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Dischargeability of Consumer Credit Card Debt After Anastas v. American Savings Bank (In Re Anastas)

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DISCHARGEABILITY OF CONSUMER CREDIT CARD DEBT AFTER *ANASTAS V. AMERICAN SAVINGS BANK (IN RE ANASTAS)*[1]

I. INTRODUCTION

Courts have grappled for years with the problem of applying the bankruptcy discharge provisions of § 523(a)(2)(A) of the Federal Bankruptcy Code (the Code) to consumer credit card debts. In cases where the debtor obtained credit under fraudulent circumstances the Code provides an exception to the normal rule of dischargeability.[2] No definitive precedent exists, however, to guide bankruptcy courts in determining exactly what circumstances define fraudulently obtained credit. Consequently, the law in this area consists of conflicting opinions issued by hundreds of individual bankruptcy court judges.[3] Against this backdrop of confusion, the recent opinion of the influential Ninth Circuit Court of Appeals in *Anastas v. American Savings Bank (In re Anastas)*[4] is particularly significant.

To determine whether or not to refuse discharge under § 523, a court must look at the intent of the debtor. The credit card issuer typically objects to a discharge under § 523(a)(2)(A) by claiming that the debtor did not intend to repay the debt at the time the charges were incurred. The debtor typically responds by adamantly denying such a deceptive purpose. Thus, the dispositive issue comes before the court: did the debtor truly intend to repay at the time the debt was incurred? Courts have traditionally used an objective test to

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1. 94 F.3d 1280 (9th Cir. 1996).

2. Section 523 provides:

> (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt—
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> . . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition . . . .

11 U.S.C. § 523 (1994). See 3 COLLIER ON BANKRUPTCY ¶¶ 523.01, -.05, -.08 (Lawrence P. King ed., 15th ed. 1996) for a general background discussion of this statute.

3. As one such judge recently noted, "[T]he implications of a debtor's use of a credit card presents [sic] one of those bankruptcy issues on which a court can find a published opinion to support almost any position one wishes to adopt." American Express Centurion Bank Optima v. Choi (*In re* Choi), 203 B.R. 397, 399 (Bankr. E.D. Va. 1996).

4. 94 F.3d at 1280.

determine a debtor's intent. This test has focused on the debtor's objectively measured ability to repay.[5]

The *Anastas* court rejected the objective approach in favor of a strict subjective test. Ruling that the debtor's credit card debts were in fact dischargeable, the *Anastas* court held that dischargeability turned on whether the debtor lacked the *intent* to repay the debts at the time they were incurred—not whether the debtor lacked the *ability* to repay.[6] *Anastas* is the first decision at the appellate level to establish a clear test for determining a consumer debtor's intent in a credit card debt dischargeability proceeding, and again, the test is strictly a subjective one.

Some of the ramifications of *Anastas* are fairly clear. A strict subjective test of intent will make it considerably more difficult for credit card issuers to prove fraud.[7] Conversely, a strict subjective test will make it easier for debtors to overcome objections to discharge and escape their consumer credit card problems through bankruptcy.

This note examines *Anastas* and some of its precursors and progeny[8] with an eye towards their policy implications. The examination reveals that, even after *Anastas*, the test for debtor intent remains unsettled for two reasons. First, a truly subjective test of intent in the context of dischargeability of consumer credit card debt is as elusive as the quest for subjective intent in any context. Aside from a person's self-serving testimony, the only evidence of subjective intent is that which is observable through a person's objective behavior. Second, courts appear to be crafting their decisions, at least partly, as ad hoc reactions to the recent conduct of many credit card issuers. In conclusion, this note argues that Congress should remove the common law element of intent from § 523(a)(2)(A) and statutorily adopt an objective standard to govern the dischargeability of consumer credit card debt.

II. DISCHARGEABILITY OF CONSUMER CREDIT CARD DEBT BEFORE AND AFTER *ANASTAS*

In *Field v. Mans*,[9] the United States Supreme Court provided that the term "fraud," as it appears in § 523(a)(2)(A), should be construed in

5. For a representative listing of cases, see *Citibank v. Eashai (In re* Eashai), 87 F.3d 1082, 1088 n.4 (9th Cir. 1996).

6. 94 F.3d at 1285.

7. "'Credit card companies are going to go berserk.'" *Credit Card Debts Are Easier To Discharge by Going Bankrupt*, LAW. WKLY. USA, Sept. 23, 1996, at 1 (quoting Professor Jeffrey Morris of the University of Dayton School of Law); "The ruling is bad news for banks." *Id.* (citing Professor Walter Effross of the Washington College of Law at American University).

