Nova Law Review

Volume 15, *Issue* 3 1991 *Article* 16

Exceptions to Discharge: The Supreme Court Adopts A Preponderance of the Evidence Standard of Proof in Section 523 Proceedings

Andrew Kessler*

*

Exceptions to Discharge: The Supreme Court Adopts A Preponderance of the Evidence Standard of Proof in Section 523 Proceedings

Andrew Kessler

Abstract

Section 523 of the Bankruptcy Reform Act' lists ten categories of debts which are excepted from discharge.2 The standard of proof necessary to establish the nondischargeability3 of debts under this section was until recently unclear.

KEYWORDS: discharge, court, adopts

Exceptions to Discharge: The Supreme Court Adopts A Preponderance of the Evidence Standard of Proof in Section 523 Proceedings

I. INTRODUCTION

Section 523 of the Bankruptcy Reform Act[1] lists ten categories of debts which are excepted from discharge.[2] The standard of proof necessary to establish the nondischargeability[3] of debts under this section was until recently unclear. The problem stemmed from the fact that neither the Code nor its legislative history directly addressed the issue. Both the bankruptcy courts and the appellate courts were split on the appropriate standard to apply. However, the controversy was resolved by the Supreme Court of the United States in the case of *Grogan v. Garner*.[4] The question before the Court was whether exceptions to discharge under Bankruptcy Code section 523(a) must be proven by a 'preponderance of the evidence' standard or by a 'clear and convincing evidence' standard.[5] Although the underlying case[6] only involved the

1. Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978), (codified at 11 U.S.C. §§ 101-2075 (1988)) [hereinafter referred to as the Code].

2. 11 U.S.C. § 523(a) (1988).

3. The reference to debts excepted from discharge as debts that are "nondischargeable" appears in the legislative history of the Code. *See, e.g.*, H.R. REP. NO. 595, 95th Cong., 2d Sess. 4, 364, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6319-20.

4. Grogan v. Garner, 111 S. Ct. 654 (1991) The Court announced its decision on January 15, 1991.

5. *Id.* at 656.

6. *In re* Garner, 881 F.2d 579 (8th Cir. 1989), *cert. granted sub nom.* Grogan v. Garner, 110 S. Ct. 1945 (1990). Oral arguments were held on October 29, 1990.

Although the particular facts of *Garner* are not essential to an understanding of this article, they may aid the reader in appreciating the context in which the issue of dischargeability arises and will therefore be briefly summarized. Grogan was awarded a money judgment against Garner in a civil trial for common law fraud. *Garner*, 881 F.2d at 580. The jury was instructed on a preponderance of the evidence standard. *Id.* Garner filed for relief under the Bankruptcy Code and requested that Grogan's judgment against him be discharged. *Id.* Garner objected to the discharge based on Bankruptcy Code section 523(a)(2) which denies a debtor a discharge from any debt obtained under false pretenses, through a false representation, or actual fraud. *Id.* To prove fraud, Grogan presented the civil court judgment to the bankruptcy court argu-

fraud exception,[7] the Court decided that a preponderance of the evidence standard should be applied to all the exceptions to discharge.[8] The Court's decision will obviously have an immediate effect on the way that cases under this section are decided, however, there may be broader, and perhaps more important, implications in the Court's decision. First, the decision will help ease the caseloads of the bankruptcy courts which in a period of economic recession are seriously overburdened.[9] Second, the decision reflects the relative importance that the Court attaches to the "fresh start" policy embodied in the Code as compared to the necessity of relitigating issues in the bankruptcy court already decided in a state court.

The first step towards the debtor's "fresh start" is the filing of a petition in bankruptcy. When an individual debtor[10] files a petition in bankruptcy, he does so in hopes of obtaining a discharge.[11] A discharge relieves the debtor from all debts that arose prior to the filing of the bankruptcy petition.[12] The grant of a discharge is intended to give the debtor a fresh start in life free from the burden of indebtedness.[13] However, there are certain categories of debts which are nondischargeable. Among these are certain tax obligations,[14] payments of alimony and child support,[15] repayment of educational loans,[16] and debts incurred as a result of the debtor's operation of a motor vehicle while

---

ing that the doctrine of collateral estoppel precluded Garner from relitigating the issue of fraud in the bankruptcy court. *Id.* The bankruptcy court agreed and declared the debt nondischargeable. *Id.* The district court in an unreported decision affirmed. The eighth circuit reversed, holding that in exceptions to discharge under section 523(a)(2) fraud needs to be proved by clear and convincing evidence, and therefore, since the standard in the civil trial was only a preponderance of the evidence, Garner was not collaterally estopped from relitigating the issue of fraud in the bankruptcy court. *Id.* at 581-82.

7. 11 U.S.C. § 523(a)(2).

8. *Grogan*, 111 S. Ct. at 661.

9. The caseload will be affected because the bankruptcy courts will be able to apply the doctrine of collateral estoppel to avoid relitigating issues that have been previously litigated in state court. *See infra* part VI.

10. Under the Code, the term "bankrupt" is abolished in favor of the term "debtor". *See* 11 U.S.C. § 101(12).

11. B. WEINTRAUB & A. RESNICK, BANKRUPTCY LAW MANUAL ¶ 3.01 (1986) [hereinafter BANKRUPTCY LAW MANUAL].

12. 11 U.S.C. § 727(b).

13. BANKRUPTCY LAW MANUAL, *supra* note 11, at ¶ 3.01.

14. 11 U.S.C. § 523(a)(1).

15. § 523(a)(5).

16. § 523(a)(8).

intoxicated.[17] Non-compensatory fines and penalties owed to a governmental unit are not dischargeable.[18] Also debts not listed on the appropriate schedules,[19] or not discharged in a prior bankruptcy[20] are excepted from discharge. Because they involve intentional conduct on the part of the debtor, the last exceptions are the most litigated,[21] they include debts incurred through various types of fraud[22] or willful and malicious injury.[23] It is the creditor's obligation to request that a particular debt owed to him not be discharged in bankruptcy.[24] The creditor who wishes to obtain a determination of nondischargeability in a

---

17. § 523(a)(9).
18. § 523(a)(7).
19. § 523(a)(3).
20. § 523(a)(10).
21. The basis for this statement is a finding during the research for this article that the majority of cases reported involve the fraud and willful and malicious exceptions. The distinguishing factor between the fraud and willful and malicious exceptions and the other exceptions is that the former involve intentional conduct on the part of the debtor. Since intent is often difficult to establish, the standard of proof used to establish this element will often play a decisive role in the outcome of the proceeding.
22. 11 U.S.C. § 523(a)(2)-(a)(4). The text of these sections is as follows:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> (B) use of a statement in writing—
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive; or
>
> . . .
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

23. 11 U.S.C. § 523(a)(6). The text of this section is as follows:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> . . .
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

24. *See* 11 U.S.C. § 523(c); BANKR. R. 4007(a).

bankruptcy court[25] must file a complaint to commence an adversary proceeding.[26]

The standard of proof necessary to except a debt from discharge had been the source of much controversy in the bankruptcy and appellate courts. With some courts following a preponderance of the evidence standard and others following a clear and convincing standard, both creditor and debtor were left in a state of confusion.[27] The issue of the appropriate standard of proof usually arose in conjunction with either the fraud[28] or the willful and malicious injury[29] exceptions, although there were a few cases involving the exception of debts incurred through the operation of a motor vehicle while legally intoxicated.[30] In

---

25. The Code requires that a creditor who wishes to have a debt declared nondischargeable as one falling within the second, fourth, or sixth exception must bring the action in the bankruptcy court within a specified amount of time. There is no time limit for commencing an action to determine the dischargeability of a debt falling within one of the other exceptions, and this may, in some instances, be determined by a state court. *See* 11 U.S.C. § 523(c); BANKR. R. 4007.

