Dischargeability in Bankruptcy of Debts Incurred by "Purported Purchasers"

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INTRODUCTION

Although bankruptcy law empowers individual debtors to discharge their debts and thereby enjoy a financial “fresh start,” certain debts are nondischargeable for competing policy reasons. Whether or not the debt incurred through credit purchases by persons fraudulently representing themselves to be good faith buyers...
("purported purchasers") is dischargeable has engendered intense and continuous judicial debate. Indeed, cases construing Bankruptcy Code section 523(a)(2)(A), which governs the exceptions to dischargeability of debt, dominate personal bankruptcy litigation. The controversy surrounding purported purchasers centers on the fact that no express representations have been made to the creditor. Under the immediate predecessor to section 523(a)(2)(A), a discharge was denied for debts incurred through "false pretenses or false representations" only. Further, some courts required that the "false pretenses or false representations" be express, not merely implied.

This Article will contend that section 523(a)(2)(A) was carefully drafted to cover all liabilities resulting from intentional fraud, whether or not the debtor made an express or implied misrepresentation. It will further be suggested in this Article that judicial action has frustrated the provision's purpose. First, many courts have misconstrued the phrase "actual fraud." Second, courts have failed to recognize that the policies underlying section 523(a)(2)(A) demand that the purported purchaser's debts be treated similarly, irrespective of whether a purchase is effectuated through the issuance of a bad check, use of a credit card, or in an "open account." Instead, courts have reached divergent results depending upon the method of purchase. By focusing on nonessential aspects of the debtor's fraudulent conduct, courts have neglected to consider the relevance of legal precedent dealing with fraud in a non-bankruptcy context.

Part I will introduce the paradigm of the purported purchaser and will suggest that inconsistent distinctions have been drawn under the current case law. Part II will examine the history of the fraud exception and will assert that section 523(a)(2)(A) applies to purported purchasers. Part III will explore the case law construing

5 See Note, The Fraud Exception to Discharge in Bankruptcy: A Reappraisal, 38 STAN. L. REV. 891, 904 n.57 (1986) (§ 523(a)(2) and its statutory precursor have been most frequently litigated exception to discharge).


7 See id.

8 As used in this Article, the phrase "bad check" includes checks which are returned because of insufficient funds, a closed account, forgery by the drawer, or any other reason. The analytical approach proposed in this Article applies to all of these types of checks. However, the bad check cases actually discussed in this Article only involve checks returned for insufficient funds. See infra notes 122-24 and accompanying text.
section 523(a)(2)(A) and will propose that an "actual fraud" standard must be applied under section 523(a)(2)(A) to ensure reasonable and uniform results.

PART I: PARADIGM OF THE "PURPORTED PURCHASER"

The objectives of the fraud exception are (i) to punish dishonest debtors; 7(ii) to shift the burden of such dishonesty from innocent creditors to dishonest debtors; 8 and (iii) to deter fraudulent conduct. 9

A purported purchaser is one who purchases goods while subjectively intending not to pay for them.10 For example, a purported purchaser may know that she is insolvent and has no reasonable likelihood of financial recovery. 11 Alternatively, she may plan on avoiding the debt in some other way, such as by concealing her assets, leaving the jurisdiction, or using an assumed name.

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7 See Birmingham Trust Nat'l Bank v. Case, 755 F.2d 1474, 1477 (11th Cir. 1985) ("one of the purposes of the fraud exception to discharge is to punish the debtor for engaging in fraudulent conduct"); In re Alwan Brothers Co., 105 Bankr. 886, 892 (Bankr. C.D. Ill. 1989) (dishonest debtor is penalized by not being absolved of certain debts); In re Kroh, 88 Bankr. 987, 992 (Bankr. W.D. Mo. 1988) (dishonest debtors not entitled to benefit of discharge of debts); see also Shuchman, supra note 1, at 739 ("denial of the privilege of discharge for a fraudulently procured debt may be best understood from the bankrupt's point of view as a form of civil punishment for his fraud").

8 See In re Smigel, 90 Bankr. 935, 939 (Bankr. N.D. Ill. 1988) ("purpose of excluding from discharge debts obtained by fraud is to protect lenders from dishonest debtors") (quoting In re Bogstad, 779 F.2d 370, 372-73 n.4 (7th Cir. 1985)); see also In re Hanson, 104 Bankr. 261, 262 (Bankr. N.D. Cal. 1989) ("bankruptcy is not supposed to be a haven for the dishonest debtor").

9 See, e.g., Hunter, 771 F.2d at 1130 ("Congress established a fraud exception to discharge 'to discourage fraudulent conduct'") (quoting In re Wilson, 12 Bankr. 363, 370 (Bankr. M.D. Tenn. 1981)); Birmingham Trust, 755 F.2d at 1477 ("By creating the fraud exceptions to discharge, Congress sought to discourage fraudulent conduct"); Kroh, 88 Bankr. at 992 (same).

10 More precisely, a purported purchaser is one who either purchases goods, property, or services without the intent to pay for them, or obtains a loan without the intent to repay it.

11 A particularly noxious practice occurs when a purported purchaser, on the eve of bankruptcy, goes on a "spending spree," expecting that a bankruptcy discharge will relieve any responsibility for the debts incurred.
A purported purchaser conducts herself as though she were an ordinary customer without disclosing her intent not to pay for her purchases. Thus, a purported purchaser deceives the seller into believing that payment is intended and will be forthcoming, and the seller releases the goods in reliance on such representation.\(^1\)

It should not matter that the deception is perpetrated by a message impliedly conveyed; an implied misrepresentation can be as deceitful, injurious, and condemnable as one stated expressly. For instance, when a person makes a purchase by intentionally issuing a bad check, it is irrelevant whether or not the purchaser states that the check is good. The mere presentation of the check misleads the seller into believing that the purported purchaser genuinely intends to pay; a debt incurred in this manner should not be dischargeable.\(^2\) Yet, courts continue to distinguish between express and implied misrepresentations.\(^3\)

Nor should it matter whether the implicit misrepresentation is made by use of a bad check or a credit card. In each instance, the seller is deceived to her detriment by conduct inducing her to believe that the purchaser intends to pay. Nevertheless, courts persist in applying different rules to these essentially similar situations.\(^4\)

The purported purchaser referred to in this Article is not someone who innocently errs as to the balance of her checking account or misunderstands the extent of her current indebtedness. Nor is it someone who honestly miscalculates the likelihood of improvement of her financial affairs. No suggestion is intended that a discharge be denied to debts incurred in good faith. However, a dishonest debtor, acquiring goods or services on credit without ever intending to pay, should not be allowed to discharge her debt; to do so would victimize the creditor.\(^5\)

This Article does not set out to evaluate whether the fraud exception is well-founded. The point of this Article is, simply, that implied and express misrepresentations should be treated consistently.