8. The cases discussed were selected for their representative support or opposition to the general holding of the Ninth Circuit in *Anastas*.

9. 116 S. Ct. 437, 443 n.9 (1995).

accordance with its common law tort meaning.[10] The common law tort of fraud requires that there be (1) a false representation, (2) made with knowledge of its falsity, (3) intending to induce reliance thereon (4) and justifiably relied upon (5) with resulting damage.[11] Even prior to *Field*, courts were in general agreement that a creditor seeking to avoid discharge under § 523(a)(2)(A) had to prove all of the elements of common law fraud.[12]

Notwithstanding this facial clarity, courts have differed widely on what is required to establish the elements of common law fraud in consumer credit card debt discharge cases. The most significant differences have concerned how courts judge a debtor's intent, how they determine the nature of any representation made by the credit card user, and how they decide whether or not a card issuer relied on the debtor's representation when extending credit.[13]

The differences in the approaches taken by courts persist perhaps because of the nature of the typical credit card transaction. Unlike most traditional forms of credit transactions, there is no direct, "face-to-face contact" between the lender and the debtor.[14] The typical card issuer makes a decision to provide credit to the debtor by mere approval of a credit card application. Sometimes, issuers approve cardholders even without an application, basing the approval on publicly available credit information. The issuer does not actually extend credit until the cardholder presents the card to a third-party merchant or bank to pay for goods, services, or a cash advance. The third-party merchant or bank, in turn, looks to the card issuer for payment.[15]

In adjudicating the debtor's intent to defraud, most courts have adopted one of the following three theories: (1) the implied representation theory, (2) the assumption of the risk theory, and (3) the totality of the circumstances theory.[16] Under the implied representation theory, when a debtor uses a credit card, the debtor impliedly represents both the *ability* and the *intention*

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10. The Court recognized the Second Restatement of Torts as "the most widely accepted distillation of the common law of torts . . . published shortly before Congress passed the [Bankruptcy Reform Act of 1978]." *Id.* at 443-44.

11. RESTATEMENT (SECOND) OF TORTS §§ 525-52 (1976); *see also* W. Page KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 728 (5th ed. 1984).

12. *See, e.g.*, Hecht's v. Valdes (*In re* Valdes), 188 B.R. 533, 535 (Bankr. D. Md. 1995).

13. *See, e.g.*, AT&T Universal Card Servs. v. Feld (*In re* Feld), 203 B.R. 360, 365 (Bankr. E.D. Pa. 1996).

14. *Id.*

15. See BARKLEY CLARK & BARBARA CLARK, THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS ¶ 15.02 (rev. ed. 1995), for a more detailed description of the standard credit card transaction.

16. In *Citibank v. Eashai* (*In re* Eashai), 87 F.3d 1082, 1987 (9th Cir. 1996), the court characterized implied representation as the majority theory and assumption of the risk as the minority theory.

to repay the card issuer for the charges incurred.[17] Under the assumption of the risk theory, the court assumes that card issuers knowingly and willingly assume the risk of default by cardholders.[18] Issuers demand and obtain compensation for this assumed risk through interest rates.[19] Given that the issuer bears a reasonable risk of default, the cardholder makes a *false* representation regarding the intention to repay only if the cardholder uses the card after the issuer has both revoked the card and clearly communicated the fact of revocation to the cardholder.[20] The only charges potentially nondischargeable on grounds of cardholder fraud, therefore, are those the cardholder makes after revocation of the card.[21] Under the totality of the circumstances theory, the court examines all of the facts and circumstances of a case. If the court determines that the facts and circumstances, taken as a whole, indicate deceptive conduct by the debtor, the court may infer that the debtor lacked the requisite intent to repay.[22]

In *Citibank v. Eashai (In re* Eashai),[23] a bankruptcy case decided just two months prior to *Anastas*, the Ninth Circuit adopted the totality of the circumstances theory. In ruling that Eashai committed fraud by utilizing a kiting scheme[24] the court stated that it "may infer the existence of the debtor's intent not to pay if the facts and circumstances of a particular case present a picture of deceptive conduct by the debtor."[25] The court applied a twelve-factor objective test, that originated with the case of *Citibank v. Dougherty (In re* Dougherty),[26] and determined that under the circumstances,

17. *See* Bank of Va. v. Davis (*In re* Davis), 42 B.R. 611, 613 (Bankr. E.D. Va. 1984).

18. *See* First Nat'l Bank v. Roddenberry, 701 F.2d 927, 932 (11th Cir. 1983).

19. *Id.*

20. *Id.*

21. One can assume, however, that card use after revocation is becoming rare due to the proliferation of electronic, point-of-sale card approval.

