

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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JOSEPH B. FIELD

Bankruptcy No. 98-00306M

*Debtor(s).*

Chapter 7

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UNIVERSAL BANK N.A.

Adversary No. 98-9079M.

*Plaintiff(s)*

vs.

JOSEPH B. FIELD

*Defendant(s)*

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### COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

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Universal Bank, N.A., formerly known as AT&T Universal Card Services, seeks to except from discharge its claim against debtor Joseph B. Field. Final trial was held February 2, 1999 in Mason City. Anthony R. Epping appeared for Universal. Field was represented by Richard D. Stochl. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

#### Findings of Fact

Field filed a Chapter 7 petition February 4, 1998. At the time of filing, he owed a debt to Universal in the approximate amount of \$5,133.83.

Until about August 1996, Field worked as a pressman for a printing firm in California. He had been employed there about 14 or 15 years. He was terminated from that job because the firm began printing material Field found offensive and would not accommodate his objection to working on particular jobs. In 1995 Field had wages of \$34,187, and in 1996 he earned \$21,506. Exhibit 4, Form 1040, 1995 and 1996.

After leaving the printing firm, Field moved back to Iowa and lived with his parents in Charles City. He had savings of a few thousand dollars, including some unused vacation pay.

He received unemployment benefits in the amount of \$4,140 for 1996 and \$1,380 for 1997. The unemployment benefits stopped about March 1997. Field did not file a tax return in 1997. He had no income from wages that year.

After moving back to Iowa, Field became involved in businesses with family members. In late 1996, he started a baseball card business, Field Marketing Distributors, with his brother, Jay. They used funds from another brother, Jon Field, to get the business going. [\(1\)](#) The baseball card venture was not profitable. Field said he was not involved in the business much after the summer of 1997.

Field also worked for one of his brothers in a moving business called Field Brothers Moving Co. Field said he did the first moving job in about February or March, 1997. It was not until March 1998, however, that he was paid for doing moving work.

Sometime in 1997, Universal offered Field a credit card with a pre-approved credit limit of \$2,000. He had the options of mailing in a written application or applying by telephone. Field made his application by telephone. The interviewer asked his date of birth, Social Security number and annual income. Field told her that he did not know his annual income, but that he and his brother were trying to get a moving business going. He told her they had had a couple of jobs recently, had another coming up, and the business looked like it was picking up. He told the interviewer how much was charged for a job. From this information, Field and the interviewer arrived at an annual income figure for Field's application. Universal issued a credit card to Field with a credit limit of \$5,000. Field received a copy of the cardmember agreement with the credit card. The agreement sets out the card holder's obligation to make minimum monthly payments on the outstanding balance.

Field's Universal credit card account was opened September 25, 1997. He first used the card October 6, 1997. During the first billing cycle ending October 18, Field made 17 purchases and took a cash advance of \$400 for a total new balance of \$1,232.60. Through November 3, Field made six more purchases and wrote a convenience check in the amount of \$3,500. The new balance was \$4,977.43. Field made a final purchase of \$41.27 on December 19, bringing the balance to \$5,113.83.

The minimum payment due from the first billing statement was \$26. Field paid this amount with a share draft from the Field Marketing Distributors account. The payment, due November 12, was posted November 17. Field made no further payments on the account.

Field made most of the Universal card purchases while traveling in Iowa, Illinois, Indiana and Ohio. Field said some of this travel was to deliver goods to Appalachia in connection with a church project. Field suggested in answer to interrogatories that many of the travel expenses were for visiting his brother in Michigan, who died of cancer on November 15, 1997. It appears from Field's credit union account statement that he was in Michigan in December 1996 and March 1997. The only purchase on the Universal card that appears to be related to travel to Michigan is a charge of \$41.27 in Albion, Michigan on December 19, 1997.

The \$400 cash advance was taken in Urbana, Illinois on October 10 and used for gambling. On October 14, Field spent \$331 for Minnesota Vikings tickets for himself and two others. In answers to interrogatories, Field stated that some of the charges were for business expenses. At trial he identified a purchase in the amount of \$20.95 that was made for his brother's moving business. He considered this a gift to his brother. A \$50 purchase described as "process agent 05550017 Sioux Falls SD" may have been a business expense, but Field was not sure what it was.

