McGeorge Law Review

Volume 22 | Issue 4 Article 6

1-1-1991

Application of a Heightened Standard of Proof Is Not Very Clear and Convincing under 11 U.S.C. Section 727(a)

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Application of a Heightened Standard of Proof Is Not Very Clear and Convincing Under 11 U.S.C. Section 727(a)*

The United States Constitution confers upon Congress the power to establish uniform laws regarding bankruptcies.[1] Bankruptcy is an equitable proceeding designed to eliminate the inefficiencies and inequities of nonbankruptcy collection law.[2] The Bankruptcy Code attempts to alleviate these inequities by promoting a system whereby similarly situated creditors receive similar treatment.[3]

The ultimate benefit that chapter 7 bankruptcy offers an individual debtor is the discharge.[4] Through discharge, the Code enables the debtor to obtain a financial fresh start.[5] Discharge provides the honest but unfortunate debtor a fresh opportunity in life and a clean slate for future financial effort, unhampered by the pressures of insurmountable preexisting debt.[6]

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* The author wishes to thank the Honorable James N. Barr, United States Bankruptcy Court, Central District of California, for his encouragement and thoughtful observations during the writing of this Comment.

1. U.S. CONST. art. I, § 8, cl. 4.

2. T. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW, 16-17 (1986). Without the protection of bankruptcy, a financially troubled debtor is often subject to "creditor assault" where each individual creditor is concerned only with recovering the debt owed to the creditor, without consideration of the interests of the other creditors or the debtor. *Id.* at 9. This scenario is frequently referred to as "grab" law. *Id.*

3. Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941); H.R. REP. No. 595, 95th Cong., 1st Sess. 177-78, 340 (1977) (declaring that the underlying theme of bankruptcy is equality of asset distribution).

4. Jackson, *The Fresh Start Policy In Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393 (1985).

5. *In re* Levitan, 46 Bankr. 380, 383 (Bankr.E.D. N.Y. 1985).

6. *See* Perez v. Campbell, 402 U.S. 637, 648 (1971); Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); Williams v. United States Fidelity & Guaranty Co., 236 U.S. 549, 554 (1915) (stating that the bankruptcy discharge provides the honest but unfortunate debtor with a fresh start in business and economic life).

In a chapter 7 bankruptcy, a discharge under section 727(a) discharges the debtor from all debts that arose prior to the date of the order for relief issued by the bankruptcy court,[7] subject to the limitations of section 523(a).[8] A discharge is a court order declaring that a person is entitled to immunity from any actions by creditors to collect debts existing on the date the bankruptcy petition was filed.[9] Individuals receive a discharge from bankruptcy if they do not violate any of the ten grounds for denial of the discharge listed in section 727(a).[10] If an objecting creditor or the bankruptcy trustee believes that the debtor is not entitled to discharge, the objecting party must file an adversary proceeding in the bankruptcy court to obtain a judgment denying the discharge.[11] If a complaint objecting to discharge is not filed within the requisite time period,[12] absent any extension of time, the discharge will be granted by the bankruptcy court.[13]

The Bankruptcy Code provision that governs denial of a chapter 7 discharge is section 727(a).[14] Bankruptcy Rule 4005 is the corresponding procedural rule that addresses the burden of proof

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7. 11 U.S.C § 727(b) (1982 & Supp. 1987).

8. *Id.* Section 523(a) enumerates certain debts that are nondischargeable. 11 U.S.C. § 523(a) (1982 & Supp. 1987). All income and excise taxes for the three years immediately preceding bankruptcy are nondischargeable. *Id.* § 523(a)(1) (1982 & Supp. 1987). Domestic obligations including child support and alimony for the maintenance or support of a spouse are nondischargeable. *Id.* § 523(a)(5) (1982 & Supp. 1987). Fines, penalties, or forfeitures that the debtor owes to a governmental body may not be discharged unless the debt is compensation for an actual pecuniary loss or a penalty assessed on a dischargeable tax. *Id.* § 523(a)(7) (1982 & Supp. 1987). Most educational debts guaranteed by a governmental entity or a nonprofit institution may not be discharged. *Id.* § 523(a)(8) (1982 & Supp. 1987). Obligations incurred as a result of the debtor driving while intoxicated are nondischargeable. *Id.* § 523(a)(9) (1982 & Supp. 1987). Debts that were listed in a prior bankruptcy case, or could have been listed in a prior case, are nondischargeable. *Id.* § 523(a)(10) (1982 & Supp. 1987).

9. 1 COWANS, BANKRUPTCY LAW AND PRACTICE § 5.3 (1989).

10. *See infra* note 32 (explaining the ten exceptions to discharge enumerated in section 727(a)).

11. BANKR. R.P. 4004(a). In a chapter 7 case, a complaint objecting to the debtor's discharge under section 727(a) must be filed not later than 60 days after the first meeting of creditors held pursuant to section 341(a). *Id.*

12. Bankruptcy Rule 4004(a) states that a complaint objecting to the debtor's discharge under section 727(a) must be filed within 60 days following the first meeting of creditors. BANKR. R.P. 4004(a).

13. BANKR. R.P. 4004(c).

14. 11 U.S.C. § 727(a) (1982 & Supp. 1987).

for actions pursuant to section 727(a).[15] Neither section 727(a) nor Rule 4005, however, addresses the standard of proof required to sustain that burden.[16]

The Bankruptcy Code and its legislative history are also silent regarding the requisite standard of proof, as are the Bankruptcy Rules and Advisory Committee Notes thereto.[17] In the absence of any clear legislative guidance, the courts have failed to reach a consensus on whether the appropriate standard under section 727(a) is a preponderance of the evidence or clear and convincing evidence. The clear and convincing standard of proof has been defined as that which supports the court's findings and conclusions with a high degree of certainty.[18] The preponderance of the evidence standard is defined as evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it.[19]

Part I of this Comment discusses the current state of the law dealing with the requisite standard of proof for objections to discharge, with primary focus upon the mechanics of section 727(a) and relevant policy considerations.[20] Part II will consider the existing case law and underlying rationale that supports the respective standards.[21] Part III analyzes the theories that support the application of each standard and considers several arguments against application of the clear and convincing standard.[22] Finally,

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15. BANKR. R.P. 4005. The burden of proof refers to the obligation of a party to introduce evidence that is sufficient to avoid a ruling against the party on the issue. State Farm Life Ins. Co. v. Smith, 29 Ill. App. 3d 942, 331 N.E.2d 275, 278 (1975). The standard of proof refers to the sufficiency of evidence in quantitative terms that the party bearing the burden of proof must establish. *Id.*

16. 11 U.S.C. § 727(a) (1982 & Supp. 1987); BANKR. R.P. 4005. *See infra* note 39 and accompanying text (discussing the burden of proof in discharge actions).

17. 11 U.S.C. § 727(a) (1982 & Supp. 1987). The House and Senate reports do not address the requisite standard of proof under section 727(a). Instead, the reports merely restate the statutory language set forth in the Code. H.R. REP. No. 595, 95th Cong., 1st Sess. 384-85 (1977); S. REP. No. 989, 95th Cong., 2d Sess. 98-99 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5884-85, 6340-41.

18. *In re* Drayman, 77 Bankr. 773, 775 (Bankr. C.D. Cal. 1987).

19. *Braud v. Kinchen*, 310 So. 2d 657, 659 (La. Ct. App. 1975).

20. *See infra* notes 24-74 and accompanying text.

21. *See infra* notes 75-165 and accompanying text.

22. *See infra* notes 166-216 and accompanying text.

Part IV concludes that the preponderance of the evidence standard is the appropriate standard of proof that an objecting party must sustain to satisfy its burden in an action to deny a discharge under section 727(a).[23]

I. CURRENT STATE OF THE LAW

Section 727 is the Bankruptcy Code provision addressing chapter 7 discharge.[24] An individual debtor is granted a discharge unless the debtor has violated any of the ten grounds for denial asserted in section 727(a),[25] and an objecting party in interest brings an adversary proceeding to deny the debtor's discharge.[26] Section 727(a), which completely denies discharge, must be distinguished from section 523(a). An action under section 523(a) merely excepts a single debt from discharge,[27] whereas a successful action under section 727(a) has the effect of completely denying the debtor from discharge.[28] If an objecting creditor establishes an exception to discharge under section 523, only that creditor may attempt to collect its debt from the debtor; all other dischargeable prepetition claims are discharged.[29] If an objection to discharge under section 727(a) is successfully established, all creditors may attempt to collect the unpaid balance of their claims from the debtor.[30]

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23. *See infra* notes 217-218 and accompanying text.
24. 11 U.S.C. § 727 (1982 & Supp. 1987).
25. See *supra* note 10 (discussing the ten grounds for denial of discharge enumerated in section 727(a)).
26. *Id.* § 727(a) (1982 & Supp. 1987).
27. *Id.* § 523(a) (1982 & Supp. 1987).
28. *Id.* § 727(a).
29. *Id.*
30. *Id.*

A. Analysis of Section 727(a)

Section 727(a) provides that the bankruptcy court shall grant a discharge to an individual chapter 7[31] debtor unless one or more of the specific grounds for denying the discharge listed in section 727(a)(1)-(10) is established.[32] Grounds for denying discharge must be proved in an adversary proceeding in the bankruptcy court.[33] Absent a judgment pursuant to section 727(a), section 727(b) discharges the debtor from all debts that arose prior to the date of the order for relief.[34]

The discharge relieves the debtor of all responsibility for discharged debts and provides a fresh start in business and in life.[35] Once the discharge has been granted by the bankruptcy

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31. Section 727 is confined to chapter 7 cases; discharge under the other chapters of the Code is governed by 11 U.S.C. section 944(b) (chapter 9); section 1141(d)(1)(A) (chapter 11); and section 1328 (chapter 13).