\(^{12}\) Compare In re Martin, 70 Bankr. 146, 150 (Bankr. M.D. Ala. 1986) (need be clear and convincing evidence that debtor made false representation to establish actual fraud) with In re Gitelman, 74 Bankr. 492, 496 (Bankr. S.D. Fla. 1987) ("[f]raud may also be accomplished by willful concealment or omission of material facts") and In re Schmidt, 70 Bankr. 634, 640 (Bankr. N.D. Ind. 1986) ("fraud may consist of silence, concealment or intentional non-disclosure of a material fact").

\(^{13}\) Compare In re Hunter, 83 Bankr. 803, 804 (M.D. Fla. 1988) ("in order to establish . . . fraud . . . [plaintiff] must prove that the debtor made a representation that the check was good") with In re Burklow, 60 Bankr. 728, 731 (Bankr. S.D. Cal. 1986) ("each time . . . [debtor] charged an item . . . he impliedly represented that he had both the intention and the ability to pay") and Comerica Bank-Midwest v. Kouloumbris, 69 Bankr. 229, 230 (Bankr. N.D. Ill. 1986) (use of credit card impliedly represented ability and intent to pay).
A. Statutory Language

The plain language of section 523(a)(2)(A) provides that three distinct types of debts are nondischargeable: debts incurred through "[1] false pretenses, [2] a false representation, or [3] actual fraud." Thus, the term "actual fraud" contemplated by section 523(a)(2)(A) embraces conduct apart from false representations; otherwise, the phrase "actual fraud" would be redundant.7

The legislative and judicial history of the fraud exception to the dischargeability of a debt buttresses the conclusion that the purported purchaser, even if impliedly misrepresenting an intent to pay, commits actual fraud within the meaning of section 523(a)(2)(A). Indeed, the history of section 523(a)(2)(A) strongly suggests that Congress added the phrase "actual fraud" specifically to reach the conduct of purported purchasers. The considerable attention that Congress has accorded this issue suggests that the present statutory language carefully and precisely reflects congressional intent. The fact that the statute sets forth actual fraud as an alternative to false representation strongly suggests that the fraud need not involve an express misrepresentation.

B. History of the Fraud Exception

1. Prior to Section 523(a)(2)(A)

Before enacting Bankruptcy Code section 523(a)(2)(A), Congress experimented with various approaches to the dischargeability of a debt which was incurred through fraud.8 The Bankruptcy Act of 1841 provided for a broad discharge of all debts "which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity." Thus, any debt incurred

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17 Id. The presence of a comma and the word "or" between the words "representation" and "actual" makes it clear that "actual fraud" is intended to be a separate ground for nondischargeability.
18 See infra notes 19-31 and accompanying text.
by the debtor, other than in a fiduciary capacity, was dischargeable. There was no reference to any generalized exception for debt incurred through fraud.

The Bankruptcy Act of 1867, however, modified this rule. It stated as follows: "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy." 20

The United States Supreme Court interpreted this provision in *Ames v. Moir*, 21 which involved a debtor 22 who had contracted for an option to purchase alcoholic beverages from the plaintiff. The contract allowed the debtor to call on the plaintiff to deliver the beverages on or before a specified date. 23 Based on the lower court's finding that the debtor knew that he was insolvent when he called for the delivery of goods, the Supreme Court held that the debtor's conduct constituted fraud and that the debt was nondischargeable. 24 The *Ames* decision, therefore, is persuasive authority for the proposition that actual fraud may be committed through an implied misrepresentation. 25

The Bankruptcy Act of 1898 (the "Act") 26 introduced yet another version of the fraud exception. In section 17(a)(2), the Act excepted from discharge "judgments in actions for frauds, . . . property [obtained] by false pretenses or false representations, or

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22 See Bankruptcy Act of 1867, ch. 176, § 33, 14 Stat. 517 (current version at 11 U.S.C. § 101 (1988)). Under this predecessor to the current Bankruptcy Code, the debtor was referred to as a "bankrupt." *Id.*
24 *Id.* at 312. Critical to the decision was the time at which the debtor incurred the debt for the beverages. If the debt was incurred at the time the contract was formed, when the debtor had no fraudulent intent, the debt would be dischargeable. The Court held that the debt was not incurred until the goods were received, at which time the debtor had a fraudulent intent. *Id.* at 311-12.
25 The Court's discussion in *Ames* nowhere suggested that at the time the debtor called for or received the goods, the debtor had made any factual misrepresentation. Moreover, *Ames* has been interpreted as not requiring such a misrepresentation. See, e.g., *In re Nuttall*, 201 F. 557, 562 (S.D.N.Y. 1912) (according to *Ames*, failure to disclose intent not to pay may sufficiently constitute fraud). This view of *Ames* would be consistent with dictum found elsewhere which states that a person who purchases with the intent not to pay commits fraud, and the debt is nondischargeable. See *Kaufman v. Lindner*, 67 How. Pr. (NY) 322, 323 (1884) (dictum).
for willful and malicious injuries to the person or property of another.”

In section 17(a)(4), the Act excluded debts which were “created by . . . [the debtor’s] fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.”

