creditors nevertheless incur preference liability because the industry standard does not encompass late payments.

In other words, the second prong of the "ordinary course" defense already provides adequate protection against the specter of inequality: the payment must be "made in the ordinary course of business or financial affairs of the debtor and the transferee." If the payment deviates from the debtor's ordinary payment behavior, then the recipient has presumably received unequal treatment. On the other hand, if all of the debtor's creditors have received comparable treatment, what is the point of holding them to an objective "industry-wide" standard? No one has been harmed by the allegedly preferential payments, and there is no reason to impose liability.

I conclude, therefore, that the third prong of the "ordinary course" defense serves no sound policy objective and imposes substantial evidentiary costs. It should therefore be repealed.

In the likely event that Congress refuses to amend the "ordinary course" defense, preference defendants should be prepared to present evidence concerning industry-wide standards of payment. Defendants will need to define the relevant industry and gather data about payment behavior in that industry. The courts seem to permit officers of the defendant to testify about industry standards, but an outside expert might be more persuasive. Perhaps trade associations could develop lists of potential expert witnesses. (I assume that sharing those lists would not violate any antitrust laws.) Groups of preference defendants, all of whom have been sued in connection with a specific bankruptcy case, also could agree to cooperate in establishing an "industry-wide" standard applicable to the debtor, perhaps including the sharing of expert witnesses.

Such an arrangement may pose ticklish questions of privilege and confidentiality, but it would also give the defendants more leverage against the trustee.

CAN A DISHONORED CHECK SERVE AS GROUNDS TO EXCEPT A DEBT FROM DISCHARGE? IT DEPENDS ON WHAT YOU HAVE TO PROVE

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For many years since the enactment of the Bankruptcy Code, creditors seeking to block the discharge of a debt resulting from a bounced check have been confounded by what at times appears to be an insurmountable hurdle -- proving all of the elements of Section 523(a)(2)(A). This Section, which may be the only available option to such creditors, requires that proof of the following elements must be satisfied in order to except the debt from discharge: (1) a false representation; (2) knowingly made; (3) with intent to deceive; (4) reliance on the representation by the creditor(s);[1] and (5) the creditors' injury. *See, e.g., Longo, Sr. v. McLaren (In re McLaren)*, 3 F.3d 958, 961 (6th Cir. 1993); *Bank of Louisiana v. Bercier (In re Bercier)*, 934 F.2d 689, 692 (5th Cir. 1991); *Lawyers Title Ins. v. Dallam (In re Dallam)*, 850 F.2d 446, 449 (8th Cir. 1988). While elements (2) through (5) are often easily satisfied by establishing the general facts giving rise to, or resulting from, the dishonor of a check, the first element, i.e. false representation, in the instance of a bounced check often times presents a significant proof problem for an objecting creditor.

It may seem an inherent assumption when drawing a check that the drawer is representing to the payee that funds are available to pay the debt. However, it has been held that establishing the existence of insufficient funds is not enough proof of a false representation. *See, e.g., Buckeye Candy Co. v. Ritzer (In re Ritzer)*, 105 B.R. 424, 428 (Bankr. S.D. Ohio 1989); *Roy E. Friedman and Co. v. Jenkins (In re Jenkins)*, 61 B.R. 30, 40 (Bankr. D.N.D. 1986); *Altus Bank v. Stacey (In re Stacey)*, 105 B.R. 672, 675 (Bankr. S.D.Ala. 1989); *Timberline Systems v. Hammett (In re Hammett)*, 49 B.R. 533, 535 (Bankr. M.D.Fla. 1985); *Heingold Commodities & Securities Inc. v. Hunt (In re Hunt)*, 30 B.R. 425, 437-38 (Bankr. M.D. Tenn. 1983); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Younesi (In re Younesi)*, 34 B.R. 828, 830 (Bankr. C.D. Cal. 1983). Rather, courts have held that a false representation is "an affirmative statement of fact, objectively and actively

[1] In *Field v. Mans*, the Supreme Court in settling a dispute among the circuits has held that the party's reliance must be justifiable under the circumstances. __ U.S. __, 116 S. Ct. 437, 133 L.Ed.2d 351 (1995).

