IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

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DISTRICT OF NEBRASKA
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William L. Olson, Clerk
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In the Matter of RAYMOND MILTON GRIESS, Bankrupt. SAUL STONE & COMPANY, an Illinois corporation, Plaintiff-Appellee, vs. RAYMOND MILTON GRIESS, Defendant-Appellant.	)	MEMORANDUM AND ORDER CV79-L-41 (BK 77-L-317)

Raymond Milton Griess, the defendant-appellant, has filed an appeal of the judgment of the bankruptcy court that his debt to Saul Stone & Company, the plaintiff-appellee, is nondischargeable. Saul Stone & Company has filed a motion to dismiss the appeal and the parties have briefed the matter. In addition, the parties have briefed the merits of the case on appeal.

Some facts were stipulated to at the pretrial conference and were relied upon by Bankruptcy Judge David Crawford. Milton Griess traded in the commodities futures market through Saul Stone & Company from approximately April, 1972, through September, 1973. On August 27, 1973, Griess bought twenty-one contracts through Saul Stone & Company; he gave Sault Stone & Company a check for $25,000.00 to cover the initial margin requirement on the contracts. Griess knew when he tendered the check that he did not have sufficient funds in his account to cover it. In previous dealings with Saul Stone & Company, Griess had paid all margin requirements upon request.

Judge Crawford found that Griess was collaterally estopped by the finding of a prior judgment of Saul Stone & Company against Griess that Griess had authorized the purchases made by Saul Stone & Company. Saul Stone & Company incurred a loss of $29,158.50 on the transactions of August 27, 1973, and obtained a judgment against Griess for that amount plus interest. Judge Crawford ruled that this debt to Saul Stone & Company is nondischargeable pursuant to § 17(a)(2) of the Bankruptcy Act, 11 U.S.C. § 35(a)(2), which excepts from discharge those debts where money or property is obtained by false pretenses.

The bankruptcy court entered judgment on December 13, 1978, and Griess filed his notice of appeal on December 20, 1978, under Rule 801 of the Rules of Bankruptcy Procedure. However, he did not file his Designation of Contents and Statement of Issues until January 11, 1979, twelve days after the expiration of the period allowed by Bankruptcy Rule 806 for such filing. Saul Stone & Company then filed a motion to dismiss the appeal based on two grounds--that either the alleged failure of the appellant to make a good faith effort to file an adequate Designation of Contents or the late filing of the Designation of Contents warrants dismissal.

Bankruptcy Rule 806 instructs the appellant to designate the contents of the record on appeal and that designation should be adequate for purposes of appeal. 13 *Collier on Bankruptcy*, ¶ 806.04 at 8-65 (14th ed. 1943). While the court may dismiss an appeal because the appellant has negligently designated an inadequate record, this rather harsh discipline generally should not be used. Where the appellant has acted in good faith, the court may direct the appellee to supplement the record. See *Drybrough v Ware*, 111 F.2d 548, 550 (C.A. 6th Cir. 1940). Rule 806 provides that the appellee may designate additional papers which he deems necessary to the record on appeal, and I note that the appellee has done so in this case. Although it does appear that the Designation of Contents filed by the appellant is inadequate due to several omissions--exhibits concerning the bankrupt's account with Saul Stone & Company and testimony of certain employees of Saul Stone--I do not conclude that the appellant failed to act in good faith. Other relevant documents and testimony, not all of which solely serve appellant's purposes, were designated by appellant. An adequate record is now before the court, as the appellee has supplemented the Designation of Contents pursuant to Rule 806. Moreover, the policy underlying Rule 806 has not been frustrated. 1/ Therefore, this appeal will not be dismissed on grounds of inadequacy of the Designation of Contents.

With respect to the fact that the Designation was filed late, the appellee suggests by analogy to the filing of Notice of Appeal provision, Bankruptcy Rule 802(c), that the appeal should be dismissed due to the late filing unless the appellant demonstrates "excusable neglect." Some of its cited cases dealing with different situations suggest such a standard. *E.g., Stumpf v Matthews*, 195 F.2d 25, 28 (C.A. D.C. Cir. 1951). The appellant alleges that the reason for the twelve-day delay past the deadline for the filing of his Designation of Contents is that when his counsel left the law firm of McGrath, North, et al, there was uncertainty as to who would handle the appeal which could not be resolved within the ten-day period for submitting the Designation after giving notice of appeal. I need not decide whether this explanation would constitute "excusable neglect" within the purview of Rule 802(c), however. I find no statutory or case law standard to bind my consideration of this matter, and look by analogy to Bankruptcy Rule 801(a) for an applicable standard. Rule 801(a) governs the situation when a party does not properly file a notice of appeal:

> " . . . An appeal from a judgment or order of a referee to a district court shall be taken by filing a notice of appeal with the referee within the time allowed by Rule 802. Failure of an appellant to take any step other than that specified in the first sentence does not affect the validity of the appeal, but is ground only for such action as the district court deems appropriate, which may include dismissal of appeal. . . ."