Section 17(a)(2) was amended in 1903 so that debts were non-dischargeable when incurred by “obtaining money or property by false pretenses or false representations.” The earlier references to “frauds” and to “judgments” were eliminated. Nonetheless, many courts ruled that the false pretenses or false representation standard of amended section 17(a)(2) could be met by an implied representation; no express misrepresentation was necessary. For example, a person who purchased goods without intending to pay for them was held to have impliedly misrepresented her ability and intention to pay, and debts so incurred were nondischargeable.

A few courts disagreed, holding that because the 1903 Amendment removed all general references to “fraud” from section 17(a)(2), implied representation was insufficient to trigger the fraud exception. The most prominent of these decisions is Davison-Paxon Co. v. Caldwell. Davison-Paxon involved a

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27 Id. § 17(a)(2), (current version at 11 U.S.C. § 523(a)(2) (1988)).
31 See, e.g., In re Nuttall, 201 F. 557, 562 (S.D.N.Y. 1912) (absent representation of ability to pay, purchasing goods without intent to pay does not constitute obtaining property by false pretenses or false representations). But cf. Zimmern v. Blount, 238 F. 745, 745 (5th Cir. 1917) (fraudulent declaration of stock dividend ‘implicitly constituted false representation).
32 115 F.2d 189 (5th Cir. 1940), cert. denied, 313 U.S. 564 (1941).
debtor who, failing to disclose her insolvency, purchased goods from the plaintiff on credit without any intention of paying for them. Without specifically citing section 17(a)(2), the court referred to "settled law" that debts created by the fraud of the debtor, in contrast to those incurred by an "actual overt false pretense of representation," were not excepted from the discharge unless the debtor was acting as an officer or in a fiduciary capacity.\(^3\)

Nonetheless, the Davison-Paxon court indicated that if fraud had been the ground for denying discharge under section 17(a)(2), rather than false pretenses or false representation, the plaintiff would have prevailed. The court expressly acknowledged that "a fraud may be committed in ways other than by the making of false representations,"\(^3\)\(^4\) and characterized the debtor's conduct as "false, deceitful and fraudulent."\(^3\)\(^5\) However, because the Act referred only to false pretenses and false representations, and not to fraud, the court held that for the debt to be nondischargeable under section 17(a)(2) the debtor must have made an overt misrepresentation or an overt false pretense; simply applying for credit while insolvent was insufficient.\(^3\)\(^6\)

In 1978, thirty-eight years after the Davison-Paxon decision, the Bankruptcy Code (the "Code") was enacted. Section 523(a)(2)(A) of the Code, replacing section 17(a)(2) of the Act, expressly excepts from discharge any debt "for money, property, [or] services ... obtained by ... false pretenses, a false representation, or actual fraud."\(^3\)\(^7\) The Senate Report discussing section 523(a)(2)(A) underscores the importance of "actual fraud" as a valid ground on which to deny discharge of a debt. It states that "actual fraud" is an additional ground "for exception from discharge."\(^3\)\(^8\) In light of Congress' response to the case law interpreting section 17(a)(2), the inclusion of the phrase "actual fraud"
seems to preclude a discharge to a purported purchaser.39

2. Post-Code Developments

Although inconclusive, a number of legislative and case law developments regarding section 523(a)(2)(A) support the notion that the fraud exception was intended to apply even where a debtor, such as a purported purchaser, makes no explicit factual misrepresentation.

For instance, the legislative history of section 523(a)(2)(C), enacted in 1984, suggests that Congress' concern focused on the moral culpability of the purported purchaser, not whether an express representation was made. The Senate Report, accompanying a preliminary version of section 523(a)(2)(C), stated: "Section 523 is amended and expanded to address a type of unconscionable or fraudulent debtor conduct not heretofore considered by the Code."40 Thus the report characterizes a purchase of goods in anticipation of discharge due to bankruptcy as "unconscionable" and "fraudulent," without indicating the need for the debtor to make an express misrepresentation.

Nor does the language of section 523(a)(2)(C) require that an express representation be made:

for purposes of subparagraph (A) of this paragraph [section 523(a)(2)], consumer debts owed to a single creditor and aggregating more than $500 for "luxury goods or services" incurred by an individual debtor on or within forty days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end

39 See Zaretsky, The Fraud Exception to Discharge Under the New Bankruptcy Code, 53 AM. BANKR. L.J. 253, 256-57 (1979). The statute has been so construed, however, primarily in modern credit card cases. See, e.g., In re Dougherty, 84 Bankr. 653, 657 (Bankr. 9th Cir. 1988) (credit card purchase without intent to pay is "actual fraud"); In re Blackburn, 68 Bankr. 870, 879 (Bankr. N.D. Ind. 1987) (same); In re Doggett, 75 Bankr. 789, 792 (Bankr. S.D. Ohio 1987) (same).

40 S. REP. No. 65, 98th Cong., 1st Sess. 58 (1983). This sentence might be construed as suggesting that prior to section 523(a)(2)(C) the fraud exception did not apply to the purported purchaser paradigm at all. But such a reading would be incorrect. Section 523(a)(2)(C) does not extend the general provision of section 523(a)(2)(A) to a limited set of purported purchasers. Instead, section 523(a)(2)(C) presupposes that section 523(a)(2)(A) applies to all purchasers. The contribution of section 523(a)(2)(C) is to establish a rebuttable presumption that debtors who incurred certain consumer debts right before the filing of the bankruptcy petition were purported purchasers. The real meaning of this sentence in the Senate Report seems to be that the Code had never before singled out the purported purchaser phenomenon.
credit plan obtained by an individual debtor on or within twenty days before the order for relief under this title, are presumed to be nondischargeable.\textsuperscript{41}

Other purchases are similarly nondischargeable under the "actual fraud" clause of section 523(a)(2)(A), provided that the creditor proves that the debtor made the purchases without any intent to pay.\textsuperscript{42}

A number of courts have acknowledged that section 523(a)(2)(A) establishes an independent "actual fraud" standard.\textsuperscript{43} These courts have employed a liberal definition of fraud which would include the conduct of a purported purchaser: "Actual fraud . . . consists of any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another—something said, done or omitted with the design of perpetrating what is known to be a cheat or deception."\textsuperscript{44} Thus, where a debtor entered into a contract to repair a homeowner's kitchen, without any intent to perform, she was found to have committed actual fraud, and her obligation to return the deposit was nondischargeable.\textsuperscript{45}

Other cases have held that an implied misrepresentation is enough to prevent a discharge under section 523(a)(2)(A),\textsuperscript{46} reasoning that a debtor's active conduct or failure to disclose material information gives rise to a false representation under section 523(a)(2)(A).\textsuperscript{47}


\textsuperscript{42} See, e.g., In re Barger, 85 Bankr. 756, 760 (Bankr. S.D. Ohio 1988).


