

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
PATRICK WILLIAM HILL and : Case No. 88-0062-W H
PEGGY JOAN HILL, :
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 Debtors. : Adv. No. 88-0084
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FCC NATIONAL BANK, :
 :
 Plaintiff, :
 :
v. :
 :
PATRICK WILLIAM HILL and :
PEGGY JOAN HILL, :
 :
 Defendants. :
 :

**ORDER--TRIAL ON COMPLAINT TO
DETERMINE DISCHARGEABILITY OF DEBT**

On August 9, 1989, a trial was held on the complaint to determine dischargeability of debt. Stephen H. Krohn appeared on behalf of Plaintiff and Casey J. Quinn appeared on behalf of Defendant. At the conclusion of said hearing, the Court took the matter under advisement upon a briefing deadline. Briefs were timely filed and the Court considers the matter fully submitted.

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

FINDINGS OF FACT

1. On January 13, 1988, Debtors filed a voluntary Chapter 7 Petition.

2. In July of 1987, Patrick and Peggy Hill executed and delivered to Plaintiff an application for a credit card. Debtors requested an additional card in the name of Peggy Hill.

3. Plaintiff conducted a credit card check on the Debtors before issuing the cards to Debtors. The credit check showed that the Debtors owed a total of \$6,916.00 as of July 12, 1987.

4. Debtors were aware that the limitation on their line of credit under their account with Plaintiff was \$3,000.00.

5. When the cards were sent to Debtors, Debtors were sent a cardholder agreement which, among other provisions, provides: "When you use your account or permit someone else to use it for purchases or advances, you represent to us that you have the intention and ability to pay and you promise to pay for all such purchases and advances as well as any finance charge and other fees, if any, that may be due."

6. The following is a listing of charges made on Debtors' account:

9/21/87	K Mart	\$ 47.81	Purchase of sundry items.
9/21/87	Cash Advance	\$1,000.00	Deposited in
debtors			checking account to pay bills.

9/26/87	Target	\$ 159.09	Purchase	of
portable			television set used	
			in debtor's semi	
			trailer truck.	
9/26/87	Sapp Bros.	\$ 161.14	Purchase	of
portable	Truck Plz.		refrigerator	and
hot			pot used	in
debtor's			semi trailer truck.	
10/2/87	Swan Productions	\$ 42.40	video tape.	
10/5/87	Penthouse Product	\$ 92.95	video tape.	
10/26/87	K Mart	\$ 82.99	sundry items.	
10/27/87	J.C. Penney	\$ 78.37	table cloth and	
			linen.	
10/28/87	Pamida	\$ 11.44	sundry items.	
10/27/87	Hardware Hanks	\$ 27.93	hardware.	
10/29/87	Cash Advance	\$1,300.00	deposited	in
debtors			checking account to	
			pay bills, one of	
			which was the	
repair			of debtor's auto.	
11/6/87	Multimedia	<u>\$ 32.95</u>	video tape.	
	TOTAL	\$3,037.07		

7. Debtors tendered one payment to the bank of \$49.00 on October 16, 1987, and made no further payments to Plaintiff.

8. On the November 27, 1987 billing statement, the billing statement which lists the last charges incurred by Debtors, the outstanding balance is \$3,097.99. The November 27, 1987 billing statement is also the first billing statement to report that Debtors

had exceeded their credit line limit.

9. Debtors regularly made purchases on their credit cards for living necessities. Payments on these credit cards were then made with monthly income. Each Debtor testified that they did not consult the other regarding the charges made on Debtors' account with Plaintiff and they intended to repay Plaintiff when the charges were made.

10. Patrick Hill testified that his gross income from trucking was reduced by expenses incurred in his employment. The portable television, hot pot, and refrigerator purchased on September 26, 1987, were purchased for his use in the truck he drives in his employment. Patrick Hill was able to reduce his expenses by sleeping and eating meals in his truck.

11. Debtors testified that they first contacted an attorney concerning their financial circumstances around Christmas time in 1987.

12. Patrick Hill testified that he sold a parcel of real estate in the spring/summer of 1987 yielding net proceeds of \$10,000.00. He further testified that he deposited approximately \$7,000.00-\$8,000.00 in his existing stockbroker account and used the remaining proceeds to pay other credit card debt. Mr. Hill purchased a grain option valued at approximately \$10,000.00 that expired in mid-September 1987. The grain option had value up until the date of expiration.

13. Debtors' Statement of Financial Affairs for Debtor Not

Engaged in Business, lists Patrick Hill's occupation as truck driver, with Patrick Hill employed for two years by Mainliner Motor Express.

Debtors' 1986 income is listed as \$21,000.00, and 1985 income listed as \$18,000.00.

14. Schedule A-3 of Debtors' Chapter 7 petition lists total unsecured debt of \$27,444,72, and lists Plaintiff's debt as \$3,097.99.

DISCUSSION

Bankruptcy Code section 523 lists 10 exceptions to discharge and provides in relevant part:

(a) A discharge under section 727... does not discharge an individual debtor from any 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).