Rule 801 gives the court discretion to take whatever action it "deems appropriate." I do not deem dismissal appropriate in this case. The twelve-day delay in the filing of the Designation of Contents does not appear to have prejudiced the appellee; it was not a long delay. While a change of law firms may or may not provide excusable neglect, I recognize that a certain amount of confusion may result. The appropriate action in the case at bar is to allow the appellant to proceed with his appeal.

Turning to the merits of the appeal, I acknowledge that a district court in considering an appeal must accept the bankruptcy judge's findings of fact unless they are clearly erroneous. Rule 810 of the Rules of Bankruptcy Procedure. No such presumption exists, however, with respect to questions of law or mixed questions of fact and law addressed by the bankruptcy court. *Stafos v Jarvis*, 477 F.2d 369, 372 (C.A. 10th Cir.), cert. denied, 414 U.S. 944 (1973); *Solomon v Northwestern State Bank*, 327 F.2d 720 (C.A. 8th Cir. 1964).

Title 11, U.S.C., § 35(a)(2) provides that a bankrupt shall not be discharged of debts which:

> " . . . are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another . . ."

In applying this section to the facts before him, Bankruptcy Judge Crawford reasoned as follows:

> "Plaintiff's theory of nondischargeability is that because plaintiff knew that he was required to pay initial margin requirements immediately upon making the purchase and further knew that he did not have sufficient funds to make the initial margin requirements, the defendant is guilty of a false pretense or false representation within the meaning of the statutory language.
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> "At one time, the generally accepted rule appeared to be that if a bankrupt had made no affirmative representation of his intention to pay, an implied representation by the mere fact of charging merchandise or obtaining credit was insufficient to render the indebtedness nondischargeable. Davison-Paxon Co. v Caldwell, 115 F.2d 189 (5th Cir. 1941), cert. den. 313 U.S. 564. However, since that decision in 1941, several courts have concluded that the case no longer states a rule which is compatible with the expanded credit industry which has come into being. See, for example, In Re Engstrom, 1 Bankruptcy Court Decisions 17 (S.D. Iowa 1973); In Re Masek, 1 Bankruptcy Court Decisions 56 (N.D. Iowa 1974); In Re Black, 373 F. Supp. 105 (E.D. Wis. 1974). Indeed, even the Fifth Circuit has suggested that the rationale underlying Davison-Paxon has been eroded in the modern world of credit transactions. See In Re Boydston, 520 F.2d 1098 (5th Cir. 1975). I conclude, therefore, that the better and more modern rule is that even absent affirmative representation, the implied representation that the indebtedness will be repaid when credit is used is sufficient to render an indebtedness nondischargeable if it is shown that the bankrupt had no intention of repaying the indebtedness at the time of the use of the credit.
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> "In the present case, the uncontroverted facts establish that the defendant knew of his obligation to pay the initial margin requirement at the inception of the

transaction and he further knew of his inability to do so. I, therefore, conclude that by instigating the transaction, the defendant impliedly represented that he was capable of performing his obligation to pay the initial requirement and that this representation was false because he could not do so and knew that he could not do so. . . ."

Memorandum opinion, Bankruptcy Judge Crawford, December 13, 1978

The appellee argues that the decision of the bankruptcy judge should be affirmed, because the appellant knew that he had an immediate obligation to pay for the margin on the contracts and he also knew that he did not then have the ability to pay. Brief of Appellee, p. 10. The appellee contends that the standard of review governing consideration of whether a debt is nondischargeable under § 35(a)(2) is that of fraud, as set out by the Eighth Circuit in *In Re Taylor*, 514 F.2d 1370, 1373 (C.A. 9th Cir. 1975) (debt nondischargeable where debtor knowingly makes false representations with the intent and purpose of deceiving the creditor who relied upon such representations to his detriment). Arguing the *Taylor* standard, the appellee states that the appellant impliedly represented that he had the money to cover the check to appellee by the mere fact of writing the check, that he knew at the moment of writing the check that he did not have sufficient funds to cover it, that the appellant's writing of the check when he did not have immediate funds to cover it indicates an intent to deceive the appellee, and that as a result of appellee's reliance on the representations, the appellee suffered a financial loss.