22. *See* Citibank v. Eashai (*In re* Eashai), 87 F.3d 1082, 1087 (9th Cir. 1996); *see also* Sears Roebuck & Co. v. Faulk (*In re* Faulk), 69 B.R. 743 (Bankr. N.D. Ind. 1986) (establishing totality of the circumstances as a new theory).

23. 87 F.3d 1082 (9th Cir. 1996).

24. In *Eashai*, the debtor used 26 different credit cards to amass aggregate debt in excess of $100,000.00. *Id.* at 1085.

In a typical kiting scheme, a debtor engages in a systematic process of using cash advances from one or more cards to make the minimum monthly payments on others. As the credit lines on existing cards are fully utilized, the debtor acquires additional cards, which he cash-advances to make the minimum monthly payments on the previous cards. The debtor continues this process until he is no longer able to acquire new cards with credit sufficient to accommodate his aggregate minimum monthly obligations. At this point, "the game is over," and the debtor will often suddenly cease payments on all cards and file for bankruptcy protection. See CLARK & CLARK, *supra* note 15, ¶ 9.01, for a general background discussion on check kiting, which is similar to credit card kiting.

25. *Eashai*, 87 F.3d at 1087.

26. *See id.* at 1087-88 (citing Citibank v. Dougherty (*In re* Dougherty), 84 B.R. 653 (B.A.P.

Eashai intended to deceive the card issuer.[27] In concluding that the *Dougherty* twelve-factor test was necessary, the Ninth Circuit stated that "[s]ince a debtor will rarely admit to his fraudulent intentions, the creditor must rely on the twelve factors of *Dougherty* to establish the subjective intent of the debtor through circumstantial evidence."[28] In essence, the Ninth Circuit used objective criteria to determine the debtor's subjective intent to deceive as an element of common law fraud.

The attitude of the Ninth Circuit seemingly changed two months later when presented with *Anastas v. American Savings Bank* (*In re* Anastas).[29] The facts of *Anastas* are typical of most dischargeability cases. Bashir Anastas held a Visa card, issued by American Savings Bank (ASB), with unpaid charges totaling $6,624.00 at the time of bankruptcy. While Anastas admittedly exceeded his authorized credit limit on the card, he never failed to make his minimum monthly payments. Over a six-month period, he used the cash advance feature of several credit cards, including the ASB account, to finance his gambling activities. Ultimately, his debt on all cards totaled $40,000.00.[30]

With monthly take home income of $3,465.00—less than his monthly expenses of $3,535.00—and with only $800.00 of liquid assets at the time of bankruptcy, Anastas admitted to realizing that he no longer could meet the minimum monthly payments on all of his cards. He testified that until the end he intended to repay his creditors and that he unsuccessfully attempted to work out alternative payment schedules with his creditors, including ASB. Rather inevitably, he concluded that his only recourse was to file for bankruptcy under Chapter 7.[31]

9th Cir. 1988)). The twelve factors are as follows:

1. The length of time between the charges made and the filing of bankruptcy;
2. Whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made;
3. The number of charges made;
4. The amount of the charges;
5. The financial condition of the debtor at the time the charges are made;
6. Whether the charges were above the credit limit of the account;
7. Whether the debtor made multiple charges on the same day;
8. Whether or not the debtor was employed;
9. The debtor's prospects for employment;
10. Financial sophistication of the debtor;
11. Whether there was a sudden change in the debtor's buying habits; and
12. Whether the purchases were made for luxuries or necessities.

Id.

27. *Id.* at 1091.

28. *Id.* at 1090.

29. 94 F.3d 1280 (9th Cir. 1996).

30. *Id.* at 1283.

31. *Id.*

In an unpublished opinion, the bankruptcy court concluded that Anastas's debt to ASB was nondischargeable under § 523(a)(2)(A) because Anastas had committed fraud when he incurred the credit card charges. The bankruptcy court based its finding of fraud on an objective evaluation of Anastas's ability to repay his debt in light of his dire financial condition at the time he made the charges. The debtor's inability to repay having been established, the bankruptcy court further concluded that Anastas either lacked the intent to repay the debt or was grossly reckless in incurring the debt.[32]

In *Anastas*, the Ninth Circuit modified the totality of the circumstances test of intent that it had adopted two months earlier in *Eashai*. The *Anastas* bankruptcy court had applied the twelve-factor *Dougherty* test and concluded that Anastas had no intent to repay.[33] In reversing the bankruptcy court and the bankruptcy appellate panel on appeal, the Ninth Circuit did an odd thing. It expressly affirmed the use of the *Dougherty* twelve-factor test as the test of intent, but it criticized the bankruptcy court for applying the test to Anastas.[34] The Ninth Circuit stated that the bankruptcy court had improperly focused it's analysis on Anastas's financial condition.[35] The Ninth Circuit then attempted to distinguish its analysis in *Eashai* by observing that *Eashai* was unusual because it pertained to kiting activities.[36] In contrast, *Anastas* pertained to individual charges on a single credit card.[37]

