

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
ABILENE DIVISION

IN RE:	§	
	§	
JIUNN CHAU LI AND	§	CASE NO. 99-10863-7
LIN YU-CHIH LI,	§	
	§	
Debtors.	§	
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UNIVERSAL BANK, N.A.,	§	
	§	
Plaintiff	§	
vs.	§	ADVERSARY NO. 00-1006
	§	
JIUNN CHAU LI AND	§	
LIN YU-CHIH LI,	§	
	§	
Defendants.	§	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**Findings of Fact**

1. The Plaintiff, Universal Bank, N.A. (Universal), contends that debt incurred by the Debtors, Jiunn Chau Li and Lin Y-Chih Li, under an AT&T Universal Card is nondischargeable under § 523(a)(2)(A) and (B) of the Bankruptcy Code (11 U.S.C.).
2. The AT&T Universal Card was issued to the Debtor, Jiunn Chau Li; it is a “pre-approved” credit card.
3. On July 19, 1999, the Debtor, Jiunn Chau Li, signed a document entitled “Pre-Approved Platinum Acceptance Certificate” (Certificate). *See* Plaintiffs’ Exh. UB-1. While this document is not entirely legible, it appears to reflect \$70,000.00 as the annual household income of the Debtors. *Id.*

4. Universal's representative, Albert Mellon,<sup>1</sup> testified that Universal's procedure before issuing a pre-approved credit card is as follows: Universal buys a list of names from a vendor. It then runs a credit report with a credit bureau with which it has a prior arrangement. Mellon testified that this is not a full blown credit report, however. Anyone who hits the "first tier" based on certain indicators is targeted to receive a "pre-approved application". The actual credit card is not sent initially with the pre-approved application. When Universal receives the pre-approved application back from the customer, it then runs a full-blown credit report. While the extension of credit and issuance of the credit card is pre-approved, Universal reserves the right to determine the amount of credit based upon the information that is received on the pre-approved application. The customer is then sent a cardholder's agreement with the credit card.<sup>2</sup>

5. Mellon testified that the July 19, 1999, Certificate<sup>3</sup> was used by Universal in connection with issuance of the AT&T Universal Card to Jiunn Chau Li.

6. The billing statements for the AT&T Universal Card indicate that Jiunn Chau Li was extended a credit limit of \$7,500.00. Plaintiff's Exh. UB-2. The initial statement, dated July 19 through August 17, 1999, reflects Jiunn Chau Li had a balance transfer, presumably from another credit card, of \$3,000.00, and a finance charge of \$25.00. This initial statement further reflects Jiunn Chau Li had a cash advance limit of \$2,000.00. After the \$3,000.00 balance transfer, Jiunn Chau Li had available credit of \$4,472.00. In late August, shortly after the card was issued to Jiunn Chau Li, he had purchases of \$990.74 and cash advances, with service charges, totaling

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<sup>1</sup>Mr. Mellon is the National Agency Manager for "Citigroup". He testified that "we" merged with Traveler's Bank in 1999. He further said, "we purchased the Universal Card portfolio in 1997." The exact relationship between Universal and Citigroup (or Citibank) is unclear. For purposes of these findings, a reference to Universal shall include Citigroup.

<sup>2</sup>A cardholder's agreement was not offered into evidence in this case.

<sup>3</sup>The Certificate constitutes the "pre-approved application" referred to during Mr. Mellon's testimony.

\$1,905.00. It reflects the Debtors made a \$64.00 payment. *Id.* This resulted in a balance on the account of \$5,959.14. *Id.* The statements reflect no further usage of the card. Therefore, the balance in December, 1999, including accrual of interest, was \$6,130.16. *Id.*

7. The Debtors filed bankruptcy on November 12, 1999. There were no charges made on the AT&T Universal Card within sixty days of the bankruptcy filing.

8. Charging privileges on the AT&T Universal Card have not been terminated, as the credit limit has not been exceeded.

9. The Debtors, who moved to the United States from Taiwan, bought and started a restaurant in Big Spring, Texas, in 1991. They moved the location of the restaurant in 1995. In doing so, they obtained a bank loan in the approximate sum of \$170,000.00 from Norwest Bank (then the First National Bank in Big Spring, Texas). The evidence suggests that the restaurant business declined along with the downturn of the oil and gas industry experienced regionally in Big Spring.

10. In May, 1999, the restaurant flooded because of a broken pipe. There was extensive damage to the interior of the restaurant building, causing the Debtors to close the restaurant for approximately a week. The business continued to decline after the flood.

11. The Debtors' son, Hsiao Hsuan Li, who worked in the restaurant, testified that the charges on the AT&T Universal Card relate to repairs to the building. Indeed, the identity of the vendors on the statements for the months of July and August lend credibility to Hsiao Hsuan Li's testimony.