The appellant contends for several reasons that the bankruptcy judge erred in his decision. The appellant asserts first that an implied representation will not suffice to make a debt nondischargeable under § 35(a)(2)--an affirmative representation is necessary. Even if an implied representation will suffice, the appellant maintains, an implied representation will engender a nondischargeable debt only where it involves an element of bad faith. A corollary to this position is that the false representation need be accompanied by an intent by the bankrupt not to repay the indebtedness. The appellant contends that the appellee failed to prove an intent not to repay, a part of the standard of review apparently used by Judge Crawford. Finally, the appellant argues that the appellee failed to prove good faith reliance on the representation made by the appellant. The appellee counters by contending that intent not to repay is not an element required for nondischargeability, and even if it is, the record reflects an intent not to repay.

Judge Crawford did not articulate a standard of review for § 35(a)(2), but did indicate that where a bankrupt had no intention of repaying his indebtedness at the time of use of the credit, his representation of ability to pay need only be implied. From the "uncontroverted facts" that the appellant "knew of his obligation to pay the initial margin requirement at the inception of the transaction and he further knew of his inability to do so," Judge Crawford concluded that "by instigating the transaction, the [appellant] impliedly represented that he was capable of performing his obligation to pay the initial requirement and that this representation was false because he could not do so and knew that he could not do so." Judge Crawford then noted that the debt to appellee was nondischargeable. It thus appears that Judge Crawford founded nondischargeability upon the following facts:

1. Payment by check on a debt incurred and due at the time of payment;

2. The inability of the appellant to make immediate payment; and

3. The knowledge of the appellant that he did not have the immediate resources to make the payment.

The foregoing three facts are insufficient to declare a debt nondischargeable pursuant to § 35(a)(2). Even if these facts might be squeezed into the *Taylor* standard (which the Eighth Circuit, incidentally, has not adopted), that standard must not mechanically be applied without considering the context of the policy underlying the Bankruptcy Act.

A primary purpose of the Bankruptcy Act is to give the honest debtor a fresh start in his economic life through the discharge of his debts. E.g., *Perez v Campbell*, 402 U.S. 637, 648 (1971); *Local Loan v Hunt*, 292 U.S. 234, 244 (1934); *Matter of Vickers*, 577 F.2d 683, 686-687 (C.A. 10th Cir. 1978). To achieve this and its other purposes, the Act is to be equitably interpreted. *Matter of Peterson*, 437 F. Supp. 1068, 1070 (U.S.D.C. Minn. 1977). Exceptions to the general policy favoring discharge of debts should be narrowly construed. Doubts concerning the applicability of an exception should be resolved against the objecting creditor and in favor of the debtor's right of discharge. *Vickers*, 577 F.2d at 687; *In Re Dolnick*, 374 F. Supp. 84, 90 (U.S.D.C. N.D. Ill. 1974); see *Taylor*, 514 F.2d at 1373.

With respect to the exception to the general rule of discharge at issue in the case at bar--those debts obtained by false pretenses or false representations--this exception encompasses only that fraud which involves moral turpitude or intentional wrong. The debtor's bad faith may not be imputed. *Wright v Lubinko*, 515 F.2d 260, 264 (C.A. 9th Cir. 1975), quoting *Forsyth v Vehmeyer*, 177 U.S. 177, 182 (1900); *Taylor*, 514 F.2d at 1373. The objecting creditor must prove actual or positive fraud; fraud implied by law will not bring the debt within the exception. *Id.* Moreover, the fraud must be shown by clear and convincing evidence. *Brown v Buchanan*, 419 F. Supp. 199, 202-203 (U.S.D.C. E.D. Va. 1975).

The bankrupt must clearly demonstrate bad faith in his dealings with the creditor to permit serious consideration of nondischargeability; he must have acted to carry out a calculated plan to defraud his creditor. See, e.g., *Wright*, 515 F.2d at 264; *Taylor*, 514 F.2d at 1373; *Dolnick*, 374 F. Supp. at 90. Otherwise, the most punitive measure of nondischargeability would attach too lightly. See, generally, *id.* Any standard which governs nondischargeability of debts must not be framed or applied in such a way as to ensnarl an unwitting or honest-intentioned debtor in its trap.

Some courts have indicated that the debtor must evince an intent not to pay for the obligation at the time of its inception. E.g., *In Re Wood*, 571 F.2d 284, 285 (C.A. 5th Cir. 1978). The appellant argues that the appellee failed to prove an intent not to repay. The appellee contends that this does not fit into the proposed mechanical five-element standard for fraud. A fortiori, the appellee asserts that the intent requirement for § 35(a)(2)--i.e., intent to deceive the creditor--

is satisfied where the debtor presents a check for which he knows he does not immediately have funds to cover. I find the argument nonpersuasive. To satisfy the intent requirement of § 35(a)(2), the debtor must demonstrate either a calculated intent to defraud the creditor or he must realize that his situation regarding payment of the newly incurred debt is and will remain to be hopelessly impossible. See *Matter of Boydston*, 520 F.2d 1098, 1101 (C.A. 5th Cir. 1975); *In Re Black*, 373 F. Supp. 105, 107 (U.S.D.C. E.D. Wis. 1974). The bankruptcy judge has not made such a finding in this case, and for this reason I remand the case for further consideration.