The Ninth Circuit accepted as conclusive Anastas's testimony that, although he had a gambling addiction and his financial condition was desperate, he believed that he would win back the money necessary to repay his debt and always had the intention to repay it.[38] In an apparent retreat from the totality of the circumstances theory, the Ninth Circuit stated that with respect to credit card debt, the representation that the debtor makes to the issuer is not that he has the ability to repay but that he has the intent to repay.[39] The Ninth Circuit concluded that there was no evidence of Anastas's intention not to repay his debt beyond his objectively measurable inability to repay his debt.[40] Having supplanted the twelve-factor *Dougherty* test and its emphasis on the debtor's ability to repay with a subjectively focused test, the Ninth Circuit easily found that Anastas's debt to ASB was dischargeable.[41] Apparently, *Anastas* holds that, absent a case of credit card kiting, if the

32. *Id.*
33. *Id.* at 1284.
34. *Id.* (citing its recent decision in *Eashai*).
35. *Id.* at 1286-87.
36. *Id.* at 1285.
37. *Id.*
38. *Id.* at 1287.
39. *Id.*
40. *Id.*
41. *Id.*

debtor proffers testimony that he intended to repay the credit card charges at the time he incurred them, he will not be found to have committed fraud, and the debt will be dischargeable in bankruptcy.[42]

The Ninth Circuit's decision in *Anastas* was not unprecedented. Over the last several years, a pro-debtor movement focusing on the debtor's subjective intent to repay in consumer credit card debt discharge cases has emerged. *Anastas* lends significant credibility to this movement. Recently, in *AT&T Universal Card Services v. Feld (In re* Feld),[43] a bankruptcy court in the Eastern District of Pennsylvania professed to adopt the twelve-factor *Dougherty* test but discounted the debtor's objective ability to pay as a significant indicator of intent—a result that seems simultaneously to accept and reject the twelve-factor test. The *Feld* court reasoned that it was "antithetical to the [Bankruptcy Code's] fresh start policy" to use a debtor's ability to pay against him; furthermore, the court found that such a use "confers an advantage on credit card issuers unintended by Congress" because it makes a debtor a guarantor of his own financial condition.[44] The court noted that such a use was at odds with the main reason that people use credit cards—they lack the ability to pay at the time of use.[45]

In *Chase Manhattan Bank v. Murphy (In re* Murphy),[46] a bankruptcy court in the Northern District of Illinois adopted a subjective test of the debtor's intent as *part* of a totality of the circumstances approach. It rejected, however, use of the twelve-factor *Dougherty* test as integral to the totality of the circumstances examination.[47] The court emphasized the importance of the debtor's testimony of his own state of mind and permitted introduction of evidence other than the debtor's ability to pay in support of his stated intention

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42. Professor Walter Effross, an early commentator on the Ninth Circuit's holding in *Anastas*, stated that "[a]s long as the debtor was standing at the betting window saying 'Next roll or next race, I'm going to win it all back and be able to pay back the bank,' he's covered." *Credit Card Debts Are Easier To Discharge by Going Bankrupt*, *supra* note 7, at 1.

43. 203 B.R. 360 (Bankr. E.D. Pa. 1996).

44. *Id.* at 368.

45. *Id.* In adopting a subjective test of a debtor's intent, the *Feld* court stated:

> Ultimately, since all debtors choosing to litigate fraud complaints will likely claim an intent to repay, the debtor's credibility will probably be the single most important determinant of intent. . . . The effect of employing a subjective standard is that dischargeability will not turn on the reasonableness of the debtor's expectations under the circumstances.

Id.

46. 190 B.R. 327 (Bankr. N.D. Ill. 1995).

47. "Bankruptcy courts are especially good at reciting lists of factors. The courts then compare the evidence to the list and count matches. [T]he fact-finding process is only clouded by copying a list of factors from other cases and weighing evidence according to how well it matches that list." *Id.* at 333-34 (citations omitted).

to repay.[48] In concluding that Murphy's debts were dischargeable, the court noted that there was no reason to doubt that Murphy honestly believed he could gamble his way out of debt because he had successfully done so previously.[49] It did not matter whether his belief was reasonable under the circumstances. The bankruptcy court concluded that using a "reasonable person" (i.e., objective) test of subjective intent is incorrect under the common law of fraud.[50] The court elaborated on its *Murphy* analysis in *AT&T Universal Card Services v. Alvi (In re* Alvi).[51] It stated that since the question goes to the debtor's subjective intent to repay, the court cannot require that the debtor have an "objectively reasonable basis for his belief."[52]

III. DISCHARGEABILITY AND PERCEPTIONS OF THE MARKETPLACE FOR CONSUMER CREDIT

The courts, like *Anastas*, *Murphy*, and others, that have adopted a strict subjective test of a consumer credit card debtor's intent have done one of two things. At best, these courts have misinterpreted the language of § 525 of the Second Restatement of Torts; at worst, they have imposed their own policy goals to address perceived abuses in the marketplace for consumer credit by favoring the consumer credit card debtor.