On October 28, Field wrote a Universal convenience check to himself for \$3,500. He deposited the money in his personal credit union account the same day. The check was posted to his Universal account on October 31. Field used some of the money to pay a phone bill and rent for a friend who was ill. He said the rent was a "couple hundred" and his friend was a couple months behind. The rest of the money from the convenience check was used for gambling, buying food and gas, and paying bills, including other credit cards.

Field first thought about filing bankruptcy sometime in December, 1997 and met with an attorney on December 11. On January 5, 1998, Universal learned that Field was planning to file bankruptcy and closed the account. Field paid Stochl a fee of \$500 for the bankruptcy on January 13, 1998.

Field scheduled the following general unsecured claims:

AT&T Universal Card Services	\$ 5,075.08
Amoco	1,504.89
Chase	1,608.02
Discover	7,280.87
First Card	7,089.69
Jon & Heather Field	13,744.19
Stephen P. Earney, D.D.S	447.00
Texaco	1,315.32
United States Cellular	<u>199.88</u>
TOTAL	\$38,264.94

The debt to Jon and Heather Field was, apparently, for the money loaned to start the baseball card business. A handwritten statement in Exhibit 13 refers to a loan in that amount. At trial Joe Field said the money may have been a gift. Credit card purchases accounted for \$23,873.87 of the unsecured claims. For each credit card claim, Field stated "consumer goods" as the consideration for the claim and "various" as the date the claim was incurred. He reported gambling losses of \$15,000 in 1997.

Ronald Lewis testified about the screening procedures used by Universal prior to sending a solicitation to a prospective customer. Universal first sets criteria for the type of customer it wants. Lewis did not know what the particular criteria were. It then requests a third party processor to obtain names of persons meeting the criteria from one of the three national credit bureaus. The list of names is run through a database at Universal to exclude existing customers, people who have asked not to be solicited, and people in areas Lewis described as "fraud pockets." The resulting list is screened a second time with the credit bureau to ensure there has not been a negative change in credit history. Universal then makes a firm offer of credit to each name on the list. The process to this point takes six to seven months. When a customer applies for a credit card, a third credit bureau screening is done to check for changes in credit history. If a customer applies by telephone, the Universal interviewer can check the person's credit bureau record during the call. Universal has computer access to such records. Lewis said the information is available in about 30 seconds.

The screening process includes use of a scoring system called FICO which was developed by Fair, Isaac & Company. A FICO score is based upon an analysis of a person's overall credit history, including number of trade lines, total amount of revolving credit, balance information, delinquencies, judgments, payment history and past due history. Scores range from zero to 900. At the time Universal offered credit to Field in 1997, it required a minimum FICO score of 680. Field's score at that time was 725.

Universal asks credit card applicants their name, address, Social Security number, date of birth, annual income, whether the person is employed, and name of employer, among other things. The information taken during a telephone application is retained for only 30 days. A written record of the information taken from Field was not available at trial. A written application is kept in a customer's account records indefinitely. At the time it issued a card to Field, Universal required a minimum annual income of \$15,000. Universal's evidence included a copy of a computer screen entitled "Inquire Application Solicitation Info." Exhibit 14, page 1. This document contains the notation

"ANNUAL INCOME 20." Lewis explained that this number did not purport to be Field's annual income, and was not information supplied by Field. He said it was a figure based on demographics for a geographic region, and was used as marketing information.

### Discussion

Universal seeks a determination that Field's debt to it is nondischargeable under § 523(a)(2)(A) of the Bankruptcy Code. That section provides that a Chapter 7 discharge does not discharge a debtor from 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).

