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FRAUDULENT TRANSFERS: RECENT DEVELOPMENTS CONCERNING SUBSEQUENT TRANSFEREES

In this article, the authors discuss a recent opinion of the Tenth Circuit which may sharply limit subsequent transferee liability in certain circumstances. While this holding remains binding precedent in the Tenth Circuit, at least one bankruptcy court in the Southern District of Texas has rejected this reading entirely. The authors explore the different reasoning that the courts applied to reach their conclusions and the implications for trustees and transferees alike.

By Evan Hollander and Nick Sabatino *

The ability to avoid certain pre-petition transfers of a debtor's property is one of the most fundamental tools at the disposal of a bankruptcy trustee or debtor-in-possession to maximize the value of the bankruptcy estate for the benefit of creditors and interest holders.[1] Under title 11 of the United States Code (the "Bankruptcy Code"), not only may the initial transferee be liable when a transfer of the debtor's property is avoided, but a subsequent transferee of the initial transferee may also be held liable.[2] There are important distinctions between the liability of an initial and subsequent transferee that must be kept in mind, however, when prosecuting or defending a fraudulent transfer matter. Moreover, it is not always safe to assume that a party will be deemed a subsequent transferee merely because the party was not the initial recipient of the property transferred by the debtor.

Section 548 of the bankruptcy code sets out the grounds on which an initial transfer may be avoided as intentionally[3] or constructively[4] fraudulent by a trustee

[1] For purposes of this article, references to a "trustee" also encompass a debtor-in-possession.

[2] However, the trustee or debtor-in-possession is entitled to only a single satisfaction in respect of the avoided transfer. 11 U.S.C. § 550(d).

[3] Section 548(a)(1)(A) addresses actual fraud and provides that a trustee may avoid a transfer of the debtor's interest in property, or any obligation made within two years before filing the bankruptcy petition if the debtor voluntarily or involuntarily made the transfer or incurred the obligation with *actual intent to hinder, delay, or defraud any entity to which the debtor* was or became indebted.

[4] Section 548(a)(1)(B) addresses constructively fraudulent transfers and provides that a trustee may avoid a transfer of the debtor's interest in property, or any obligation made within two years before filing the bankruptcy petition if the debtor

EVAN HOLLANDER is a Partner at Orrick, Herrington & Sutcliffe LLP. He is a member of the firm's Restructuring Group and is resident in Orrick's New York office. NICK SABATINO is an Associate at Orrick. He is a member of the firm's Restructuring Group and is resident in Orrick's Sacramento office. Their e-mail addresses are echollander@orrick.com and nsabatino@orrick.com.

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in a bankruptcy case. In the case of constructively fraudulent transfers, section 548 focuses on the value *received by the debtor's estate* in exchange for the value transferred by the debtor to the initial transferee.[5] In the case of a subsequent transfer of property by an initial transferee of a fraudulent transfer, section 550 focuses on the value *provided by the subsequent transferee* and not on the value received by the debtor's estate.[6] There is no requirement that the debtor receive any value directly or indirectly from a subsequent transferee.[7] Further, an initial transferee that provides value in exchange for the property transferred by the debtor and *acts in good faith* will be protected only to the extent of the *value actually provided* in the exchange,[8] whereas a subsequent transferee that acts in good faith and without knowledge of the voidability of the initial transfer avoided under section 548 has a complete defense from an avoidance action so long as the subsequent transferee has provided any value in exchange for the property received.[9] Accordingly, a trustee's ability to recover value for the estate and its creditors may well depend on whether the defendant in a fraudulent transfer action is an initial or subsequent transferee.

Two recent decisions signal a split among courts examining subsequent transferee liability and warrant further analysis. This article sets out the legal framework that underpins initial and subsequent transferee liability, explores two recent decisions concerning subsequent transferee liability, and discusses possible implications for avoidance actions in the wake of those decisions.

