UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF NEW YORK

In re

MARY ANN SHANAHAN

Case No. 92-10990 K

Debtor

J.C. PENNEY COMPANY, INC.

Plaintiff

-vs-

AP 92-1179 K

MARY ANN SHANAHAN

Defendant

Paul M. Aloi, Esq. 1596 Monroe Avenue Rochester, New York 14618

Attorney for Plaintiff

Barry H. Sternberg, Esq. 2746 Delaware Avenue Kenmore, New York 14217

Attorney for Defendant

ThisThis action under 11 U.S.C. § 523(a)(2)(A) came on for trialtrial on December 30, 1992. It alleges fraud arising out of the Debtor's Debtor's use of a credit card to buy Christmas presents, at a time whenwhen she was unemployed and heavily in debt. This Court finds that fraudfraud has been established by a preponderance offraud has been establish that the creditor J.C. Penney must prevail in this action.

¹Grogan v. Garner, 112 L.Ed.2d 755 (1991).

CREDIT CARD ABUSE AS FRAUD

AbuseAbuse of credit cards or of lines of credit defies traditional traditional analysis of "frauds."traditional analysis of "frauds. elemenelements elements that traditionally define a "fraud" are a f "representation" representation and "reliance" thereon: Although a credit clineline of crline of creditline of credit frequently is initially issue representations representations concerning assets, incomerepresentations concusingusing such accounts after they are establishedusing such accounts after oneone wondering where these tone wondering where these two one wondering transaction at a later point in time when assets, income or debts mightmight have changed. Is there a. Is there a new "representation" each accaccounaccountaccount is used, and if bankruptcy ensues and the account paidpaid can it be said that the representation was "false" andpaid can it thethe creditor the creditor "relied" thereupon? At least three schools of the

²(1) That the Debtor made representations; (2) that at the time, the Debtor knew the representations were false; (3) that the Debtor made them with the intention and purpose of deceiving the creditor; (4) that the Creditor relied on such representations; and (5) that the Creditor sustained the alleged loss and damage as the proximate result of the representations. In re Dougherty, 84 B.R. 653, 656 (9th Cir. BAP 1988).

³The Court need not belabor the point that a "credit card purchase" involves, at most, the signing of a sales draft and the retailer's checking with the card issuer to make sure that the card has not been reported stolen, and to give the issuer a chance to make sure that the account is not delinquent or over the credit limit. Then the goods are handed over.

have emerged in the cases analyzing credit card or line-of-credit useuse as fraudulent unuse as fraudulent under use as fraudulent under cannot cannot improve upon the examination of these schools of thought offeredoffered by other Courts.⁴ As explained therein, the three schools of thought are:

- (1) (1) that each use of a char(1) that each use of a charge representation of ability and intent to repay;
- (2) (2) that the card issuer assumes the risk of use or abuse, up to the credit limit or until the card is revoked; and
- (3) that there is an implied representation of intent to pay (but not of ability).

WithoutWithout quarreling with theWithout quarreling with the wisd byby by theby the Courts that have examined the problem in such terms, thi CourtCourt takesCourt takes a more fundamental view of thisCourt takes a more thatthat some fraudulent acts -- some tricks, deceptive devices or artificesartifices -- do not involve "reliance" upon a "representation." SomeSome artificesSome artifices or pretenses or devices are frauds even ifS no real "representation" (but merely an action or impetus) and no realreal "reliance" (but merely an anreal "reliance" (but mere consequence).

⁴In particular see In re Dougherty, 84 B.R. 653 (9th Cir. BAP 1988), and In re Faulk, 69 B.R. 743 (Bankr. N.D. Ind. 1986). Also consider In re Cirineo, 110 B.R. 754 (Bankr. E.D. Pa. 1990) and In re Labuda, 37 B.R. 47 (Bankr. M.D. Fla. 1984). But see First Nat. Bank of Mobile v. Roddenberry, 701 F.2d 927 (11th Cir. 1983).

SlavishSlavish adherence to the "five elements of fraud" set forthforth at footnote 2 above was not required at common law, for it waswas longwas long recognized that "fraud"was long recognized that "fraud" is well summarized in 37 Am.Jur. 2d, Fraud and Deceit § 1:

[W]hile [W]hile it has often b[W]hile it has often been [W]hile cannot cannot or should not be precisely defined, cannot or should no booksbooks contain many definitions, such as unfair dealing; dealing; malfeasance, a positive actdealing; malfeasance, a fromfrom a wilful intent to decfrom a wilful intent to decefrom byby which a person is deceived to his hurt; a act, directed wilful, wilful, malevolent perpetrating a wrong to the rights of others; anythinganything which is calculated to deceive, whetherwhether it is a single act or a combination of circumstances, circumstances, or acts or words which amount a suppression of the truth, or mere silence; silence; deceitful pracsilence; deceitful practsilence; endeavoringendeavoring to deprive another of his known rightright by meright by means right by means of some artful dev contrary contrary to the plain rules of commoncontrary to the plain unlawful appropriation of another's propertyproperty by design; and making one staproperty by design thingsthings appear to a person with things appear to a person are had to be the true state of things, while actingacting on the knowlacting on the knowleacting on the knowl Fraud has also been said to ofof things. consistconsist of conduct that operatesconsist of conduct that oper on the rights of others and is so intended; a deceitful design to deprive another of some profit profit or advantage; or deception practiced to induceinduce another induce another to induce another to part surrendersurrender some legal right, whichsurrender some legal right thethe end desithe end desired. the end desired. Fraud there general sense, is deemed to comprise anything calcalculatedcalculated to deceive, including all acts, omissions and concealments involving a breach legal or equitable duty, trust, or confidence confidence justly reposed, resulting inconfidence justly another, or to another, or byto another, or by unconscientiousunconscientious advantage is taken ofunconscientiou [Citations Omitted.]