26. BANKR. R. 4007(e), 7001(6).

27. The standard of proof utilized in dischargeability proceedings affects the certainty with which either party can predict the outcome of the proceeding. In deciding whether to file a petition in bankruptcy, it is important for the debtor to know whether he will receive a complete discharge. On the other hand, the certainty with which a creditor feels he can prove the debt is nondischargeable will often determine whether he files a complaint. If the debt the creditor is seeking to except from discharge is a consumer debt, the certainty with which he can predict the outcome of the case has special significance. If a creditor seeks to have a consumer debt declared nondischargeable, and such debt is discharged, the court may, at its discretion, award the debtor costs and attorney's fees. *See* 11 U.S.C. § 523(d).

28. Fraud cases applying a preponderance of the evidence standard: *see, e.g., In re* Glendenning, 107 Bankr. 136 (Bankr. N.D. Ohio. 1989); *In re* Basham, 106 Bankr. 453 (Bankr. E.D. Va. 1989); *In re* Showalter, 86 Bankr. 877 (Bankr. W.D. Va. 1988); *In re* Walters, 24 Bankr. 649 (Bankr. W.D. Penn. 1982).

Fraud cases applying the clear and convincing evidence standard: *see, e.g., In re* King, 96 Bankr. 413 (D. Mass 1989); *In re* McQueen, 102 Bankr. 120 (Bankr. S.D. Ohio 1989); *In re* Zack, 99 Bankr. 717 (Bankr. E.D. Va. 1989); *In re* Adleman, 90 Bankr. 1012 (Bankr. D. S.D. 1988).

29. Wilfull and malicious cases applying a preponderance of the evidence standard: *see, e.g., In re* Martinez, 110 Bankr. 353 (Bankr. N.D. Ill. 1990); *In re* Ziegler, 109 Bankr. 172 (Bankr. W.D. N.C. 1989); *In re* Meyer, 100 Bankr. 297 (Bankr. D. S.C. 1988), *aff'd* 100 Bankr. 301 (D. S.C. 1989).

Wilfull and malicious cases applying a clear and convincing evidence standard: *see, e.g., In re* Burke, 83 Bankr. 716 (Bankr. D. N.D. 1988); *In re* Auto Outlet, Inc., 71 Bankr. 674 (Bankr. D. Utah 1987); *In re* Peoni, 67 Bankr. 288 (Bankr. S.D. Ind. 1986).

30. Drunk driving cases holding a preponderance of the evidence standard ap-

some districts, courts applied different standards of proof depending on the exception to discharge at issue.[31]

This article, by adopting the reasoning of the Supreme Court and expanding upon its analysis, explains why the preponderance of the evidence standard of proof is the correct standard to apply in section 523 proceedings. First, the article will describe the use of the different standards of proof and their origins. Next, it will look at the history of discharge in bankruptcy and explain why, although discharge is a fundamental part of bankruptcy law, it is not so important as to justify the imposition of a higher standard of proof than the preponderance standard normally applied in civil proceedings. From that point, the article will examine the "fresh start" policy of the Code as a reason to construe the Code's provisions against the creditor and in favor of the debtor. Then, the article will argue that the reasons the courts of equity required fraud to be proven by clear and convincing evidence are inapplicable in dischargeability proceedings. Finally, the benefits of the doctrine of collateral estoppel will be discussed.

II. THE STANDARD OF PROOF: ITS USE AND ORIGIN

Up until the Supreme Court rendered its decision in *Grogan*, the determination of the appropriate standard of proof to apply in proceedings under section 523 was complicated by the fact that many bankruptcy courts found it easier to avoid the issue rather than justify its use of either standard.[32] In holding in favor of the debtor, some courts simply stated that the plaintiff failed to prove its case by even a preponderance of the evidence,[33] or did not mention a standard at all.[34]

---

plies: *see, e.g., In re* Middleton, 100 Bankr. 814 (Bankr. E.D. Va. 1988), *aff'd sub nom.* Whitson v. Middleton, 898 F.2d 950 (4th Cir. 1990); *In re* Humphrey, 102 Bankr. 629 (Bankr. S.D. Ohio 1989); *In re* Carney, 68 Bankr. 655 (Bankr. D. N.H. 1986).

Drunk driving cases in which the court utilized a heightened standard of proof: *see, e.g., In re* Vorek, 95 Bankr. 599 (Bankr. S.D Ind. 1989) (strict proof); *In re* Wright, 66 Bankr. 403 (Bankr. S.D. Ind. 1986) (clear and convincing evidence); *In re* Christianson, 65 Bankr. 157 (Bankr. W.D. Mo. 1986) (substantial evidence).

31. *See, e.g., In re* Feldman, 111 Bankr. 481 (Bankr. E.D. Pa. 1990); *In re Zack*, 99 Bankr. 717.

32. *See In re Middleton*, 100 Bankr. 814. "The burden of proof under section 523(a) is a murky area of bankruptcy law where few clear rules, if any, have been developed. In fact, many courts fail even to address this issue just as it has not been addressed by the parties here." *Id.* at 817.

33. *See In re* Drake, 5 Bankr. 149, 151 (Bankr. W.D. Wis. 1980), *overruled on*

Courts deciding in favor of the creditor found that the case was proven by clear and convincing evidence.[35] Other courts, without explanation, simply applied the higher standard.[36] Those courts that did attempt to select one standard over the other, often confused the reader by utilizing "loose language" in describing the standard being applied. For instance, courts presumably meaning to apply a preponderance standard also used the term "fair preponderance"[37] while courts applying the clear and convincing standard used phrases such as "clear, cogent, and convincing," "clear and conclusive," and "clear, unequivocal, and convincing."[38] The differing and varied expressions courts used in applying the standard of proof made it difficult to establish a uniform rule.

Although at times it may be difficult to distinguish between the two different standards of proof,[39] the purpose of establishing different

---

other grounds, *In re* Shuler, 21 Bankr. 643 (Bankr. D. Idaho 1982) ("The preponderance of the evidence does not establish . . . ."); *In re* Walker, 7 Bankr. 216, 219 (Bankr. D. R.I. 1980) ("[T]he plaintiff has proved neither by clear and convincing evidence, nor a preponderance thereof . . . ."); *see also In re* Watkins, 90 Bankr. 848, 851, n.7 (Bankr. E.D. Mich. 1988) ("Most courts, I surmise, do what the court in *In re* Horldt, 86 Bankr. 823 (Bankr. E.D. Pa. 1988) did and 'punt'. They merely avoid the issue by saying that the plaintiff has failed to meet even the lower standard. Until now that is precisely what I have been able to do.").

34. *See In re* Maiolo, 12 Bankr. 114 (Bankr. N.D. Ga. 1981).

