UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

IN RE
JOSEPH GUERRY WILSON, JR.,
Debtor.

Case No. 96-27231-WHB
Chapter 7

AT&T UNIVERSAL CARD SERVICES,
Plaintiff,

v.

Adversary Proc. No. 96-0972

JOSEPH GUERRY WILSON, JR.,
Defendant.

MEMORANDUM OPINION
ON COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

The plaintiff AT&T Universal Card Services (AT&T) filed its complaint to determine the dischargeability of the debtor's credit card debt in the amount of $5,572.92, plus interest and attorney's fees, and the complaint alleges an exception pursuant to 11 U.S.C.A. § 523(a)(2)(A) and (B). Section 523(a)(2)(C) is not alleged. The defendant filed his answer, and the parties engaged in extensive discovery. A settlement conference before another bankruptcy judge was unsuccessful, and a trial was held on August 5, 1997, after which the Court took the issues under advisement. This memorandum opinion is entered with its findings of fact and conclusions of law, pursuant to FED. R. BANKR. P. 7052.

APPLICABLE LAW

The complaint relies upon § 523(a)(2)(A) and (B) of the Bankruptcy Code as the applicable exceptions from discharge. Those sections provide that the following debts shall be excepted from a chapter 7 debtor's general discharge:

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by--
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
> (B) use of a statement in writing--
> (i) that is materially false;
> (ii) respecting the debtor's or an insider's financial condition;
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive....

11 U.S.C.A. § 523(a)(2)(A), (B).

There is no controlling authority on the particular facts of this case in the Sixth Circuit; however, the Court of Appeals for this Circuit has given some guidance in its § 523(a)(2) decisions. The facts of each case are unique, and the parties agree that the dischargeability of the debt in this proceeding depends upon an examination of all of the facts and circumstances. In Manufacturer's Hanover Trust Co. v. Ward (In re Ward), 857 F.2d 1082 (6th Cir. 1988), the Court of Appeals held that the following elements must be established in order to support an exception to discharge under § 523(a)(2)(A), when based upon false representations:

> [T]he creditor must prove that the debtor obtained money through a material misrepresentation that at the time the debtor knew was false or made with gross recklessness as to the truth. The creditor must also prove the debtor's intent to deceive. Moreover, the creditor must prove that it reasonably relied on the false representation and that its reliance was the proximate cause of loss.

857 F.2d at 1083 (quoting Coman v. Phillips (In re Phillips), 804 F.2d 930, 932 (6th Cir. 1986)). In addition to false representations or false pretenses, § 523(a)(2) includes actual fraud as a basis for excepting a debt from discharge.

The Ward opinion and its dissent principally discussed the requirement that the creditor reasonably rely upon the debtor's misrepresentation, false pretense, or fraud. There was no focus by

the parties to this proceeding on the issue of this creditor's reliance, but the Supreme Court has recently held that a creditor's reliance must be measured by a justifiable rather than reasonable standard. Field v. Mans, ____ U.S. ____, 116 S. Ct. 437, 133 L.Ed.2d 351 (1995). In so holding, the Supreme Court stated that Congress used the terms "false pretenses," "false representations," and "actual fraud" in their common law meanings. 116 S.Ct. at 443. The Supreme Court's adoption of the common law use of justifiable reliance requires a subjective analysis of each case's facts and circumstances in reference the creditor's reliance upon a debtor's false pretenses, false representation, or actual fraud. This type of analysis fits well with the totality of circumstances examination that this Court has adopted for § 523(a)(2)(A) complaints in general.

A totality of circumstances approach to complaints filed by credit card issuers is one of the four approaches that courts have used to determine dischargeability of credit card debt. An excellent paper that discusses these four theories has been written by one of the judicial law clerks in this District, Abigail Gerlach, "The Dischargeability of Credit Card Gambling Debt Under 11 U.S.C. § 523(a)(2)(A)," which paper has been accepted for publication by the University of Memphis Law Review. The implied representation theory has been used by some courts. Under this theory, a credit card customer makes an implied representation of both intent and ability to repay the incurred debt with each use of the card. See, e.g., American Express v. McKinnon (In re McKinnon), 192 B.R. 768 (Bankr. N. D. Ala. 1996). Lack of intent, for purposes of this theory, may be inferred from all of the circumstances or it may be found in the debtor's actual inability to repay the debt when it was incurred. FCC National Bank v. Bartlett (In re Bartlett), 128 B.R. 775 (Bankr. W.D. Mo. 1991). Under the assumption of risk theory, used by a minority of courts and principally in the Eleventh Circuit, the card issuer assumes all of the risks of the customer's use until the issuer revokes the