32. The first ground for denial of discharge is that the debtor is not an individual. 11 U.S.C. § 727(a)(1) (1982 & Supp. 1987). The second ground for denial is the fraudulent transfer or concealment of assets within the twelve months preceding the bankruptcy or after the commencement of the case. *Id.* § 727(a)(2) (1982 & Supp. 1987). The third ground for denial is the fraudulent concealment of information, or the failure to maintain adequate books and records from which the debtor's financial condition may be ascertained. *Id.* § 727(a)(3) (1982 & Supp. 1987). The fourth ground for denial of discharge is the making of false statements in connection with the bankruptcy proceeding or the commission of a bankruptcy crime. *Id.* § 727(a)(4) (1982 & Supp. 1987). The fifth ground is the failure of the debtor to satisfactorily explain any loss of assets or any deficiency of assets to meet the debtor's liabilities. *Id.* § 727(a)(5) (1982 & Supp. 1987). The sixth ground for denial is the failure to cooperate with the bankruptcy court by refusing to testify after having been granted immunity or after improperly invoking the constitutional privilege against self incrimination, or by refusing to obey any lawful order of the court. *Id.* § 727(a)(6) (1982 & Supp. 1987). The seventh ground for denial of discharge is the commission of any act specified in grounds two through six during the twelve months prior to the debtor's case in connection with another bankruptcy case concerning an insider. *Id.* § 727(a)(7) (1982 & Supp. 1987). The eighth and ninth grounds for denial are if the debtor has received a discharge in another bankruptcy proceeding commenced within six years prior to the filing of the current case, unless the prior case was a chapter 13 case where the debtor had repaid all or a substantial portion of its indebtedness. *Id.* §§ 727(a)(8)-(9) (1982 & Supp. 1987). The tenth ground for denial of discharge is approval by the bankruptcy court of a waiver of discharge. *Id.* § 727(a)(10) (1982 & Supp. 1987).

33. BANKR. R.P. 7001.

34. 11 U.S.C. § 727(b) (1982 & Supp. 1987).

35. 3 COLLIER'S ON BANKRUPTCY § 727.01[1] (1990). The effects of the discharge are enumerated in section 524 of the Code. *See* 11 U.S.C. § 524 (1982 & Supp. 1987).

court, the debtor does not have the power to reaffirm or otherwise become legally obligated upon any discharged debt.[36]

Neither the Bankruptcy Code nor the Bankruptcy Rules address the standard of proof under section 727(a), and the issue remains unsettled in the federal courts.[37] Bankruptcy Rule 4005 is the applicable procedural rule for actions pursuant to section 727(a).[38] Rule 4005 mandates that the objecting creditor bears the burden of proof as to whether the debtor violated one of the grounds for discharge under section 727(a),[39] but Rule 4005 does not mention the standard of proof required to sustain that burden.[40] Rule 4005 leaves to the courts the formulation of rules governing the burden of persuasion.[41]

Section 727(a) of the Code and its legislative history are also silent regarding the requisite standard of proof.[42] The issue remains unresolved in that the United States Supreme Court has never examined the issue of the appropriate standard of proof required under section 727(a). The federal bankruptcy courts, which provide the majority of available case authority, are in disagreement in their interpretation of the appropriate standard of proof.[43]

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36. 11 U.S.C. § 524(f) (1982 & Supp. 1987). The debtor is not precluded from voluntarily repaying an otherwise dischargeable debt prior to discharge. *Id.*

37. *See In re* Mayo, 94 Bankr. 315, 329 (Bankr. D. Vt. 1988) (stating that the cases dealing with the issue of the standard of proof under section 727(a) are unreconcilably conflicting).

38. BANKR. R.P. 4005. Rule 4005 only applies to section 727. *Id.*

39. BANKR. R.P. 4005. Rule 4005 states in pertinent part: "At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection." *Id.*

40. BANKR. R. P. 4005, Advisory Committee Note. The Advisory Committee Notes to Rule 4005 state in pertinent part:

> [T]he rule does not address the burden of going forward with the evidence. Subject to the allocation by the rule of the initial burden of producing evidence and the ultimate burden or persuasion, the rule leaves to the courts the formulation of rules governing the shift of the burden of going forward with evidence . . . .

Id.

41. *Id.*

42. *See supra* note 17 and accompanying text (discussing the failure the House and Senate reports to address the requisite standard of proof under section 727(a)).

43. *See In re* Kim, 97 Bankr. 275, 281 (Bankr. E.D. Va. 1989) (applying the preponderance of the evidence standard to discharge and dischargeability actions). *See also In re* Mayo, 94 Bankr. 315, 329 (Bankr. D. Vt. 1988); *In re* Booth, 70 Bankr. 391, 394 (Bankr. D. Colo. 1987) (applying the clear and convincing standard to discharge and dischargeability actions).

The majority of the cases which dare to elect one standard of proof over the other do so without any explanation whatsoever, merely stating their selection and citing to some other decision that also applied the selected standard without any supporting rationale.[44] The opinions that have attempted to offer persuasive reasoning on the question are often based upon faulty analysis or suspect underlying case authority.[45] Several courts merely avoid the question entirely by stating that the plaintiff has failed to meet even the lowest standard of proof.[46]

B. The Role and Significance of the Standard of Proof

The absence of clear congressional guidance, the inactivity of the Supreme Court of the United States in deciding the issue, and the irreconcilable conflict among the lower federal courts create a situation whereby the issue of the appropriate standard of proof required in an action to deny discharge pursuant to section 727(a) is yet to be determined.[47] The appropriate standard in a civil action is either a preponderance of the evidence or clear and convincing evidence.[48] Given the importance of the discharge as the primary benefit to most debtors in chapter 7 bankruptcy, this issue is of the utmost significance to both debtor and creditor alike.

The determination of the appropriate standard of proof in a discharge action pursuant to section 727(a) depends in part upon

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44. *In re* Watkins, 90 Bankr. 848, 851 (Bankr. E.D. Mich. 1988). *See, e.g.*, Farmers Co-Operative Association of Talmage, Kansas v. Strunk, 671 F.2d 391, 395 (10th Cir. 1982) (stating without any supporting rationale that proof of fraudulent concealment must be proven by a preponderance of the evidence in order to bar discharge).

45. *See e.g.*, *In re* Booth, 70 Bankr. 391, 394 (Bankr. D. Colo. 1987) (holding that the clear and convincing standard is appropriate for actions to deny discharge under section 727 because of the harsh ramifications of a successful action). *See also infra* note 187 and accompanying text (discrediting the so-called harsh ramifications rationale).

46. *See e.g.*, Chrysler Credit Corp v. Rebhan, 842 F.2d 1257, 1262 (11th Cir. 1988); *In re* Phillips, 804 F.2d 930, 932 (6th Cir. 1986); *In re* Kimzey, 761 F.2d 421, 423-24 (7th Cir. 1985); *In re* Horldt, 86 Bankr. 823 (E.D. Pa. 1988) (avoiding the issue of the appropriate standard of proof by stating that the plaintiff has failed to meet even the lowest standard).

47. *In re* Mayo, 94 Bankr. 315, 329 (Bankr. D. Vt. 1988) (stating that in the absence of congressional guidance, the lower federal courts are in irreconcilable conflict regarding the standard of proof inquiry).

48. *Id.* at 318.

the importance society places upon the bankruptcy discharge.[49] The standard of proof reflects an assessment of the comparative social costs of erroneous factual determinations.[50] Thus, a standard of proof represents an attempt to instruct the fact finder, who in a discharge proceeding is the bankruptcy judge, concerning the degree of confidence that society believes the judge should have in the correctness of factual determinations for a particular type of adjudication.[51] Although the phrases "preponderance of the evidence" and "clear and convincing evidence" are qualitatively ambiguous, these phrases communicate the different notions of the degree of confidence the fact finder is expected to possess in the correctness of factual conclusions.[52] Accordingly, application of the clear and convincing standard of proof to actions under section 727(a) instructs the bankruptcy judge that society affords a great deal of importance to the discharge, thus requiring the judge to possess a higher degree of confidence in his factual conclusions than under application of the preponderance standard.[53]

C. Policy Considerations Implicated by the Chapter 7 Discharge

Bankruptcy is an equitable proceeding.[54] A bankruptcy case is administered according to principles of fairness, as contrasted with the strictly formulated rules of common law.[55] The equitable role of the bankruptcy court, coupled with the court's concern for promoting substantive fairness, mandates that the court balance the competing policy concerns of the debtor's fresh start and the objecting creditor's interest in enforcing its legal rights in determining denial of discharge issues.[56] Therefore, in determining the appropriate standard of proof under section 727, it is necessary

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49. *In re* Winship, 397 U.S. 368, 369-72 (1970) (stating that the standard of proof reflects a societal assessment of the importance of the issue at hand).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934).

55. *Id.*

56. 1 COWANS, BANKRUPTCY LAW AND PRACTICE § 1.1 (1989).

to examine the competing policy concerns to be served by that section.

One of the primary purposes of chapter 7 bankruptcy is to provide the debtor with a fresh start.[57] Discharge from bankruptcy is a privilege that is granted to the honest but unfortunate individual debtor who surrenders property for distribution to obtain a fresh start in business and life.[58] The discharge relieves the honest debtor from the weight of oppressive indebtedness and permits the debtor to start afresh, free from the insurmountable obligations and responsibilities that resulted from prior financial misfortunes.[59] Given the importance of the discharge to the debtor, in light of the policy that promotes the "fresh start," the court must carefully scrutinize the debtor's behavior, and construe objections to discharge strictly against the objecting creditor and liberally in favor of the debtor, so as to insure that the fresh start is not frustrated.[60]

The granting of a discharge is dependent upon a balancing of the debtor's equitable interest in obtaining a fresh start and the legal interests of the objecting creditor.[61] In determining whether the privilege of discharge is to be granted to a particular debtor, the court must balance the underlying policy of providing the debtor a fresh start with the policy of preventing a dishonest debtor from using the bankruptcy laws to avoid the consequences of wrongful conduct at the expense of the creditor.[62] Discharge is

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57. *In re* Levitan, 46 Bankr. 380, 383 (Bankr. E.D. N.Y. 1985).

58. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); *In re* Mayo, 94 Bankr. 315, 320 (Bankr. D. Vt. 1988).

59. *Local Loan*, 292 U.S. at 244.

60. *See* Gleason v. Thaw, 236 U.S. 558, 562 (1915); Caspers v. Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987); Murphy & Robinson Investment Co. v. Cross, 666 F.2d 873, 879-80 (5th Cir. 1982); *In re* Vickers, 577 F.2d 683, 687 (10th Cir. 1978); Spach v. Strauss, 373 F.2d 641, 642-43 (5th Cir. 1967); *In re* Zidoff, 309 F.2d 417, 419 (7th Cir. 1962); Bockus v. Yuen, 29 F.2d 205, 206 (9th Cir. 1928); *In re* Greene, 81 Bankr. 829, 833 (Bankr. S.D. N.Y 1988); *In re* Jenkins, 61 Bankr. 30, 39 (Bankr. D. N.D. 1986); *In re* Materetsky, 28 Bankr. 499, 502 (Bankr. S.D. N.Y. 1986) (stating that objections to discharge should be strictly construed against the objecting creditor and liberally construed in favor of the debtor).

61. United States v. Sotelo, 436 U.S. 268, 279 (1978) (implying that the fresh start policy must be balanced with the innocent creditor's interest in obtaining redress for harm caused by the debtor).

62. *Id.*

appropriately denied to the debtor who engages in legally reprehensible conduct, before or during bankruptcy, that is to the disadvantage of creditors.[63] Whatever strength the fresh start policy may have, the policy may not outweigh an innocent creditor's interest in obtaining redress for harm suffered as a result of the debtor's behavior in violation of section 727(a).[64] The fresh start policy must therefore be considered in light of the interests of the creditor which Congress attempted to protect in enacting the Code.[65]

D. Analysis of Section 523 by Analogy

The Supreme Court of the United States and several federal courts of appeal have examined the issue of the appropriate standard of proof required for an exception to discharge under section 523(a) of the Code.[66] If an objecting creditor successfully maintains an action under section 523, the debtor still receives a discharge, however the particular debt owed to the objecting creditor is excepted from that discharge.[67] In contrast, a successful action under section 727(a) denies the debtor discharge of all debts.[68] The severity of a successful action under section 727(a) is clearly more adverse to the debtor than a successful action under section 523(a).[69]

Although sections 727(a) and 523(a) differ substantially in scope, several courts have found cases determining the applicable

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63. *Id.*

64. *Id.* (Court observed that the fresh start policy may not outweigh specific policy judgments made by Congress in enacting the exceptions to discharge).

65. 1 COWANS, BANKRUPTCY LAW AND PRACTICE § 6.2, at 691-92 (1989).

66. *See, e.g.*, Grogan v. Garner, 111 S. Ct. 654, 661 (1991); *In re* Braen, 900 F.2d 621, 626 (3rd Cir. 1990), *cert. denied*, 111 S. Ct. 782 (1991) (applying the preponderance of the evidence standard to section 523).

67. 11 U.S.C. § 523(a) (1982 & Supp. 1987).

68. *Id.* § 727(a) (1982 & Supp. 1987).

69. *Compare id.* (a successful action under section 727(a) completely denies the debtor from discharge) *with* 11 U.S.C. § 523(a) (1982 & Supp. 1987) (a successful action under section 523(a) merely excepts a single debt from discharge). If discharge is denied, the debtor remains liable for all prepetition debts that the debtor incurred, thus frustrating the fresh start policy. 1 COWANS, BANKRUPTCY LAW AND PRACTICE § 5.1 (1989).

standard of proof under section 523(a) are useful by analogy in determining the appropriate standard for an action under section 727(a).[70] While decisions based upon the application of section 523(a) are useful by analogy in determining the appropriate standard of proof required for an objection to discharge under section 727(a), such an analogy is not controlling.[71] As a result of the difference between the severity of the two sections, a determination that the standard of proof under section 727(a) is appropriate solely because a decision under section 523(a) is well reasoned is unsound.[72] The differing consequences of successful actions under the two sections prevent absolute application.[73] However, the underlying rationale of several cases decided under section 523(a) is sound, and may be applicable merely as a consideration in determining the standard under section 727. For instance, the Supreme Court of the United States recently held that the preponderance of the evidence standard of proof is applicable to exception from discharge actions under section 523(a).[74] This decision is useful in determining the appropriate standard of proof required in a section 727(a) objection.

II. THE CASES

Most of the case authority dealing with the standard of proof issue is from the various federal bankruptcy courts. This Comment will next analyze several cases dealing with the issue of the standard of proof under section 727(a) and under section 523(a).[75]

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70. *In re* Mayo, 94 Bankr. 315, 318 (Bankr. D. Vt. 1988) (stating that courts can use cases decided under section 523 to analogize the section 727 standard of proof requirement).

71. *Id.* The *Mayo* court cautioned that in analogizing to cases decided under section 523, it should be clearly understood that causes of action under section 523 are dissimilar statutory creatures from causes of action under section 727. *Id.* Whereas a successful action under section 727(a) completely denies the debtor from discharge, a successful action under section 523 merely excepts a single debt from discharge. *See* 11 U.S.C. §§ 523(a), 727(a) (1982 & Supp. 1987).

72. *In re* Mayo, 94 Bankr. at 318.

73. *Id.*

74. Grogan v. Garner, 111 S. Ct. 654, 661 (1991) (holding that the appropriate standard of proof for all actions to except a debt from discharge under section 523(a) is a preponderance of the evidence).

75. *See infra* notes 77-141 and accompanying text.

The discussion includes an analysis of the recent decision from the Supreme Court of the United States holding that the appropriate standard of proof for actions under section 523(a) is a preponderance of the evidence.[76]

A. The Preponderance Standard

Courts applying the preponderance of the evidence standard frequently subscribe to one of two theories. Some courts apply the "silence of the Code" theory, reasoning that since the Code is silent regarding the standard of proof, courts may not imply a higher standard than the preponderance standard normally applied in ordinary civil proceedings.[77] Courts adopting this theory reason that it is the role of Congress, rather than the courts, to determine when a heightened standard of proof is required.[78]

Other courts determine the appropriate standard of proof by ascertaining whether the underlying cause of action is founded upon fraud.[79] The clear and convincing standard is applied if fraud is alleged;[80] and if not, the lesser preponderance standard is

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76. *See infra* notes 85-89 and accompanying text.

77. *See, e.g., In re* Kim, 97 Bankr. 275, 279-81 (Bankr. E.D. Va. 1989) (applying the silence of the Code theory in holding that the appropriate standard of proof under section 727(a)(3) is a preponderance of the evidence).

78. *Id.*

79. The underlying cause of action refers to the underlying activity that is addressed by the relevant subsection of section 727. For instance, section 727(a)(2) denies discharge if the debtor fraudulently transferred, removed, destroyed, mutilated, or concealed property of the estate or property belonging to the debtor within twelve months preceding the filing. 11 U.S.C. § 727(a)(2) (1982 & Supp. 1987). Thus, the underlying cause of action in an action under section 727(a)(2) is based upon fraud. In contrast, failure to obey a lawful order of the court pursuant to section 727(a)(6) in not a fraudulent activity, and thus the underlying cause of action is not based upon fraud, but rather upon nonfeasance. *Id.* § 727(a)(6) (1982 & Supp. 1987).

80. *See In re* Mayo, 94 Bankr. 315, 329 (Bankr. D. Vt. 1988); (applying the fraud/nonfraud distinction in determining that the appropriate standard is clear and convincing evidence).

applied.[81] Further, some courts apply both the silence of the Code and the fraud/nonfraud theories together.[82]

Other courts have applied alternative rationales in determining that the appropriate standard of proof is a preponderance of the evidence. One court reached that conclusion by employing a balancing test.[83] Another court held that the preponderance standard is appropriate by reasoning that the clear and convincing standard is illogical.[84] Each of those rationales will be further explored below.

1. Grogan v. Garner: *The Silence of the Code Theory*

The Supreme Court of the United States recently held in *Grogan v. Garner*[85] that the appropriate standard of proof for all actions to except debts from discharge pursuant to section 523(a) is a preponderance of the evidence.[86] The Court applied the silence of the Code theory, holding that the statutory silence is inconsistent with the view that Congress intended to require a heightened standard of proof.[87]

The Court also reasoned that the preponderance standard results in roughly equal allocation of risk among the litigants, and is therefore applicable unless constitutionally recognized rights or interests are at issue.[88] The Court held that since the debtor does not have a fundamental right to discharge in bankruptcy, and since discharge is not analogous to any of the recognized constitutional

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81. *See, e.g., In re* Braen, 900 F.2d 621, 624-26 (3rd Cir. 1990), *cert. denied* 111 S. Ct. 782 (1991); *In re* Kim, 97 Bankr. 275, 280-81 (Bankr. E.D. Va. 1989) (applying the fraud/nonfraud distinction in determining that the appropriate standard is a preponderance of the evidence).

82. *See In re* Kim, 97 Bankr. 275, 279-81 (Bankr. E.D. Va. 1989) (applying the silence of the Code and the fraud/nonfraud theories in determining that the appropriate standard of proof under section 727(a) is a preponderance of the evidence).

83. *See In re* Watkins, 90 Bankr. 848, 854 (Bankr. E. D. Mich. 1988).

84. *See In re* Stowell, 113 Bankr. 322, 331 (Bankr. W. D. Tex. 1990).