manifested by the debtor". *Check Control, Inc. v. Anderson (In re Anderson)*, 181 B.R. 943, 948 (Bankr. D. Minn. 1995) (citing *In re Reder,* 60 B.R. 529, 535-36 (Bankr. D. Minn 1986)). Thus, these courts conclude that "the mere act of tendering a check in payment of a pre-existing or current obligation *is not a representation of fact*, and cannot itself impose liability ...". *In re Anderson*, 181 B.R. at 949 (emphasis added).2

Of course, there do exist a few decisions which hold that a dishonored check can constitute a false representation within the meaning of 11 U.S.C. §523(a)(2)(A); however, these decisions base their decision on a finding that the act of tendering the check where insufficient funds exist constitutes an *implicit* false representation. *See Georgia Casualty and Surety Co. v. Miller (In re Miller)*, 112 B.R. 937, 939 (Bankr. N.D. Ind. 1989); *Bear Stearns & Co. v. Kurdoghlian (In re Kurdoghlian)*, 30 B.R. 500, 502 (BAP 9th Cir. 1983); *Sun Bank of Tampa Bay v. Perkins (In re Perkins)*, 52 B.R. 355, 357 (Bankr. M.D. Fla. 1985); *Frits Lounsten, Inc. v. Mullin (In re Mullin)*, 51 B.R. 377, 378 (Bankr. S.D. Ind. 1985). As a result, these decisions appear to pervert one of the more steadfast tenets of the Bankruptcy Code, i.e. that the complaining creditor bears the *strict burden* of *proving all* of the elements of nondischargeability. *See* Federal Rule of Bankruptcy Procedure 4005; *see also Household Finance Corp. v. Danns (In re Danns)*, 558 F.2d 114, 116 (2d Cir. 1977); *Public Finance Corp. v. Taylor (In re Taylor)*, 514 F.2d 1370 (9th Cir. 1975). In the face of this evidentiary burden it seems clear that the simple act of a check passing hands, does not constitute such sufficient proof, in and of itself, of a false representation. *See In re Anderson*, 181 B.R. at 949-950 (asking "[h]ow ... can [a] Bankruptcy Court justify itself in deeming the element of an *express* statement to have been met when the creditor proves no more than that a small, pre-printed bank form physically passed hands in connection with a commercial transaction." (emphasis in original)). What then can creditors do? It certainly seems unfair to let a debtor who knowingly writes bad checks walk away from bankruptcy unscathed. The answer may lie with a recent decision by the Bankruptcy Court in Minnesota -- offering an alternative way out of the conundrum. *In re Anderson*, 181 B.R. 943. While many practitioners fall into the habit of lumping all three of the terms contained within Section 523(a)(2)(A) together3, several courts have recognized that each of these constitutes "a different overt manifestation of the same sort of deceptive animus." *In re Anderson*, 181 B.R. at 950. As the Supreme Court has recognized, each and every phrase and provision of a statute should be given meaning if possible. *Central Trust Co. v. Official Creditors Committee*, 454 U.S. 354 (1982). Thus quite simply, the answer lies in changing the basic premise of the problem. Creditors may be focusing too narrowly on "false representations" in a discharge proceeding of this nature. Instead, as discussed in the *Anderson* case, creditors should look to one of the less cited provisions of Section 523 (a)(2)(A) - "*false pretenses*".

False pretense has been held to include:

> a series of events, activities or communications which, when considered collectively create a false and misleading set of circumstances, or false and misleading understanding of a transaction, in which a creditor is wrongfully induced by the debtor to transfer property or extend credit to the debtor. "False pretense" may, but does not necessarily, include a written or express false representation. It can consist of silence when there is a duty to speak.

Evans v. Dunston (In re Dunston), 117 B.R. 632, 641 (Bankr. D. Col. 1990) (emphasis added); *see also Goldberg Securities, Inc. v. Scarlata (In re Scarlata)*, 127 B.R. 1004, 1009 (D.Ill. 1991), *aff'd*, 979 F.2d 521 (7th Cir. 1992); *Germain Lincoln Mercury of Columbus, Ins. v. Begun (In re Begun)*, 136 B.R. 490, 494 (Bankr. Ohio 1992); *Howard & Sons, Inc. v. Schmidt (In re Schmidt)*, 70 B.R. 634, 640 (Bankr. N.D. Ind. 1986); *Minority Equity Capital Corp. v. Weinstein (In re Weinstein)*, 31 B.R. 804, 809 (Bankr. E.D.N.Y. 1983).