Universal tried its claim under a theory of actual fraud. To prove actual fraud, Universal must show that: (1) Field made a false representation; (2) Field knew the representation was false at the time he made it; (3) Field made the representation with the intention and purpose of deceiving Universal; (4) Universal relied on the representation; and (5) Universal sustained damage as a proximate result of the representation having been made. Thul v. Ophaug (In re Ophaug), 827 F.2d 340, 342 n.1 (8th Cir. 1987). Universal's reliance must have been justifiable. Field v. Mans, 116 S.Ct. 437, 439 (1995). Universal has the burden of proving each of the elements of its claim by a preponderance of evidence. Grogan v. Garner, 111 S.Ct. 654, 659 (1991).

Universal does not allege that Field made a false representation in his telephone interview to apply for the credit card. Universal contends that, by using the credit card, Field impliedly represented that he had the intent and ability to repay the debt. Universal alleges that Field's representations were false because he used the card when he knew he did not have the ability to repay the debt.

Use of a credit card has been construed as an implied representation that the card holder has the intention to pay for the charges incurred. Anastas v. American Savings Bank (In re Anastas), 94 F.3d 1280, 1285 (9th Cir. 1996). In cases involving the dischargeability of credit card obligations, this court has adopted a "totality of circumstances" test in examining the debtor's knowledge and intent, and in determining whether a debtor has made credit charges with no intention at the time of repaying them. AT&T Universal Card Services v. Feldhacker (In re Feldhacker), Adv. No. 96-5119XS, slip op. at 8-9 (Bankr. N.D. Iowa Sept. 5, 1997) (listing non-exclusive factors from First Deposit National Bank v. Coates (In re Coates), Adv. No. L-90-0137C (Bankr. N.D. Iowa April 1, 1991)).

The court first concludes that Field used the Universal credit card with no intention of repaying the charges. At the time he used the card, he had no income. It had been more than a year since he lost his job as a pressman, and more than five months since his unemployment benefits ceased. He was no longer involved in the baseball card business and was receiving nothing from his brother's moving business. He began using the Universal card shortly after the account was opened. His balance went from zero to \$4,977 in 29 days. Several of his purchases were for luxury expenses rather than necessities. He made gifts to a relative and friends. He used the card to finance gambling. He made one minimum payment of \$26. Before the payment from the second billing statement was due, he had talked with an attorney about bankruptcy. Field appeared to be juggling accounts to extend his access

to credit as long as possible. For example, in September 1997, he ran up his Chase credit card over his credit limit in 11 days. Exhibit 15, page 2. He used the Universal card during October. After using a cash advance on the Universal card to make a payment on the Chase card, he then used the Chase card again in November, 1997. Exhibit 15, page 5.

The court next considers the evidence relevant to the element of reliance. In Field v. Mans, 116 S.Ct. 437, 439 (1995), the Court held that, in a claim under 11 U.S.C. § 523(a)(2)(A), the plaintiff's reliance on a fraudulent misrepresentation must meet the level of "justifiable reliance," a less stringent standard than reasonable reliance. Justification is not a single standard applicable to all cases. Rather, it takes into account the "qualities and characteristics of the particular plaintiff, and the circumstances of the particular case." Field v. Mans, 116 S.Ct. at 444 (quoting Restatement (Second) of Torts, § 545A, Comment b). "Justifiability is not without some limits, however. [A] person is 'required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.'" Id. (quoting Restatement (Second) of Torts, § 541, Comment a). "It is only where, under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own." Id. (quoting Prosser, Law of Torts, § 108).

Universal claims it relied on Field's representations, made when he used the credit card, of his intent to repay charges. Every lending situation involves a promise to repay, but the lender generally does not rely on such a promise standing alone. The lender bases its reliance on the factual circumstances surrounding the transaction. In the usual bank loan situation, commonly a lender relies on a promise to pay only after reviewing the borrower's income, expenses, assets and liabilities. Use of a credit card is similar to drawing on a line of credit with a bank. A credit card issuer may not blindly extend credit with the expectation that it may later attach reliance on a promise to repay implied at the time the card is used. The issuer's reliance on the debtor's promise to pay for the credit advanced must be based on circumstances existing at the time the credit card is issued.

