

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION**

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**IN RE**

**Anthony M. Pearson & Tina J. Pearson,**

**Debtor.**

**Case No. 01-15086**

**Chapter 7**

**H & W Recruiting Enterprises, LLC,**

**Plaintiff,**

**v.**

**Adv. Pro. No. 02-5061**

**Anthony M. Pearson & Tina J. Pearson,**

**Defendant.**

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**MEMORANDUM OPINION AND ORDER RE  
COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT**

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The Court conducted a trial in this matter on June 19, 2002. FED. R. BANKR. P. 7001. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the trial and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

**I. FINDINGS OF FACT**

On July 11, 2002, the parties in this matter filed the following stipulations of fact:

1. The Debtor sought financing from H & W Recruiting Enterprises on 6-02-01 in order to attend truck driving school.
2. The Debtor signed a retail installment contract with H & W Recruiting Enterprises on 6-02-01 and began immediately attending the truck driving school.

3. In consideration for the loan Debtor granted a security interest in a 1998 Yamaha four-wheeler to the Creditor as collateral for said loan. Debtor signed an application for lien on a certificate of title on 6/02/01.
4. Debtor did not have insurance on the four-wheeler. Debtor had homeowners insurance coverage. After the theft, the Debtor discovered that the four-wheeler was not covered by his policy.
5. On 6-04-01 Debtor reported the collateral stolen to the Carroll County Sheriff's Office.
6. On 6-15-01 Debtor graduated the Creditors truck driving course. At that time he executed and signed a form labeled "Financing Statement of Understanding."
7. Debtor did not report the theft of the collateral to the Creditor while attending the truck driving school and only reported the theft to the Creditor approximately 3 months after completing school and after filing Chapter 7 Bankruptcy.
8. Creditor contends that they would not have allowed the Debtor to continue the truck driving school after being informed of the theft of collateral, unless and until the Creditor had properly substituted collateral for the loan of equal value to the collateral that was stolen.
9. Debtor was never informed of this "contention" by the Creditor.

## **II. CONCLUSIONS OF LAW**

Section 523(a)(2)(A) excepts from discharge any debt:

(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;

11 U.S.C. § 523(a)(2)(A). This Court has previously discussed the requirements of an 11 U.S.C. § 523(a)(2)(A) dischargeability action in the case of *A T & T Universal Card Serv. v. Crutcher* (*In re Crutcher*), 215 B.R. 696 (Bankr. W.D. Tenn. 1997). In order to have a debt declared nondischargeable pursuant to this section, the creditor must prove (1) the debtor made a material representation, (2) the debtor knew the representation was false at the time of making it, or made the representation with gross recklessness as to the truth, (3) the debtor made the representation with the intention of deceiving the creditor, (4) the creditor justifiably relied upon such representation, and (5) the creditor sustained loss and damage as the proximate result of the representations. *In re McLaren*, 3 F.3d 958 (6<sup>th</sup> Cir. 1993); *Brady v. McAllister*, 101 F.3d 1165, 1172 (6<sup>th</sup> Cir. 1996).

The terms “false pretenses,” “false representation” and “actual fraud” are not defined by the Bankruptcy Code. As a result, courts have had the responsibility for setting their boundaries. In the case of *Field v. Mans*, the U.S. Supreme Court held that the terms used in § 523(a)(2)(A):

. . . carry the acquired meaning of terms of art. They are common law terms, and . . . in the case of “actual fraud,” . . . they imply elements that the common law has defined them to include.

*Field*, 516 U.S. 59, 69, 116 S.Ct. 437, 443 (1995). In following the Supreme Court mandate announced in *Field v. Mans*, all courts have unanimously held that, as used in § 523(a)(2)(A), “[a]ctual fraud involves moral turpitude and does not include fraud implied in law which may exist without imputation of bad faith or intentional wrong.” *In re Pommerer*, 10 B.R. 935, 939 (Bankr. D. Minn. 1981). For a creditor to succeed in excepting a debt from discharge, the debtor

must have engaged in some conduct which can be fairly said to be "blameworthy." *In re Anderson*, 181 B.R. 943, 948 (Bankr. D. Minn. 1995).

The second and third elements of a § 523(a)(2)(A) claim can be somewhat more troublesome for two reasons. First, and foremost, it is often difficult to determine a debtor's true intent. No debtor is going to get on the stand and admit to fraudulent intent. As a result, "Plaintiff may present evidence of the surrounding circumstances from which intent may be inferred." *Van Wert Nat'l. Bank v. Druckemiller*, 177 B.R. 859, 861 (Bankr. N.D. Ohio 1994), citing *Matter of Van Horn*, 823 F.2d 1285, 1287 (8<sup>th</sup> Cir. 1987). Secondly, it is the debtor's intent at the time of incurring the debt that is central to the § 523(a)(2)(A) inquiry. *In re Rembert*, 141 F.3d 277, 281 (6<sup>th</sup> Cir. 1998). The debtor's intent after incurring the debt is irrelevant. So long as the proof shows that the debtor intended to repay the debt at the time he incurred it, it will be held to be dischargeable under § 523(a)(2)(A). *Id.*

The level of reliance which a creditor must prove in a false representation action was established by the Supreme Court case in *Field v. Mans*. This case changed the level of reliance in § 523(a)(2)(A) actions from a reasonable one to a justifiable one. *Field*, 516 U.S. at 73. As a result, the Supreme Court stated that an inquiry of a creditor's reliance is a subjective one which depends on the facts and circumstances of each case. Under this standard, a creditor will be found to have justifiably relied on a representation even though "he might have ascertained the falsity of the representation had he made an investigation." *Id.* at 70. [Citing Restatement (Second) of Torts § 540 (1976)].

The creditor bears the burden of proof in a § 523(a)(2)(A) action and must prove the necessary elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991). Exceptions to discharge are to be strictly construed against the creditor and liberally in favor of the debtor. *Meyer v. Rigdon*, 36 F. 3d 1375 (7<sup>th</sup> Cir. 1994). This approach is thought to further the well-espoused bankruptcy policy of granting the honest, but unfortunate debtor a fresh start in bankruptcy. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

In the case at bar, the stipulated facts establish that:

- (1) the debtor was in possession of the four-wheeler on June 2, 2001, when he signed the retail installment contract/student loan and security agreement;
- (2) the Plaintiff's lien on the four-wheeler was noted on the certificate of title for the four-wheeler;
- (3) the four-wheeler was stolen on June 4, 2001; and
- (4) the "Financing Statement of Understanding" signed by the debtor on June 15, 2001, makes no mention of either the four-wheeler or the secured nature of the loan.

The Court concludes that because the four-wheeler was not stolen until after the debt was incurred, the debtor had the intent to repay the loan when he signed the security agreement. The Court further concludes that the June 15, 2001, "Financing Statement of Understanding" did not act as a renewal of the loan. It is a document which simply restated the debtor's responsibility for repaying the loan incurred on June 2, 2001. Because the debtor did not possess a fraudulent

intent or make a false representation at the time of entering into the retail installment contract/student loan and security agreement, the loan is not excepted from discharge under 11 U.S.C. § 523(a)(2)(A).

### **III. ORDER**

It is therefore **ORDERED** that the Complaint to Determine Dischargeability of Debt is **DENIED**.

**IT IS SO ORDERED.**

**By the Court,**

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**G. Harvey Boswell**  
**United States Bankruptcy Judge**

**Date: July 25, 2002**