\textsuperscript{44} COLLIER ON BANKRUPTCY, § 523.08[5] (L. King 15th ed. 1990).

\textsuperscript{45} In re Fenninger, 49 Bankr. 307, 310 (Bankr. E.D. Pa. 1985); see also In re Guy, 101 Bankr. 961, 979 (Bankr. N.D. Ind. 1988) (actual fraud requires showing of material misrepresentation and scienter); In re Firestone, 26 Bankr. 706, 716-17 (Bankr. S.D. Fla. 1982) (promise to perform contractual obligations made with no intent to fulfill promise constitutes actual fraud for purposes of § 523(a)(2)(A)).

\textsuperscript{46} See supra note 30 and accompanying text.

\textsuperscript{47} The material nondisclosure is said to give rise to an affirmative misrepresentation. See In re Van Horne, 823 F.2d 1285, 1288 (8th Cir. 1987) (debt nondischargeable where debtor obtained renewal of loan from mother-in-law without disclosing deteriorating relationship with spouse); In re Piercy, 96 Bankr. 953, 955 (Bankr. W.D. Mo. 1989).
C. Nonbankruptcy Law Analysis Favors an Expansive Definition of "Actual Fraud"

At common law, it was generally recognized that the purchase of goods without the intent to pay constituted fraud, even absent express misrepresentations. Therefore, under an "actual fraud" test, debts incurred by purported purchasers would be nondischargeable under section 523(a)(2)(A).

There are at least two distinct theories which explain why debts so incurred amount to fraud. One theory, set forth in section 530 of the Restatement (Second) of Torts, states that a "representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention." By contracting to purchase goods the purported purchaser is deemed to have impliedly misrepresented that she intends to pay for them.

Under the second theory, the purported purchaser commits

§ 523(a)(2)(A) applies where debtor/vendor fails to disclose latent defects to creditor/vendor; Fox, 13 Bankr. at 830 (debt nondischargeable where debtor failed to disclose another person's forgery on note and mortgage); see also In re King, 68 Bankr. 569, 572 (Bankr. D. Minn. 1986) (debt dischargeable where creditor did not rely on debtor's "deceitful silence"). But cf. In re Smith, 81 Bankr. 888, 896 (Bankr. W.D. Mich. 1988) (no intentional nondisclosure where husband filed chapter 7 petition months after divorce settlement). Unfortunately, many courts continue to differentiate between implicit and explicit representations and between the use of bad checks and credit card purchases. See infra notes 53, 60-61 and accompanying text.

(§ 530(1) (1977)).

"See supra notes 42-45 and accompanying text.

See id. at comment c.

c. Misrepresentation of intention to perform an agreement.

The rule stated in this Section [530] finds common application when the maker misrepresents his intention to perform an agreement made with the recipient. The intention to perform the agreement may be expressed but it is normally merely to be implied from the making of the agreement. Since a promise necessarily carries with it the implied assertion of an intention to perform it follows that a promise made without such an intention is fraudulent and actionable in deceit under the rule stated in Section 525.

Id.; see also id. § 525 (liability for fraudulent misrepresentation); F. Harper, F. James & O. Gray, THE LAW OF TORTS § 7.10, at 445-46 (2d ed. 1986) (law more prepared to recognize potential materiality of expressions of intentions than opinions). See generally Keeton, Fraud—Statements of Intention, 15 Tex. L. Rev. 185, 186 (1937) (implied representation of intent arises out of contractual promise); Note, The Legal Effect of Promises Made With Intent Not to Perform, 38 Colum. L. Rev. 1461, 1461 (1938) (promise made with intent not to perform constitutes actionable fraud); Note, Torts—Actionable Fraud—Promissory Representations, 24 N.C.L. Rev. 49, 50 (1945) (fraud may be predicated on promise made with intention not to perform); Note, Fraud: Promises Made Without Intention to Perform, 2 Okla. L. Rev. 365, 365-67 (1949) (statute of frauds undisturbed by allowing plaintiff to prove defendant's fraud).
fraud by failing to disclose her intention not to pay. Although parties to a commercial transaction usually bear no affirmative duty to divulge information to one another, there are certain well-established exceptions. One exception applies to a party having knowledge not reasonably available to the other party, knowing the other is acting upon a mistaken belief. Silence in such a circumstance constitutes fraud.

This theory would cover debts incurred by the purported purchaser. Although the purported purchaser does not intend to pay, this information is not reasonably available to the seller. As a result, the debtor has committed fraudulent nondisclosure.

In addition, where there is an initial truthful representation of an intent to pay, such as when a debtor first enters into a credit card contract with the issuer in good faith, there is a duty to advise the issuer of any subsequent information which would make the initial representation untrue or misleading. Where a purported purchaser who initially dealt in good faith decides not to pay for her purchases, she has knowledge of information that she knows will make the initial representation untrue or misleading. Consequently, the purported purchaser is obligated to disclose this information to the seller; failure to do so constitutes fraud.

D. Other Code Provisions Interpret “Fraud” Broadly

The fact that “fraud” is interpreted broadly in other sections of the Code to include deceptive conduct suggests that the term should also be broadly interpreted in section 523(a)(2)(A) as well.

For example, section 548(a) deals with fraudulent transfers made with the subjective intent “to hinder, delay, or defraud” creditors. This section applies to transfers of ownership or security interests in property.

