

**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF ILLINOIS**

<b>IN RE:</b>	)	
	)	
<b>RICKY D. TEUSINK and JERRI K. FRANGENBERG,</b>	)	<b>No. 03-81003</b>
	)	
<b>Debtors.</b>	)	
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	)	
<b>CITIZENS EQUITY FIRST CREDIT UNION,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	<b>Adv. No. 03-8095</b>
	)	
<b>RICKY D. TEUSINK,</b>	)	
	)	
<b>Defendant.</b>	)	

**OPINION**

The facts of this adversary proceeding are not in dispute. Since December of 1999, Ricky D. Teusink (Defendant) maintained a charge card relationship with AT&T Universal (Universal). He also maintained three account relationships with Citizens Equity First Credit Union (Plaintiff), a checking account, a savings account, and a Visa charge card account. In October of 2002, as part of an apparent program to increase the Defendant's use of the charge card with Universal, Universal sent the Defendant a check for \$6,500. The Defendant negotiated the check to the Plaintiff, putting \$1,500 into his savings account, \$3,000 into his checking account, and received \$2,000 in cash. Without waiting to see if the check would be honored by Universal, the Plaintiff allowed the Defendant to take the \$2,000 in cash and to withdraw the monies from the savings and checking accounts. When the check was presented for payment Universal denied payment, which resulted in the Plaintiff being owed \$6,500 by the Defendant.

The Defendant filed a Chapter 7 case in bankruptcy and the Plaintiff filed this adversary proceeding to have the \$6,500 debt owed to it declared to be non-dischargeable under § 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A). That section provides as follows:

A discharge under section 727 . . . of this title does not discharge an individual debtor from 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 . . .

In order for the Plaintiff to prevail under § 523(a)(2)(A), the Plaintiff must prove that (1) the debtor obtained the money through representations either knowingly false or made with such reckless disregard for the truth as to constitute willful misrepresentation; (2) the debtor possessed an actual intent to deceive; and (3) the creditor justifiably relied on the false misrepresentation. *Citibank (South Dakota), N.A. v. Michel*, 220 B.R. 603, 605 (N.D.Ill. 1998); *see, also, Mayer v. Spanel Intern. Ltd.*, 51 F.3d 670, 675 (7th Cir. 1995).<sup>1</sup>

This adversary proceeding is factually unique in that the Plaintiff is not a credit card company suing to have a debt owed to it declared non-dischargeable for use of a credit card without intent to repay the debt. Nor is it a situation where a person issues an insufficient funds check in order to obtain money or goods. Rather, it is a situation where the Defendant was sent a check which he negotiated to the Plaintiff, received the amount of the check, only to have the issuer of the check refuse to honor it upon presentment for payment. The parties have not cited any authority, nor has this Court found any, which involves this set of facts. It is the Plaintiff's position that the Defendant

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<sup>1</sup>While the Seventh Circuit originally construed the third element of requiring reasonable reliance, the Supreme Court subsequently clarified that the third element only requires "justifiable" reliance in *Field v. Mans*, 516 U.S. 59, 73-76, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995).

acted with reckless disregard in depositing the check when he should have known that it would not be honored based on the amount of credit available to him on the credit card account with Universal. The Defendant takes a two fold position: first, he had no intent to defraud the Plaintiff, as he thought Universal was increasing his credit line; and second, there was no reliance by the Plaintiff as it should have waited for the check to be honored before it allowed him to have access to the funds.

The Seventh Circuit has held that “reckless disregard of the truth is a form of the intent to defraud,” and therefore applies to the scienter element under § 523(a)(2)(A). *Mayer*, 51 F.3d at 675. Further, proof of intent to deceive is measured by the debtor's subjective intention at the time the representation was made, that he knew the representation to be false or made the representation with such reckless disregard for the truth as to constitute willful misrepresentation. *In re Murphy*, 190 B.R. 327, 333 (Bankr.N.D.Ill.1995), citing, *In the Matter of Sheridan*, 57 F.3d 627, 635 (7th Cir. 1995). In *Murphy*, the court discussed various factors and “tests” laid out by other courts in determining fraudulent intent but dismissed reliance on any particular set of factors holding instead that a trial court must look at the totality of the circumstances in order to “determine whether all the evidence leads to the conclusion that it is more probable than not that the debtor had the requisite fraudulent intent.” *Murphy*, 190 B.R. at 334.