card. First National Bank of Mobile v. Roddenberry, 701 F.2d 927 (11th Cir. 1983). Under a subjective approach, some courts examine the debtor's intent to repay using the totality of circumstances examination, but with a focus on the intent of the particular debtor, with all of his or her frailties, at the time of the credit card transaction. Thus, under Anastas v. American Savings Bank (In re Anastas), 94 F.3d 1280 (9th Cir. 1996), that Court found a debtor who had an admitted gambling problem to still have had the intent to repay the debt when the credit card was used for cash advances and gambling.

This Court has chosen to use the fourth, totality of circumstances, approach to the § 523(a)(2)(A) element of this complaint, looking at all of the relevant factors presented by the proof in this proceeding. A nonexclusive list of some factors that courts have considered is found in Citibank v. Eashai (In re Eashai), 87 F.3d 1082 (9th Cir. 1996):

> 1. The length of time between the charges made and the filing of bankruptcy;
> 2. Whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made;
> 3. The number of charges made;
> 4. The amount of the charges;
> 5. The financial condition of the debtor at the time the charges are made;
> 6. Whether the charges were above the credit limit of the account;
> 7. Whether the debtor made multiple charges on the same day;
> 8. Whether or not the debtor was employed;
> 9. The debtor's prospects for employment;
> 10. Financial sophistication of the debtor;
> 11. Whether there was a sudden change in the debtor's buying habits; and
> 12. Whether the purchases were for luxuries or necessities.

87 F.3d at 1087-88 (quoting Citibank v. Dougherty (In re Dougherty), 84 B.R. 653, 657 (Bankr. 9th Cir. 1988)).

Under this type of analysis, no one factor is determinative, and these factors address the debtor's intent. The trial court may and should consider any other factors presented by the proof

in an evaluation of the debtor's intent, and one factor may outweigh others in a particular case. Assuming that the debtor's intent to misrepresent, to deceive, or defraud is established, the creditor must still prove justifiable reliance by the creditor on the debtor's representation, as well as damages resulting from that reliance.

For purposes of § 523(a)(2)(B), the statute sets out the elements, which specifically include a reasonable reliance prong. In that regard, the Sixth Circuit has said that once a materially false written financial statement has been established, "the reasonableness requirement of § 523(a)(2)(B) 'cannot be said to be a rigorous requirement, but rather is directed at creditors acting in bad faith.'" Bank One, Lexington, N.A. v. Woolum (In re Woolum), 979 F.2d 71, 76 (6th Cir. 1992) (quoting Martin v. Bank of Germantown (In re Martin), 761 F.2d 1163, 1166 (6th Cir. 1985)).

FACTS OF THIS PROCEEDING

There is no significant dispute of the relevant facts in this proceeding; rather, the dispute is one of what inferences should be drawn from the facts. The debtor has been a practicing attorney for 21 years, engaged principally in taxation, estate planning and probate work. He is also a certified public accountant, although he has never practiced accountancy and his licence is not active. The evidence clearly established that he is not the typical debtor; rather, he is highly educated, sophisticated in financial matters, and works in the financial area of the law. The evidence established that the debtor received an unsolicited, pre-approved credit card application in the mail. Exhibit A. The debtor voluntarily completed the application, signed it, and returned it to AT&T, which then verified with credit reporting agencies that the credit information it had obtained previously was unchanged. AT&T had obtained from those credit reporting agencies information on

individuals, including the debtor, who met the necessary credit profiles for pre-approval of credit applications. After verification of the application, AT&T issued a credit card to the debtor with a $5,000 line of credit. The debtor inserted on the application after "Annual Income $" the amount "70,000." This is the only part of the application that is alleged to be false. AT&T clearly relied upon the debtor's application and his stated income in issuing a credit card to him, and its reliance was justifiable. As the representative from AT&T testified, the debtor did not receive a pre-approved credit card, he received a pre-approved application for a card. By completing and signing the application, the debtor made representations to the creditor, including the express representation that he earned $70,000 annually and the implied representation that he intended to repay charges made by him with the card.[1] The debtor then began to use the card, and between May 29, 1995 and November 19, 1995, he made charges in approximately 70 transactions. Many of the charges were made on the same day or within a few days of each other. For example, between August 18 and September 13, 1995, 19 charges totaling $1,614.04 were made. At the end of the period at issue, the debtor had over-reached his credit limit, with a balance due on the account's December, 1996 statement of $5,572.92. Exhibit B. Interest has continued to accrue on this unpaid balance, until the debtor filed bankruptcy on June 13, 1996. As can be seen from these dates, no charges were made within the 60 days immediately preceding the bankruptcy filing; therefore, § 523(a)(2)(C) is not applicable and was not pleaded. Nevertheless, the plaintiff's proof showed that some of the account's charges were for luxury or non-essential items. For example, there were six transactions totaling $1,140 at The Gold Club of Memphis, an entertainment club that provides sports bar and