35. *See In re* Powell, 88 Bankr. 114 (Bankr. W.D. Tex. 1988). "The grounds for denial of discharge have been proven by clear and convincing evidence, though this court is not satisfied that such a heightened evidentiary standard is either mandated by the statute or appropriate to achieve the purpose of the Bankruptcy Code." *Id.* at 118.

36. *In re* Brink, 30 Bankr. 28, 30 (Bankr. W.D. Wis. 1983); *In re* Ashley, 5 Bankr. 262, 264 (Bankr. E.D. Tenn. 1980) ("It must be proved by clear, cogent, and convincing evidence.").

37. *In re Glendenning*, 107 Bankr. 136; *In re* Dubian, 77 Bankr. 332 (Bankr. D. Mass. 1987); *In re* Clark, 50 Bankr. 122 (Bankr. D. N.D. 1985); *In re* Carr, 49 Bankr. 208 (Bankr. W.D. Ky. 1985); *In re* Stephens, 26 Bankr. 389 (Bankr. W.D. Ky. 1983).

38. *See* 37 AM. JUR. 2D *Fraud and Deceit* § 468, p. 645 (1968). There are at least twenty-five additional varieties of the clear and convincing standard listed in this section.

39. Whereas the preponderance standard lends itself to a workable definition, the clear and convincing standard does not. The preponderance standard has been defined as:

> [T]he evidence which, when weighed with that opposed to it as [sic] more convincing force and is more probably true and accurate. If upon any issue in the case, the evidence appears to be equally balanced, or if it cannot be said upon which side it weighs heavier, then plaintiff has not met his or her burden of proof.

In re Clark, 50 Bankr. at 125-26 (citing Smith v. United States, 726 F.2d 428 (8th

standards of proof should not be overlooked. "[T]he labels used for alternative standards of proof [may be] vague and not a very sure guide to decision-making,"[40] but they nevertheless, "represent[] an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions."[41] In this way, "[t]he standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."[42] Thus, "when the individual interests at stake . . . are both 'particularly important' and 'more substantial than the mere loss of money,' "[43] such as proceedings to terminate parental rights, the Supreme Court has applied the clear and convincing evidence stan-

---

Cir. 1984)). There is no comparable definition to utilize in applying the clear and convincing evidence standard. The bankruptcy courts have not come up with a workable definition. Those that attempt to define it, simply say it requires evidence more convincing than a mere preponderance, but less convincing than beyond a reasonable doubt. *See In re* Bonnett, 72 Bankr. 715, 717 (C.D. Ill. 1987), *rev'd on other grounds*, 895 F.2d 1155 (7th Cir. 1989) (citing *In re* Delano, 50 Bankr. 613, 617 (Bankr. D. Mass. 1985)) ("[T]he clear and convincing burden of proof standard creates a greater burden of proof than the normal preponderance of the evidence standard.") Other courts have indicated:

> "[T]he term 'clear and convincing' does not lend itself to preciseness in definition. It is pretty much a relative term. The measure of proof required by this designation falls somewhere between the rule in ordinary civil cases and the requirement of our criminal procedure, that is, it must be more than a preponderance but not beyond a reasonable doubt. It is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegation sought to be established. Evidence need not be voluminous or undisputed to accompany this."

Brown v. Warner, 78 S.D. 647, 653, 107 N.W.2d 1, 4 (1961) (citation omitted). At least one bankruptcy court, in the case of *In re Dubian*, 77 Bankr. 332, has stated that "terms such as 'clear and convincing' and 'not of doubtful character' are helpful in emphasizing a careful approach to the decision of certain important issues, but are too vague to serve generally as a practical guide in the trial of cases." *Id.* at 338 (citations omitted). In holding that a preponderance of the evidence standard applied in proceedings under sections 523(a)(2) and 523(a)(6), the court stated that an application of the clear and convincing standard would be a pure abstraction and an unwarranted judicial gloss on the statute." *Id.* at 339 (In footnote 5 of the court's opinion, it states that "[t]he origin of a higher standard in dischargeability proceedings seems to be more the result of some flowery language in the decisions than any sound analysis.").

40. *In re* Winship, 397 U.S. 358, 369-70 (1970) (Harlan, J., concurring).

41. *Id.*

42. Herman & Maclean v. Huddleston, 459 U.S. 375, 389 (1983) (citing Addington v. Texas, 441 U.S. 418, 423 (1979)).

43. Santosky v. Kramer, 455 U.S. 745, 756 (1982) (citing *Addington*, 441 U.S. at 424).

dard.[44] However, as the Court noted in *Grogan*, where particularly important individual rights or interests are not at stake, the preponderance of the evidence standard is presumed to be the standard applicable in civil actions between private litigants.[45] This is "[b]ecause the preponderance of the evidence standard results in a roughly equal allocation of the risk of error between the litigants."[46] It was therefore necessary for the Court in *Grogan* to consider whether the right to a discharge in bankruptcy approaches a constitutional level of importance, making it appropriate to apply a higher standard of proof in section 523 proceedings than that of a preponderance of the evidence. In considering this issue, the Court began by stating it had "previously held that a debtor has no constitutional or 'fundamental' right to a discharge in bankruptcy."[47] The Court then quickly disposed of the issue by stating that "in the context of provisions designed to exempt certain claims from discharge, [it does not believe] a debtor has an interest in discharge sufficient to require a heightened standard of proof."[48] From the Court's opinion, it is not exactly clear why the Justices do not believe a debtor has an interest in discharge sufficient to require a heightened standard of proof. However, a closer look at the history of discharge in bankruptcy and an expansion of the Court's analysis may aid the reader in an understanding of the Court's position.

III. HISTORY OF DISCHARGE

In order to provide the debtor with a new opportunity in life, the

---

44. *See Santosky*, 455 U.S. 745 (proceeding to terminate parental rights); *Addington*, 441 U.S. 418 (involuntary commitment proceeding); Woodby v. INS, 385 U.S. 276 (1966) (deportation); Cruzan v. Missouri Dep't of Health, 110 S. Ct. 2841 (1990) (withholding of nutrition and hydration from a person in a persistent vegetative state).

45. *Grogan*, 111 S. Ct. at 659. For cases where the Court has applied a preponderance of the evidence standard, see Rivera v. Minnich, 483 U.S. 574 (1987) (paternity could be established by a preponderance of the evidence despite "serious economic consequences" to the defendant); *Huddleston*, 459 U.S. 375 (establishment of securities fraud under section 10(b) of the Securities Exchange Act of 1934); Steadman v. SEC, 450 U.S. 91 (1981) (sanctions under the Investment Advisors Act, including permanently barring an individual from practicing his profession); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943) (establishment of securities fraud under section 17(a) of the Securities Act of 1933); United States v. Regan, 232 U.S. 37 (1914) (proof of acts exposing a party to criminal prosecution).

46. *Grogan*, 111 S. Ct. at 659.

47. *Id.* (citing United States v. Kras, 409 U.S. 434, 445-46 (1973)).

48. *Id.*

Code grants the debtor a discharge from his pre-petition debts.[49] The discharge of the debtor is the heart of the "fresh start" policy of the Code.[50] In order to appreciate the importance of the discharge in bankruptcy, it is necessary to look back to its origin, its development throughout the years, and its position today in bankruptcy law.

