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UNITED STATES  
DISTRICT COURT  
DISTRICT OF UTAH

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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH - CENTRAL DIVISION

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85PA-0099

In re:

CALVIN ARTHUR HENNINGSEN,  
Debtor.

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L&M NEVADA, LTD.,  
Debtor.

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L&M ELECTRICAL CONTRACTORS, INC.,  
Debtor.

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STEPHEN W. RUPP, Trustee,  
Appellee,

vs.

CODALE ELECTRIC SUPPLY, INC.  
Appellant.

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MEMORANDUM DECISION  
AND ORDER

Civil No. 87-C-0772G

This matter came before the court on March 18, 1988, pursuant to 28 U.S.C. § 158(a), on appellant Codale Electric Company's ("Codale") appeal from final judgment of the United States Bankruptcy Court for the District of Utah. Codale was represented by John L. McCoy. Stephen W. Rupp, Trustee for the bankruptcy estate of L&M Electrical Contractors, Inc. (L&M) was represented by Scott C. Pierce. Counsel for both parties submitted memoranda and presented oral argument, after which the court took the matter under advisement. Being now fully advised, the court enters its Memorandum Decision and Order.

FACTUAL BACKGROUND

Appellant Codale, an electrical wholesale supplier, furnished electrical equipment and materials to L&M, an electrical contractor, on an open account for use on building construction projects. On February 7, 1983, L&M filed a petition under Chapter 7 of the bankruptcy code naming Stephen W. Rupp, appellee herein, as trustee of the bankruptcy estate. Therefore, the ninety-day statutory preference period<sup>1</sup> began on November 9, 1982. During the preference period Codale received eight

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<sup>1</sup> 11 U.S.C. § 547(b) provides:

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor--

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made--
  - (A) on or within 90 days before the date of the filing of the petition; or
  - (B) between ninety days and one year before the date of the filing of the petition if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if--
  - (A) the case were a case under chapter 7 of this title;
  - (B) the transfer had not been made; and
  - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The parties do not dispute that the five statutory requirements of section 547(b) for an avoidable transfer have been met. The controversy in this case involves the exceptions to the trustee's avoidance power under section 547(c).

payments from L&M for a total of \$60,945.79.<sup>2</sup> On February 6, 1985 the trustee filed this action to recover the majority of these funds as alleged preferential transfers. The bankruptcy court held for the trustee, awarding him \$50,024.64 as preferential payments. This appeal followed.

#### ANALYSIS

##### A. The Delivery Issue

Codale raises several affirmative defenses on appeal.

First, Codale disputes the date of transfer of one of the alleged

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<sup>2</sup> Codale received the following payments from L&M within the 90-day preference period:

1. Check No. 8295 drawn on L&M's account at the Citizen's Bank in Ogden, Utah in the amount of \$4,000 received on November 18, 1982.

2. A cashier's check drawn on the Bank of Utah, South Ogden Branch, No. 59436 in the amount of \$22,564.99 received on November 22, 1982.

3. Check No. 1037 drawn on L&M's account at the Citizen's Bank in Ogden, Utah, in the amount of \$18,756.94 received on December 8, 1982.

4. Check No. 1039 drawn on L&M's account at the Citizen's Bank in Ogden, Utah, in the amount of \$452.81 received on December 8, 1982.

5. Check No. 2498 drawn on the account of Calvin Henningsen d/b/a Mr. Electric in the amount of \$3,160.80 received on December 8, 1982.

6. Check No. 1135 drawn on L&M's account at the Citizen's Bank in Ogden, Utah in the amount of \$2,275.25 received December 29, 1982.

7. Check No. 8471 drawn on L&M's account at the Citizen's Bank in Ogden, Utah, in the amount of \$3,642.32 received on January 18, 1983.

8. Check No. 8531 drawn on the debtor's account at the Citizen's Bank in Ogden, Utah, in the amount of \$10,000 received on February 3, 1983.