In one case, In re Allied Development Corp., a debtor borrowed money from his attorney and executed a mortgage to secure

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61 See Reid v. Cowdroy, 79 Iowa 169, 172-73, 44 N.W. 351, 352 (1890); Oswego Starch Factory v. Lendrum, 57 Iowa 573, 581, 10 N.W. 900, 905 (1881); Swift v. Rounds, 19 R.I. 527, 35 A. 45, 46 (1896).
62 See Reid, 79 Iowa at 172, 44 N.W. at 352.
63 Restatement (Second) of Torts § 551(2)(c) (1977).
64 See 11 U.S.C. § 548(a)(1) (1988). Section 548(b), in contrast, addresses transfers that are “fraudulent” as to creditors based on objective criteria; and it is therefore irrelevant to the purported purchaser paradigm. See id. § 548(b).
65 435 F.2d 372 (7th Cir. 1970).
Afraid that other creditors would be provoked into collection activity if they were to learn of the transaction, the debtor persuaded his attorney to delay recording the mortgage. When finally recorded, the mortgage was undone as a fraudulent transfer. The court held that the parties had defrauded the debtor's creditors, although no false representation had been made. More commonly, a subjectively fraudulent transfer involves a debtor's conveyance of assets to friends or relatives for lower than fair market value, usually without any misrepresentation whatsoever. The transferee is liable to the debtor's creditors for the difference between the fair market value and the actual value given. For example, in *Mackel v. Rochester*, the court held that the transferee's liability was incurred through fraud and was therefore nondischargeable under an earlier version of section 523(a)(2)(A).

Fraud also has been found where a debtor engaged in a check kiting scheme, although there was no evidence that the scheme involved any express misrepresentations.

**PART III: MISAPPLICATION OF SECTION 523(a)(2)(A)**

Where purported purchasers make express misrepresentations, courts have had little trouble finding that section 523(a)(2)(A) applies. However, where there are no such express misrepresentations, courts have had difficulty in deciding whether or not to apply section 523(a)(2)(A). Rather than acknowledge that the purported purchaser's conduct is fraudulent, whether a bad check or credit card is employed, most courts have focused on the device used. This results in separate lines of cases with inconsistent rulings.  

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56 Id. at 373.  
57 Id. at 375-76. The facts of this case do not even give rise to an implied representation because the court did not cite as essential any actual communication or communicative conduct between the debtor and his creditors.  
58 135 F. 904 (D. Mont. 1905).  
59 Id. at 908. Such conduct also has been characterized as sufficiently reprehensible to warrant subordination of claims against a debtor. See *In re Luby*, 89 Bankr. 120, 126-27 (Bankr. D. Or. 1988) (dictum).  
60 *In re Paolino*, 53 Bankr. 399, 402 (Bankr. E.D. Pa. 1985), aff'd, 60 Bankr. 828 (Bankr. E.D. Pa 1986); see also infra note 61 and accompanying text.  
61 In bad check cases, preoccupation with the method of committing the fraud, for example, the bad check, has caused a number of bankruptcy courts erroneously to find that they are bound by one particular nonbankruptcy precedent, *United States v. Williams*, 458 U.S. 279 (1982), which reached the counterintuitive conclusion that passing a bad check does not constitute even an implicit misrepresentation.
A. Credit Card Cases

There are essentially two methods by which a purported purchaser may obtain the use of a credit card: a debtor may simply apply for a credit card or, alternatively, may receive an unsolicited notification that she has been pre-approved for the card. Whether or not she applied for the credit card, the debtor's initial intention to accept or procure the card may be either honest or dishonest. Optimally, the applicable legal standard regarding dischargeability should be sufficiently flexible to respond to the ways in which these situations differ, both conceptually and pragmatically.

Courts have adopted three different approaches under section 523(a)(2)(A): the implied misrepresentation approach, the assumption of risk/reliance test, and the actual fraud standard. The actual fraud standard not only seems correct from the perspectives of legislative history and statutory construction, but also offers the greatest flexibility in dealing with the many purported purchaser variations.

1. Implied Misrepresentation Approach

Most courts have focused on whether the debtor's use of the credit card gave rise to an implied representation. The Davison-Paxon ruling, that a "false representation" under section 17(a)(2) of the Act must be made expressly for the debt to be nondischargeable, has been frequently and severely criticized; its validity under section 523(a)(2)(A) also has been sharply questioned. Some courts have opined that Davison-Paxon remains good law under section 523(a)(2)(A) when a debtor deals directly with a creditor, but reject it in a three-party credit card context.

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62 Use of a stolen credit card would represent a third example that does not seem to have been the subject of any reported decisions.
63 See First Nat'l Bank of Mobile v. Roddenberry, 701 F.2d 927, 932 (11th Cir. 1983) (adopting assumption of risk/reliance approach); see also supra note 42 and accompanying text (actual fraud approach); supra note 30 and accompanying text (implied misrepresentation approach).
64 See In re Poteet, 12 Bankr. 565, 568 (Bankr. N.D. Tex. 1981) ("[t]he Davison-Paxon requirements are no longer relevant to the credit transactions of the type involved in this case and are rejected"); Note, Recent Decisions, Bankruptcy—Debts Not Affected by a Discharge—Goods Purchased When Insolvent With No Intent To Pay, 39 Mich. L. Rev. 812, 813 (1941) ("[u]nder . . . Davison-Paxon, an insolvent debtor may purchase goods with no intent to pay for them, dissipate them in one last fling, and then be completely discharged in bankruptcy of any liability to pay for them").
65 See Roddenberry, 701 F.2d at 932. For an example of a two-party transaction where
Under the implied misrepresentation approach, most courts have held that the user of a credit card impliedly represents that she has the ability and intent to pay for a purchase. Thus, where the implied representations are knowingly false, debts so incurred are nondischargeable. These cases rely on the “false representation” language in section 523(a)(2)(A).