85. 111 S. Ct. 654 (1991).

86. *Id.* at 661. Although the issue in *Grogan* concerned section 523(a) exception from discharge, the reasoning may be applicable to determining the appropriate standard of proof under section 727(a) denial of discharge. *See supra* notes 66 - 74 and accompanying text (discussing the use of section 523(a) decisions by analogy).

87. *Grogan*, 111 S. Ct. at 659-60 (discussing the silence of the Code theory).

88. *Id.* at 659.

rights that traditionally implicate a heightened standard of proof, the preponderance standard is applicable to actions to except debts from discharge.[89]

2. In re Stowell*: Application of the Preponderance Standard by Reasoning that the Clear and Convincing Standard is Illogical*

Prior to the *Grogan* decision, in the case of *In re Stowell*,[90] a federal bankruptcy court concluded that the clear and convincing standard is illogical in actions under section 523(a). That court challenged two common maxims upon which courts frequently rely upon in adopting the heightened standard.[91] The *Stowell* court acknowledged that several courts had held that exceptions to discharge are to be literally and strictly construed against the creditor and liberally construed in favor of the debtor.[92] Those courts held that in order to achieve this "prodebtor" construction, the clear and convincing standard is necessary.[93]

The *Stowell* court also recognized that several courts reason that the clear and convincing standard is required by the fresh start policy of the Code.[94] Those cases reason that because the public policy underlying the Code favors a fresh start for the honest debtor, any objections to this fresh start must be established with

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89. *Id.* at 659-61.

90. 113 Bankr. 322, 331 (Bankr. W.D. Tex. 1990). Although *Stowell* was a section 523 case, the opinion offers useful insight as to why the court declined to adopt the clear and convincing standard.

91. *Id.* at 331.

92. *Id.* at 330. *See* Gleason v. Thaw, 236 U.S. 558, 562 (1915); Caspers v. Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987) Murphy & Robinson Investment Co. v. Cross, 666 F.2d 873, 879-80 (5th Cir. 1982); *In re* Vickers, 577 F.2d 683, 687 (10th Cir. 1978); Spach v. Strauss, 373 F.2d 641, 642-43 (5th Cir. 1967); *In re* Zidoff, 309 F.2d 417, 419 (7th Cir. 1962); Bockus v. Yuen, 29 F.2d 205, 206 (9th Cir. 1928); *In re* Greene, 81 Bankr. 829, 833 (Bankr. S.D. N.Y 1988); *In re* Jenkins, 61 Bankr. 30, 39 (Bankr. D. N.D. 1986); *In re* Materetsky, 28 Bankr. 499, 502 (Bankr. S.D. N.Y. 1986) (stating that objections to discharge should be strictly construed against the objecting creditor and liberally construed in favor of the debtor).

93. *In re* Stowell, 113 Bankr. at 330. This liberal construction is intended to protect the debtor's fresh start. *Id.*

94. *Id. See In re* Booth, 70 Bankr. 391, 394 (Bankr. D. Colo. 1979) (holding that the clear and convincing standard is required by the fresh start policy of the Code).

a heightened standard of proof, in order to protect the debtor's interest in obtaining a fresh start.[95]

The *Stowell* court reasoned that application of these maxims does not produce a logical result.[96] The *Stowell* court referred favorably to the case of *In re Powell*,[97] wherein the court reasoned that it is the very honesty of the debtor which is called into question in section 523(a) dischargeability and section 727(a) discharge cases, and the higher clear and convincing standard of proof essentially presumes the very issue in question, namely the debtor's honesty.[98]

The privilege of discharge from bankruptcy is based upon honest behavior by the debtor.[99] If an objecting creditor brings an action against the debtor for denial of discharge or to determine the dischargeability of a given debt, the creditor is in effect calling the debtor's honesty into question.[100] However, the clear and convincing standard is so difficult to satisfy that such a standard virtually creates a conclusive presumption of the debtor's honesty.[101] This presumption of honesty is not appropriate because it tends to favor the dishonest debtor by making it more difficult for the objecting creditor to prove that the debtor acted dishonestly.[102] In the alternative, the preponderance of the evidence standard is sufficient to decisively establish the debtor's dishonesty without the requirement of overcoming a presumption

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95. *See, e.g., In re* Cook, 21 Bankr. 112, 114 (Bankr. D. N.M. 1982) (holding that the clear and convincing standard is required to protect the debtor's interest in obtaining a fresh start).

96. *In re* Stowell, 113 Bankr. at 330. The *Stowell* court based its reasoning on the opinion of Judge Clark in the Texas case of *In re* Powell, 88 Bankr. 114, 118 (Bankr. W.D. Tex. 1988). *Id.*

97. 88 Bankr. 114 (Bankr. W.D. Tex. 1988).

98. *Stowell*, 113 Bankr. at 330 (citing *In re* Powell, 88 Bankr. 114, 118 (Bankr. W.D. Tex. 1988)).

99. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); *In re* Mayo, 94 Bankr. 315, 320 (Bankr. D. Vt. 1988).

100. *In re* Powell, 88 Bankr. at 118.

101. *Id.*

102. *Id.* The clear and convincing standard makes it more difficult for the objecting creditor to prove that the debtor acted dishonestly, yet it is the debtor's honesty that is called into question in an action pursuant to section 727(a). *Id.* Thus, it is contradictory to make the standard more burdensome for an objecting creditor to prove the dubious honesty of the debtor. *Id.*

in such actions.[103] Thus, the *Powell* court reasoned that the preponderance standard promotes a more measured and even-handed review.[104]

The *Stowell* court agreed with the reasoning of the *Powell* court in determining the appropriate standard of proof in actions under section 523(a).[105] The *Stowell* court concluded that the analytical underpinnings of the clear and convincing standard were not sound when applied in such actions.[106] Thus, the court held that the appropriate standard of proof in an action to deny discharge pursuant to section 727(a) is a preponderance of the evidence.[107]

3. In re Watkins: *A Balancing Test*

The bankruptcy court in *In re Watkins*[108] applied a balancing test in holding that the appropriate standard of proof under section 523(a) is a preponderance of the evidence.[109] The court stated that to determine the requisite standard of proof, a court must consider the type of action being litigated, the risks faced by the defendant if the defendant should lose, and the interests the plaintiff will enjoy if the plaintiff should prevail.[110]

The *Watkins* court stated that the requisite standard of proof is a preponderance of the evidence unless the law places a particularly strong value upon the privilege of discharge that would

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103. *In re* Stowell, 113 Bankr. 322, 331 (Bankr. W.D. Tex. 1990). The *Stowell* court stated that the preponderance of the evidence standard is mandated in light of the shaky analytical underpinnings of the clear and convincing standard, particularly the creation of the presumption of the debtor's honesty. *Id.*

104. *Powell*, 88 Bankr. at 118.

105. *Stowell*, 113 Bankr. at 331 (citing *In re* Powell, 88 Bankr. 114 (Bankr. W.D. Tex. 1988).

106. *Id.*

107. *Id.*

108. 90 Bankr. 848 (Bankr. E.D. Mich. 1988).

109. *Id.* at 855. Although the *Watkins* decision has been superseded by the recent Supreme Court decision in *Grogan v. Garner*, the rationale remains valuable in determining the appropriate standard of proof under section 727(a). *See* Grogan v. Garner, 111 S. Ct. 654 (1991).

110. *In re* Watkins, 90 Bankr. at 854. This test requires the bankruptcy judge to balance the interests of the parties in light of the issue at hand. *Id.*

require a greater burden to be imposed upon the objecting party.[111] The court held that certain rights demand greater protection than do other rights.[112] Deprivation of one of these protected rights requires proof by a heightened standard.[113]

The ultimate example of a constitutionally protected right is the right to liberty, best illustrated by the right to remain free from imprisonment.[114] This right is deemed so important that it may only be lost by a criminal defendant upon proof beyond a reasonable doubt of all substantive elements of a crime.[115] The *Watkins* court also cited a number of rights which may only be deprived upon proof by clear and convincing evidence.[116] These include the right not to be deported,[117] the right not to be stripped of one's U.S. citizenship,[118] and the right to free speech.[119]

The *Watkins* court asserted that on the other end of the continuum is the typical civil case that involves a monetary dispute

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111. *Id.* at 855. Thus, the question is essentially the degree of importance that the law affords to the bankruptcy discharge, in light of the degree of importance of other legal rights that are subjected to the clear and convincing standard. *Id.*

112. *Id. See* Cruzan v. Director, Missouri Dept. of Health, 110 S. Ct. 2841, 2856 (1990) (holding that the clear and convincing standard is appropriate to determine the termination of nutrition and hydration of a person in a persistent vegetative state); *In re* Winship, 397 U.S. 358, 369-72 (1970) (holding that the beyond a reasonable doubt standard is appropriate to determine the right to remain free from imprisonment); Woodby v. INS, 385 U.S. 276, 286 (1966) (holding that the clear and convincing standard is appropriate to determine the right not to be deported); New York Times v. Sullivan, 376 U.S. 254, 285-86 (1964) (holding that a public official who sues the media for libel must prove allegations by clear and convincing evidence); Chaunt v. United States, 364 U.S. 350, 353 (1960) (holding that the clear and convincing standard is appropriate to determine the right to citizenship).

113. *In re* Watkins, 90 Bankr. at 855. Rights that are afforded greater protection may only be deprived upon a showing of clear and convincing proof. *Id.*

114. *See In re* Winship, 397 U.S. 358, 362 (1970) (holding that the prosecution in a criminal trial must prove all elements of the alleged offense by proof beyond a reasonable doubt).

115. *Id.*

116. *In re* Watkins, 90 Bankr. at 855.

117. Woodby v. INS, 385 U.S. 276, 286 (1966) (holding that the clear and convincing standard is appropriate in denaturalization proceedings).