[1] The actual cardholder agreement was not introduced into evidence; thus, the Court does not know if there were express representations of repayment.

semi-nude female dancing services. Most of the volume of transactions were for more routine goods and services, provided by businesses ranging from restaurants to WalMart.

The debtor made only some of the minimum required payments on the account for some of the months August through November, 1995, although he was late in some of those payments resulting in late charges. In at least three of those months, he made no payment. An analysis of the account statements, Exhibit B, shows the following:

June 1995 statement:	Beginning balance -0-; 12 charges; ending balance $785.77
July 1995 statement:	6 charges totaling $415.45; $17.00 paid
August 1995 statement:	8 charges totaling $751.91; $60.00 paid
September 1995 statement:	19 charges totaling $1,614.04; $41.00 paid
October 1995 statement:	11 charges totaling $835.34; -0- paid
November 1995 statement:	16 charges totaling $968.70; $169.00 paid
December 1995 statement:	3 charges totaling $154.90; -0- paid; closing balance $5,572.92.

The pattern of uses shown in these statements and their underlying charges indicate that the debtor knew that he must maintain some minimal payments in order to retain the open status of the account and that he used the account rapidly until his credit limit was exceeded.

The debtor testified that at all times he intended to pay all of the charges incurred and that he made minimum payments until his assets were frozen by a Chancellor during divorce proceedings. The debtor's testimony obviously has weight; however, the Court has concluded that his testimony is not entitled to overcome the other proof. The debtor stated that he construed the Chancellor's orders, which apparently took effect at about the same time the debtor ceased use of this credit card but which were not admitted into evidence, to prohibit him from paying such creditors as AT&T. The debtor denied that he had an awareness of financial trouble until the divorce proceedings began in late 1995 and even then, he thought that he would negotiate a favorable divorce settlement.

According to his testimony, the debtor was unsuccessful and he was left with all of the family debt and custody of two minor children. The debtor, however, also testified that his financial troubles began in May, 1994 with his separation and that his wife filed for divorce in the Fall of 1994. The injunction was not issued until October, 1995. Even if the Court assumes that the debtor incorrectly used 1994 instead of 1995 as the time for initiation of his marital troubles, he was aware of his financial difficulty at least by May, 1995, and his use of this credit card began after that.

DISCUSSION

As stated earlier, the dispute in this proceeding is one of what inferences should be drawn from the facts. The plaintiff first points to the fact that the debtor is a knowledgeable professional who is more sophisticated than the typical debtor in bankruptcy. AT&T then points to the discrepancy in the June 5, 1994 application's statement that annual income is $70,000 and to the debtor's 1994 tax return showing only $34,339 in adjusted gross income. Exhibit E. In rebuttal, the debtor stated that he drew the $70,000 figure directly from his 1993 tax return, which does show an adjusted gross income of $78,867. Exhibit I. The debtor also testified that at the time he completed the application, he had not completed or filed his 1994 tax return and he did not know how much his income would be for the year. The Court does not find the debtor's testimony in this regard to be credible. An attorney and accountant, who makes his living doing tax and related legal work, would certainly have a sense of his on-going cash flow. Even though cash flow for such a professional will vary month to month, as the debtor testified, such a professional would have to know whether this year's cash flow measured up to last year's.

As to § 523(a)(2)(B), the only written statement respecting the debtor's financial condition is the application, Exhibit A, and the only alleged falsity is the insertion of $70,000 annual income.

The Court will not decide whether that statement was false when made for purposes of § 523(a)(2)(B), because the Court will except this debt from discharge under subsection (A).