LEGAL FRAMEWORK – TRANSFEREE LIABILITY

One of the underlying principles of American bankruptcy law is the goal of maximizing the assets of the estate to increase distributions to creditors and other interest holders. To that end, the Bankruptcy Code permits a trustee or debtor-in-possession to avoid pre-petition transfers of the debtor's property (or the value of such property) in certain circumstances. Section 548 of the bankruptcy code sets out the grounds for a trustee to avoid both intentional and constructively fraudulent transfers made by a debtor to an initial transferee under the federal bankruptcy code. Section 550 of the bankruptcy code sets out the liability of various parties in respect of a transfer to an initial transferee avoided under section 548 of the bankruptcy code. Section 550 provides that in respect of a transfer to an initial transferee avoided under section 548, the property transferred, or its value, may be recovered from (1) the initial transferee, (2) the entity for whose benefit such transfer was made (e.g. the value of a fraudulent transfer to a creditor of an insider of the debtor may be recovered from the insider),[10] or (3) any immediate or mediate transferee of the initial transferee of the fraudulent transfer (i.e. a "subsequent transferee").[11]

The trustee's ability to recover from a subsequent transferee, however, is limited by section 550(b), which prevents recovery from a subsequent transferee that takes property for value, in good faith, and without

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transferred the property without receiving reasonably equivalent value and the debtor (1) was insolvent at the time of, or became insolvent as a result of, the transfer or obligation, (2) was engaged in or about to engage in business for which it was undercapitalized, (3) intended to or believed it would incur debts beyond its ability to pay when due, or (4) made such transfers to or for the benefit of an insider under an employment contract and not in the ordinary course of business.

[5] 11 U.S.C. § 548(a)(1)(B)(i).

[6] 11 U.S.C. § 550(b)(1).

[7] *Bonded Financial Services, Inc. v. European American Bank*, 838 F.2d 890, 897–98 (7th Cir. 1988) (rejecting argument that a subsequent transferee must "give value to the debtor" and concluding that the statute "looks to what the transferee gave up rather than what the debtor received").

[8] 11 U.S.C. § 548(c).

[9] 11 U.S.C. § 550(b)(1).

[10] *See, e.g., In re M2Direct, Inc.*, 282 B.R. 60 (Bankr. N.D. Ga. 2002) (holding that an insider guarantor may be liable for preferential transfers made by the debtor to third-party lenders because such transfers reduce the insider guarantor's potential liability).

[11] 11 U.S.C. § 550(a).

knowledge of the voidability of the transfer avoided (often referred to as a "good faith transferee").[12]

Section 101 of the Bankruptcy Code defines "transfer" as "the creation of a lien, the retention of title as a security interest, the foreclosure of a debtor's equity of redemption, or each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or an interest in property."[13] Notably, however, the Bankruptcy Code does not define "transferee," "initial transferee," "immediate transferee," or "mediate transferee."[14] Generally, the party who receives a transfer of property directly from the debtor is the initial transferee.[15] Many courts, however, have found that a party acting as a "mere conduit" to facilitate a transfer from the debtor to a third party is not a "transferee" and, therefore, not the initial transferee.[16] Rather, these courts have held that the minimum requirement of status as a "transferee" is dominion or control over the property transferred.[17]

This distinction can be critical because, as noted above, a party that receives a transfer from the initial recipient of a fraudulent transfer may ultimately find itself in the position of defending a transaction as an initial transferee.[18] Moreover, it is possible that a trustee may seek to employ the conduit theory offensively to "bypass an intermediary" in an attempt to prevent a party from accessing a complete defense to an avoidance action under section 550(b).[19]

SUBSEQUENT TRANSFEREE LIABILITY IN GENERATION RESOURCES

In the 2020 decision in *Generation Resources Holding Co. LLC*,[20] the Tenth Circuit held that to qualify as a subsequent transferee under section 550(b) a party must have received the "property transferred" by the debtor.

Generation Resources Holding Company, LLC ("Generation Resources") developed three wind power projects in Pennsylvania, known as Stonycreek, Forward, and Lookout.[21] In February 2004, Generation Resources entered discussions with Edison Capital ("Edison") about selling the projects to Edison.[22] In November 2005, Generation Resources created Lookout Windpower Holding Company, LLC ("LWHC") and Forward Windpower Holding Company, LLC ("FWHC").[23] Later that month, Generation Resources became unable to pay its debts, and in December 2005 Generation Resource's insiders circulated among themselves revised development agreements, which had the effect of transferring Generation Resource's rights to payment under the contract with Edison to LWHC and FWHC.[24] In April 2008, Generation Resources filed for

[12] 11 U.S.C. § 550(b)(2).

[13] 11 U.S.C. § 101(54).