When a debtor possesses information which would impact upon a creditor's willingness to make certain financial accommodations and fails to disclose such information, such actions, if proven, will satisfy the elements of Section 523(a)(2)(A). The key is the silence on the part of the

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[2] In so holding, many of these cases rely on the Supreme Court decision of *Williams v. United States,* 458 U.S. 279, 102 S. Ct. 3088, 73 L.Ed.2d 767 (1982). In *Williams* the Court held that "technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false'. ... a check is literally not a 'statement' at all." 458 U.S. at 285-286, 102 S.Ct. at 3092-3093, 73 L.Ed 2d at 773-774. *But see In re Anderson*, 181 B.R. at 949 (disapproving of these courts reliance on the Supreme Court decision in *Williams* in light of the criminal context in which it was decided).

[3] That is, §523(a) (2) (A) refers to either: "false pretenses, a false representation, or actual fraud...".

debtor. While the burden on the creditor does not change, the facts necessary to prove its case are more easily established.

In *Anderson* the Court utilized this alternative approach to the benefit of the creditor seeking to deny the debtor's right to discharge gambling losses obtained by check. 181 B.R. at 954. Specifically, in the *Anderson* case the debtor had tendered a stream of checks to a casino in order to obtain gambling money. However, while the debtor had some money on deposit with the bank, he did not have enough to cover all of the checks he wrote. The Court found that by cashing check after check to obtain money for gambling in what it turned into an "increasingly fantastical hope" that he would recoup his losses, the debtor was creating the illusion that he could cover the checks, notwithstanding that the conveyance of such image was done passively. *In re Anderson*, 181 B.R. at 951. The Court found that the debtor intended the casino personnel to rely on this false pretense, i.e. give him the face amount of each check in cash, which resulted in harm to the casino when his checks were dishonored. *Id.* at 952. "The pretense, of course, became more and more false with each check, and he knew that all along. Though the Defendant conveyed his artifice of solvency by passive rather than active means, his conduct, nonetheless satisfies the first and second elements of §523(a)(2)(A)." *Id.* at 951.

The result in *Anderson* affords the Court the opportunity to strike a balance among the cases that have advanced differing interpretations of "false representations" as relates to dishonored checks, thereby avoiding a legal fiction centered around "an implicit representation". *See In re Miller*, 112 B.R. at 940 n. 1; *In re Kurdoghlian*, 30 B.R. at 502. As the Court in *Anderson* recognized, the result is a "poor fit between the fiction's characterization and the facts' actuality, in light of the basic principles of dischargeability theory." 181 B.R. at 949. Since the complaining creditor bears a strict burden of proof that burden cannot possibly be met where the element of an *express* statement is held to be satisfied by simple proof of a preprinted check. Utilizing the approach outlined in *Anderson* the problem of proof is resolved by giving substance to the term "false pretenses", thereby allowing the practitioner to make use of the whole statute as Congress intended, and providing a new and unique avenue of relief for objecting creditors.

Moreover, the alternative approach advanced in the *Anderson* case can be utilized in disputes other than dishonored checks. Clearly this approach offers up a broad array of possibilities for creditors seeking to block the discharge of their debts. For example, there will be an additional avenue of recourse against debtors who charge against an ever increasing balance on their credit cards knowing that they can't pay it back.[4] As the Court stated *In Matter of Weinstein*, 31 B.R. at 809, "silence, or the concealment of a material fact, can be the basis of a false impression which creates a misrepresentation actionable under Section 523(a)(2)(A)." This offers an additional ground to except a debt of discharge in the absence of a false *written* representation.

Clearly, this alternative interpretation offers and expands the opportunities to commence dischargeability proceedings. In fact, as noted above, the potential application of this section appears far beyond the tender of checks subsequently dishonored.

[4] This would supplement other causes of action under Section 523(a)(2)(B) or (a)(2)(C) of the Bankruptcy Code.