Mr. Griess stated at the hearing that when he tendered the check for the margin requirement he knew that he did not have sufficient funds in his account to cover the check. Furthermore, he stated that he told a commodities broker for Saul Stone & Company of this and that he should hold the check for three days while Griess attempted to secure a loan from his banker. He also stated that the broker agreed to hold the check. T.R. 64:8-65:13. There was conflicting testimony about this, T.R. 35:18-22, but the bankruptcy judge did not announce a finding of fact. Had Griess indicated his situation to the broker who took his check, and if at that time he could have reasonably believed that he would have a reasonable likelihood of securing the loan, then it may not be said that he obtained money or property from Saul Stone & Company by false pretenses. This is so even if Griess did not, and knew he did not, have the money in his account at the instant he wrote the check. I note that a sympathetic reading of the record *could* portray merely a confused and unsophisticated man in dire financial straits who made a desperate attempt to play the futures market before he knew he could acquire the necessary cash.

The exception to the general rule of dischargeability embodied in § 35(a)(2) was not meant to trap this kind of a debtor in the net of his previous financial errors. I emphasize that I do not find this to be the case on this factual record. I hold only that in the absence of a finding by the bankruptcy judge to the contrary, the debt of Mr. Griess to Saul Stone & Company may not be held nondischargeable.

An affirmative representation of one's ability to pay the creditor may generally be necessary to a finding of non-dischargeability, but that is not always the case. An implied representation will suffice to prevent a knowing abuse of creditors by debtors who, for example, may desire to go on a spending spree before formally declaring bankruptcy. See *In Re Black*, supra. There has been no finding, however, that this is the situation here. Griess retains no benefit from his dealings with Saul Stone & Company. He did not manipulate his relationship with Saul Stone & Company to live in the lap of luxury. See, generally, *Matter of Vecchione*, 407 F. Supp. 609 (U.S.D.C. E.D. N.Y. 1976).

While the elements of fraud as set out by the court in *Taylor*, supra, may serve as a standard of review for § 35(a)(2) I conclude that an implied representation will not satisfy, as a general rule, the representation element of that standard Moreover, the representation must have been made with an intent to defraud--i.e., a present intent not to pay for the indebtedness being incurred coupled with an intent to deceive the creditor about the intent not to pay. See *Dolnick*, 374 F. Supp. at 90.

Saul Stone & Company contends that transactions on the futures market do not involve credit trading because of the high risk involved in such a volatile market. It thus distinguishes the decisions which hold that in credit transactions an implied representation is insufficient to sustain a finding of nondischargeability. I do not find this argument compelling. The type of market in which the bankrupt incurs his debt is indeed a factor in determining the necessary type of representation and a clear and convincing showing of intent to defraud in order to prove a debt nondischargeable. It is not, however, dispositive.

I hold that the three facts listed above on which Judge Crawford relied are not sufficient to make a debt nondischargeable. Otherwise, many bankrupts, it would seem, would find their last debts paid by check to be nondischargeable, and this would be inconsistent with the liberal purpose underlying the Bankruptcy Act. As a general rule, an insufficiently funded check should not be the basis for nondischargeability. See *Swanson Petroleum Corp. v Cumberland*, 184 Neb. 323, 167 N.W.2d 391 (1969). It seems not an entirely uncommon phenomenon that a person would write a check with the intent of making a deposit to cover an insufficient amount of funds in his account before the check ultimately reaches his bank. Until there is some finding that this case presents a different situation, there has been no showing of bad faith sufficient to warrant the severe pnealty of nondischargeability. See *In Re Black*, supra.

IT THEREFORE HEREBY IS ORDERED:

1. That the motion to dismiss the appeal filed by the plaintiff-appellee is denied; and

2. That the case is remanded to the bankruptcy court for further proceedings or a determination consistent with this memorandum.

Dated January 28, 1980.

BY THE COURT

Chief Judge

Footnote 1/ None of the purposes of Rule 10(b) of the Federal Rules of Appellate Procedure, from which Rule 806 was derived, have been violated insofar as they relate to the case at bar. See Advisory Committee's Note to Rule 806, 11 U.S.C.A., Rules, Part VIII: Appeal to District Court. See, generally, *Phillips Petroleum Co. v Williams*, 159 F.2d 1011 (C.A. 5th Cir. 1947) (purpose of Rule 10 is to save useless costs and eliminate unnecessary matter); *Miller v United States*, 117 F.2d 256 (C.A. 7th Cir.), cert. denied, 313 U.S. 591 (1941) (purpose of Rule 10 is to expedite appeals and guard against dilatory tactics).