118. Chaunt v. United States, 364 U.S. 350, 353 (1960) (holding that the clear and convincing standard is appropriate to revoke a person's U.S. citizenship).

119. New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964) (holding that a public official who sues the media for libel must prove allegations by clear and convincing evidence).

between private parties.[120] These actions involve controversies affecting economic interests rather than controversies affecting liberty interests.[121] Since society has a minimal concern with the outcome of such private monetary disagreements, the plaintiff's standard of proof is merely a preponderance of the evidence.[122] This standard places the litigants in a position whereby they share the risk of error in roughly an equal fashion.[123]

The court concluded that an action for nondischargeability is analogous to the claims in the economic rights category rather than the liberty rights category.[124] If a debtor is denied discharge, or a particular debt is excepted from discharge, all the debtor loses is the right to not pay a debt that was voluntarily incurred.[125] The sole rights of the parties are economic: if discharge is denied, the debtor merely remains subject to the same risks and burdens of any other debtor outside bankruptcy.[126] If the discharge is granted, the creditor merely loses any right to collect a previously owed debt.[127] Thus, the court in *Watkins* held that given the balancing of the interests of the parties, and in light of the type of action at issue, no sound reason exists to require a heightened standard of proof under section 523(a).[128]

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120. *In re* Watkins, 90 Bankr. at 856. The Supreme Court of the United States has held that a bankruptcy debtor does not have a constitutional right to obtain a discharge. United States v. Kras, 409 U.S. 434, 445-46 (1973). Thus, the debtor's interest in obtaining a discharge is analogous to the typical civil action involving a monetary dispute between two private parties.

121. *In re* Watkins, 90 Bankr. at 856. The typical civil suit is based solely upon monetary disputes that do not involve allegations of constitutional liberty violations. *Id.*

122. *Id.* The corollary is that if society has a strong concern with the outcome of a case involving rights other than mere monetary disputes, the clear and convincing standard is mandated. *Id.*

123. *Id.*

124. *Id.* The focus of the bankruptcy discharge is to economically rehabilitate the honest but unfortunate debtor. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); *In re* Mayo, 94 Bankr. 315, 320 (Bankr. D. Vt. 1988).

125. *In re* Watkins, 90 Bankr. at 856. The denial of discharge only affects the debtor's economic rights, with no effect on any of the debtor's constitutionally protected liberty rights. *Id.*

126. *Id.* If discharge is denied, the primary consequence is that the debtor remains liable for debts voluntarily incurred prior to filing for bankruptcy protection. *Id.*

127. *Id.* The granting of a discharge only affects the creditor's economic interest in receiving payment of a debt owed to it, with no effect on any of the creditor's constitutionally protected liberty rights. *Id.*

128. *Id.*

4. In re Braen*: The Fraud/Nonfraud Distinction*

In *In re Braen*,[129] the Court of Appeals for the Third Circuit held that the standard of proof should be determined by examining whether or not the underlying action is based upon fraud.[130] This fraud/nonfraud theory suggests that if the underlying cause of action is not based upon fraud, the objecting creditor need only satisfy the preponderance standard.[131] The corollary is that if the underlying cause of action is fraudulent in nature, the movant must prove the allegations by clear and convincing evidence.[132] This theory comports with the traditional common law notion that allegations of fraud had to be established by a heightened standard of proof, because a successful action has the potential of tarnishing the defendant's reputation of honesty and fair dealing.[133] The *Braen* court held that the appropriate standard of proof is the prevailing standard used by courts to resolve the types of claims underlying the particular exceptions at issue.[134] Thus, the *Braen* decision stands for the proposition that in determining the requisite standard of proof, it is necessary to examine the underlying claim, and determine the standard of proof that would be required by that claim in an ordinary civil action.[135] Thus, in *Braen*, the objecting creditor was merely required to prove his claim of willful and malicious injury by a preponderance of the evidence, since that tort does not constitute an act of fraud.[136]

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129. 900 F.2d 621 (3rd Cir. 1990), *cert. denied*, 111 S. Ct. 782 (1991).

130. *Id.* at 624-26.

131. *Id.* at 625.

132. *See In re* Kim, 97 Bankr. 275, 281 (Bankr. E.D. Va. 1989) (holding that for purposes of fraudulent intent or fraud claims, the correct burden of proof is clear and convincing evidence, however, where fraud is not alleged, the correct burden of proof is a preponderance of the evidence).

133. *See* Oriel v. Russell, 278 U.S. 358, 362-63 (1929); Lalone v. United States, 164 U.S. 255, 257-58 (1896); Huntley v. North Carolina State Bd. of Education 493 F.2d 1016, 1019 (4th Cir. 1974); Holley Coal Co. v. Globe Indemnity Co., 186 F.2d 291, 296 (4th Cir. 1950) (stating that over the years a rule has evolved where one who charges fraud must prove the fraud by clear and convincing evidence).

134. *In re* Braen, 900 F.2d at 625-26.

135. *Id.*

136. *Id.* at 626.

5. In re Kim: *The Fraud/Nonfraud Distinction and the Silence of the Code Theory Applied Together*

One decision that applies both the fraud/nonfraud distinction and the silence of the Code theory is *In re Kim*.[137] The *Kim* court first based its holding on the silence of the Code reasoning, holding that in the face of statutory silence courts may not impose a higher standard than normally applied in ordinary civil proceedings.[138] However, the court took the analysis one step further and examined the underlying cause of action.[139] In holding that an action for failure to maintain adequate financial records pursuant to section 727(a)(3) is not akin to fraud, the *Kim* court declared that the correct standard of proof is clear and convincing evidence for claims based upon fraud or fraudulent intent; however, if fraud is not alleged, then the correct standard is preponderance of the evidence.[140] The court then held that because fraud was not alleged, the appropriate standard of proof was a preponderance of the evidence.[141]

B. The Clear and Convincing Standard

Generally, courts applying the clear and convincing standard in actions under section 727(a) utilize three theories to justify their decisions. Several courts hold that because of the harsh consequences of a successful action under section 727, a heightened standard of proof is required to justify denying a debtor the privilege of discharge.[142] Other courts place great emphasis on the fact that the underlying policy of discharge is to provide the honest debtor with a fresh start, and any action that may impede

137. 97 Bankr. 275 (Bankr. E.D. Va. 1989).
138. *Id.* at 281.
139. *Id.*
140. *Id.* at 280-81.
141. *Id.*
142. *See, e.g., In re* Mayo, 94 Bankr. 315, 329 (Bankr. D. Vt. 1988); *In re* Booth, 70 Bankr. 391, 394 (Bankr. D. Colo. 1987) (holding that the severe effects of a successful action under section 727 mandates application of the clear and convincing standard).

this goal must be proven by clear and convincing evidence.[143] At least one other court applied the fraud/nonfraud distinction,[144] reasoning that if the underlying cause of action is based upon fraud, then the clear and convincing standard is required, as in ordinary civil actions for fraud at common law. As shown in the above section dealing with the preponderance of the evidence standard, this fraud/nonfraud distinction is also utilized in determining the applicability of that standard.[145]

1. In re Mayo*: Harsh Consequences and the Fraud/Nonfraud Distinction*

In the case of *In re Mayo*,[146] a Vermont federal bankruptcy court recently held that clear and convincing evidence, rather than mere preponderance of the evidence, is the appropriate standard of proof when a creditor objects to a debtor's discharge under section 727(a).[147] The plaintiff sued the debtor under sections 727(a) and 523(a), however, the court only addressed the issue of the appropriate standard of proof under section 727(a).[148] In determining that the clear and convincing standard is applicable to section 727(a)(3), which denies discharge for failure by the debtor to maintain adequate financial records,[149] the *Mayo* court relied in part on the 1929 Supreme Court decision of *Oriel v. Russell.*[150]

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143. *See, e.g., In re* Booth, 70 Bankr. at 394 (holding that the significance of the fresh start policy is one reason to apply the clear and convincing standard to an action under section 727).

144. *See, e.g., In re* Mayo, 94 Bankr. at 329 (holding that the clear and convincing standard is appropriate if the underlying action in the dischargeability proceeding is based upon fraud).

145. *See supra* notes 79 - 82 and accompanying text (discussing the fraud/nonfraud distinction in applying the preponderance of the evidence standard).

146. 94 Bankr. 315 (Bankr. D. Vt. 1988).

147. *In re* Mayo, 94 Bankr. at 318.

148. *Id.* at 315. In *Mayo*, the issue of the appropriate standard of proof was first raised at the pretrial conference. *Id.* at 318. Neither party to the litigation objected to the court's pronouncement that the appropriate standard under section 523 was clear and convincing evidence. *Id.* Thus, the sole issue for determination at trial was the appropriate standard of proof in an action under section 727. *Id.*

149. 1 U.S.C. § 727(a)(3) (1982 & Supp. 1987).

150. *Mayo*, 94 Bankr. at 315 (citing Oriel v. Russell, 278 U.S. 358 (1929)). *Oriel* involved a debtor who refused to produce various books of account pursuant to an order to turnover. *Oriel*, 278 U.S. at 361. As a result, the debtor was held in contempt of court. *Id.* Although the debtor appealed

In *Oriel*, a case decided prior to enactment of the Code, the Court held that in an action for turn over[151] of accounting records, the clear and convincing standard is appropriate.[152]

The *Mayo* court maintained that *Oriel* was analogous because a 1929 turnover proceeding is akin to a modern section 727(a)(3) proceeding.[153] The *Oriel* Court reasoned that the failure to deliver accounting records is analogous to fraud, in that the debtor knew he was obligated to deliver the records to the trustee, but deliberately refused to comply with that obligation.[154] The *Oriel* Court then held that such failure must be proven to the same extent as required in a civil action for fraud.[155]

The *Mayo* court also reasoned that the requirement of the heightened standard of proof is further compelled by the harsh consequences of a successful objection under section 727(a)(3), as compared to a successful action under section 523(a).[156] Whereas a successful action under section 523(a) merely excepts a single debt from discharge,[157] a successful action under section 727(a)

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on the contempt issue, Chief Justice Taft, writing for the majority, addressed the issue of the requisite standard of proof applicable to the order to turnover. *Id.* at 361-62. The majority opinion in *Oriel* rejected the preponderance of the evidence standard and held that a proceeding to turn over in bankruptcy is a charge equivalent to fraud, and must be established by the same kind of evidence required in a case of fraud, namely clear and convincing evidence. *Id.*

151. A turnover proceeding is an action where the plaintiff requests judicial intervention to cause the defendant to surrender the articles in question to the plaintiff. *Oriel*, 278 U.S. at 361.