The debtor's statement of income is relevant to AT&T's other thrust under that latter subsection, which was to show that the debtor used the credit card beginning in May, 1995, with no intent or ability to repay the charges made. In this regard, the fact that this highly educated and sophisticated debtor incurred a large number of charges while he knew that he was in financial trouble because of his divorce and loss of business income, coupled with the inconsistent and minimal payments, and the ending result of the exceeding of his credit line, lead to an inference that the debtor lacked both the ability to repay and the intent to repay this account. Moreover, non-essential, arguably luxury charges, such as those at The Gold Club, contribute to that inference. The nature of the charges is not in itself determinative of dischargeability in this proceeding, although one's use of a credit card for frivolous purposes may be one of those circumstances that indicate a lack of intent to repay. Even though most of the charges in number were for routine services, the fact that the debtor was paying for meals, vacation, golf, as well as groceries, medicine, and clothing with this card indicates that this debtor was relying upon this card when he had insufficient income to pay for essential services. There is nothing inherently wrong with the latter, provided that the totality of circumstances demonstrates an ultimate intent to repay. "[T]he representation made by the card holder in a credit card transaction is not that he has an ability to repay the debt; it is that he has an intention to repay." In re Anastas, 94 F.3d at 1285. Also, a credit card debt should not be denied dischargeability merely because the debtor is insolvent when the charges were made.

The totality of facts and circumstances in this case, however, persuade the Court that this debtor lacked the intent to repay the account when the bulk of the charges were made. At the very least, the

debtor was grossly reckless in using this card as he did, after he knew of his financial difficulty. There was no proof that the debtor's financial expectations would improve as he was using the card; in fact, his financial condition continued to worsen.

AT&T also produced proof that the debtor made deposits to his checking accounts during 1995 in sufficient amounts to pay this account in full. Exhibits G and H. The debtor responded to this proof by testimony that the large deposits were a bank loan and withdrawals of insurance cash values, most of which he was required to pay in response to divorce court orders or for support and maintenance of himself and his children. Accepting the debtor's testimony as true, the deposits in his checking account establish that the debtor was picking which creditors to repay, and he chose not to repay a significant amount to AT&T while he incurred over $5,000 in charges, another indication that he lacked an intent to repay AT&T.

As to allegations that the debtor's use of the card was actually fraudulent, or that each use of the card carried with it false pretenses or false representations, the creditor relies upon all of the circumstances to show that at least certain charges were within § 523(a)(2)(A)'s elements. The plaintiff is met with the debtor's testimony that he intended to repay every charge at the time it was made. The Court was not impressed with the debtor's testimony, and the Court found Mr. Wilson's testimony to be inconsistent with the other proof. His explanations of the charges, including those at The Gold Club, were not plausible. The Court should not insert its value judgment as to whether a debtor should ever frequent The Gold Club; however, when one uses a credit card there to withdraw cash and leaves with cash, as the debtor testified, and when no payments or late minimum payments were being made on this credit card account, it may be inferred that the debtor did not intend to repay those charges. The Court may and should look at the

nature of and frequency of charges in a totality of circumstances examination of the debtor's intent. In this case, AT&T's proof overcame the debtor's testimony that he intended to pay the charges when he made them. By use of the card without the intent to repay the resulting debt to AT&T, the debtor made false representations to AT&T with each use, and the creditor's reliance upon the debtor's representations in this case were justifiable. AT&T clearly suffered a loss as a result of the debtor's actions.[2]

The creditor seeks a judgment that is debt is excepted from discharge; moreover, it seeks a judgment for attorney's fees. No proof was introduced at trial on the debtor's contractual obligation to pay attorney fees, therefore, the Court will not grant AT&T its attorney's fees.

CONCLUSION

Based upon the above findings of fact and conclusions of law, the Court concludes that the creditor, AT&T established its complaint as to the § 523(a)(2)(A) allegation, and that judgment should be entered in favor of the plaintiff. The debt to AT&T is nondischargeable; however, the request for attorney's fees is denied. A separate order and judgment will be entered.

_____

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

[2] Moreover, the debtor's worsening financial condition as he used the card may be a violation of an implied duty to advise AT&T that his financial condition had changed adversely subsequent to the card's issuance. See Restatement (Second) of Torts § 551 (1976) (for discussion of liability of nondisclosure); In re Eashai, 87 F.3d at 1089. Violation of such a duty was not argued by the parties; therefore, it is unnecessary for the Court to decide that issue.

Dated: October 8, 1997

David L. Mendelson
Attorney for AT&T
P.O. Box 17235
Memphis, TN 38187-0235

Eugene G. Douglass, Jr.
Attorney for Defendant/debtor
6471 Stage Road, Suite 201
Bartlett, TN 38134

United States Trustee
200 Jefferson Avenue, Suite 400
Memphis, TN 38103