[14] *In re Montross*, 209 B.R. 943, 948 (B.A.P. 9th Cir. 1997). Section 550 refers to "initial transferees" and any "immediate or mediate or transferees of such initial transferee." Immediate or mediate transferees of the initial transferee are often referred to in practice — and throughout this article — as "subsequent transferees."

[15] 5 COLLIER ON BANKRUPTCY ¶ 550.02.

[16] *In re International Administrative Services, Inc.*, 408 F.3d 689, 705 (11th Cir. 2005) (noting that courts have created a "malleable approach to § 550(a), recognizing that such a 'mere conduit' cannot be considered an 'initial recipient' for purposes of an avoidance action").

[17] *See, e.g., Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988) ("the minimum requirement of status as a 'transferee' is dominion over the money or other asset, the right to put the money to one's own purposes. When A gives a check to B as agent for C, then C is the 'initial transferee;' the agent may be disregarded"); *but see In re Bicom NY, LLC*, Case No. 21-1821, 2022 WL 1419997 (2nd Cir. 2022), a recent nonprecedential, *per curiam* opinion of the 2nd Circuit affirming a bankruptcy court's determination, 619 B.R. 795 (Bankr. S.D.N.Y.), wherein the court ruled that a co-owner of a joint bank account was not liable as an initial transferee even though she had the ability to exercise dominion and control over the account because she had no knowledge that the funds had been deposited into the account before such funds were transferred by the other co-owner to another entity.

[18] *See, e.g., In re International Administrative Services, Inc.*, 408 F.3d at 705 ("the party who receives the property from the conduit is likely to be considered the 'initial transferee,' albeit several steps removed"); *see also In re Granada, Inc.*, 156 B.R. 303 (D. Utah 1990) ("a creditor who received a preference payment from a conduit is liable as an initial transferee. This prevents the creditor from raising the defense provided in § 550(b) for subsequent transferees.").

[19] *Id.* at 307 (note, however, that the court ultimately denied the trustee's attempt to use the "mere conduit" theory offensively).

[20] 964 F.3d 958 (10th Cir. 2020).

[21] *Id.* at 962.

[22] *Id.*

[23] *Id.*

[24] *Id.*

bankruptcy in Kansas and a trustee (the "Generation Resources Trustee") was appointed.[25]

In November 2008, LWHC asserted that the Lookout project was operational and demanded payment from Edison.[26] Edison unilaterally reduced the payment to LWHC from approximately $10 million to $5.5 million "due to delays in construction and increased costs attributable to LWHC."[27] LWHC disputed these reductions and, in December 2008, LWHC hired Husch Blackwell on a contingency fee arrangement to sue Edison for the remaining balance.[28] Husch Blackwell commenced a lawsuit against Edison in Pennsylvania federal district court in April 2009.[29] Shortly before commencing the suit, the Generation Resources Trustee notified LWHC that the trustee believed that the funds LWHC sought belonged to the bankruptcy estate.[30] In May 2011, the Generation Resources Trustee tried to enjoin LWHC from pursuing its lawsuit in Pennsylvania but was unsuccessful.[31] LWHC ultimately obtained a $9 million judgment against Edison in Pennsylvania federal district court.[32] The district court transferred enforcement of that judgment to the court overseeing Generation Resource's bankruptcy to determine "whether the judgment, partially or completely, is part of the bankruptcy estate."[33] Edison deposited funds in satisfaction of the judgment into the bankruptcy court's registry.[34]

LWHC then hired another law firm, Spencer Fane, to seek release of the funds on the ground that the award was not part of the bankruptcy estate.[35] The bankruptcy court ultimately held that the $9 million payment was not an estate asset and granted the request for the release of the funds, ruling that, if the Generation Resources Trustee "prevails on his fraudulent transfer claims, he then has the remedy of avoiding the fraudulent transfer."[36] The funds were released by the bankruptcy court, with most of the funds going to a bank account controlled by LWHC, whereafter LWHC paid certain obligations, including those owing to Spencer Fane and Husch Blackwell.[37]