If the card issuer establishes justifiable reliance at the time of issuance of the card, the court will presume continuing reliance when the card is used. Then, as long as the issuer has had no warning of the debtor's intent not to repay, it will be held to have justifiably relied in continuing to extend credit. This is not to say that the card issuer can never establish reliance if it does not exist when an account is opened. It might be established by the debtor's course of conduct over a period of time. AT&T Universal Card Services v. Mercer (In re Mercer), 220 B.R. 315, 327 n.5 (Bankr. S.D. Miss. 1998). However, if justifiable reliance does not exist when the account is opened, it will not automatically attach when the card is used. Mercer, 220 B.R. at 327 (following AT&T Universal Card Services v. Ellingsworth (In re Ellingsworth), 212 B.R. 326, 338-39 (Bankr. W.D. Mo. 1997)).

Universal based its reliance primarily on a credit score. See Complaint, ¶ 17 (plaintiff based reliance in part on use of credit scoring service). Indeed, it offered Field an unsolicited, pre-approved credit line of \$2,000 solely on the basis of a credit score. Universal also appears to have based its reliance on information obtained during Field's application for the credit card. It issued the card with a much higher credit limit than that offered at the time of the initial offer.

The credit score model used by Universal was designed, apparently, to select names meeting the criteria for the type of customer it wanted. Since there was no evidence as to what the criteria were or what the credit score was meant to predict, Universal has offered no basis for finding it was justified in relying on the credit score. See Providian Bancorp v. Stockard (In re Stockard), 216 B.R. 237, 243 (Bankr. M.D. Tenn. 1997) (if plaintiff targeted people with high debt load who could make only

minimum payments, fact that debtor met its criteria may not justify reliance). Moreover, a credit score is based on a person's credit bureau file, which is an incomplete picture of the person's financial condition. Credit bureau records do not contain income information. The records depend for information on reporting by others and may not be current.

There is no record of the credit application interview with Field because of Universal's policy to keep such records for only 30 days. None of Universal's business records introduced at trial includes Field's actual income as an item of information. Its records do include, however, a demographic figure that is irrelevant to Field's particular situation. Exhibit 14, page 1.

Universal gave Field a \$5,000 credit line when he had not had income for more than a year and already had more than \$10,000 of revolving credit debt. Universal now contends that Field used the card at a time when he was hopelessly insolvent. Joint Pretrial Statement, Plaintiff's Contentions of Fact, ¶ 1. Field began using the card, however, just days after Universal issued it to him.

Universal is a sophisticated institutional lender. Yet it did not base its decision to extend credit to Field on usual standards of creditworthiness. In re Ellingsworth, 212 B.R. at 330. Instead, Universal chose to rely most heavily on credit scoring information, which facilitates its use of mass marketing to attract new customers. Universal made minimal effort to discover Field's actual financial condition. Moreover, it ignored warning signs in the little information it collected. Universal had access to Field's credit bureau file and was aware that he had already incurred significant amounts of revolving credit debt. Universal did not carefully question Field in order to justify extending him further credit. It accepted Field's vague account of his employment and income when the situation warranted further investigation.

The court therefore finds and concludes that Universal has failed to meet its burden of proving that it justifiably relied on a representation made by Field. The complaint should be dismissed.

IT IS ORDERED that the complaint of Universal Bank, N.A. is dismissed.

SO ORDERED THIS 28th DAY OF APRIL 1999.

William L. Edmonds  
Chief Bankruptcy Judge

I certify that on I mailed by U.S. mail a copy of this order and a judgment to Anthony Epping, Richard Stochl and U.S. trustee.

1. A handwritten notation on Exhibit 13 states: "We, Jon and Heather Field, ... gave Joe an unsecured loan in December 1996 for \$13,744.19." Joe Field made a deposit of \$14,500 in his personal credit union account on January 10, 1997. Exhibit 11, page 8. He began using the money. By early April 1997, he had a few hundred dollars in the account. On April 9, 1997, a deposit of \$14,500 was made in a credit union account in the name of Field Marketing Distributors. Exhibit 3, page 1. The business account used Field's Social Security number. Id. Field said the April 9 deposit was the money given by his brother to start up the baseball card business. No one explained the apparent discrepancy in dates or in the amount of the loan.