However, the implied misrepresentation theory has been criticized because it denies a discharge to debts incurred by implied, rather than actual, fraud.67 There is considerable authority for the proposition that actual fraud, not merely fraud implied by law, must exist for a debt to be nondischargeable under section 523(a)(2)(A).67 Critics have complained that by recognizing implied representation of the debtor’s ability to pay, and then denying a discharge because of the representation, courts have used the implied misrepresentation theory as a disguised path to implied fraud.

This criticism is misplaced. First, the criticism wrongly assumes that the implied misrepresentation doctrine does not require proof of the debtor’s fraudulent intent. In fact, however, in addition to finding an implied misrepresentation of debtor’s solvency, these cases have required independent proof that the misrepresentation was made with actual fraudulent intent.68

Alternatively, the complaint erroneously ignores the distinc-

promises made with the intent to deceive were not deemed to be false representations under section 523(a)(2)(A), see In re Simpson, 29 Bankr. 202, 205-07 (N.D. Iowa 1983) (debtor borrowed from bank on alleged fraudulent promise to provide additional collateral and promise held to be neither false representation nor actual fraud).

66 See In re Dougherty, 84 Bankr. 653, 656 (9th Cir. 1988) (implied representation theory rejected because creditors must prove existence of representation by clear and convincing evidence); In re Blackburn, 68 Bankr. 870, 877 (Bankr. N.D. Ind. 1987) (since creditor must establish elements of actual fraud, implied representation theory rejected); In re Holston, 47 Bankr. 103, 108 (Bankr. M.D. La. 1985) (implying false representation violates legislative history of § 523(a)(2)(A)).


tion between implied fraud and implied misrepresentation. Implied fraud is insufficient because a discharge under section 523(a)(2)(A) is denied only to debts incurred through a debtor's morally culpable conduct. Fraud implied by law, or constructive fraud, may be committed without fraudulent intent; it should not be a basis for a denial of discharge. The purported purchaser, in contrast, intends to mislead creditors even though the misrepresentation is implied. Such deliberate deceit is morally offensive whether achieved impliedly or expressly.

Although the implied misrepresentation theory provides the advantage of denying discharge to purported purchasers who work their deception without any express misstatement, the theory is conceptually faulty. As noted above, a representation may be implied from the making of a contract because at that time one makes a promise to perform. However, where a debtor applies for and obtains a credit card without fraudulent intent, any representation implied by her making of the contract would not be fraudulent and could not give rise to a section 523(a)(2)(A) exception. When the debtor's intentions become fraudulent, the contract has already been entered into and there seems to be no occasion to infer a new representation.

Judge Merritt, writing for the dissent in In re Ward, has attempted to explain the implied misrepresentation theory by arguing that by issuing a credit card an issuer offers to form a number of discrete, future contracts each time the cardholder uses the card. Every time the card is used, the cardholder accepts the of-

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69 See Zaretsky, supra note 39, at 257 (implied misrepresentations may render debt nondischARGEABLE).
70 See In re Kimsey, 761 F.2d 421, 423-24 (7th Cir. 1985) (creditor must prove debtor's scienter); Gabellini v. Rega, 724 F.2d 579, 580-81 (7th Cir. 1984) (scienter required); In re Gonzalez Seijo, 76 Bankr. 11, 13-14 (Bankr. D.P.R. 1987) (false representation must be made with intent to deceive); In re Fordyce, 56 Bankr. 102, 104 (Bankr. M.D. Fla. 1985) (fraud implied in law insufficient without bad faith or immorality); In re Hunt, 30 Bankr. 425, 436 (D. Tenn. 1983) (actual fraud involving intentional wrongdoing or moral turpitude required); In re Simpson, 29 Bankr. 202, 209 (Bankr. N.D. Iowa 1983) (proof of actual fraud requires showing moral turpitude or intentional wrong).
71 RESTATEMENT (SECOND) OF TORTS § 530 comment c (1977).
72 857 F.2d 1082 (6th Cir. 1988) (Merritt, J., dissenting).
73 See id. at 1086-87 (Merritt, J., dissenting). Judge Merritt cited several cases for this proposition. Id.; see, e.g., Garber v. Harris Trust & Sav. Bank, 104 Ill. App. 3d 675, 681, 432 N.E.2d 1309, 1311-12 (1982) (contract not formed upon issuance; separate contracts created with each use of card); Novak v. Cities Service Oil Co., 149 N.J. Super. 542, 548-49, 374 A.2d 89, 92-93 (1977) (no contractual relationship created by mere issuance and receipt of credit card), aff'd, 159 N.J. Super. 400, 388 A.2d 264 (1978). But even Novak indicated that if the
fer and a new contract is formed. As part of the formation of each subsequent contract the purchaser promises to perform, thereby impliedly representing that she intends to perform. The creditor relies on the promise to perform and on the implied statement of intent.\textsuperscript{74}

The principal problem with Judge Merritt's explanation is his conceptualization of the issuer-holder relationship. There is authority that a single contract is formed once either the credit card is used or any annual fee is paid.\textsuperscript{76} Therefore, the only time the purchaser makes any representation is at the time of contracting, at which time her purpose may have been non-fraudulent.

Even if Judge Merritt is correct, and separate contracts are made each time the debtor uses the credit card, the implied misrepresentation theory might prove inadequate. Whether through speech or conduct, a misrepresentation affirmatively communicates a false message to the creditor on which the creditor may detrimentally rely. In a credit card purchase, however, there is no such communication; the issuer may not even learn of the debtor's conduct, \textit{i.e.}, the purchase, until after it is accomplished. Moreover, cardholder gives consideration (\textit{e.g.}, an annual fee) for the original issuance of a card, a contract for credit would be formed. \textit{Id}. at 549, 374 A.2d at 92.