The Generation Resources Trustee brought fraudulent transfer claims against the insiders of Generation Resources, LWHC, and FWHC.[38] The Generation Resources Trustee and Generation Resources insiders eventually negotiated a settlement reflected in a consent judgment avoiding the original transfer of rights to certain payments under the development contracts from Generation Resources to LWHC and FWHC.[39] However, the Generation Resources Trustee was unable to recover against LWHC, and, at the time of the decision, the Generation Resources Trustee claimed he had not recovered any of the LWHC funds "from any source."[40] The Generation Resources Trustee then sued the law firms, seeking to hold them liable under section 550 as subsequent transferees.[41] The law firms moved to dismiss, and the bankruptcy court denied the motion, reasoning that the law firms had received proceeds of Generation Resources fraudulent transfer of the Edison receivable to LWHC and were therefore subsequent transferees.[42]

The United States Bankruptcy Court for the District of Kansas denied the law firms' motions to dismiss.[43] On appeal, the Tenth Circuit reversed. According to the Tenth Circuit, in order to succeed on a claim under section 550, (1) the claim must relate to a transfer avoided under the Bankruptcy Code, (2) the plaintiff must plausibly allege that it is seeking to recover "the property transferred" or "the value of such property" as required by the plain language of section 550(a), and (3)

[25] *In re Generation Resources Holding Co., LLC*, Case No. 08-20957 (Bankr. D. Kan.), ECF No. 1.

[26] *Generation Resources Holding Co., LLC*, 964 F.3d at 963.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 963–64.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 965.

[41] *Rajala v. Husch Blackwell LLP*, Adv. No. 18-06016 (Bankr. D. Kan.) ("Husch Blackwell Docket"), ECF No. 1, ¶¶ 153–159; *Rajala v. Spencer Fane, LLP*, Adv. No. 18-06020 (Bankr. D. Kan.) ("Spencer Fane Docket"), ECF No. 1, ¶¶ 155–160.

[42] Husch Blackwell Docket, ECF No. 21 at 7–8; Spencer Fane Docket, ECF No. 19, at 8–9.

[43] *In re Generation Resources Holding Co., LLC*, 604 B.R. 896 (Bankr. D. Kan. 2019).

the defendant is the "the initial transferee," "the entity for whose benefit such transfer was made," or "any immediate or mediate transferee of such initial transferee" as required by section 550(a).[44]

Because section 550 entitles a trustee to recover "the property transferred" from the transferee(s), the court first sought to identify the property that was transferred.[45] The court interpreted this to mean the property fraudulently transferred in the first instance.[46] Here, that property was the receivable payable to Generation Resources by Edison, which Generation Resources had transferred to LWHC.[47] The "initial transferee" of the receivable was therefore LWHC.[48] However, the law firms, the court held, were not transferees of the receivable.[49] Instead, the firms received funds from LWHC after LWHC had received payment on the receivables from the account debtor (Edison).[50] Those funds, the court held, were "distinct 'from the property transferred,' which in section 550 refers only to that property that changed hands as part of the avoided transfer."[51] Indeed, the court acknowledged that the funds paid to the firms were "proceeds" of the receivable paid by Edison.[52] However, the court reasoned that while "proceeds" are included in a debtor's bankruptcy estate, such proceeds were not recoverable from the law firms under section 550 of the Bankruptcy Code.[53] The court ruled that in order to qualify as a subsequent transferee a party must actually receive the underlying property transferred as opposed to proceeds of that property.[54]

Put another way, the Tenth Circuit ruled that had LWHC assigned the receivable to the law firms, the trustee could have sought to recover the receivable or its value from the law firms, but because the law firms never acquired the receivable, the firms were not subsequent transferees for the purposes of section 550.

INSIGHTS AND IMPLICATIONS

The holding in *Generation Resources* is significant, as the ruling completely insulates from attack third parties that knowingly transact with the recipient of a fraudulent transfer that has liquidated or bartered away the property received from the debtor before transacting with the third party. As such, the Tenth Circuit's interpretation threatens to undermine one of the fundamental tools of a bankruptcy trustee to maximize the value of the bankruptcy estate for the benefit of creditors.

SUBSEQUENT TRANSFEREE LIABILITY IN GIANT GRAY

In contrast to the *Generation Resources* case, less than six months later, Judge Rodriguez of the United States Bankruptcy Court for the Southern District of Texas issued a decision in *In re Giant Gray, Inc.*[55] that rejects the Tenth Circuit's approach and essentially provides that any party that transacts with an initial transferee of a fraudulent transfer could theoretically be liable as a subsequent transferee of the initial transferee. More specifically, the *Giant Gray* decision held that while an initial transfer must necessarily involve the transferred property itself, the same restriction is not placed on subsequent transferees.[56] Instead, to be a

[44] *Generation Resources Holding Co., LLC*, 964 F.3d at 965–66.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at 967.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 966.