152. *Id.* at 362.

153. *In re* Mayo, 94 Bankr. at 325. Section 727(a)(3) states in relevant part: "The court shall grant the debtor a discharge, unless . . . the debtor has concealed . . . any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained." 11 U.S.C. § 727(a)(3) (1982 & Supp. 1987). The concealment of recorded information contemplated by section 727(a)(3) is analogous to the defendant's refusal to surrender articles subject to a turnover proceeding. *In re* Mayo, 94 Bankr. at 325.

154. *Oriel*, 278 U.S. at 362-63. The fraud arose because the debtor had knowledge that he was required to deliver the records to the bankruptcy trustees, but expressly refused to do so. *Id.*

155. *Id.*

156. *In re* Mayo, 94 Bankr. at 329. In *Mayo*, the court stated that "A section 727 nondischargeability complaint is a cataclysmic attack on a debtor's fresh start. The successful result of such an attack is to deprive the debtor of his entire fresh start. Compared to the nondischargeability result of a successful section 523(a) attack, a successful section 727 proceeding is the equivalent of all out nuclear war on the debtor." *Id.*

157. 11 U.S.C. § 523(a) (1982 & Supp. 1987).

completely denies the debtor discharge.[158] The court held that the harsh effect of a successful action under section 727(a) mandates the heightened standard of proof.[159] The *Mayo* court, in applying both the fraud/nonfraud distinction and the harsh consequences theory, held that the requisite standard of proof in an action to deny discharge under section 727(a) is clear and convincing evidence.[160]

2. In re Booth: *Harsh Consequences and the Fresh Start*

In *In re Booth*,[161] a Colorado federal bankruptcy court held that a party objecting to a debtor's discharge must prove its allegations by clear and convincing evidence.[162] The Court reasoned that an attack on discharge under section 727(a) is significantly more severe in its consequences than excepting a single debt from discharge under section 523(a).[163] The court held that this severity, coupled with the policy of providing the debtor with a fresh start, mandates application of the clear and convincing standard.[164] Thus, the *Booth* court relied on both the harsh consequences theory and the fresh start theory in reaching its decision.[165]

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158. *Id.* § 727(a) (1982 & Supp. 1987).

159. *Mayo*, 94 Bankr. at 329. The court stated that the denial of discharge is a particularly severe remedy because it precludes the debtor from obtaining any relief from creditors at the conclusion of the bankruptcy proceeding. *Id.*

160. *Id.* at 328-29. In stating its holding, the court noted the absence of any congressional guidance and the unreconcilable conflict among the cases dealing with the standard of proof issue under section 727. *Id.*

161. 70 Bankr. 391 (Bankr. D. Colo. 1987).

162. *Id.* at 394.

163. *Id.*

164. *Id.*

165. *Id.*

III. ANALYSIS OF THE THEORIES: APPLICATION OF A HEIGHTENED STANDARD OF PROOF IS NOT VERY CLEAR AND CONVINCING

The function of a standard of proof is to inform the finder of fact regarding the degree of confidence that he or she should possess in the correctness of the particular factual conclusion at issue.[166] Thus, the choice of a particular standard of proof reflects the importance of the interests at stake.[167] The Supreme Court of the United States has recognized that a heightened standard of proof is mandated when the interests at stake are both "particularly important" and "more substantial than [the] mere loss of money."[168] These important issues generally deal with fundamental constitutional rights.[169]

The Supreme Court has held that the imposition of even the most severe civil sanctions will be permitted based upon proof by a mere preponderance of the evidence, so long as "important" interests are not implicated.[170] Society has a minimal concern with the outcome of the typical civil action involving a monetary dispute between two parties that does not implicate fundamental constitutional rights.[171] Accordingly, the Court has held that the plaintiff's standard of proof in such an action is generally the preponderance of the evidence standard.[172] In fact, the standard of proof imposed in the majority of nonbankruptcy civil actions dealing with economic disputes is a preponderance of the evidence.[173] This includes ordinary civil actions in fraud.[174]

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166. Addington v. Texas, 441 U.S. 418, 423 (1979).

167. *In re* Watkins, 90 Bankr. 848, 855 (Bankr. E.D. Mich. 1988).

168. Santosky v. Kramer, 455 U.S. 745, 756 (1982) The Supreme Court has applied the heightened clear and convincing standard of proof in several nonbankruptcy cases. *See supra* note 112 and accompanying text (discussing other factual situations in which the Court has imposed the clear and convincing standard).

169. *Santosky*, 455 U.S. at 756.

170. Herman & MacLean v. Huddleston, 459 U.S. 375, 389-90 (1983).

171. *Id.*

172. Addington v. Texas, 441 U.S. 418, 423 (1979) (holding that the clear and convincing standard is appropriate in an action for civil commitment).

173. *Id.* at 423 (stating that the preponderance of the evidence standard is imposed in the ordinary civil suit for money damages).

Further, a number of nonbankruptcy federal laws permit proof of fraud by a mere preponderance of the evidence.[175] Included in this category are the antifraud provisions of the federal securities laws.[176]

The Supreme Court has held that the debtor's interest in obtaining a discharge is not a fundamental interest or constitutionally guaranteed right.[177] An action to deny the debtor's discharge is essentially a monetary dispute between two parties.[178] The characterization of the discharge is muddled, however, because the fresh start policy of the Code has been viewed to mandate application of section 727(a) with a prodebtor disposition.[179]

The innocent creditor's interest in obtaining compensation for the debtor's violation of section 727(a) is however at least as important as the debtor's interest in obtaining a fresh start.[180] Further, given the Supreme Court's reluctance to apply the clear and convincing standard to civil suits solely involving monetary

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174. *See infra* notes 183-186 and accompanying text (discussing the emerging majority view that the appropriate standard of proof in an ordinary civil action in fraud is a preponderance of the evidence).

175. Congress and the Supreme Court have decided that the preponderance of the evidence standard is appropriate in a number of federally created substantive causes of action for fraud. *See* Herman & MacLean v. Huddleston, 459 U.S. 375, 388-92 (1983) (civil enforcement of the antifraud provisions of the federal securities laws); Steadman v. Securities & Exchange Comm'n, 450 U.S. 91, 96 (1981) (administrative proceedings concerning violation of antifraud provisions of the securities laws); Securities & Exchange Comm'n v. C.M. Joiner Leasing Corp., 320 U.S. 344, 355 (1943) (section 17(a) of the Securities Act of 1933); First National Monetary Corp. v. Weinberger, 819 F.2d 1334, 1341-42 (6th Cir. 1987) (civil fraud provisions of the Commodity Exchange Act); 12 U.S.C.§ 1833a(e) (1986 & Supp. 1990) (civil penalties for fraud involving financial institutions); 31 U.S.C. § 3731(c) (1986 & Supp. 1990) (False Claims Act); 42 C.F.R. § 1003.114(a) (1989) (Medicare and Medicaid fraud under 42 U.S.C. section 1320a-7a).

176. Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983) (holding that the preponderance of the evidence standard is applicable to a private action under section 10(b) of the Securities and Exchange Act of 1934); Securities & Exchange Comm'n v. C.M. Joiner Leasing Corp., 320 U.S. 344, 355 (1943) (holding that the preponderance of the evidence standard is applicable to an action pursuant to section 17(a) of the Securities and Exchange Act of 1933).

177. United States v. Kras, 409 U.S. 434, 445-46 (1973) (stating that the debtor does not have a constitutional right to discharge and that no fundamental interest is gained or lost depending on the availability of a bankruptcy discharge).

178. *In re* Watkins, 90 Bankr. 848, 856 (Bankr. E.D. Mich. 1988).

179. *In re* Huff, 1 Bankr. 354, 356-57 (Bankr. D. Utah 1979).

180. *Id.*

damages, the balance of the interests among the parties involved in the discharge litigation appears to be evenly balanced in that whichever party loses, the loss suffered is solely economic.[181] Given that the interests of the debtor and creditor are merely economic, as in any ordinary civil action, and given that the discharge does not implicate any important societal interest that the Court has traditionally protected with heightened scrutiny, application of the clear and convincing standard in discharge actions is not justified in light of the traditional types of actions that have utilized the heightened standard.[182]

In addition, a majority of the states, including California, hold that the preponderance of the evidence standard is the appropriate standard of proof in a civil action for fraud.[183] This emerging

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181. *Id.*

182. *In re* Watkins, 90 Bankr. at 855-56.