*Murphy* stands for the proposition that in cases where a credit card company is attempting to prevent discharge of the debts owed to them, the trial court must consider all of the circumstances in order to determine whether at the time the debtor incurred the debts at issue he intended to repay them and believed, however unreasonably, that he would have the means to do so. See, *In re Murphy*, 190 B.R. at 334; see, also, *In re Jacobs*, 196 B.R. 429, 434 (Bankr.N.D.Ind. 1996). By direct analogy, the test to apply in the instant case would be whether after considering all of the

circumstances, did the Defendant believe, however unreasonably, that he had the requisite credit available to satisfy the cash advance? *Murphy* demonstrates that this is an entirely subjective test.

There are several key factors weighing in the Defendant's favor. There was no evidence as to why Universal sent the check to the Defendant or why it refused to honor the check when presented. Nor was there any evidence to suggest that at the time the Defendant received the check that he knew it would not be honored. The Defendant had made regular payments on the Universal card up until the time he lost his job and got divorced. The making of regular payments is a characteristic in users of credit cards that credit card companies like to see and which often encourages credit card companies to increase the user's credit limit in the hope that they will do exactly what the Defendant did here, charge more on the credit card. The Defendant testified to this very fact when he stated that Universal had increased his credit limit on several occasions without his request.

Furthermore, Universal did not send the Defendant a check indicating that he may receive a cash advance for the unused portion of his credit limit or some similar condition. If this had been the case, the Defendant likely would have had more reason to question whether he had been granted a larger credit limit. This was not the case, however. While some people may have questioned whether or not they had credit available for such a large cash advance, it would not be unreasonable for the Defendant to believe that Universal had increased his credit limit, as it had before, up to an amount sufficient for him to cover the \$6,500 cash advance. It can only be assumed this is what occurred in this case.

Given these facts, this Court cannot conclude that the Defendant endorsed and deposited the check with knowledge that it would not be honored or a reckless disregard that it would be honored.

In conclusion, this Court would add that while it is the actions of the Defendant that are being questioned, the propriety of those actions must be determined in light of the surrounding circumstances involving the nature of modern credit card solicitation and use, and modern check clearing procedures. *See, In re Davis*, 176 B.R. 118 (Bankr.W.DN.Y. 1994). Assuming that the Defendant's credit standing was the reason the check was not honored, Universal put into the stream of commerce an instrument without first investigating for changes in the Defendant's financial circumstances. Credit card issuers solicitations for credit card use are aggressive, encouraging users to maximize or increase their credit cards to maintain or improve their standard of living.

The Plaintiff allowed the Defendant to withdraw the funds without waiting to see if the check cleared, even though it had the right under the deposit agreement to wait until the check cleared.<sup>2</sup> The deposit agreement was drafted by the Plaintiff to allow it to protect itself in situations such as the one before the Court, but for some reason, opted not to do so in this case.

The Defendant's actions in depositing the check and withdrawing the funds without waiting for the check to be honored was no different than other credit card users who use credit to maintain or improve their standard of living. They do just what they are permitted to do. In this case, the Defendant took no actions that were not allowed by Universal and the Plaintiff.

The Defendant also raises the issue of the Plaintiff's reliance and as to that issue the Plaintiff cites *Field v. Mans, supra*. As this Court has found that the Defendant did not intend to deceive the Plaintiff or act with a reckless disregard for the truth, there is no need to consider the issue of reliance.

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<sup>2</sup>Section 30 of the deposit agreement between the Plaintiff and Defendant (Pl. Ex.#2) sets forth the Plaintiff's policy for the withdrawal of funds. Subject to certain limitations, the policy provides funds from deposits will be available the day of deposit. The availability of funds deposited by check could, at the Plaintiff's option, be delayed for up to nine days if the Plaintiff believed a check would not be honored or the deposit exceeded \$5,000.

This Opinion constitutes this Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate Order will be entered.

Dated: September 22, 2004.

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WILLIAM V. ALTENBERGER  
UNITED STATES BANKRUPTCY JUDGE

Copies to:

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Charles E. Covey, Trustee, 416 Main Street, Suite 700, Peoria, IL 61602

U.S. Trustee, 401 Main Street, Suite 1100, Peoria, Illinois 61602

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**ORDER**

For the reasons stated in an Opinion filed this day, IT IS HEREBY ORDERED that Judgment is entered on the Complaint in favor of the Defendant, Ricky D. Teusink, and against the Plaintiff, Citizens Equity First Credit Union, and the debt to the Plaintiff is hereby determined to be DISCHARGED.

Dated: September 22, 2004.

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WILLIAM V. ALTENBERGER  
UNITED STATES BANKRUPTCY JUDGE

Copies to:  
Sumner Bourne  
S. Linn Perkins  
Charles E. Covey  
U.S. Trustee