A. The Strict Subjective Test at the Extreme

The legal analysis supporting a strict subjective test of fraudulent intent is unnecessarily extreme. In *American Express Centurion Bank Optima v. Choi*

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48. *Id.* at 334.

49. *Id.*

50. *Id.* at 333. The court stated its logic as follows:

> "The fact that the misrepresentation is one that a man of ordinary care and intelligence in the maker's situation would have recognized as false is not enough to impose liability upon the maker for a fraudulent misrepresentation under the rule stated in this Section, but it is evidence from which his lack of honest belief may be inferred. So, too, it is a matter to be taken into account in determining the credibility of the defendant if he testifies that he believed his representation to be true."

Id. (quoting RESTATEMENT, *supra* note 11, § 526 cmt. d).

51. 191 B.R. 724 (Bankr. N.D. Ill. 1996).

52. *Id.* at 733. The court added the following admonition:

> "Care must be taken to stop short of a rule that would make every desperate, financially strapped debtor a guarantor of his ability to repay, on pain of dischargeability. Such a rule would unduly expand the 'actual fraud' discharge exception by attenuating the intent requirement. A substantial number of bankruptcy debtors incur debts with hopes of repaying them that could be considered unrealistic in hindsight. This by itself does not constitute fraudulent conduct warranting non-discharge."

Id. (quoting Karelin v. Bank of America Nat'l Trust & Sav. Ass'n (*In re* Karelin), 109 B.R. 943, 947-48 (B.A.P. 9th Cir. 1990)).

(*In re* Choi),[53] a case that was decided after *Anastas* and *Murphy*, the bankruptcy court in the Eastern District of Virginia illuminated the flaws in the legal analysis supporting a subjective test. The court noted that because the credit card transaction is peculiar in nature,[54] it is difficult for the card issuer to prove under § 523(a)(2)(A) that the cardholder did not intend to repay his debt.[55] Moreover, the cardholder invariably claims that he intended to repay. Courts, therefore, must resolve the debtor's intent on the basis of other evidence, as they do in other types of fraud cases.[56] As the *Choi* court pointed out, however, "What may set the credit card case apart is that in many, if not most, instances, debtors probably *do* intend to pay the charges they make."[57] The court commented further that this situation is the very reason why most courts have traditionally analyzed a consumer credit card debtor's intent under the *Dougherty* twelve-factor test or, as in its own case, under a totality of the circumstances approach that does not use any pre-defined set of factors but looks at all of the circumstances objectively.[58]

The *Choi* court next examined the language of the Second Restatement of Torts,[59] just as the court in *Murphy* had done. However, where the *Murphy* court interpreted the Restatement's language to justify rejecting an objective test of subjective intent, the *Choi* court concluded that the Restatement provision fully supports use of an objective test when considered as part of a totality of the circumstances analysis:

> From the Restatement comment, it seems that whether the court accepts or rejects the reasonable person test may be a question of semantics. Under the rule as stated, the fact that a person of ordinary care and intelligence (the reasonable person) would have recognized a representation as false may be relied upon as evidence of fraud, and it also may bear on the debtor's credibility as a witness.[60]

The *Choi* court acknowledged that the debtor's testimony is entitled to substantial weight, but it insisted that such testimony be considered as only one factor in the overall analysis of the evidence as a whole:[61]

53. 203 B.R. 397 (Bankr. E.D. Va. 1996).
54. *See supra* note 15 and accompanying text.
55. *Choi*, 203 B.R. at 399.
56. *Id.*
57. *Id.*
58. *Id.*
59. *See supra* note 50.
60. *Choi*, 203 B.R. at 400.
61. *Id.*

> If a debtor's financial condition, viewed in its entirety at the time of a credit card charge, presents a hopeless inability to pay, of which the debtor was aware, this is evidence of fraudulent intent. And when these circumstances are present, I find it difficult to side with a debtor who subjectively but irrationally intended to pay.[62]

Without doubt, this statement in *Choi* is true; elevating the debtor's self-serving testimony of intent above all objective indicators of that intent is unnecessarily pro-debtor.