Record at 137-44.

preferential payments. Codale argues that a payment of \$22,564.99 in the form of a check drawn on L&M's account was not a preferential transfer because payment allegedly was made on November 8, 1982, outside of the statutory preference period. On the other hand, the trustee contends that the payment in fact was a preferential transfer because that particular check did not clear the bank and had to be replaced by a cashier's check for the same amount on November 22, 1982, within the statutory period. The leading case in this circuit for determining when a transfer of funds by check is effective is In re White River Corp., 799 F.2d 631 (10th Cir. 1986). In that case, the court held that "a transfer occurs upon delivery of the check." Id. at 631; see also Continental Commodities, Inc. v. Smith Metal and Iron Co., 841 F.2d 527, 530 (4th Cir. 1988); O'Neill v. Nestle Libbys P.R., Inc., 729 F.2d 35, 38 (1st Cir. 1984).<sup>3</sup> However,

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<sup>3</sup> The courts are split regarding the effective date of a transfer of funds by check. Some courts adhering to the tenth circuit's position hold that the date of delivery constitutes the date of transfer. See e.g., In re Wolf & Vine, 825 F.2d 197, 200-01 (9th Cir. 1987); In re Fuel Oil Supply and Terminaling, Inc., 72 B.R. 752, 763-64 (S.D. Tex. 1987), rev'd on other grounds, 837 F.2d 224 (5th Cir. 1988); In re All American of Ashburn, Inc., 65 B.R. 303, 305 (Bankr. N.D. Ga. 1986); In re Fasano/Harriss Pie Co., 43 B.R. 871, 874-76 (Bankr. W.D. Mich. 1984). Other courts reason that the date the check is honored constitutes the date of transfer. See e.g., Nicholson v. First Investment Co., 705 F.2d 410, 412-13 (11th Cir. 1983); In re Hartwig Poultry, Inc., 70 B.R. 748, 751-52 (Bankr. N.D. Ohio 1987); In re Staveco Electric Constr. Co., 48 B.R. 247, 250 (Bankr. N.J. 1985); In re Naudain, Inc., 32 B.R. 871, 874 (Bankr. E.D. Pa. 1983); In re Advance Glove Mfg. Co., 25 B.R. 521, 524-29 (Bankr. E.D. Mich. 1982).

the White River court limited its holding by stating that "the check must be presented for payment with 'the 30-day period deemed reasonable under the U.C.C.' and honored upon presentment in order for the delivery date to be considered the time of transfer." White River, 700 F.2d at 634 (emphasis added) (quoting O'Neill, 729 F.2d at 38). Thus, it is clear that the only way the date of transfer of the \$22,564.99 payment would have been November 8th is if the bank had honored the check upon presentment. Because the bank returned the check for insufficient funds, the effective date of the transfer was November 22nd, the date that Codale received the replacement cashier's check.

B. The Proper Amount of New Value Setoff Against the Preference Amount Under Section 547(c)(4)

Codale's second argument is that it should be permitted to offset subsequent unsecured credit that it advanced to L&M against the preference amount under 11 U.S.C. § 547(c)(4).<sup>4</sup> The

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<sup>4</sup> 11 U.S.C. § 547(c)(4) provides:

(c) The trustee may not avoid under this section a transfer--

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor--

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor

trustee concedes that Codale gave "new value" to L&M within the meaning of sections 547(c)(4) and 547(a)(2).<sup>5</sup> The amount of the setoff is in dispute, however. The trustee argues that because the date of transfer of the \$22,564.99 payment is November 22, 1982, any charges made by L&M on its open account between November 8th and November 22nd cannot be included in the amount of the setoff as urged by Codale.

The following events must have taken place for a creditor to assert successfully the affirmative defense of section 547(c)(4). First, the creditor must have obtained a payment which would otherwise be preferential under section 547(b). Second, the creditor must extend subsequent unsecured credit to the debtor. Third, the unsecured credit advanced to the debtor must be unpaid as of the date of the petition. See In re Almarc Mfg., Inc., 62 B.R. 684, 686 (Bankr. N.D. Ill. 1986); In re American Int'l Airways, Inc., 56 B.R. 551, 554 (Bankr. E.D. Pa. 1986); In re Formed Tubes, Inc., 46 B.R. 645, 647 (Bankr. E.D. Mich. 1985); In re Columbia Packing Co., 44 B.R. 613, 615

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<sup>5</sup> 11 U.S.C. § 547(a)(2) provides:

"New Value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation.