The standards for holding a credit card debt nondischargeable under §523(a)(2)(A) are stated in Matter of Stewart, 91 B.R. 489 (Bankr. S.D. Iowa 1988):

In order to hold a credit card debt nondischargeable under (§523(a)(2)(A), the court must find that (1) the debtor knowingly made a

false representation; (2) the debtor intended to deceive the creditor; and (3) the creditor relied upon the false representation. Comerica Bank--Midwest v. Kouloumbiris, 69 B.R. 229, 230 (N.D. Ill. 1986); In re Schmidt, 36 B.R. 459, 460 (E.D. Mo. 1983); and Matter of Buford, 25 B.R. 477, 481 (Bankr. S.D.N.Y. 1982). The use of the credit card is an implied representation to the issuer that the holder has both the ability and the intention to pay for the purchases and the advances. Comerica, 69 B.R. at 230; Schmidt, 36 B.R. at 460; Buford, 25 B.R. at 481. Intent to deceive may be inferred when the cardholder knew or should have known that the cardholder was insolvent and had no ability to pay. Buford, 25 B.R. at 481. However, insolvency alone does not establish intent to deceive. Schmidt, 36 B.R. at 460.

The plaintiff has the burden of proving each of the elements by clear and convincing evidence. Matter of Van Horne, 823 F.2d 1285 (8th Cir. 1987). Regarding the evidence presented, the Eighth Circuit has stated that it:

must be viewed consistent with the congressional intent that exceptions to discharge be narrowly construed against the creditor and liberally against the debtor, thus effectuating the fresh start policy of the Code. These considerations, however, "are applicable only to honest debtors."

Matter of Van Horne, 823 F.2d at 1287.

In the case *sub judice*, the third element is easily proven by clear and convincing evidence. Debtors used their cards on the dates listed in the facts. Plaintiff relied upon the use as a representation that Debtors could and would pay the debt.

Knowledge of a false representation and intent to deceive are more difficult to establish. Concerning the knowledge of a false

representation element, the Plaintiff must show that: 1) the Debtor purchased goods (or made a cash withdrawal) by means of a credit card; and 2) at the time the purchase or cash withdrawal was made, the Debtor either did not have the means to or did not intend to pay for the goods or to repay the money advanced. Matter of Schnore, 13 B.R. 249 (Bankr. W.D. Wisc. 1981). Plaintiff did not prove that at the time Debtors made purchases or cash withdrawals on their cards, Debtors did not have the means to or did not intend to pay for the goods or repay the money advanced. Therefore, Plaintiff did not prove by clear and convincing evidence that Debtors knowingly made a false representation.

Concerning the intent to deceive standard, intent may be inferred where the Debtor knew or should have known that repayment of the debt was impossible. However, courts have recognized "that misconceived optimism is not uncommon to the financially distressed."

Stewart, 91 B.R. at 495, citing Buford, 25 B.R. at 482. Courts look at various factors in assessing the intent issue:

- (1) the length of time between making the charges and filing bankruptcy;
- (2) the number of charges made;
- (3) the amount of the charges;
- (4) whether the charges were above the credit limit on the account;
- (5) a sharp change in the buying habits of the debtor;
- (6) whether charges were made in multiples of three or four per day;

(7) whether charges were less than the \$50.00 floor limit;

(8) financial condition of the debtor was hopelessly insolvent when the charges were made;

(9) whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made;

(10) the debtor's employment circumstances; and

(11) the debtor's prospects for employment.

Stuart, 91 B.R. at 495, citing In re Kramer, 38 B.R. 80, 83 (Bankr. W.D. La. 1984).

Applying the above factors to the case *sub judice*:

1. The length of time between making the charges and the January 13, 1988, Chapter 7 filing was substantial. Debtors incurred the final charge on November 6, 1987, 68 days prior to the filing date. The initial charge on the account occurred September 21, 1987, 114 days prior to the filing.

2. From the time the cards were issued in July 1987 until the January 13, 1988 filing, Debtors made only twelve charges on the account.

3. The total amount of charges was \$3,037.07.

4. Debtors first exceeded their credit line limit in October 1987. On the November 27, 1987 billing statement, the billing statement which lists the last charges incurred by Debtors, the outstanding balance is \$3097.99. This balance exceeds the \$3,000.00 credit line limit by \$97.99. Thus, the excess over credit line limit was minimal. Further, Debtors did not incur any further charges

after receiving the November 27, 1987 statement, which was the first statement to report that Debtors had exceeded the credit line limit.

5. It was Debtors' usual buying habit to purchase living necessities on credit cards. Thus, it was not a sharp change in Debtors' buying habits to incur the listed charges on Plaintiff's credit card. Plaintiff provided no evidence of a sharp change in the buying habits of the Debtor.

6. Charges were not made in multiples of three or four per day. On September 21, 1987, September 26, 1987, and October 27, 1987, Debtors incurred two charges per day. There were no other multiple charges.

7. There is no indication in the record that Debtors were attempting to escape detection by making charges less than the floor limit.

8. The Debtors' financial condition was not hopelessly insolvent. Reviewing Schedule A-3, it is clear that Debtors incurred substantial credit card debt. However, Debtors' employment remained constant throughout the time period relevant to this Court's determination.

9. Debtors contacted an attorney concerning the filing of bankruptcy approximately one month after the final charge was made.

10. The record indicates that Patrick Hill maintained his employment during the period in which these charges were incurred.

In summary, applying the Stewart factors to the case *sub judice*, it is evident that Plaintiff did not prove by clear and convincing

evidence Debtors' intent to deceive Plaintiff.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes that Plaintiff did not prove by clear and convincing evidence that Debtors intended to deceive Plaintiff or that Debtors knowingly made a false representation to Plaintiff.

IT IS ACCORDINGLY ORDERED that Defendants Patrick William Hill and Peggy Joan Hill, have judgment against the Plaintiff, FCC National Bank, dismissing the complaint and for the costs of this adversary proceeding.

FURTHER, the debt owed by the Debtors, Patrick William Hill and Peggy Joan Hill, to the Creditor, FCC National Bank, is dischargeable.

Dated this 4th day of January, 1990.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE