

**In the United States Bankruptcy Court**  
**for the Northern District of Iowa**

DAVID E. HEMM and DONNA R. HEMM  
Debtors.

Bankruptcy No. L-92-00932C  
Chapter 7

MERCANTILE BANK OF ILLINOIS N.A.  
Plaintiff

Adversary No. 92-1170LC

vs.

DAVID E. HEMM  
Defendant.

**ORDER**

On August 20, 1993, the above-captioned matter came on for hearing pursuant to assignment. Hearing was held by telephone conference call pursuant to agreement. Plaintiff appeared by Attorney G. Mark Rice. Defendant appeared by Attorney Mark J. McCool. The parties argued their position after which the Court took the matter under advisement.

The matter before the Court is an Application filed by the Defendant for attorney's fees pursuant to 11 U.S.C. 523(d).

The file reflects that Debtor/Defendant David Hemm filed a Chapter 7 Bankruptcy on May 11, 1992. On August 13, 1992, Plaintiff/Creditor Mercantile Bank of Illinois N.A. filed an adversary proceeding by way of complaint to determine the dischargeability of a debt. The underlying debt involved arose from a credit card. Plaintiff brought the adversary proceeding under 11 U.S.C. 523(a)(2)(A) of the Bankruptcy Code. Thereafter, discovery took place and after completion of discovery, a Motion for Dismissal was filed by the Plaintiff on June 21, 1993. Defendant did not resist the Motion to Dismiss but reserved the issue of possible attorney's fees under 523(d). Based upon the unresisted Motion to Dismiss, the Court entered a dismissal of this adversary proceeding on June 25, 1993. Thereafter, counsel for the Defendant filed an Application for attorney's fees and it is this Application which is presently before the Court.

The Application and Brief assert that the attorney for the Defendant incurred 10.5 hours of time at a normal hourly rate of \$95. Defendant asserts that the Plaintiff was not justified in filing the complaint and that there are no special circumstances that would make an award of attorney's fees unjust. Defendant filed an affidavit setting out his version of the facts.

Plaintiff has filed a resistance to this Application and has attached its own affidavit. Plaintiff's application asserts that counsel for the Plaintiff felt that there was sufficient evidence to support a dischargeability complaint. Plaintiff states that correspondence was attempted with counsel for the Defendant prior to the filing of a complaint but no response was received. Plaintiff asserts a complete review of the credit card history was made prior to the filing of a complaint. Plaintiff's affidavit asserts that based upon the short period of time between the issuance of the card and the filing of the Petition as well as the number of cash advances made during that time, substantial justification existed for the filing of a complaint. Finally, Plaintiff asserts that, upon completion of discovery and a review of that discovery, Plaintiff determined that the case "could go either way" and decided at the earliest feasible time that pursuit of the complaint did not justify further expenditures. Therefore, Plaintiff dismissed the complaint. Based on the foregoing, Plaintiff asserts that the filing of the complaint was substantially justified and that it would be unjust to award attorney's fees in this case.

The issue of cost and attorney's fees is controlled by 11 U.S.C. 523(d) which provides:

"If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust."

The stated purpose for 523(d) is to discourage creditors from commencing actions in an effort to obtain a settlement from an honest debtor who may not be able to pay for an attorney to handle an adversary proceeding. In re Stewart, 91 B.R. 489, 497 (Bankr. S.D. Iowa 1988). As stated, attorney's fees under this section are ordinarily to be awarded unless the creditor can establish that its claim was "substantially justified". In re Willett, 125 B.R. 607, 609 (Bankr. S.D. Cal. 1991).

Analysis of this issue requires an examination of the facts discernible from the pleadings and affidavits filed. The pleadings and the affidavits filed establish that the Debtor was issued this credit card in December of 1991. He took bankruptcy on May 11, 1992. Almost immediately after being issued the card, the Defendant began to make purchases on this card. Also, during the month of December and into January of 1992, the Defendant made frequent cash advances against this card. Between the middle of December and the middle of January, the Defendant made nine cash advances on this card, the majority of which were \$200 each. In total, the Defendant incurred cash advances of \$1,550 during this time period. The credit limit on Defendant's mastercard was \$2,300 and at the time of the filing of this Chapter 7 Bankruptcy, the total charges on the card were \$2,280.63. The Defendant made three payments on the balance; one in February, one in March, and one in April of 1992. All payments appear to have been in the minimum amount authorized on the bottom of the billing statement.

Complaints to determine dischargeability of debt under 523 of the Code are analyzed under several theories. Many Courts analyze 523 complaints under an implied representation theory. Other Courts apply a totality of circumstances theory in regard to credit card fraud cases. First Deposit Nat'l Bank v. Albert Coates, Adv. L-90-0137C (slip op. N.D. Iowa August 9, 1991). Nevertheless, under either theory, a finding of substantial justification under 523(a)(2) is made upon the facts peculiar to each case. In this case, the Plaintiff was presented with a credit card history of short duration. During that time, the Defendant made what would rationally be determined to be an excessive number of cash advances in the \$100 to \$200 range. These were all made within a short period of time. There are several dates during which the Defendant made multiple cash advances totaling as much as \$400. Additionally, the Defendant made minimum payments during this time and had incurred charges almost up to the exact limit of the card.

The Court recognizes that the stated purpose of 523(d) is to discourage creditors from taking unfair advantage of honest debtors by commencing adversary proceedings which are unjustified in an attempt to obtain unwarranted settlements. At the same time, enforcement of the rule without analysis of the underlying facts serves the function of penalizing creditors from pursuing claims which may be entirely warranted based upon the facts peculiar to each case. An analysis of the facts in this case establish to the Court's satisfaction that the large number of substantial cash advances, over a short period of time, would be sufficiently suspicious to justify the exploration of a complaint under 523. The apparent failure of the Defendant to respond to inquiries would justify further action on this claim. Finally, when the Plaintiff determined that it would not pursue this claim as it was both problematical and overly expensive, the Plaintiff dismissed its complaint. It did not pursue it to ultimate determination on an unjustified basis.

Based upon the foregoing, it is the conclusion of this Court that applying the law to the facts in this case, the Plaintiff Mercantile Bank of Illinois N.A. was substantially justified under 523(a) in pursuing this claim. Award of attorney's fees under 11 U.S.C. 523(d) is not warranted.

**WHEREFORE**, for all the reasons set forth herein, the Defendant David E. Hemm's Motion for Award of Attorney's Fees is DENIED.

**SO ORDERED** this 1st day of September, 1993.

Paul J. Kilburg, Judge  
U.S. Bankruptcy Court