Reliance on the United States Supreme Court's decision in *Field v. Mans*,[63] a decision that dealt neither directly with the specific element of intent nor with credit card debt discharge, to support applying a strict subjective test of intent, is decidedly the wrong approach. Section 523(a)(2)(-A), as interpreted by the Supreme Court, does not require such an extreme result. While the Supreme Court may have settled that § 523(a)(2)(A) requires inquiry into a debtor's subjective state of mind,[64] the Court did not establish exactly how that inquiry should proceed. The Supreme Court most certainly *did not* state that a court must accept the debtor's own self-serving testimony—and little more—as evidence of the debtor's intent.[65]

The problem of establishing subjective intent based on indirect, objective evidence is a familiar one. For example, in a trial for murder in the first degree, the jury commonly looks to objective evidence to resolve whether or not the accused's actions were premeditated. While the accused's own self-serving testimony is relevant, the jury will generally not take it to be dispositive. Such testimony is but one of many factors that the jury weighs in resolving questions of the accused's intent. A similar analysis applies in certain types of tort actions where a plaintiff seeks punitive damages that are awarded only when the defendant's behavior is willful. In those cases, the court examines objective evidence to resolve the issue of willfulness. Again, rarely will courts accept as dispositive the defendant's own testimony that his or her actions were merely negligent.

As the *Choi* court noted, the Second Restatement of Torts does not prohibit an objective test of subjective intent, like a reasonable man test. The Restatement merely posits that application of a reasonable man standard, without more, is not enough to support a finding of fraudulent intent. That is, mere objective stupidity, incompetency, or poor judgement *alone* will not support a finding of fraudulent intent. The Restatement otherwise clearly embraces the reasonable man standard as having evidentiary value for use in

62. *Id.*

63. 116 S. Ct. 437 (1995).

64. *See id.* at 443.

65. As previously discussed, neither does the Restatement.

inferring fraudulent intent and in determining the credibility of the defendant.[66]

The *Choi* court, which favored an objective approach, acknowledged that a financially distressed debtor often can successfully argue for discharge by "demonstrating with at least some rational justification a belief that a charge would be paid."[67] In context, it seems clear that the court meant that an objective test of a debtor's subjective intent can be overcome by other evidence, including the debtor's own testimony. Exclusive reliance on a debtor's testimony, however, is grossly unfair to creditors, who would rarely, if ever, be able to prove the debtor's fraudulent intent. It cannot be overstressed that a debtor's declaration of the intent to repay should not alone supplant a contrary finding of intent derived through a thorough analysis of objective, indirect evidence.

The *Choi* court's analysis strikes an appropriate policy balance between the competing interests of the debtor and creditor, and it does so within the United States Supreme Court's requirement of using a subjective standard for establishing the debtor's intent. The Bankruptcy Court of the Eastern District of Virginia, however, is but one court among hundreds, and *Choi* stands in direct conflict with the influential Ninth Circuit's decision in *Anastas*. Certainly the *Anastas* decision will make it easier for bankruptcy courts across the country to either adopt a strict subjective test or at least weaken the significance of more objective evidence, particularly as to the debtor's reasonable ability to pay. As previously noted, a growing number of courts are doing just that.

B. The Strict Subjective Test: Political Fashion?

Given that § 523(a)(2)(A) does not require a strict subjective test of fraudulent intent, a question arises: Why are some courts apparently looking for a reason not only to move away from using objective evidence to determine the debtor's subjective intent but also to move toward relying more on the debtor's own testimony as dispositive?

The answer to the question can possibly be found within the consumer credit industry itself. The consumer credit industry in general, and the credit card sector in particular, have undergone significant changes over the past few years. Consumers have been accumulating more debt and filing for bankruptcy in greater numbers. There were approximately 1.1 million bankruptcies in the

66. *See supra* note 50.
67. *Choi*, 203 B.R. at 399.

United States during 1996—a new record.[68] This means that one out of every one hundred families filed for bankruptcy protection in 1996.[69]

There are competing theories that attempt to explain the phenomenal rise in bankruptcy filings during a period of relative economic prosperity. Financial institutions claim that consumers irresponsibly use credit, that the federal bankruptcy laws allow debtors to escape their debts too easily, and that societal changes have partially removed the social stigma once associated with personal bankruptcy.[70] On the other hand, consumer groups and debtors' attorneys blame job loss, uninsured medical bills, divorce (especially for women), and guerilla marketing tactics by a "greedy" lending industry.[71]