(Bankr. D. Mass 1984); In re Quality Plastics, Inc., 41 B.R. 241, 242 (Bankr. W.D. Mich. 1984). Only if these three requirements are met may Codale setoff the amount of subsequent unsecured credit it advanced to L&M against the amount which Codale must restore to the bankruptcy estate as preferential payments.

The total amount of payments received by Codale which would otherwise be voidable as preferential under section 547(b) is \$60,945.79. The proper amount of the setoff can be calculated from Codale's own billing statements which list all subsequent unsecured credit extended to L&M which remained unpaid on February 7, 1983, the date the petition was filed. As noted above the date of transfer of the \$22,564.99 payment was November 22, 1982, when Codale received delivery of the cashier's check which was honored by the bank. Therefore, any unsecured credit extended to L&M by Codale on L&M's open account between November 8th and November 22nd is not included in the amount of the setoff. Codale's billing statements reveal the only new value for which payment was not received by Codale within the ninety day statutory period. By adding these charges together, the correct amount of credit is \$10,921.15, which leaves a total of \$50,024.84 as the preference amount.

C. Release of Lien Rights as New Value Under Section 547(c)(1)

As a third defense to the trustee's avoidance power, Codale relies upon 11 U.S.C. § 547(c)(1).<sup>6</sup> Codale argues that it gave "new value" to L&M by releasing mechanics' lien rights and bond rights against L&M.<sup>7</sup> In In re George Rodman, Inc., 792 F.2d 125 (10th Cir. 1986) the court held that a release of a lien on an oil well in exchange for payment represented a contemporaneous exchange for new value under section 547(c)(1). Id. at 127. During the preference period, the debtor paid \$238,000 to one of its suppliers in exchange for the release of liens actually filed

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<sup>6</sup> 11 U.S.C. § 547(c)(1) provides:

(c) The trustee may not avoid under this section a transfer--

- (1) to the extent that such transfer was
- (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
  - (B) in fact a substantially contemporaneous exchange.

(emphasis added).

<sup>7</sup> Some courts agree with Codale, holding that relinquishment of a statutory lien constitutes new value. See e.g., In re George Rodman, Inc., 792 F.2d 125, 127 (10th Cir. 1986); Matter of Anderson Plumbing Co., 71 B.R. 19, 20 (Bankr. E.D. Cal. 1986); In re Mason and Dixon Lines, 65 B.R. 973, 978-979 (Bankr. M.D.N.C. 1986); In re Advanced Contractors, 44 B.R. 239, 241 (Bankr. M.D. Fla. 1984); In re Dick Henley, Inc., 38 B.R. 210, 213 (Bankr. M.D. La. (1984); In re Johnson, 25 B.R. 889, 892-894 (Bankr. E.D. Tenn. 1982). Other courts, however, hold that a release of a statutory lien does not constitute new value. See e.g., In re H&S Transp. Co., 80 B.R. 441, 447 (M.D. Tenn. 1987); In re Fuel Oil Supply and Terminaling, Inc., 72 B.R. 752 (S.D. Tex. 1987), rev'd, 837 F.2d 224 (5th Cir. 1988); Matter of Control Electric, Inc., 66 B.R. 626-627 (Bankr. N.D. Gas. 1986).



against the oil well. It was undisputed that the liens were valid. Id. Here, by contrast, there is no evidence that Codale actually and formally released valid lien and bond rights on specific properties in exchange for payment. Moreover, Codale has failed to demonstrate how this alleged new value was "given to the debtor" as required by Section 547(c)(1). The new value, if any, was given to third parties such as the property owners and prime contractors, not to the debtor. Accordingly, the court concludes that under the facts and circumstances in this case the section 547(c)(1) defense does not apply here.