12. Because of the downturn in their restaurant operation, the Debtors defaulted in making payments on their bank loan. While the Debtors had insurance on the building, the bank, apparently because of the default on its loan, applied the insurance proceeds to its indebtedness.

Accordingly, the insurance funds were not available for use in making the repairs caused by the flood.

13. The Debtors attempted to sell the restaurant and hoped to raise sufficient funds from a sale to satisfy their debts.

14. The Debtors were unsuccessful in selling the restaurant; the bank posted the restaurant for a foreclosure sale by a notice of trustee's sale dated October 25, 1999, which noticed a sale for December 7, 1999.

15. There is no evidence that the Debtor, Lin Yu-Chih Li, applied for or used the AT&T Universal Card.

16. If appropriate, these findings of fact shall be considered conclusions of law.

#### **Conclusions of Law**

17. This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding. 28 U.S.C. § 157(b).

18. Section 523(a)(2)(A) of the Bankruptcy Code provides a debt arising from the extension of credit is nondischargeable to the extent obtained by "false pretenses, a false representation, or actual fraud, other than a statement reflecting the debtor's or an insider's financial condition . . . ." A creditor must prove its claim by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); *AT&T Universal Card Services v. Mercer (In re Mercer)*, 211 F.3d 214, 216-17 (5<sup>th</sup> Cir. 2000); *Universal Bank, N.A. v. Kuntz (In re Kuntz)*, 249 B.R. 699, 703 (Bankr. N.D. Tex. 2000).

19. To establish false pretenses or a false representation, the creditor must prove the debtor: (1) made a knowing and fraudulent falsehood; (2) describing past or current facts; (3) that was relied upon by the creditor; (4) who thereby suffered a loss. *In re Mercer*, 211 F.3d at 216-

17; *In re Kuntz* at 703. To recover under an actual fraud theory, the creditor must prove that: (1) the debtor made representations; (2) at the time they were made the debtor knew they were false; (3) the debtor made the representations with the intention and purpose to deceive the creditor; (4) that the creditor relied on such representations; and (5) that the creditor sustained losses as a proximate result of the representations. *In re Kuntz* at 703-704, citing *RecoverEdge, L.P. v. The Pentecost*, 44 F.3d 1284, 1292 (5<sup>th</sup> Cir. 1995). The creditor must show justifiable reliance on the debtor's representations. *Field v. Mans*, 516 U.S. 59, 69-70, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995); *In re Mercer*, 211 F.3d at 216-17; *In re Kuntz* at 704.

20. Either theory, false pretense/representation or fraud, requires, as a threshold element, a representation by the debtor.

21. Issuance of the AT& T Universal Card was pre-approved by Universal. Therefore, the July 19, 1999, Certificate was not relied upon by Universal in issuing the card to Jiunn Chau Li.

22. While there was some testimony that, generally, a customer's representation regarding his annual household income may affect the amount of credit, i.e. the credit line extended by Universal, there is no evidence that the representation here regarding the Debtors' annual income affected the credit line extended to Jiunn Chau Li.<sup>4</sup>

23. There was no implied representation by the Debtor each time the Debtor used the AT&T Universal Card. *In re Mercer; In re Kuntz*.

24. Section 523(a)(2)(B) makes nondischargeable a debt arising from an extension of credit to the extent obtained by "use of a statement in writing (i) that is materially false; (ii)

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<sup>4</sup>Universal contends that Jiunn Chau Li's representation concerning his annual household income contained on the August 2, 1998, Certificate is false. The court notes that § 523(a)(2)(A) specifically excludes a representation regarding the debtor's financial condition.

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 . . . .”

25. As the AT&T Universal Card was pre-approved, there is no extension, renewal, or refinancing of credit obtained by use of a statement in writing.

26. Universal did not actually rely upon a written representation made by Jiunn Chau Li in connection with issuance of the AT&T Universal Card.

27. The Plaintiff's claims under § 523(a)(2)(A) and (a)(2)(B) are denied.

28. As there is a split of authority on the issue of whether use of a credit card constitutes an implied representation of intent to repay, Universal has not acted in bad faith in filing the complaint.

29. For a debtor to recover costs and attorney's fees, the creditor must have sought and lost a determination of dischargeability of a consumer debt. 11 U.S.C. § 523(d).

30. The evidence indicates the charges on the AT&T Universal Card were for repairs to the restaurant following the flood. Such charges do not constitute a consumer debt as required by § 523(d). *In re Baker*, 213 B.R. 834 (Bankr. N.D. Ill. 1997).

31. The Debtors' request for recovery of attorney's fees and costs is denied.

32. If appropriate, these conclusions of law shall be findings of fact.

Signed October \_\_\_\_, 2000.

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Robert L. Jones  
UNITED STATES BANKRUPTCY JUDGE