The credit card industry has undoubtedly changed the way it does business, especially with respect to the manner in which it markets cards to consumers. Virtually all consumers have experienced a steady barrage of unsolicited, pre-approved credit card offers. During 1995 and 1996, card issuers distributed five billion solicitations, even though there are only 78 million credit-worthy households in the United States.[72] The 2.7 billion pre-approved solicitations mailed during 1996 alone amount to roughly seventeen offers for every person in the U.S. between the ages of 18 and 64, and the average aggregate amount of credit extended to each household receiving those seventeen offers was about $130,000.00.[73] Aggregate outstanding credit card debt was $223 billion as of September 30, 1996, up from $204 billion in 1995 and $172 billion in 1994.[74] In addition, card issuers raised the aggregate credit limit on outstanding cards to $1.28 trillion as of September 30, 1996, up from $815 billion in 1994.[75] As of June 30, 1996, there were 376 million Visas and Mastercards in circulation in the United States, up from 209 million

68. NAT'L BANKR. REV. COMM'N, *Quarterly Summary and Progress Report, December 1996*, <http://www.nbrc.gov/archive/qrpt12.96.html>.

69. *Id.*

70. *See* Robert K. Heady, *Credit-Card Companies Want 'Lenient' Bankruptcy Laws Revised*, SUN-SENT. (Fort Lauderdale), Jan. 6, 1997, (Your Business), at 25; Ken Skopec, Editorial, *House of Cards: Financial Service Industry Deserves Part of the Blame On Why More and More People Are Headed for the Poorhouse*, CHI. TRIB., Dec. 26, 1996, (Commentary), at 29.

71. Donna Halvorsen & Dee DePass, *The Bankruptcy Business; Lawyers Argue Over Who's Responsible*, STAR TRIB., Jan. 24, 1997, at 19A.

72. Skopec, *supra* note 70, at 29.

73. Laurie Hays, *Banks' Marketing Blitz Yields Rash of Defaults*, WALL ST. J., Sept. 25, 1996, at B1.

74. Dee DePass & Donna Halvorsen, *The Bankruptcy Business; Who Is to Blame for Rise in Personal Bankruptcy?*, STAR TRIB., Jan. 24, 1997, at 1A.

75. *Id.*

in 1991.[76] On June 30, 1996, the average credit card holder possessed from eight to ten cards, with combined outstanding debt of $3,900.00.[77]

In summary, record numbers of U.S. consumers are in serious financial difficulty. Many believe that consumer debtors are in distress because these debtors have failed to exercise common sense and self-restraint. Others, however, contend that the credit card issuers "make them do it" by utilizing exploitive credit card marketing tactics which force credit upon consumers who lack the sophistication to manage it. Some commentators urge that, through overzealous marketing, "'[card issuers] have created their own monster.'"[78] Evidence suggests that a growing number of courts may agree. It is quite possible that some courts, while not expressly admitting this, are in certain cases adopting a debtor-friendly, "more subjective/less objective" test of the debtor's subjective intent to repay as a means of sanctioning credit card issuers. A reading of the dicta in recent bankruptcy opinions suggests that a growing number of courts disapprove of the marketing tactics being utilized by some credit card lenders.[79] One Texas bankruptcy court recently went so far as to brand the credit card industry's solicitation practices as "commercial entrapment."[80]

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76. Jerome R. Stockfisch, *Millions of Americans Are Deluged with Credit Card Offers Daily. Low Interest Rates. No Annual Fees. But What Sounds Like a Deal May Sink You Only Deeper into Debt. Here's Where To Turn If You Find Yourself Doing the . . . Credit Card Crush*, TAMPA TRIB., Jan. 27, 1997, (Business & Finance), at 16.