\textsuperscript{74} \textit{Ward}, 857 F.2d at 1087 (Merritt, J., dissenting). Judge Merritt argued that unless such reliance is assumed, the contract between the card issuer and the cardholder would be voidable because the "exchange of consideration" necessary to formation of a contract would be lacking. \textit{Id}. at 1088. Without such reliance, there would not be the exchange of consideration essential to formation of a contract; cardholders could avoid paying their debts by developing a present intent not to pay. This could result in invalidation of billions of dollars of credit debt. It is therefore necessary as a matter of policy to assume that issuers do rely on the cardholder's implicit promise to pay. \textit{Id}. at 1088-89. Judge Merritt's argument raises an interesting question as to whether contract reliance is necessarily identical to tort reliance.

\textsuperscript{76} \textit{See} Gray v. American Express Co., 743 F.2d 10, 17 (D.C. Cir. 1984); City Stores Co. v. Henderson, 116 Ga. App. 114, 121, 156 S.E.2d 818, 823 (1967). Judge Merritt seems to have mis construed these cases in \textit{Ward} as standing for the proposition that each use of the credit card establishes a discrete contract. Actually, the cases indicated that the initial use of a credit card establishes one contract which is terminable at will unless the terms of the contract provide otherwise. \textit{See}, \textit{e.g.}, \textit{City Stores}, 116 Ga. App. at 121, 156 S.E.2d at 823 ("[a]cceptance or use of the card by the offeree makes a contract between the parties according to its terms, but we have seen none which prevents a termination of the arrangement at any time by either party"); \textit{Novak}, 149 N.J. Super. at 549, 374 A.2d at 92 (if debtor/cardholder gave consideration, such as annual fee, binding contract would be formed); Barringer & Roberts, \textit{The Credit Card Fraud Act of 1984, Clarification or Further Confusion of the Law of Credit Card Fraud?}, 24 Am. Bus. L.J. 449, 451 (1986) (cardholder's acceptance constitutes contract). Consequently, if the cardholder had used the card once in good faith, a binding credit agreement would be formed. \textit{But cf. Garber}, 104 Ill. App. 3d at 681, 432 N.E.2d at 1311-12 (contract formed each time card used).
the issuer is not led to act because of any communication. The issuer's subsequent conduct in paying the retailer is not based on any misimpression caused by the debtor's use of the card, but rests on a separate contractual relationship between the issuer and the retailer.

Application of the "false representation" theory to implied representations engenders the same "implied fraud" problems discussed above. In addition, false representations cannot be based on the issuer's subrogation rights. The credit card issuer primarily represents to the retailer that it will pay the bill. The retailer does not inquire into, nor can it meaningfully rely on, the purchaser's financial circumstances. Provided that the credit card issuer will pay, the retailer has not been fraudulently misled or harmed.

2. Assumption of Risk/Reliance Approach

Another approach first suggested by the Court of Appeals for the Eleventh Circuit in First National Bank of Mobile v. Roddenberry arose under section 17(a)(2) of the Act. The defendants, Mr. and Mrs. Roddenberry, had obtained joint credit cards from the plaintiff bank. When the defendants exceeded their credit ceiling, the bank wrote to them on several occasions requesting that no further charges be made. The Roddenberrys ignored the written requests and made additional purchases. In response, the bank's credit department official had a telephone conversation with Mr. Roddenberry in which he promised to make no further

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76 Cf. Ward, 857 F.2d at 1083.
77 Judge Merritt argued that, as a matter of contract law, there must be reliance on the implied promise to perform which is made at each use of the credit card. Id. at 1088-89. But this reliance can itself be implied. Id. Judge Merritt offers no explanation why implied reliance is sufficient for the purposes of section 523(a)(2)(A).
78 See First Nat'l Bank of Mobile v. Roddenberry, 701 F.2d 927, 931-32 (11th Cir. 1983). The Roddenberry court stated:
[When Mrs. Roddenberry purchased merchandise she did not present herself to her creditor, and arguably took affirmative steps to avoid such a confrontation. Moreover, the merchants with whom . . . she had direct contact had no incentive to perform a credit card check because they were assured payment from the bank so long as the charge was less than $50.00. Indeed, to have performed a credit card check would have resulted in a lost sale.]
Id. at 931.
79 701 F.2d 927 (11th Cir. 1983).
80 Id. at 928.
81 Id.
82 Id.
charges. Nevertheless, when the defendants separated, Mrs. Roddenberry went on a credit card spending spree, compelling the plaintiff to program its automatic teller machines to retain the cards if they were used for a cash advance. It also notified the retailers to withhold the cards if any attempts were made to use them for a purchase. However, because retailers were only required to obtain authorization for purchases exceeding fifty dollars, Mrs. Roddenberry was able to make many additional credit purchases before her card was seized.

The Roddenberry court presupposed that the use of a credit card could constitute an implied representation. However, a credit card issuer does voluntarily enter into a relationship with the debtor, and takes the risk of nonpayment into consideration when it determines its schedule of finance charges. The Roddenberry court, therefore, held that the issuer's rights under section 523(a)(2)(A) should be restricted. Specifically, the court declared that credit card issuers generally assume the risk of debtor nonpayment, but only to the extent that the issuer's notification unequivocally and unconditionally revoked the cardholder's right to possess and use the credit card. Debts incurred prior to notification are dischargeable. If a cardholder uses the card after receiv-
ing such notice, the cardholder is said to make “an affirmative mis-
representation that . . . [she] is entitled to possess and use the
card.” 90 These debts are nondischargeable. 91

“Assumption of risk” is a concept which is usually raised by a
tort defendant as a shield against liability for negligence. 92 It may
not be used to defend against intentional wrongdoing, such as
fraud. 93 Moreover, it is illogical to hold that an issuer should be
barred from bringing suit to recover an unpaid sum because it
assumed the risk of nonpayment; this view allows one to refuse to
pay with impunity.