Bankruptcy law today, and at its inception, appears to have two main objectives: to provide for an equitable distribution of an insolvent debtor's property, and to prevent the insolvent debtor from acting in a manner which is detrimental to the interests of his creditors. Protecting the honest debtor from his creditors by means of a discharge, although a fundamental feature in today's bankruptcy law, has not historically been a feature of bankruptcy law.[51] Early English bankruptcy law, which provided the foundation for American bankruptcy law, was instituted for the benefit of the creditor.[52] Not only did the early laws fail to provide the debtor with a discharge from his debts, they allowed creditors to involuntarily seize and distribute the debtor's property and place him in prison.[53] Even the first discharge provision, which appeared in an English bankruptcy law in 1705,[54] was introduced for the benefit of creditors; it was a way to induce debtors to disclose and deliver all their assets to their creditors.[55] If the debtor honestly surrendered all his assets and cooperated fully with the creditors, he was granted a discharge of the unpaid balance of his debts.[56] A debtor that failed to make a full disclosure was considered a felon and imprisoned.[57]

The first American bankruptcy laws followed the model of the English laws. The Bankruptcy Act of 1800[58] provided for involuntary

---

49. 11 U.S.C. § 727.

50. *See*, H.R. REP. NO. 595, 95th Cong., 2d Sess. 5, 384, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6340.

51. *See* Levinthal, *The Early History of Bankruptcy law*, 66 U. PA. L. REV. 223, 225 (1918).

52. Countryman, *Bankruptcy and the Individual Debtor - and a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U.L. REV. 809, 813 (1983).

53. *Id.* at 811-12.

54. *Id.* at 812. (citing 4 Anne, Ch. 17 (1705)).

55. J. MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY § 100 (1956).

56. When the law was first enacted, a discharge was granted only after approval by all of the creditors. Later, it was amended so as to only require approval of a majority of claims in number and amount. Note, *Essentials of Bankruptcy: Prevention of Fraud, and Control of Debtor*, 23 VA. L. REV. 373, 380 (1937).

57. *See* Countryman, *supra* note 52, at 812.

58. Bankruptcy Act of 1800, Ch. 19, 2 Stat. 19 (1800) (repealed 1803).

proceedings to be initiated on creditors petitions only, and provided the debtor with a discharge if he made a full disclosure to his creditors. The discharge was conditioned on the debtor receiving the consent of two-thirds of the creditors who had claims against two-thirds of the total value of all outstanding debts.[59] A failure to honestly disclose resulted in the debtor's imprisonment for not less than one year, nor more than ten years.[60] The position of the debtor gradually improved with the enactment of the latter Bankruptcy Acts of 1841[61] and 1867.[62] Under the 1867 Act, both voluntary and involuntary petitions could be filed. Along with the discharge a debtor received by cooperating with his creditors, he was granted certain limited exemptions in clothing, furniture, and other necessaries.[63] Also by this time, imprisonment for debt was curtailed by many state constitutions and statutes.[64]

Under the 1898 Act,[65] the debtor could file a voluntary petition and would be granted a discharge, regardless of creditor consent, as long as he acted in accordance with the Act's provisions.[66] As enacted, the Act excepted certain debts from discharge. These included, among others, debts incurred through fraud or for the willful and malicious injury to the person or property of another.[67] By including provisions in the Act which except certain debts from discharge, it is evident that Congress concluded the debtor was only entitled to a discharge when he dealt honestly with his creditors. Although Congress limited the discharge to a certain extent, it improved the debtor's position after bankruptcy by granting debtors liberal exemptions. For the first time, states were permitted to expand upon the exemptions granted by bankruptcy law.[68]

With the enactment of the Bankruptcy Act of 1898, and the additional allowances granted to the debtor therein, the original purpose of the discharge, that of facilitating the liquidation of the debtors assets, began to give way to the "fresh start" policy currently embodied in the

59. Countryman, *supra* note 52, at 813.
60. *Id.*
61. Bankruptcy Act of 1841, Ch. 9, 5 Stat. 440 (1841) (repealed 1843).
62. Bankruptcy Act of 1867, Ch. 176, 14 Stat. 517 (1867) (repealed 1878).
63. Countryman, *supra* note 52, at 815.
64. *Id.* at 814.
65. Bankruptcy Act of 1898, Ch. 541, 30 Stat. 544 (1898) (repealed 1978) [hereinafter Bankruptcy Act].
66. Bankruptcy Act, § 14, 30 Stat. at 550.
67. *Id.* at § 17, 30 Stat. at 550.
68. Bankruptcy Act, § 6, 30 Stat. at 548.

Code. The bankruptcy laws no longer served the interests of the creditors to the detriment of the debtors.

> [The new Act was] designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great stress upon this feature of the law-as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life.[69]

By following the development of discharge, one can see that the discharge has become a fundamental part of bankruptcy law today. However, one "cannot allow the apparent importance of these rights in the limited context of this area of the law to skew their opinions concerning the relative importance of bankruptcy rights within the overall context of the law."[70] It may be true that the debtor has a important personal interest in obtaining a discharge,[71] but the discharge remains a privilege.[72] As the Court noted in *United States v. Kras*,[73] and later reiterated in *Grogan*, there is no constitutional right to be relieved of one's debts in bankruptcy.[74] In *United States v. Kras*, the Court denied the debtor a "fresh start" by refusing to allow him to proceed in *forma pauperis* so that he could receive a discharge of his debts.[75] The Court recognized that a discharge was important, but felt it did not reach the same constitutional level of particularly important individual rights or interests involved in other proceedings, which warranted a waiver of

---

69. Stellwagen v. Clum, 245 U.S. 605, 617 (1917) (citations omitted).

70. *In re Watkins*, 90 Bankr. at 857.

71. *See* United States v. Kras, 409 U.S. 434, 445 (1973).

72. *See In re* Lah, 88 Bankr. 141, 145 (Bankr. N.D. Ohio 1988); Hudson County Welfare Dep't v. Roedel, 34 Bankr. 689, 694 (D. N.J. 1983), *aff'd*, 734 F.2d 7 (3d Cir 1984).

73. *Kras*, 409 U.S 434.

74. *See id.* at 446.

75. Under the Bankruptcy Act, the payment of all bankruptcy fees was required before a discharge could be granted. The policy is continued under the Code. *See* 11 U.S.C. § 707(a)(2) (The court may dismiss a case for nonpayment of any fees or charges under chapter 123 of title 28).

fees.[76] Thus, the Court has found that a "[b]ankruptcy [discharge] is hardly akin to free speech or marriage . . . which are imbedded in the [f]irst [a]mendment, [and which] the Court has come to regard as fundamental."[77] Since the right to a discharge is not fundamentally important, there is no compelling reason for moving away from the general rule that in a "typical civil suit for money damages, plaintiffs must prove their case by a preponderance of evidence."[78] A proceeding under section 523 is equivalent to a civil suit for money damages. The creditor is simply trying to collect money he believes is owed to him by the debtor. By excepting a particular debt from discharge, the court is merely leaving the debtor "subject to the same risks and burdens of any other debtor outside of bankruptcy."[79] Since in a discharge proceeding, the only interest of the debtor which is at stake is that of his "economic freedom," an interest which is not afforded constitutional protection, there is no basis for requiring a heightened standard of proof.