183. Calhoun v. Baylor, 646 F.2d 1158, 1163 (6th Cir. 1981) (applying Tennessee law) (holding that Tennessee law requires only that fraud be proved by a preponderance of the evidence); L & S Enterprises Co. v. Great American Ins. Co., 454 F.2d 457, 460 (7th Cir. 1971) (diversity action applying Illinois law holding that fraud need only be proved by a preponderance of the evidence); Powerhouse, Inc. v. Walton, 557 So. 2d 186, 187 (Fla. Dist. Ct. App. 1990) (holding that the quantum of proof necessary to support an action for fraud is preponderance of the evidence); LaCaze v. State, 541 So. 2d 322, 328 (La. Ct. App. 1989) (holding that fraud need only be proved by a preponderance of the evidence and it may be established by circumstantial evidence); Dairy Queen v. Travelers Indemnity Co., 748 P.2d 1169, 1171-72 (Alaska 1988) (holding that no more than a preponderance of the evidence is necessary to establish fraud); Tipp v. United Bank of Durango, Colorado, 23 Ark. App. 176, 178, 745 S.W.2d 141, 143 (1988) (holding that the party who alleges fraud bears the burden of proving it by a preponderance of the evidence); Parke County v. Ropak, Inc., 526 N.E.2d 732, 736 (Ind. Ct. App. 1988) (holding that fraud must only be proved by the preponderance of the evidence); Ostalkiewicz v. Guardian Alarm, 520 A.2d 563, 569 (R.I. 1987) (holding that fraud in a civil suit need only be proved by a preponderance of the evidence); Tobin v. Flynn & Larsen Implement Co., 220 Neb. 259, 261, 369 N.W.2d 96, 99 (1985) (holding that fraud suits at law must be proved by a preponderance of the evidence); General Elec. Credit Corp. v. Wolverine Ins., 420 Mich. 176, 181, 362 N.W.2d 595, 601 (1984) (holding that fraud must be established by a preponderance of the evidence); Poulsen v. Treasure State Industries, Inc., 192 Mont. 69, 626 P.2d 822 (1981) (holding that fraud can never be presumed, but must be proved by a preponderance of the evidence); Jennings v. Jennings, 309 N.W.2d 809, 812 (S.D. 1981) (holding that fraud must be proved by a preponderance of the evidence); Liodas v. Sahadi, 19 Cal. 3d 278, 291, 562 P.2d 316, 324, 137 Cal. Rptr. 635, 643 (1977) (holding that civil fraud must only be proved by a preponderance of the evidence); Goodfellow v. Kattnig, 533 P.2d 58, 60 (Colo. 1975) (holding that the preponderance of the evidence standard applies in all civil actions); Kern v. NCD Industries Inc., 316 A.2d 576 (Del. 1973) (holding that fraud must be proved by a preponderance of the evidence); Echols v. N.C. Ribble Co., 85 N.M. 240, 244, 511 P.2d 566, 571 (1973) (holding that fraud is proved by a preponderance of the evidence); Crawford v. Smith, 470 S.W.2d 529, 531-32 (Mo. 1971) (holding that fraud is proved by a preponderance of the evidence); Manning v. Len

majority view contradicts the rationale of several of the cases discussed above applying the clear and convincing standard in discharge actions by reasoning that the standard of proof in an ordinary civil action for fraud is clear and convincing evidence.[184]

The traditional reasons for applying the clear and convincing standard to issues of fraud are inapplicable in modern jurisprudence. Historically, the clear and convincing standard was applied in civil proceedings involving allegations of fraud where a written instrument failed to comply with the Statute of Frauds, the Statute of Wills, or the parol evidence rule.[185] The courts applied the clear and convincing standard in those cases because of the potential that such claims were fabricated.[186]

Concerns of document fabrication are generally not implicated in actions under section 727(a). In most discharge actions, the validity of a written document is not in issue. Therefore, the traditional common law rationale for requiring the clear and convincing standard in civil actions for fraud is not applicable in the discharge context. Further, in light of the emerging majority view applying the preponderance of the evidence standard to civil actions for fraud, the rationale for applying the clear and convincing standard in discharge actions is no longer valid.

Immke Buick, Inc., 28 Ohio App. 2d 203, 276 N.E.2d 253, 257 (1971) (holding that the degree of proof necessary to show fraud in a civil action for damages is by a preponderance of the evidence); Medivox Productions, Inc. v. Hoffman-LaRouche, Inc., 107 N.J. Super. 47, 256 A.2d 803, 814 (1969) (holding that fraud is determined in actions at law by a preponderance of the evidence); Frankfurt v. Wilson, 353 S.W.2d 490, 496 (Tex. Ct. App. 1961) (holding that the burden of proof on the part of the plaintiff to establish fraud is by a preponderance of the evidence); Maynard v. Durham & Southern Railway Co., 251 N.C. 783, 786, 112 S.E.2d 249, 252 (1960), *rev'd on other grounds*, 365 U.S. 160 (1961) (holding that in an action to set aside an instrument based upon fraud, the burden of proof to establish such allegation is by the preponderance of evidence). In addition, several scholars argue that the preponderance of the evidence standard is the appropriate standard of proof in civil actions alleging fraud. *See* 37 AM. JUR. 2D *Fraud and Deceit* § 468 (1968); 37 C.J.S. *Fraud* § 94, 113 (1943); Annotation, *Quantum of Proof in Civil Case on Issue Involving Fraudulent, Dishonest, or Criminal Misappropriation of Property*, 62 A.L.R. FED. 1449 (1929).

184. *See In re* Mayo, 94 Bankr. 315, 328 (Bankr. D. Vt. 1988).

185. Herman & MacLean v. Huddleston, 459 U.S. 375, 388 n.27 (1983).

186. Note, *Appellate Review in the Federal Courts of Findings Requiring More than a Preponderance of the Evidence*, 60 HARV. L. REV. 111, 112 (1946) (discussing the reasons for applying the clear and convincing standard of proof in common law actions for fraud).

The harsh consequences rationale is also not convincing. The fact that a successful action to deny discharge pursuant to section 727(a) produces harsh consequences in relation to a successful action to except a debt from discharge pursuant to section 523(a) is not sufficiently compelling to mandate imposition of a heightened standard of proof. It is clear that a debtor will suffer repercussions of a greater magnitude if discharge is denied than if a single debt is merely excepted from discharge. However, these heightened ramifications are purely of economic significance: the effect of a denial of discharge is that the debtor remains liable upon all prepetition debts. If discharge is denied, the debtor loses monetarily. Yet, the Supreme Court has consistently held that issues relating solely to economic interests are not sufficiently important to warrant application of a heightened standard of proof.[187] The Court has refused to apply the clear and convincing standard to issues solely involving monetary disputes. Therefore, in light of the Court's treatment of monetary disputes, the harsh economic consequences of a successful action under section 727(a) are not sufficient to justify imposition of the clear and convincing standard of proof.

The argument that the clear and convincing standard is mandated by the fresh start policy underlying the discharge is also not compelling. The fresh start that discharge contemplates is a financial fresh start. The honest debtor is relieved from the insurmountable indebtedness and is permitted to start afresh, unrestrained by the obligations that resulted from prebankruptcy financial misfortunes. The only interests that are affected by the fresh start are purely economic. Thus, the fresh start, although important as economic protection for the debtor, is not sufficiently compelling to mandate a standard of proof greater than a mere preponderance of the evidence.[188]

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187. *See supra* note 112 and accompanying text (discussing situations where a heightened standard of proof is imposed).

188. The Supreme Court recently rejected the fresh start theory in the context of section 523. Grogan v. Garner, 111 S. Ct. 654, 659 (1991). The Court held that the fresh start is limited to the honest but unfortunate debtor, and that the interest of a perpetrator of fraud in obtaining a complete discharge should not prevail over the interest in protecting victims of fraud. *Id.*

Imposition of the clear and convincing standard would cause discrepancy in application of issue preclusion procedures. The effect of a nonbankruptcy court judgment that was rendered prior to the filing of the bankruptcy petition is often an issue in a bankruptcy discharge proceeding.[189] The res judicata and collateral estoppel effect of a prepetition nonbankruptcy court judgment is thus an important consideration in determining the appropriate standard of proof.[190]

The supremacy clause of the United States Constitution dictates that the Bankruptcy Code takes precedence over conflicting state laws and proceedings.[191] By express terms of the Constitution, bankruptcy law is federal law.[192] Yet, prior to 1970, the state courts had jurisdiction to determine dischargeability issues.[193] However, because of abuses precipitated by overzealous creditors which effectively undermined the impact of the debtor's discharge, and in an effort to promote uniformity in application of the Code, Congress amended the Code, granting exclusive jurisdiction to the bankruptcy courts over issues of dischargeability.[194]

In light of the exclusive grant of jurisdiction to the bankruptcy courts over issues relating to discharge, the Supreme Court held in *Brown v. Felsen*[195] that res judicata does not apply in dischargeability proceedings.[196] The Court in *Brown* stressed that the purposes behind granting the bankruptcy courts exclusive jurisdiction over dischargeability proceedings would be frustrated

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189. 1 COWANS, BANKRUPTCY LAW AND PRACTICE § 6.11 (1989). For example, the prepetition judgment may have concerned litigation by a creditor against the debtor on the basis of a contract dispute involving fraud that would necessarily be nondischargeable in a bankruptcy proceeding. *Id.*

190. *Id.*

191. U.S. CONST. art. VI, § 2. *See* Perez v. Campbell, 402 U.S. 637, 643-54 (1971) (discussing the effects of the supremacy clause in causing the Bankruptcy Code to take precedence over conflicting state laws).

192. U.S. CONST. art. I, § 8, cl. 4.

193. *In re* Huff, 1 Bankr. 354, 356 (Bankr. D. Utah 1979).

194. *See* S. REP. NO. 91-1173, 91st Cong., 2d Sess. (Sept. 16, 1970); House Judiciary Comm., H. R. DOC. NO. 91-1502, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS, 4156 (discussing the reasons for granting exclusive jurisdiction to the bankruptcy courts regarding issues of dischargeability).

195. 442 U.S. 127 (1979).