ThusThus the Supreme Court has stated (at least in the contextcontext of the criminal law of macontext of the criminal law of macont

defraud'defraud'... have the 'common understanding' of 'wronging one in his property rights by dishonest methods or schemes' and 'usually signifysignify the deprivation of something of value by trick, deceit, chicanechicane or overreaching.'" Carpenter v. Carpenter v. U.S., 98 L.Ed.2d (1987).

Furthermore, Furthermore, itFurthermore, it is evident from 11Furth itselfitself that "actual fraud" does not require a false representation, forfor that provision speaks of "false pretenses, a false representation, tation, or actual fraud." [Emphasis added.] The disjunctive bespeaks a distinction among the three.

"implied representation" is not always necessary when examining a questionquestion of fraud in the use of a credit card. Such resort, furthermore, furthermore, may achieve furthermore, may achieve untowash representation"representation" theory seems to imbue every use of a representative withwith implications with implications that may bewith implications that may particular particular user, implications that turn the burden of proof of fraudfraud on its head. For example, is a simple-minded person who has obtained obtained a credit carobtained a credit card (hobtained a credit carbianism pre-approval" in the mail) really making an "implied representation" representation" of his ability to pay when in fact represents everely severely limited knowledge of his financial resources or even of hishis duty to repay, and merelyhis duty to repay, and merely does exactly when the does not a card to the card? (This Court has had the experience of

aa case in which a mentally-impaired debtor was issued an unsolicitedunsolicited card, and was proven at trial to lack the menta aptitude to know that she had to pay for merchandise charged on a creditcredit cardcredit card.) Such acredit card.) Such a debtor should penaltypenalty of a fpenalty of a fipenalty of a finding of fraud, of penaltypenalty of a fpenalty of a fipenalty of a finding of fraud, of penaltypenalty of a fipenalty of a finding of fraud, of penaltypenalty of a fipenalty of a finding of fraud, of penaltypenalty of a fipenalty of a finding of fraud, of penaltypenalty of a fipenalty of a finding of fraud, of penaltypenalty of a fipenalty of a finding of fraud, of penaltypenalty of a fipenalty of a fipenalty of a finding of fraud, of penalty

IfIf theIf the creditor can make such a showing, then aIf the credit intentionintention to repay on the part of the user -- even highly positive hopeshopes and plans to repay -- might not purgehopes and plans t sophisticatedsophisticated cardholder's actions of fraud. Stated otherwise, factfact that one has profoundly fooled oneself wi prospectsprospects forprospects for the future should not mean that any conse to others was merely inadvertent and not fraudulent.

WhileWhile there is some analytic appeal to the conclusion that the card issuer has assumed the risk that the card would be usedused in this mused in this mannused in this manner⁵ this Court cannot a

 $^{^5}$ First Nat. Bank of Mobile v. Roddenberry, 701 F.2d 927 (11th Cir. 1983).

somethingsomething of which one assumes the risk. The issuer of a credit cardcard or credit linecard or credit line per ignorance, ignorance, mistake, naivete, gullibility, misfortune, accident, or otherother innocent failing or adversity, but the Court declines to applyapply assumption of risk theory to the user's knowing and intentional use of the card to obtain goods without any realistic prospect of having the wherewithal to pay.

InIn sum, this Court finds that deciding whether credit cardcard use was fraudulent does not recard use was fraudulent does not retraditional traditional five elements of fraud, "for the term "fraud" h broader meaning.

THE PRESENT CASE

The The Court will leave the matter of The Court will leave the matter as "bank card" -- to another day. Here the card is a J.C. Penney CardCard and the Court will presume it to be a two-party card: just J.C.J.C. Penney and the debtor. The debtor (and her son, at the debtor's debtor's request) charged over a thousand dollars at J.C. Penney's forfor Christmas for Christmas gifts in December of 1991 on her theretofore for J.C.J.C. PenneyJ.C. Penney Charge Account. (Plaintiff's Exhibit #2). EachJ. slipslip is lip is signed by the debtor, or by her son at her directioslip

 $^{^6}$ The 3rd party issuer is subject to an agreement with the retailer. This may or may not be important.

thethe place where it boldly and conspicuously states "The cardholder acknowledgesacknowledges receipt of gooacknowledges receipt of goods/sackr hereon and agrees to pay the card issuer according to its current terms."