[53] *Id.* at 968.

[54] *Id.* (In response to the argument of the Generation Resources Trustee that the reference to "property transferred" in section 550(a) included proceeds of such property, the court looked to section 541(a) of the Bankruptcy Code which defines "property of the estate." Analyzing the seven categories of property identified in section 541(a), the court noted that "property that the trustee recovers under section…550" was categorized in

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section 541(a)(3) while "proceeds … of or from property of the estate" was separately categorized in section 541(a)(6). From this distinction the court reasoned "if proceeds were already available under section 550, there would be no reason to list them separately under section 541." *Id.* It is not clear why the Tenth Circuit concluded that the inclusion of "proceeds" in the definition of property transferred under section 550 would obviate the need for a separate reference to proceeds in section 541(a)(6), because to do so would limit estate property to only those proceeds that were generated though recovery actions initiated by the trustee and would exclude, *inter alia*, proceeds generated by a post-petition sale of a debtor's pre-petition inventory).

[55] 629 B.R. 814 (Bankr. S.D. Tex. 2020).

[56] *Id.* at 846.

subsequent transferee, "one need only be a transferee of the initial transferee."[57]

In *Giant Gray*, the founder of a software company, a privately held company largely owned by third-party investor shareholders, sought an exit in 2015 through a sale of the company.[58] The founder, who held only three per cent of the company's equity approached an old ally, Assed "Ozzie" Kalil ("Kalil"), who, along with Michael J. O'Donnell ("O'Donnell"), agreed to help the founder find a buyer.[59] However, the founder determined that shareholder approval of a sale would be difficult to obtain and would not produce the return desired for him personally.[60] In an effort to facilitate a sale transaction and to extract greater value for himself, the founder caused the company to issue 1,000 shares of convertible preferred stock to himself.[61] As purported consideration for the issuance of stock, the founder entered into an employment agreement with Giant Gray.[62]

In July 2015, after the convertible stock was issued, the founder entered an agreement to sell the stock for $15 million to Pepperwood Fund II, LP ("Pepperwood II"), a vehicle created by Kalil and O'Donnell and funded by third-party investors.[63] Of the $15 million purchase price, the founder directed that $5 million be payable as a referral fee to a separate entity established by Kalil and O'Donnell (the "Referral Agent").[64] In addition, on the same day that the founder received the balance of the purchase price, he made several transfers of funds to his children.[65]

The chapter 7 trustee (the "Giant Gray Trustee") asserted that at the time of the issuance of the convertible stock, the company owed millions of dollars to noteholders that it could not pay.[66] However, the company did not become subject to a bankruptcy proceeding until three years later when an involuntary Chapter 7 bankruptcy petition was filed against the company on April 13, 2018,[67] whereupon the Giant Gray Trustee was appointed.[68] On May 12, 2020, the Giant Gray Trustee filed separate complaints pursuant to the Texas Uniform Fraudulent Transfer Act and sections 544 and 550(a) of the Bankruptcy Code against the founder's children, the Referral Agent, Kalil, and O'Donnell (collectively, the "Defendants").[69] In total, the Giant Gray Trustee sought to avoid and recover more than $6 million from the Defendants as subsequent transferees of the alleged fraudulent transfer of the convertible stock.[70] The Defendants moved to dismiss.[71]

The Defendants asserted, among other things, that they were not subsequent transferees because they possessed proceeds from the stock sale to Pepperwood II, not the property itself (i.e., the convertible stock) or the value of the property.[72] In response, the Giant Gray Trustee argued that, if the convertible stock was property of the estate, so too were the proceeds from the sale of that stock.[73] The bankruptcy court rejected the Defendants' argument, reasoning that parties "are subject to recovery actions [as subsequent transferees] based solely on their relationship with the initial transferee," rather than their relationship to the property transferred.[74] Accordingly, the court held that as long as the Defendants received a transfer from the initial transferee, the Giant Gray Trustee could recover from the Defendants unless they are able to establish a subsequent transferee defense under section 550(b).[75] The bankruptcy court further reasoned that, to hold otherwise, "[t]ransferees could take with knowledge of the voidability of the transfer, in bad faith, or without

[57] *Id.*

[58] *Id.* at 824.

