

UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa

In the Matter of :  
JOHN F. FOUST : Case No. 88-795-C H  
Debtors. : Chapter 7  
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UNITED STATES OF AMERICA, :  
Plaintiff, : Adv. No. 88-0221  
 : 88-0193  
v. :  
JOHN F. FOUST and :  
JAMES D. FOUST, :  
Defendants. :  
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**ORDER--MOTION TO AMEND COMPLAINTS**

On November 20, 1989, the trial on Plaintiff's complaints to determine dischargeability of debt was completed. The following attorneys appeared on behalf of their respective clients: Kevin R. Query and Debora Anderson for Plaintiff; Clarence Stennes for John F. Foust; and Louis Fusco for James D. Foust. Just prior to the conclusion of said trial, Plaintiff made an oral motion to amend the complaints submitted. At the conclusion of said trial, the Court took the motion to amend complaints under advisement.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I). The Court, upon review of the pleadings and arguments of counsel, now enters its findings and conclusions pursuant to Fed.R.Bankr. 7052.

**FINDINGS OF FACT**

1. On April 13, 1988, James Foust filed a voluntary Chapter 7 petition.

2. The deadline for Plaintiff to file a complaint against James Foust objecting to the discharge and/or to determine dischargeability of a debt was extended by Court Order to September 9, 1988.

3. On September 9, 1988, Plaintiff filed Adversary Proceeding No. 88-0193 against James Foust. In said complaint, Plaintiff's sole legal theory for recovery was under §523(a)(6).

4. On July 22, 1988, John Foust filed a voluntary Chapter 12 petition.

5. The deadline for filing a §523(c) complaint against John Foust to determine the dischargeability of a debt was October 18, 1988.

6. On October 18, 1988, plaintiff filed adversary proceeding No. 88-0221 against John Foust. In said complaint, Plaintiff's sole legal theory for recovery was under §523(a)(6).

7. On December 29, 1988, the Court entered an order converting the John F. Foust Chapter 12 case to Chapter 7.

8. On April 17, 1989, the Court entered an order consolidating for trial adversary No. 88-0193 (Plaintiff v. James Foust) and adversary No. 88-0221 (Plaintiff v. John Foust).

9. On November 20, 1989, the trial on Adversary Nos. 88-0193 and 88-0221 was completed.

10. Just prior to completion of said trial, Plaintiff made an oral motion to amend the complaints submitted. Plaintiff requested leave of the Court to amend Plaintiff's complaints to include an additional legal theory for recovery under §523(a)(2)(A).

11. The §523(a)(2)(A) claims rely on the facts set forth in the original complaints, and the Defendants' specified conduct upon which Plaintiff is relying to enforce the §523(a)(2)(A) claims is identifiable with the original claims.

#### DISCUSSION

The issue *sub judice* is whether Plaintiffs should be allowed to amend their complaints to add a new legal theory over one year after the deadline for filing a section 523(c) complaint. Resolution of this issue requires the Court to consider the interaction and interplay of two procedural rules. Federal Rule of Civil Procedure (hereinafter "Rule") 15 is made applicable to these adversary proceedings pursuant to Bankruptcy Rule 7015, and provides in relevant part:

(a) A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served....Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

...

(c) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date

of the original pleading. [emphasis added]

The other applicable rule is Bankruptcy Rule 4007(c) which provides in relevant part:

A complaint to determine the dischargeability of any debt pursuant to §523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to §341(a).

As a general rule, an additional ground for objecting to discharge cannot be added in the form of an amended complaint after the deadline for filing complaints has passed. In re Herrera, 36 B.R. 693, 694 (Bankr. D. Colo. 1984). However, if the proposed amendment satisfies the requirements of Rule 15(c), the amendment will relate back to the date of the original complaint. Fed.R.Civ.P. 15(c). The test for relation back is whether the defendant's specified conduct, upon which the plaintiff is relying to enforce his amended claim, is identifiable with the original claim. In re Dean, 11 B.R. 542, 545 (B.A.P. 9th Cir. 1981). An amendment that adds or changes the statutory provision relied upon while relying on the same facts in the original complaint will relate back. See Herrera, 36 B.R. at 695 (citations omitted).

Under Rule 15(a), the grant or denial of leave to amend is within the sound discretion of the court. In re Wahl, 28 B.R. 688, 690 (Bankr. W.D. Ky. 1983). The requirement "when justice so requires" in Rule 15(a) requires the court to consider the equities of each case. In re Harrison, 71 B.R. 457, 458 (Bankr. D. Minn.

1987). In considering the relevant equities in a dischargeability adversary proceeding, the court cannot ignore the 60-day statute of limitations of Bankruptcy Rule 4007(c). Harrison, 71 B.R. at 459. This statute of limitations is one of the shortest under federal law and is designed to further a debtor's "fresh start" by allowing the debtor to "enjoy finality and certainty in relief from financial distress as quickly as possible." Id.

In the case *sub judice*, the §523(a)(2)(A) claims rely on the facts set forth in the original complaints, and the Defendants' specified conduct upon which Plaintiff is relying to enforce the §523(a)(2)(A) claims is identifiable with the original claims. Therefore, Nearmyer v. Wiltfang (Matter of Wiltfang), Case No. 88-147-E, unpub. op. (S.D. Iowa January 18, 1989) is controlling, and the Court finds that Plaintiff should be allowed to amend its complaints to include the §523(a)(2)(A) theory for recovery.

IT IS ACCORDINGLY ORDERED that Plaintiffs' motion to amend complaints is granted. Therefore, Counts I and II of Plaintiff's complaint versus James Foust and Counts I, II, and III of Plaintiff's complaint versus John Foust are amended to include a §523(a)(2)(A) claim.

Dated this \_\_\_\_\_ day of January, 1990.

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RUSSELL J. HILL  
U.S. BANKRUPTCY JUDGE