D. Retroactive Application of Section 547(c)(2)

The last defense articulated by Codale is that the transfers in question fall within the scope of 11 U.S.C. § 547(c)(2).<sup>8</sup> Codale argues that the 1984 amended version of section 547(c)(2) should be applied retroactively to this action so that Codale can apply payments received from L&M to debts incurred within forty-five days of the payments. Until this provision was amended by the 1984 Bankruptcy Amendments and Federal Judgeship Act, Public Law 98-353 ("BAFJA"), section 547(c)(2) read:

(c) The trustee may not avoid under this section a transfer--

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<sup>8</sup> Section 547(c)(2) protects the creditor from the trustee's avoidance power where an otherwise preferential credit transaction is incurred and paid in the ordinary course of the business of the debtor and the debtor's transferee. See 4 COLLIER ON BANKRUPTCY § 547.10 (15th ed. 1988).

- (2) to the extent that such transfer was--
- (A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;
  - (B) made not later than 45 days after such debt was incurred;
  - (C) made in the ordinary course of business of financial affairs of the debtor and the transferee; and
  - (D) made according to ordinary terms.

(emphasis added). In 1984, Congress repealed the requirement of section 547(c)(2)(B) that the alleged preferential payments be transferred within forty-five days of the respective dates that the debts for which they made payment were incurred.

The court's analysis must begin by acknowledging the presumption against retroactive application of statutes. In United States v. Security Indus. Bank, 459 U.S. 70 (1982), the Supreme Court stated:

The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student . . . This Court has often pointed out: "[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past. . . . The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'"

Id. at 79 (citations omitted) (quoting Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913)). Thus, it

must be determined whether Congress, in BAFJA, has overridden the usual presumption against retroactive application. Indeed, just the opposite is true with respect to section 547(c)(2). The 1984 Act, as set forth in a note under 11 U.S.C. § 101, specifies that the foregoing amendment, among others, "shall become effective to cases filed 90 days after the enactment of this Act." The 90th day after the date of enactment of the 1984 Act was October 8, 1984.<sup>9</sup> This case was filed on February 7, 1983, more than a year and one-half before the effective date of the amendment.

Codale urges that the relevant date for retroactive application of the 1984 amendment should be the date this adversary proceeding was filed, February 6, 1985, as if Congress had specified in the above quoted effective date provision that the Amendment was to apply to "adversary proceedings" filed on or after October 8, 1984 rather than bankruptcy "cases" filed on or after that date. There is no reason to assume that Congress by using the word "cases" meant anything other than the original filing of bankruptcy cases. Accordingly, the court concludes

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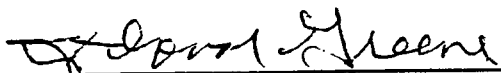
<sup>9</sup> Codale relies upon In re George Rodman, Inc., 792 F.2d 125, for the proposition that this court should apply the 1984 amended version of section 547(c)(2). In Rodman, the court noted, "an appellate court should 'apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.'" Id. at 127 n.5 (emphasis added) (quoting Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974)). By clearly setting forth the effective date of the 1984 Amendment as October 8, 1984, Congress has expressed such a contrary intent.

that the 1984 Amendment has no application to the adversary proceeding arising in this bankruptcy case. See In re Art Shirt Ltd., Inc., 68 B.R. 316, 323-24 (Bankr. E.D. Pa. 1986); In re Tucker Freight Lines, Inc., 62 B.R. 210, 213 (Bankr. W.D. Mich. 1986); In re Chase & Sanborn Corp., 51 B.R. 736, 737-38 (Bankr. S.D. Fla. 1985).

For the reasons set forth herein, the decision of the bankruptcy court is affirmed in its entirety.

This Memorandum Decision and Order will suffice as the court's final action on this matter; no further Order need be prepared by counsel.

DATED: August 15, 1988.

  
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J. THOMAS GREENE  
UNITED STATES DISTRICT JUDGE

COPIES TO: 8-16-88jm

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