IV. Fresh Start Policy

After deciding that a debtor does not have an interest in discharge sufficient to require the clear and convincing evidence standard of proof, the *Grogan* Court next addressed the "fresh start" policy of the Code as a reason for applying a heightened standard of proof. One of the principal reasons many courts held a clear and convincing evidence standard was required to except a debt from discharge was a belief that such a standard was necessary to preserve the debtor's "fresh start." The Court stated that it was "unpersuaded by the argument that the clear and convincing standard is required to effectuate the 'fresh start' policy of the Bankruptcy Code."[80] The Court does not point out exactly

76. See *Kras*, 409 U.S. at 444-45, where the Court compared a divorce proceeding in which they allowed the payment of fees to be waived, in *Boddie v. Connecticut*, 401 U.S. 371 (1971), with a bankruptcy discharge. In a divorce proceeding the parties' inability to dissolve their marriage seriously impairs their "freedom to pursue other protected associational activities." *Id.* at 444-45. Whereas in a bankruptcy discharge, the debtor's interest in eliminating the burden of his debt, and "in obtaining his desired new start in life, although important and so recognized by the Bankruptcy Act, does not rise to the same constitutional level." *Id.* at 445.

77. *Id.* at 446 (citations omitted).

78. *Huddleston*, 459 U.S. at 387 (citing *Addington*, 441 U.S. at 423).

79. *In re Watkins*, 90 Bankr. at 856.

80. *Grogan*, 111 S. Ct. at 659.

which argument it is referring to, but there is one particular maxim which the courts frequently used to back up their position: "[E]xceptions to [discharge] should be strictly construed against the objecting creditor and liberally in favor of the debtor."[81] The maxim, most likely gained popularity through a remark made by the Supreme Court in *Gleason v. Thaw*,[82] where the Court stated that "[i]n view of the well-known purpose of the [b]ankrupt[cy] law, exceptions to the operation of a discharge . . . should be confined to those plainly expressed."[83] The Court in *Gleason* indicated that the bankruptcy courts should not expand on the exceptions listed in the Bankruptcy Act.[84] It was not specifying the standard of proof required to prove an exception. Thus, the maxim should not be applied to establish a standard of proof, but rather should be utilized to determine whether the debt is of the type which falls within the exception.[85] The Court in *Grogan* recog-

---

81. *See In re* Foreman, 906 F.2d 123, 127-28 (5th Cir. 1990); *see also In re* Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987); *In re* Klag, 112 Bankr. 456, 458 (Bankr. M.D. Fla. 1990); *In re* Liptack, 89 Bankr. 3, 4 (Bankr. W.D. Pa. 1988); *In re* Perez, 94 Bankr. 765, 768 (Bankr. M.D. Fla. 1988); *In re* Howard, 73 Bankr. 694, 700 (Bankr. N.D. Ind. 1987).

82. Gleason v. Thaw, 236 U.S. 558 (1915).

83. *Id.* at 562.

84. The issue before the Court was whether the professional services of an attorney and counselor at law were property within the meaning of paragraph 2, section 17 of the Bankruptcy Act. *Id.* at 558. This section excepted "from the general release of a discharge 'liabilities for obtaining property by false pretenses or false representations.' " *Id.* The Court concluded that Congress never intended the term property to include professional services. *Id.* at 561.

85. *See* Combs v. Richardson, 838 F.2d 112, 116 (4th Cir. 1988) ("Although the 'fresh start' philosophy of bankruptcy law requires that exceptions to discharge 'be confined to those plainly expressed'(citation omitted), this policy does not justify judicial imposition of a heavier burden of proof on creditors . . . ."); *see also In re Watkins*, 90 Bankr. at 856:

> However, I believe that the maxim is applicable only when construing the breadth of a statutory exception to discharge and not to the quantum of proof necessary to establish one of the factual elements of the cause of action. A creditor may, for example, bring an action alleging that a certain debt is nondischargeable under [section] 523(a)(6) and may prove all the elements of the cause of action by a preponderance of the evidence, yet such debt must be held to be dischargeable if the conduct alleged and proven is not within the exception narrowly construed.

Id.; *In re* Wellever, 103 Bankr. 856, 861 (Bankr. W.D. Mich. 1989) ("[P]olicy is best served by construing the *scope* of the exceptions narrowly, not by arbitrarily making their proof more difficult.") (emphasis in original); 3 W. COLLIER ON BANKRUPTCY ¶ 523.05A, at 523-16-17. (15th ed. 1979) ("In determining whether a *particular debt*

nized that although bankruptcy law generally favors the granting of a discharge,[86] the Code should be construed to protect the debtor only in those cases where there is no intent to violate its provisions.[87] "The statutory provisions governing nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts . . . Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start."[88] In other words, the exceptions to discharge reflect "Congress' belief that debtors *do not* merit a fresh start to the extent that their debts fall within section 523."[89] In a section 523 proceeding it is the debtor's honesty that is called into question. Requiring a clear and convincing standard of proof "tends to presume the very issue in question, namely the debtor's honesty."[90] It follows, therefore, that the Court's reasoning is correct when it states that "[r]equiring the creditor to establish by a preponderance of the evidence that his claim is not dischargeable reflects a fair balance between [the] conflicting interests"[91] of the debtor and the creditor. Applying a clear and convincing standard would express a preference for the debtor,[92] and "it is unlikely that Congress, in fashioning the standard of proof that governs the applicability of [the nondischargeability] provisions, would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud."[93]

---

falls within one of the exceptions of section 523, the statute should be strictly construed against the objecting creditor and liberally in favor of the debtor.") (emphasis added) (citations omitted).

86. *See Grogan*, 111 S. Ct. at 659 ("[A] central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' ").

87. *See id.* ("But in the same breath that we have invoked this 'fresh start' policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.' ").

88. *Id.*

89. *In re* Braen, 900 F.2d 621, 625 (3d Cir. 1990) (emphasis in original) (citation omitted).

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

91. *Grogan*, 111 S. Ct. at 659.

92. *See Huddleston*, 459 U.S. at 390 ("Any other standard expresses a preference for one side's interests"). *See also Combs*, 838 F.2d at 116 (referring to a debt under section 523(a)(6), but it applies equally to all section 523 proceedings).

93. *Huddleston*, 459 U.S at 390.

V. PROOF OF FRAUD

Where the exception to discharge requires proof of fraud, some courts required clear and convincing evidence because they believed this was the prevailing standard, for both section 523 and common law purposes, at the time of the Code's adoption.[94] The Court rejected this idea. "Because it seems clear that a preponderance of the evidence is sufficient to establish [some of] the nondischargeability"[95] exceptions, the court reasoned that "the structure of section 523(a), which groups together in the same subsection a variety of exceptions without any indication that any particular exception is subject to a special standard of proof"[96] supports the conviction that Congress intended the preponderance standard to apply to all the exceptions, including those involving fraud.

