprizio Constr. Co.), 874
27 F.2d 1186, 1195-96 (7th Cir. 1989)). See also Leonard v. Optimal
28 Payments Ltd. (In re Nat'l Audit Def. Network), 332 B.R. 896, 915-

1 16 (Bankr. D. Nev. 2005). Contra Weinman v. Simons (In re
2 Slack-Horner Foundries Co.), 971 F.2d 577, 580 (10th Cir. 1992);
3 Enron Corp. v. Int'l Fin. Corp. (In re Enron Corp.), 343 B.R. 75
4 (Bankr. S.D.N.Y. 2006).

5 The heart of the Eleventh Circuit precedent is that the "to
6 the extent" language in § 550(a) does not require any particular
7 remedy with respect to avoidance. Instead, it means that recovery
8 is possible "to the extent" that the transferee is not protected
9 by another provision of the Bankruptcy Code. See In re Int'l
10 Admin. Serv., 408 F.3d at 706. Indeed, this interpretation
11 recognizes that avoidance is the prerequisite for recovery, and
12 where there is no avoidance, there is no recovery. As a result,
13 "to the extent" in § 550(a) does not limit the means of recovery.
14 Once a right to avoid is established, the bankruptcy court may
15 properly exercise its discretion to give the trustee the form of
16 recovery that would restore the estate to the position it would
17 have been in if the transfer had not occurred and maximize the
18 value returned to the bankruptcy estate. See In re Classic
19 Drywall, Inc., 127 B.R. at 877.

20 This result is further reinforced by a recent Tenth Circuit
21 Court of Appeals decision regarding the interest preserved under
22 § 551. Morris v. St. John Nat'l Bank (In re Haberman), 516 F.3d
23 1207 (10th Cir. 2008). In Haberman, the Tenth Circuit held that
24 avoidance is limited to a specific interest in property and not to
25 all rights appurtenant to that property. Id. at 1212.¹⁶ In

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27 ¹⁶In Haberman, as here, the trustee pursued the lender for a
28 monetary judgment. The lender in that case, however, chose not to
(continued...)

1 Haberman, the trustee successfully avoided the transfer of a
2 security interest as preferential and requested both the value of
3 the security interest and an amount equal to the deficiency
4 balance on the underlying contract. The Tenth Circuit stated that
5 the security interest and the underlying contract were two
6 separate legal interests. Id. at 1210-12. The security interest
7 represented the creditor's right to repossess its collateral upon
8 default, and the contract represented the creditor's right to
9 receive payments from the debtor. The Tenth Circuit essentially
10 held that trustee's avoidance of the security interest did not
11 affect the creditor's separate right to receive payments. Id. at
12 1212. This illustrates that the "to the extent" language in
13 § 550(a) does not prevent recovery of the value of a security
14 interest, as was approved here, but it does prevent recovery of a
15 property interest that was not avoided.

16 For the foregoing reasons, the bankruptcy court's decision to
17 award the value of the security interest in lieu of transferring
18 the security interest was a proper exercise of the court's
19 discretion. As a matter of law, it was proper because perfection
20 of the security interest was an avoidable preference, and so the
21 transfer was avoidable. Since the transfer was avoidable,
22 recovery was possible, and it was within the court's discretion to
23 determine the proper form and amount of recovery.

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27 ¹⁶(...continued)
28 contest the type of relief sought. In re Haberman, 516 F.3d at
1209 n.2.

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VI. CONCLUSION

This panel will not disturb the bankruptcy court's determination as to liability or as to remedy. The liability decision rested on a sound basis, and the decision regarding the remedy awarded was well within the bankruptcy court's discretion.

AFFIRMED.