[59] *Id.*

[60] *Id.* at 825.

[61] *Id.*

[62] *Id.* The Giant Gray Trustee (defined below) alleged that the founder did not provide reasonably equivalent value under the employment agreement because, *inter alia*, it merely installed the founder as chairman of the board of directors of the company but did not require duties other than those typically required of a board chairman.

[63] *Id.* at 825–26.

[64] *Id.* at 826.

[65] *Id.*

[66] *Id.* at 828.

[67] *Id.* at 824.

[68] *Id.*

[69] *Id.* at 820.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 841.

[73] *Id.* at 843.

[74] *Id.* at 846.

[75] *Id.*

providing value, and escape unscathed with property properly belonging to a debtor."[76]

The Defendants also argued that the Giant Gray Trustee failed to bring an action under section 548 to avoid the transfer of convertible stock to the founder, as the initial transferee.[77] As such, the Defendants argued, the Giant Gray Trustee had failed to satisfy the requirements of section 550, which allows recovery "to the extant a transfer is *avoided*," not "to the extent a transfer is *avoidable*."[78] The court rejected this argument, holding that section 550 does not require a trustee to bring an action against the initial transferee in order to recover from subsequent transferees.[79] Instead, the inclusion of the phrase "to the extent that a transfer is avoided" in section 550 merely means that any recovery from the Defendants "will be limited by certain subsections (aka safe harbor provisions) within the avoidance sections that limit the amount of a transfer that could be statutorily avoided."[80]

INSIGHTS AND IMPLICATIONS

The ruling in *Giant Gray* provides a trustee with broad power to pursue any party that transacts with an initial transferee as a subsequent transferee, although the court noted it is "unlikely that a trustee would bring an action against a transferee that almost certainly has a good faith defense" and "even if a trustee did, the transferee could assert the defense and exit the litigation promptly."[81]

As the rulings in *Giant Gray* were on preliminary motions (1) to dismiss, (2) for a more definite statement, and (3) for leave to amend the complaint, the court did not have the opportunity to address some interesting questions in respect of the facts as alleged in the complaint and the motions. For example, as the stock was sold by the founder for $15 million and the company did not enter bankruptcy until three years after the sale, it is not easy to comprehend how the company could have been insolvent at the time of the transfer or rendered insolvent by the issuance of the stock (which presumably would only have value to the extent of the company's surplus). While it seems likely that the issuance of convertible preferred stock and subsequent sale by the founder to Pepperwood II could form the basis of an intentional fraud claim by Giant Gray's third-party shareholders, it is less clear how a fraudulent transfer claim could be established by the Giant Gray Trustee.[82]

CONCLUSION

The decisions in *Generation Resources* and *Giant Gray* provide interesting and divergent standards of transferee liability under fraudulent transfer law. The Tenth Circuit's approach in *Generation Resources* imposes an extreme limitation on the ability of a trustee to enhance an estate by perusing claims against recipients of fraudulent transfers, particularly in the case of fraudulently transferred receivables and other rights of payment from third parties. Although the *Giant Gray* ruling may result in more parties having to defend against avoidance actions as subsequent transferees, we agree with Judge Rodriguez that trustees are not likely to pursue parties that transact with an initial transferee without some indication that the defendant paid less than fair value and so must lack a good faith defense. Moreover, even in rare cases where such an action is brought, it should not be difficult for a third party that casually transacts with an initial transferee to establish its entitlement to the defense. ■

[76] *Id.* at 847.

[77] *Id.* at 829.

[78] *Id.*

[79] *Id.* at 832.

[80] *Id.*

[81] *Id.* at 847.

[82] The Giant Gray Trustee reached separate settlement agreements with the various Defendants resulting in the dismissal of the underlying actions. In support of the requests to settle the various cases, the Giant Gray Trustee acknowledged a split of authority on the question of whether the convertible stock transferred to the founder constituted property of the estate. See, e.g., *In re Giant Gray, Inc*., No. 18-31910 (Bankr. S.D. Tex.) ("Giant Gray Docket"), ECF No. 285, ¶ 31. Further, the Giant Gray Trustee noted that the Generation Resources decision by the Tenth Circuit created a possibility that the bankruptcy court's decision in the Giant Gray case might be overturned on appeal. Id., ¶ 32.

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