In addition to the reason given by the Supreme Court, there are other persuasive arguments for not applying a higher standard of proof to the fraud exceptions. The bankruptcy court case, *In re Huff*,[97] was frequently cited for the rationale behind making a creditor prove by "clear and convincing" evidence that a debt falling within the section 523(a)(2) exception is nondischargeable.[98] That court ruled that where dishonesty or fraud is at issue, a higher standard of proof is required to overcome the presumption that all men are honest and fair dealing.[99] The court in *Huff*, quoting from section 94 of Corpus Juris Secundum, stated that the higher standard is based on considerations that "fraud is regarded as criminal in its essence, and involves moral turpitude at least, while, on the other hand, the presumption is that all men are honest, that individuals deal fairly and honestly, that private transactions are fair and regular, and that participants act in honesty and good faith."[100] There are two problems with the court's reliance on section

---

94. *In re Garner*, 881 F.2d at 582.

95. *Grogan*, 111 S. Ct. at 660.

96. *Id.* at 659-660.

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

98. *See, e.g., In re* Lowther, 32 Bankr. 638, 641 (Bankr. W.D. Okla. 1983); *In re* Trewyn, 12 Bankr. 543, 545 (Bankr. W.D. Wis. 1981).

99. *In re Huff*, 1 Bankr. at 357; *See In re* Garcia, 88 Bankr. 695 (Bankr. E.D. Pa. 1988) (this case was decided under 11 U.S.C. § 727(a)(2), but referred to section 523(a) proceedings); *In re Auto Outlet, Inc.*, 71 Bankr. 674; *In re Lowther*, 32 Bankr. 638; *In re* Iannelli, 12 Bankr. 561 (Bankr. S.D. N.Y. 1981); *In re Trewyn*, 12 Bankr. 543.

100. *In re Huff*, 1 Bankr. at 357, quoting from 37 C.J.S. *Fraud* § 94, p. 398 *et seq.* (1943) (citations omitted).

94 to support its proposition. First, the cited section deals with imposing the burden of proof on the one alleging fraud, it mentions nothing about a "clear and convincing" standard of proof.[101] Second, the presumption of fair dealing does not justify the imposition of a higher standard of proof than that normally applied in civil cases. The presumption can be overcome "by producing facts and circumstances in evidence which cannot fairly or reasonably be reconciled with fair dealing and honesty of purpose."[102]

The original reason for which the clear and convincing evidence standard was created by the courts of equity is inapplicable to section 523 proceedings. The Supreme Court has recognized that the "clear and convincing" standard of proof was created by the courts of equity for a particular class of claims.

> A higher standard of proof apparently arose in courts of equity when the chancellor faced claims that were unenforceable at law because of the Statute of Wills, the Statute of Frauds, or the parol evidence rule. Concerned that claims would be fabricated, the chancery courts imposed a more demanding standard of proof. The higher standard subsequently received wide acceptance in equity proceedings to set aside presumptively valid written instruments on account of fraud.[103]

An article cited by the Supreme Court in *Huddleston* states that "[t]he

---

101. In fact, a later section of C.J.S. entitled "weight and sufficiency," states that fraud need only be proved by a preponderance of the evidence:

> Fraud must be established by a preponderance of the evidence. Although a court or jury should be cautious in arriving at conclusions prejudicial to character and honesty, a preponderance of evidence such as required in civil cases generally is ordinarily sufficient to show fraud, provided the proof is clear and strong enough to preponderate over the general and reasonable presumption that men are honest and do not ordinarily commit fraud or act in bad faith.

37 C.J.S. *Fraud* § 114, p.426-27 (1943) (citations omitted).

102. 37 AM. JUR. 2D *Fraud and Deceit* § 470 p.649 (1968) (citations omitted). Requiring the "clear and convincing" standard to overcome the presumption of honesty has also been attacked on another level. In *In re Watkins*, 90 Bankr. at 852 n.9, Judge Spector, intrigued with why some courts had such solicitude for the feelings of the allegedly dishonest, admitted it would hurt to be called a fraud or a cheat; but then asked whether it was less hurtful to be called a murderer, rapist, or vandal. If not, he posited, "then there is no good reason to require clear and convincing evidence in cases of 'dishonesty' but not in cases of other sorts of depravity." *Id.*

103. *Huddleston*, 459 U.S. at 388 n.27 (citations omitted).

requirement in civil actions of more than a preponderance of the evidence was first applied in equity to claims which experience had shown to be inherently subject to fabrication, lapse of memory, or the flexibility of conscience."[104] The adversary proceedings brought under section 523(a)(2) for debts obtained by false pretenses, false representations, or actual fraud are not the type of claims which the courts of equity were concerned about when they developed the clear and convincing evidence standard. First, since debts have to be confirmed by the bankruptcy court prior to the holding of a hearing to determine their dischargeability,[105] the danger that the facts of fraud claims will be fabricated or subject to a lapse of memory, is minimal. Second, in applying the clear and convincing evidence standard to actions seeking to set aside the terms of written instruments, the courts of equity were concerned with protecting the validity of written instruments and the reliance placed upon such documents. Since in dischargeability proceedings, the validity of written agreements is rarely an issue, and since the claims in these proceedings are no more likely to be fabricated than in other types of proceedings, the clear and convincing standard is inappropriate.

VI. Clear and Convincing Standard Applied by "Accident"

One issue which was not addressed by the *Grogan* Court, but should not be overlooked, is the manner in which some of the lower courts came to apply the clear and convincing evidence standard. The courts which applied a clear and convincing standard did so "almost by historical accident."[106] The historical accident, according to Judge Stewart's opinion in *In re Curl*,[107] was the result of courts citing to cases that did not stand for the proposition stated. For instance, in *Sweet v. Ritter Finance Co.*,[108] a case which is repeatedly cited on the elements of fraud and the burden of proof in dischargeability proceedings, the court unequivocally stated that the elements must be proven

104. Note, *Appellate Review in the Federal Courts of Findings Requiring More than a Preponderance of the Evidence*, 60 Harv. L. Rev. 111, 112 (1946).

105. *See* 11 U.S.C. § 502.

106. *See In re* Curl, 49 Bankr. 302, 304 (Bankr. W.D. Miss. 1985).

107. *Id.*

108. Sweet v. Ritter Fin. Co., 263 F.Supp. 540, 543 (W.D. Va. 1967).

by a preponderance of evidence.[109] However, numerous cases cited *Sweet* for the proposition that the standard of proof is clear and convincing evidence.[110] In fact, at least two circuit court opinions, which are supposed to serve as binding precedent for the bankruptcy courts, adopted the clear and convincing standard of proof by citing to cases which relied on *Sweet*.[111] Another circuit court opinion, which applied a clear and convincing standard, cited to a bankruptcy court decision which did not even mention the standard of proof.[112] Perhaps the clearest episode of misstating a proposition was done by the court in *In re Pallo*.[113] In this case, the court stated "[i]t is *unquestioned* that the party seeking to have its debt excepted from discharge pursuant to [s]ection 523 bears the burden of proof by clear and convincing evidence."[114] To support its statement, the court cited two bankruptcy court cases which unequivocally held that a fair preponderance of evidence is all that is required to except a debt from discharge.[115] The fact that these courts applied the clear and convincing standard by "accident" lends further support to the Supreme Court's adoption of the preponderance standard.

VII. Application of Collateral Estoppel

Applying a preponderance of the evidence standard to proceedings under section 523(a) will allow bankruptcy courts to give prior state

---

109. *Id.* at 543 ("In other words, Ritter Finance must show by a preponderance of the evidence that . . . .").