77. *Id.*

78. Halvorsen & DePass, *supra* note 71, at 19A (quoting New Brighton lawyer Jack Prescott).

79. *See, e.g.*, Citibank v. Eashai (*In re* Eashai), 87 F.3d 1082, 1093 (9th Cir. 1996) (O'Scannlain, J., concurring) ("[I]t would be wrong to conclude that a person who genuinely becomes overextended, perhaps because of the availability of too much free and easy credit, risks nondischargeability. In short, the credit card issuer is not entirely blameless in this equation."); Chevy Chase, F.S.B. v. Hoffman (*In re* Hoffman), 934 F.2d 319, 1991 WL 91445, at **1 (4th Cir. June 4, 1991) (unpublished table decision) ("We are persuaded that conduct resulting from susceptibility to the kind of market place enticements demonstrated by this case is not the type of conduct contemplated by § 523."); AT&T Universal Card Servs. v. Feld (*In re* Feld), 203 B.R. 360, 370 (Bankr. E.D. Pa. 1996) ("Unsolicited credit cards are received in the average American household with the same frequency as discount shopping coupons. Presumably these lenders have calculated the increased risk that this practice entails and have factored it into the pricing of their product through finance and other charges."); AT&T Universal Card Servs. v. Alvi (*In re* Alvi), 191 B.R. 724, 731 (Bankr. N.D. Ill. 1996) ("Creditors 'might just as well pass out cards to every working person it [sic] can find and hope those who use them will pay for the charges.'") (quoting Chevy Chase, F.S.B. v. Pressgrove (*In re* Pressgrove), 147 B.R. 244, 247 (Bankr. D. Kan. 1992)); Hecht's v. Valdes (*In re* Valdes), 188 B.R. 533, 539 (Bankr. D. Md. 1995) ("Plaintiff voluntarily entered into this financial relationship with Mr. Valdes at a point in time when he already had incurred significant unsecured credit card debt."); Citibank v. Davis (*In re* Davis), 176 B.R. 118, 120 (Bankr. W.D.N.Y. 1994) ("[T]he credit card industry has deluged virtually every adult American with invitations to become a charge customer. . . . Lending practices almost encourage the misuse of credit, such as to finance existing debt service.").

80. [T]he bank sent a financially strapped Debtor an enticement to consolidate

Perhaps some courts are using their judicial power to reshape the nature of the debtor-creditor relationship with respect to credit card transactions; perhaps they are not. One fact, however, is certain: in a market economy, an industry will ultimately recover its costs of doing business from its customers. Although empirical evidence is unavailable, it is reasonable to assume that if industry-hostile judges fashion rules that make it easy for credit card debtors to avoid their debts through bankruptcy proceedings and if, as a result, the amount of credit card debt discharged in bankruptcy proceedings continues to rise, credit card issuers will pass the cost of this discharged debt on to cardholders in the form of higher interest rates.

Credit card issuers conduct billions of transactions with millions of consumer cardholders across the United States and around the world. In 1995, banks earned $35 billion in interest on credit card transactions.[81] Surely, an industry with such a pervasive financial impact on society requires some amount of governmental regulation. It should not need mention, however, that courts are not the appropriate regulatory bodies. Policy decisions touching nearly all U.S. citizens are the rightful province of the legislative branch.

Perhaps partially in recognition of this fact, Congress appointed the nine-member National Bankruptcy Review Commission (NBRC) pursuant to the Bankruptcy Reform Act of 1994. The task of the NBRC is to reexamine the Bankruptcy Code, solicit input from interested parties, evaluate proposals for reforms, and report back to Congress, the President, and the Chief Justice by October 20, 1997 with recommendations for revisions to the Bankruptcy Code.[82] One of the NBRC's principal recommendations should be that Congress codify an objective test under § 523(a)(2)(A) for determining a credit card debtor's fraudulent intent for dischargeability purposes. The NBRC should use the twelve-factor test of *Dougherty*[83] as a starting point because, as discussed previously, many courts have successfully utilized this test for twenty years. Although Congress might rightly choose to modify the twelve-factor test to eliminate some factors and add others, the end product should be

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> bills and to purchase holiday gifts, bolstered by emphasis on a low interest rate and an increased credit limit. The Bank cannot now be heard to complain that the Debtor committed fraud by doing the very thing the Bank touted—getting cash advances to pay other bills. To allow the Bank to prevail in this situation would result in converting dischargeable debts into nondischargeable debts and would amount to this court condoning commercial entrapment.

Bank One Columbus, N.A. v. McDaniel (*In re* McDaniel), 202 B.R. 74, 79 (Bankr. N.D. Tex. 1996).

81. Hays, *supra* note 73, at B1.

82. Nat'l Bankr. Rev. Comm'n, *NBRC Fact Sheet* (last modified Feb. 1997) <http://www.nbrc.gov/facts.html>.

83. See *supra* note 26 for a list of the factors.

an objective test of intent that is straightforward and subject to reasonably uniform application.

Although common law purists and judges who prefer not to shed judicial discretion will likely disapprove of this proposal, it is, nevertheless, a necessary reform. As previously noted, Congress—not the judiciary—is better suited to make policy decisions that impact nearly all Americans. Also, the Bankruptcy Code is federal law. As such, its application should be relatively uniform across the fifty states and territories—not subject to substantial jurisdictional differences. There is today absolutely no uniformity in adjudicating credit card debt dischargeability across the federal court system. Credit card issuers—which conduct their business worldwide—and today's transient consumers will be best served by a statute that forces federal courts to adjudicate credit card matters in bankruptcy with some level of predictable consistency, regardless of jurisdiction, and with a fair and reasonably uniform balance between debtors' and creditors' rights.

Samuel B. Cothran, Jr.