196. *Id.* at 138-39.

by applying res judicata to a state court judgment.[197] The Court stated that the primary purpose of granting such exclusive jurisdiction is to eliminate the abuses that were caused by creditors' utilization of postbankruptcy state court collection actions to resolve questions relating to dischargeability issues.[198] Therefore, the res judicata effect of a prior nonbankruptcy judgment is not applicable in a bankruptcy court.[199]

Although application of res judicata is inconsistent with the exclusive jurisdiction granted to bankruptcy courts, application of collateral estoppel in determining issues relating to discharge is not inconsistent with such exclusive jurisdiction.[200] Collateral estoppel is an equitable doctrine, based upon the principle that litigants and courts should not be subjected to relitigation of factual issues that were fully adjudicated in another court of competent jurisdiction.[201] The underlying policy of collateral estoppel is to promote judicial economy in the already overburdened judicial system.[202]

There are three requirements for application of collateral estoppel of a prior court factual determination in a subsequent adjudication.[203] First, the precise factual issue sought to be litigated in the second court must be identical to the issue previously litigated in the prior court.[204] Second, the issue must

197. *Id.* at 136.

198. *Id.*

199. *Id.*

200. 1 COWANS, BANKRUPTCY LAW AND PRACTICE § 6.11 (1989). The Supreme Court recently held that collateral estoppel principles are applicable in discharge exception proceedings pursuant to section 523(a). Grogan v. Garner, 111 S. Ct. 654, 658-59 (1991).

201. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (stating that collateral estoppel has the dual purpose of protecting litigants from the burden of relitigating an identical factual issue with the same party and of promoting judicial economy by preventing needless litigation).

202. *Id.*

203. *See In re* Ross, 602 F.2d 604, 608-09 (3rd Cir. 1979); *In re* Merrill, 594 F.2d 1064, 1066-67 (5th Cir. 1979); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) (discussing the three requirements for application of collateral estoppel). Traditionally, there was a fourth requirement of mutuality. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979). The mutuality requirement mandated that the same parties had to be involved in both the prior proceeding and the current proceeding. *Id.* Mutuality is no longer required in most circumstances. *Id.*

204. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

have been actually litigated in the prior adjudication.[205] Third, the factual determination in the prior court adjudication must have been critical and necessary to the outcome of the case.[206] The burden is on the moving party to establish these three requirements.[207]

The bankruptcy court's exclusive jurisdiction over the legal issues relating to discharge does not mean that the underlying facts are so sacrosanct that only the bankruptcy court may resolve them.[208] Indeed, the Court in *Brown v. Felsen* specifically left open the possibility that the collateral estoppel effect of a nonbankruptcy court determination of a factual issue may be applicable in a bankruptcy court.[209] Accordingly, a number of federal courts of appeal have held that collateral estoppel is applicable in discharge and dischargeability proceedings.[210]

Application of collateral estoppel of a prior nonbankruptcy court determination in a discharge proceeding imposes one additional requirement to the three common law requirements of collateral estoppel.[211] The nonbankruptcy court that adjudicated the prior factual determination must have applied the same standards which are applied in the bankruptcy court.[212] In other words, the standard of proof applied by the nonbankruptcy court in

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205. *Id.* A default judgment does not fulfill the requirement of "actually litigated," and collateral estoppel does not apply to such a judgment. Commonwealth of Massachusetts v. Hale, 618 F.2d 143, 146 (1st Cir. 1980); Matter of McMillan, 579 F.2d 289, 293 (3rd Cir. 1978). Consent judgments and stipulations will only be given collateral estoppel effect if it can be said that the parties could reasonably have foreseen the conclusive effect of their actions. Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., 575 F.2d 530, 539 (5th Cir. 1978).

206. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

207. *See* New Equity Security Holders Committee for Golden Gulf, Ltd. v. Phillips, 97 Bankr. 492, 495 (Bankr. E.D. Ark. 1989); Folsom v. Continental Illinois National Bank and Trust Co. of Chicago, 633 F. Supp. 178, 181 (N.D. Ill. 1986) (stating that the movant bears the burden of establishing the requirements of collateral estoppel).

208. Becher v. Contoure Laboratories, Inc., 279 U.S. 388, 391-92 (1929) (holding that a prior state court judgment that a patent holder held the patent for the benefit of another has collateral estoppel effect in a federal patent infringement suit brought by the patent holder).

209. Brown v. Felsen, 442 U.S. 127, 139, n. 10 (1979).

210. *See In re* Wallace, 840 F.2d 762, 764-65 (10th Cir. 1988); Klingman v. Levinson, 831 F.2d 1292, 1295 (7th Cir. 1987); *In re* Latch, 820 F.2d 1163, 1166 (11th Cir. 1987); *In re* Ross, 602 F.2d 604, 607 (3d Cir. 1979); *In re* Allman, 735 F.2d 863, 864 (5th Cir. 1984), *cert. denied*, 469 U.S. 1086 (1984); Spilman v. Harley, 656 F.2d 224, 228 (6th Cir. 1981).

211. *In re* Supple, 14 Bankr. 898, 904 (Bankr. D. Conn. 1981) (stating that the standards employed by a state court in making its factual determination must comport with federal standards).

212. *Id.*

determining the factual issue in question must be tantamount to the standard of proof that the bankruptcy court is to apply.[213]

Factual issues in most civil actions are subject to the preponderance of the evidence standard, and imposition of the clear and convincing standard in discharge proceedings under section 727(a) will preclude application of the doctrine of collateral estoppel in most instances because doing so would violate the requirement that the standards of proof be the same in both courts.[214] The result will be to impose significant additional burdens on the litigants as well as the already overburdened bankruptcy courts, by causing the bankruptcy courts to relitigate issues that have already been determined in state courts, thus undermining the policy of encouraging judicial economy.[215] In every instance where the initial nonbankruptcy judgment is obtained pursuant to the preponderance of the evidence standard, the entire action will have to be retried in the bankruptcy court applying the clear and convincing standard.[216]

IV. CONCLUSION

The courts are not in agreement as to the appropriate standard of proof required for a denial of discharge under section 727(a) of the Bankruptcy Code. The Supreme Court has not addressed the issue and the various federal bankruptcy and appellate courts do not agree whether the appropriate standard is a preponderance of the evidence or clear and convincing evidence. There is persuasive authority in support of both standards.

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213. *Id.*

214. *In re* Supple, 14 Bankr. 898, 904 (Bankr. D. Conn. 1981) (holding that collateral estoppel may only be applied to a nonbankruptcy court judgment if the standards employed by the nonbankruptcy court in reaching its decision comport with federal standards).

215. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (stating that the policies of collateral estoppel are to prevent against relitigation of identical issues by identical parties and to promote judicial economy). The policies of collateral estoppel will be frustrated in this situation because the parties in the non-bankruptcy court litigation will be required to relitigate the issue of fraud in the bankruptcy court dischargeability proceeding. *In re* Supple, 14 Bankr. at 904.

216. *In re* Supple, 14 Bankr. at 904 (discussing concerns of judicial economy in the context of collateral estoppel application in bankruptcy discharge litigation).

The most common rationale is the fraud/nonfraud distinction. According to this theory, the clear and convincing standard is appropriate if the underlying cause of action is based upon fraud. Otherwise the preponderance of the evidence standard is appropriate. This theory is based upon the fact that at common law allegations of fraud were required to be proved by clear and convincing evidence. The fraud/nonfraud distinction is not sound in the modern legal arena. The rationale for applying the clear and convincing standard for allegations of fraud is not applicable in the bankruptcy discharge context in that document fabrication, the common justification for the heightened standard in civil actions for fraud, is not a concern in discharge proceedings. Further, a majority of state jurisdictions, including California, currently specify that the appropriate standard of proof in civil actions for fraud is a preponderance of the evidence.

Additionally, imposition of the clear and convincing standard in actions pursuant to section 727(a) reduces judicial economy. A bankruptcy court lying within a jurisdiction that requires proof of the underlying claim by a preponderance of the evidence would preclude application of collateral estoppel of a prior nonbankruptcy court judgment, and would impose great burdens on the already overburdened bankruptcy court system. The result is that the entire issue would have to be relitigated in the bankruptcy court.

The fresh start rationale similarly does not support application of a heightened standard of proof. The fresh start that discharge contemplates is a financial fresh start, and the Supreme Court has consistently held that issues involving pure financial interests are to be subjected only to the preponderance of the evidence standard. Indeed, the Supreme Court recently held that the fresh start theory is invalid in actions to except debts from discharge pursuant to section 523(a).

The argument that the harsh consequences imposed by a successful action pursuant to section 727(a), as compared to an action pursuant to section 523(a), mandates application of the clear and convincing standard is similarly not compelling. It is conceded that the ramifications of a successful action to deny discharge are significantly more severe to the debtor than a successful action to

merely except a single debt from discharge. However, these harsh consequences relate solely to economic implications. Issues relating solely to economic interests are only subjected to the preponderance of the evidence standard.

Application of the clear and convincing standard in nonbankruptcy contexts has been limited by the Supreme Court to actions dealing with fundamental constitutional rights and issues that interfere with liberty.[217] The debtor's interest in obtaining a discharge is purely economic, as is the creditor's competing interest in denying the debtor's discharge. Further, the Court has held that the debtor's interest in obtaining a discharge is not a fundamental right, nor even a constitutionally guaranteed interest.[218] Thus, a determination favoring the preponderance of the evidence standard for actions pursuant to section 727(a) is consistent with the current approach of the Supreme Court.

Given the inapplicability of the traditional justification for requiring proof by clear and convincing evidence in allegations based upon fraud, the judicial economy decisions regarding application of the doctrine of collateral estoppel, and the application of standards of proof by the current Supreme Court, the appropriate standard of proof in an action to deny discharge under section 727(a) is a preponderance of the evidence.

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217. *See supra* note 112 and accompanying text (discussing situations in which the Supreme Court has imposed the clear and convincing standard of proof).

218. United States v. Kras, 409 U.S. 434, 445-46 (1973) (stating that the debtor does not have a fundamental right or a constitutionally guaranteed interest in obtaining a bankruptcy discharge).