110. *In re* Aldrich, 16 Bankr. 825, 828 (Bankr. W.D. Ky. 1982); *In re Ashley*, 5 Bankr. at 266; *In re* Jones, 3 Bankr. 410, 412 (Bankr. W.D. Va. 1980).

111. *See Kimzey*, 761 F.2d at 424 (citing *In re Aldrich*, 16 B.R. at 828); *In re* Martin, 761 F.2d 1163, 1165 (6th Cir. 1985) (citing *In re Jones*, 3 Bankr. at 412).

112. *See Rebhan*, 842 F.2d at 1262 (citing *In re* Wise, 6 Bankr. 867 (Bankr. M.D. Fla. 1980). The court in *Wise* simply states that the creditor has the burden of proof.

113. *In re* Pallo, 65 Bankr. 101 (Bankr. W.D. Ky. 1986).

114. *Id.* at 103 (emphasis added).

115. *See In re Carr*, 49 Bankr. at 210 (The "party seeking to have its debt excepted from discharge pursuant to section 523 bears the burden of proof by the fair preponderance of evidence."); *In re* Baiata, 12 Bankr. 813, 817 (Bankr. E.D. N.Y. 1981) ("[T]he correct standard of proof in [section] 523 dischargeability proceedings in this district is a fair preponderance of the evidence.").

In addition to these two cases, the court cited two other cases which do not even mention the standard of proof. *See Hunt*, 292 U.S. 234; *In re Maiolo*, 12 Bankr. 114. The court also cited *In re Martin*, 761 F.2d 1163, a case which misapplied *Sweet*.

court judgments preclusive effect, thereby avoiding duplicative relitigation of identical issues. The doctrine of collateral estoppel or "issue preclusion" bars relitigation of issues in a subsequent proceeding which were actually litigated in a previous adjudication.[116] The application of collateral estoppel in bankruptcy cases was left open in *Brown v. Felsen*[117] where the court stated that "[i]f in the course of adjudicating a state-law question, a state court should determine factual issues using standards identical to those of [section] 17, then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court."[118] There is no countervailing statutory policy which would preclude the application of collateral estoppel in dischargeability proceedings:

> The application of a collateral estoppel bar obviously serves important interests. These interests do not disappear simply because the subsequent proceedings are in bankruptcy. Judicial resources are always conserved by avoiding duplicative relitigation of identical issues . . . There is also no reason here to prefer the fact-finding of a bankruptcy judge to that of a jury so long as the same issue was presented in each proceeding."[119]

In *Grogan*, the Court clarified any confusion which existed by expressly stating "that collateral estoppel principles do indeed apply in discharge exception proceedings."[120] Although collateral estoppel can properly be applied in dischargeability proceedings, if the standard of proof used to establish the requisite elements of the cause of action in state court is lower than the applicable standard in bankruptcy cases, then the bankruptcy court cannot give the state court judgment preclusive effect.[121]

---

116. Allen v. McCurry, 449 U.S. 90, 94-95 (1980).

117. Brown v. Felsen, 442 U.S. 127 (1979).

118. *Id.* at 139 n.10. (the reference to section 17 is to section 17 of the Bankruptcy Act of 1898, which is essentially the same as section 523 under the Code). In *Brown*, the Court decided that the doctrine of res judicata should not apply in dischargeability proceedings because of the exclusive jurisdiction granted to the bankruptcy courts by the 1970 amendments to the Bankruptcy Act to decide dischargeability issues. *Brown*, 442 U.S. at 138-39.

119. *Combs*, 838 F.2d at 115 (citation omitted).

120. *Grogan*, 111 S. Ct. at 658 n. 11.

121. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28, p.273 (1982) which provides:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation

Since in most civil proceedings the standard of proof is a preponderance of the evidence, a state court judgment presented to the bankruptcy court will, more likely than not, have been decided under a preponderance standard. Although it is true that many states require a higher standard in cases involving fraud,[122] there is still a significant

---

of the issue in a subsequent action between the parties is not precluded in the following circumstances:

. . .

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action.

122. Marcus v. Fox, 150 Ariz. 342, 344, 723 P.2d 691, 693 (1985); Ficor, Inc., v. McHugh, 639 P.2d 385, 396 (Colo. 1982); Connell v. Colwell, 214 Conn. 242, ___, 571 A.2d 116, 121 (1990) (evidence must be clear, precise, and unequivocal); Hercules & Co., v. Shama Restaurant Corp., 566 A.2d 31, 39 (D.C. App. 1989); Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, ___, 768 P.2d 1293, 1295 (1989); Magic Valley Potato Shippers v. Continental Ins., 112 Idaho 1073, 1076, 739 P.2d 372, 375 (1987); Hofmann v. Hofmann, 94 Ill.2d 205, 222, 446 N.E.2d 499, 506 (1983); Stauth v. Brown, 241 Kan. 1, 9, 734 P.2d 1063, 1064 (1987); Alvey v. Union Inv. Inc., 697 S.W.2d 145, 147 (Ky. Ct. App. 1985); Hall v. Arkansas-Louisiana Gas Co., 368 So. 2d 984, 992 (La. 1979) (fraud must be established by legal and convincing evidence); Butler v. Poulin, 500 A.2d 257, 260 n.5 (Me. 1985); Everett v. Baltimore Gas and Elec. Co., 307 Md. 286, 303, 513 A.2d 882, 891 (1986); Hi-Way Motor Co. v. International Harvester Co., 398 Mich. 330, 336, 247 N.W.2d 813, 816 (1976); Anderson v. Burt, 507 So. 2d 32, 37 (Miss. 1987); Gibson v. Smith 422 S.W.2d 321, 327 (Mo. 1968); Fletcher v. Mathew, 233 Neb. 853, 858-59, 448 N.W.2d 576, 581 (1989); Hindenes v. Whitney, 101 Nev. 175, 178, 697 P.2d 932, 933 (1985); Calendonia, Inc. v. Trainor, 123 N.H. 116, 123, 459 A.2d 613, 617 (1983); Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395, 565 A.2d 1133, 1137 (N.J. Super. Ct. App. Div. 1989); Treider v. Doherty and Co., 86 N.M. 735, 737, 527 P.2d 498, 500 (N.M. Ct. App. 1974), *cert. denied* 86 N.M. 730, 527 P.2d 493 (1974); Chopp v. Welbourne & Purdy Agency, Inc., 135 A.D.2d 958, 959, 522 N.Y.S.2d 367, 368-69 (N.Y. App. Div. 1987); Porter v. Fridley, 373 N.W.2d 917, 920 (N.D. 1985) (clear, satisfactory, and convincing); Tice v. Tice, 672 P.2d 1168, 1171 (Okla. 1983); Galego v. Knudsen, 282 Or. 155, 165, 578 P.2d 769, 775-76 (1978) (clear, satisfactory, and convincing); Snell, D.D.S. v. State Examining Bd., 490 Pa. 277, 281, 416 A.2d 468, 470 (1980) (clear, precise, and convincing); First State Savings and Loan v. Phelps, 299 S.C. 441, 447, 385 S.E.2d 821, 824 (1989) (clear, cogent, and convincing); Bezner v. Continental Dry Cleaners, 548 P.2d 898 (Utah 1976); Estate of Raedel, 152 Vt. 478, 485, 568 A.2d 331, 334 (1989); Elliot v. Shore Stop, Inc., 238 Va. 237, 244, 384 S.E.2d. 752, 756 (1989); Adams v. Allen, 56 Wash. App. 383, 393, 783 P.2d 635. 640 (Wash. Ct. App. 1989) (clear, cogent, and convincing); Tri-State Asphalt Prod. v. McDonough Co., 391 S.E.2d 907, 912 (W. Va. 1990); Lundin v. Shimanski, 124 Wis. 2d 175, 184, 368 N.W.2d 676, 680 (1985); Duffy v. Brown, 708 P.2d 433, 437 (Wyo. 1985) (clear, unequivocal, and convincing).