AtAt the tAt the time of the charges the debtor had been out of workwork fowork for fivework for five months, after having worked ele businessbusiness office. Shebusiness office. She is articulate and presents hashas bookkeeping experience and was seeking a bookkeeping or data ententryentry job. She was receiving approximately \$160.00 per week in unemploymentunemployment counemployment compensation interviews during the five month period, and though she testified thatthat she had "good prosthat she had "good prospects" fthat she had month, month, she "couldn't [now] say" who thosemonth, she "couldn't [now HerHer rate of payHer rate of pay at Her rate of pay at her previous job appears that her work was bookkeeping and office clerical.

AtAt the time she made these charge purchases, her only assassets assets were assets were household goods and an automobile. She home.home. Yet she admitted "pehome. Yet she admitted "perhaps"home. Yet balancebalance due on a number of other accounts, somebalance due on a retailretail store or bank-card charge accounterail store or bank-card balances of \$2,000-\$3,000 each.

SheShe may have been fully sincShe may have been fully sincerShe testifiedtestified to the Court and at the time she incurred the charges) in declaring declaring her wholehearted "intent" to declaring her wholehearted But within the next sixty days after the goods were obtained, she

obtained obtained new employment that she determined was at insufficient pay toto repay her debts ito repay her debts into repay her debts in whole previous previous job), previous job), and she consulted with an attorney in la 19921992 about filing bankruptcy. The Petition1992 about filing bankruptcy. ChapterChapter 7 on Chapter 7 on March 20, 1992. Chapter 7 on March 20, 1992. repay these charges.

The debtor was not unsophisticated. She knew the scope of of her indebtedness. She knew that herof her indebtedness. She knew that chargescharges did not rise to an "expectation" charges did not rise to an "expectation" charges did not rise to an "expectation, rather, her professed intention to repay must have appeared unrealisticunrealistic even to her. Nonetheless it was understandable important for her to buy Christmas gifts for her family.

INTENT TO TRICK OR OVERREACH MAY BE FRAUD EVEN WITHOUT INTENT TO DAMAGE

SomeSome disciplines or callings aside from the law might have no difficulty with the notion that one might intend to trick someonesomeone else but not intend to damage that someone. Criminal Law sometimessometimes recognizes such nuances, but more often it charges one withwith the reasonably foreseeable consequences of an intentional act, even if those consequences were not themselves intended. The law of frauds in the context of bankruptcy might cease its utility if itit were not to impose similar liability. It seems clear that if damage results from trickery or overreaching or sham or the like,

thenthen that is sufficient to establish fraud as to anthen that is sufficient damagedamage even if the debtor had hoped to make the other party whole.

FewFew would disagree that if I were to knowingly and intentionally intentionally overstate my assetsintentionally overstate my ass orderorder to obtain a loan, and if I were toorder to obtain a loan, and if thatthat deception, and if damagethat deception, and if damage were to result thethe creditor even if all the while my honest intention had been to repayrepay the loan if it were to be obtained. It is not my prerogative to decide what the lender needs to know, and I cannot justifyjustify my placing the lender at risk through intentional falsehoodsfalsehoods on the grounds that I meant the lender ultifalsehood harm. The result should be no different when the overreaching is the act of invoking an account which I know I cannot pay, knowing further further that if I do so, the vendor must handfurther that useuse of the cause of the carduse of the card is conduct designed advantaadvantage. The advantage. The release of the goods is pretensepretense was intended to achieve. The contractual relationship has beenbeen used in a harmful manner, knowing that damage is nearly certaicertaincertain to rcertain to result. Under the circumstances of t this is fraud.

CONCLUSION

 $^{^{7}}$ Such a fraud would be governed by 11 U.S.C. § 523(a)(2)(B), the "false financial statement" provision, rather than by 523(a)(2)(A).

The The Debtor's charge account purchases from J. The Debtor's charge are non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

Plaintiff's Plaintiff's exhibits 1 through 4 were admiPlaintiff

evidence on Stipulation of the parties, except that the defendant diddid notdid not stipudid not stipulate to having made charges in the reflected therein - nearly \$1400.00. Having had the opportunity since since trial to reflect upon the exhibits, it is not clear to the CourtCourt whether the parties had stipuCourt whether the parties had stiputherethere was no stipulation as there was no stipulation as tothere was allall new charges reflected onall new charges reflected on Exhibits 1 through the debtor, or upon her directithe debtor, or declared declared non-dischargeable in accordance with the above. If the parties have stipulated to a lesser amount, then that amount will be declared non-dischargeable.

Court, on notice to opposing counsel, an affidavit of amount due, including including costs including costs and prejudgmentincluding costs and pandand theand the Clerk shall enter money judgment thereon, which judgmentand excepted excepted from the debtor's discharge in this case. Postjudgment interest shall be awarded in accordance with law.

SO ORDERED.

⁸In re Marie B. King, 135 B.R. 734 (Bankr. W.D.N.Y. 1992).

Dated:	Buffalo,	New	York
	Januarv	28,	1993

U.S.B.J.