number of states that only require a preponderance of the evidence to prove fraud.[123] To require a higher standard in dischargeability cases would often require that the holder of a state court judgment retry the entire case in a bankruptcy court. This would be an "unnecessary exercise in judicial machinery."[124]

In addition to state court judgments which would have to be relitigated, a clear and convincing standard of proof would require that judgments awarded under important federal non-bankruptcy laws, which only require a preponderance of the evidence to prove fraud, be relitigated.[125] For instance, fraud actions brought by the United States under the False Claims Act[126] only require the claim be established by a preponderance of the evidence.[127] Congress also expressly provided that the preponderance standard applies to civil penalties for fraud involving financial institutions.[128] In addition, courts have judicially

---

123. Purcell Co. v. Spriggs Enterprises, Inc., 431 So. 2d 515, 519 (Ala. 1983) (intent to defraud must be clearly proved by a preponderance of the evidence); Saxton v. Harris, 395 P.2d 71, 72 (1964); Lancaster v. Schilling Motors, Inc., 299 Ark. 365, 367, 772 S.W.2d 349, 350 (1989); Lindoas v. Sahadi, 19 Cal. 3d 278, 289, 137 Cal. Rptr. 635, 641, 562 P.2d 316, 322 (1977); NYE Odorless Incineration Corp. v. Felton, 35 Del. 236, 252, 162 A. 504, 509 (1931); Wieczoreck v. H & H Builders, 475 So. 2d 227, 228 (Fla. 1985); City Dodge, Inc. v. Gardner, 232 Ga. 766, 770, 208 S.E.2d 794, 798 (1974); Plymale v. Upright, 419 N.E.2d 756, 759 (Ind. Ct. App. 1981); Robinson v. Perpetual Serv. Corp., 412 N.W.2d 562, 565 (Iowa 1987) (fraud must be established by a preponderance of the clear, satisfactory and convincing evidence); Briggs v. Carol Cars, Inc., 407 Mass. 391, 393, 553 N.E.2d 930, 932 (1989); Sievert v. LaMarca, 367 N.W.2d 580, 589 (Minn. Ct. App. 1985); Rother v. Hiniker, 208 Minn. 405, 407, 294 N.W. 644, 645 (1940) ("Civil actions require proof of fraud by a fair preponderance of the evidence."); Batten v. Watts Cycle and Marine, Inc., 240 Mont. 113, 117, 783 P.2d 378, 380 (1989), *cert. denied*, 110 S. Ct. 1826 (1990); Manyard v. Durham and Southern Ry. Co., 112 S.E.2d 249, 252 (N.C. 1960), *rev'd on other grounds*, 365 U.S. 160 (1961) (in an action to set aside a written instrument based on fraud "the burden of proof to establish such allegation is by the preponderance or greater weight of the evidence."); Manning v. Len Immke Buick, Inc., 28 Ohio App. 2d 203, 207-08, 276 N.E.2d 253 (Ohio Ct. App. 1971); Ostalkiewicz v. Guardian Alarm, 520 A.2d 563, 568 (R.I. 1987); Wise v. Thompson, 540 S.W.2d 837, 839 (Tex. Civ. App. 1976); Piccadilly Square v. Intercontinental Constr. Co., 782 S.W.2d 178, 183 (Tenn. Ct. App. 1989); Delany v. Delany, 402 N.W.2d 701, 705 (S.D. 1987).

124. *In re* Daboul, 85 Bankr. 197, 201 (Bankr. D. Mass. 1988).

125. *See Grogan*, 111 S. Ct. at 660 ("Unlike a large number, and perhaps the majority, of the States, Congress has chosen the preponderance standard when it has created substantive causes of action for fraud.").

126. 31 U.S.C. § 3729.

127. *See* 31 U.S.C. § 3731(c).

128. *See* 12 U.S.C.A § 1833a(e) (West 1989).

adopted the preponderance of the evidence standard for other federal antifraud statutes.[129]

VIII. CONCLUSION

As the nation moves into a period of economic recession and the number of bankruptcy filings continues to rise, the Court's adoption of a preponderance of the evidence standard for section 523 proceedings will avoid wasteful litigation. Persons who have successfully litigated claims under the preponderance standard in state court actions will be able to utilize the doctrine of collateral estoppel in a bankruptcy court. Repeated actions will not have to be brought by the government, or individuals, who have won judgments under a federal antifraud statute.[130] Currently, the government, in hopes of recovering large monetary judgments, is filing numerous lawsuits against persons accused of defrauding federal savings and loan institutions. Should the government be successful with these lawsuits, and if any of the "accused" subsequently file a petition in bankruptcy (a very good possibility due to the large sums of money involved), the government will be able to avoid relitigating these cases in bankruptcy court, because the original judgments, as well as the dischargeability proceeding, will be based upon the preponderance of the evidence standard. Adoption of a higher standard would force the government to retry these types of cases and would result in an extreme waste of the taxpayers' money. This could not have been what Congress intended in prescribing the preponderance standard for these federal antifraud statutes. The application of a clear and convincing standard in federal bankruptcy dischargeability proceedings, while maintaining a preponderance standard for other federal antifraud laws, would cause a conflict in federal law.[131] Adoption

129. *See Huddleston*, 459 U.S. at 390 (preponderance standard applies in cases brought under Section 10(b) of the Securities Exchange Act and Commission Rule 10-b(5)); Cullen v. Margiotta, 811 F.2d 698, 731 (2d Cir. 1987) (preponderance standard applies in civil actions brought under the Racketeer Influence and Corrupt Organizations Act); First Nat'l Monetary Corp. v. Weinberger, 819 F.2d 1334, 1340 (6th Cir. 1987) (preponderance standard applies in actions brought under the fraud provisions of the Commodity Exchange Act).

130. *See supra*, notes 126-28.

131. *See Grogan*, 111 S. Ct. at 658 n.10. Noting that dischargeability was a matter of federal law, the Court explained that prior to 1970 the bankruptcy courts and the state courts had concurrent jurisdiction to decide the dischargeability of debts. However, with the enactment of the 1970 amendments to the Bankruptcy Act of 1898,

of a preponderance of the evidence standard, on the other hand, avoids the conflict. In addition, it allows bankruptcy courts to apply the principles of collateral estoppel in dischargeability proceedings and thereby avoid wasteful and costly litigation of issues already decided by other courts.

Andrew Kessler

---

the bankruptcy courts were granted exclusive jurisdiction over certain dischargeability exceptions, including the exceptions for fraud.