Even if an assumption of risk analysis were applicable theoret-
ically, Roddenberry provides no convincing basis for ruling that
credit card issuers assume the risk of fraud or nonpayment.
Rather, the Roddenberry court reasoned that an issuer’s ac-
counting for the risk of nonpayment in determining finance charges
should protect the purchaser. 94 This argument is clearly unsound.
All profit-maximizing companies attempt to estimate prospective
business losses, including those arising from potential intentional
wrongdoing, as a part of the cost of doing business. This practice
should not, however, prevent a creditor from seeking reimbur-
sement from a wrongdoer. 95

Even if the Roddenberry court had reasoned that credit card
issuers cannot reasonably rely on the implied representations
which the cardholders may make, such an argument would have

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90 Id.
91 Id.
92 Restatement (Second) of Torts § 496A (1977).
93 See generally, W. Prosser, R. Keeton, D. Dobbs & D. Owen, Prosser and Keeton
on Torts 108 (5th ed. 1984) (discussing defense to intentional tort, excluding assumption of
risk).
94 See Roddenberry, 701 F.2d at 932. Some credit card issuers encourage their card-
holders to exceed their credit limit. Id. There is, however, no evidence that such encourage-
ment extends to inducing cardholders to make purchases without an intent to pay. Id. Con-
sequently, the “encouragement” argument referred to in Roddenberry is unhelpful.
95 Credit card issuers presumably realize the risk of defalcation by employees who han-
dle checks and cash as one of their duties. Nevertheless, issuers “voluntarily” hire employ-
ees and assign them tasks which include handling checks and cash. The risk of embezzle-
ment is calculated into the finance charges. Should a dishonest employee be protected from
liability because the company “assumed the risk”?  
Likewise, a retailer who encourages customers to enter the store and examine mer-
chandise must be aware that some of the customers may shoplift. The retailer presumably takes
this into account in determining prices. A shoplifter, however, would not be entitled to use
assumption of risk to defend against prosecution.
been equally unpersuasive. In determining whether a party was defrauded, courts often ask whether the party reasonably relied on the deceptive message conveyed to it. 96 A "reasonable reliance" test has two parts; it first determines whether there was reliance, and then determines whether the reliance was reasonable. 97 If the cardholder's representation arises before the card's misuse, 98 the issuer can reasonably rely on the representation and either issue the credit card or fail to take steps to close the account. 99

None of the facts in Roddenberry suggest that the issuer's reliance on the debtors' initial representation was unreasonable. 100 There was no evidence that the issuer failed to perform a credit check. Further, nothing in the debtors' credit history indicated that the Roddenberrys were a poor credit risk. Instead, Roddenberry involved an unanticipated break-up of the debtors' marriage which resulted in one of the debtors abusing her credit privileges. 101 Although she knew that she had exceeded her credit limit, this co-debtor engaged in a series of purchases deliberately below the price limit which would have required a credit check. 102 The facts in Roddenberry simply provide no justification for question-

96 See In re Mullet, 817 F.2d 677, 680 (10th Cir. 1987); In re Hunter 780 F.2d 1577, 1579 (11th Cir. 1986); In re Kimzey, 761 F.2d 421, 423 (7th Cir. 1985).

97 See Mullet, 817 F.2d at 680.

98 The representation can arise from the cardholder's implied or express statement in her initial credit application, previous proper use of the card, or payment of an earlier account statement.

99 Cf. RESTATEMENT (SECOND) OF TORTS § 551(c) (1977) (failure to disclose change in intent treated as continuous representation upon which issuer can rely).

100 See Roddenberry, 701 F.2d at 927, 928-29 (11th Cir. 1983). After the original extension of credit, the debtors' credit limit was raised twice. Id. at 928. The first increase was granted automatically by the issuer to all of its cardholders who were in good standing. Id. The second increase was granted in May 1978, at the debtors' request. Id. An argument could be made that the issuer's reliance on the debtors' continuing representation was unreasonable at the time of the second increase.

Yet, there are at least two reasons to reject this argument. First, the credit card initially was issued in November 1975. Id. The court did note that in the approximately two and one-half years prior to May 1978, the issuer had not experienced any serious problems with the debtors' account. Id. In light of this credit history, the issuer's reliance may not be unreasonable. See id.

More importantly, the Roddenberry court focused on the reliance in issuing the credit card in November 1975. See id. Once the credit card was issued, the debtor was in a position to engage in her fraudulent and deceptive series of purchases. Id. The increase in the credit limit in no way assisted the debtor in her scheme. Id. Indeed, despite the increase, the debtors exceeded their credit limit at all times. Id. As early as May 1978, the issuer wrote to the debtors and requested that the excess account balance be eliminated. Id.

101 Id.

102 Id. at 928-29.
ing the reasonableness of the card issuer's reliance at the time of issuance.

Additionally, there is no theoretical basis for characterizing as unreasonable a card issuer's reliance on a debtor's initial intent to pay. The vast majority of debtors presumably intend to pay, and, indeed, most do.

A reasonable reliance approach does not adequately justify different treatment for pre-revocation and post-revocation debt. The creditor's reliance is no more reasonable after the debtor receives notification that the right to use or possess the card is revoked than before. The creditor does not act in reliance on any representation. Rather, the creditor is simply trying to prevent the debtor from making any new purchases. Reliance at this point in time, therefore, plays no part in the issuer's conduct.

The Roddenberry opinion was inconclusive as to whether section 523(a)(2)(A) treats a credit card issuer differently from section 17(a)(2) of the Act.\textsuperscript{103} Subsequent cases have reached variant results. Some courts have held that Roddenberry does apply to section 523(a)(2)(A) and, therefore, credit card debts incurred before the issuer unambiguously revokes the customer's credit card privileges are dischargeable.\textsuperscript{104} Others courts have rejected Rod-

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\textsuperscript{103} Id. at 929 n.3.

Although . . . [Section 523(a)(2)(A)] is substantially identical to section 17(a) . . . Congress has incorporated certain modifications which may alter the outcome in certain cases where debtors obtain credit without a present intention of repayment (citation omitted). Indeed, one commentator suggests that Congress' addition of the term "actual fraud" to the "false pretenses and false representation" language of section 17(a) was intended to eliminate the distinction between overt and implied misrepresentation drawn in Davis-Paxon (citation omitted). At this time, we express no opinion with respect to this construction of section 523 (a)(2)(A).

\textsuperscript{104} See In re Landen, 95 Bankr. 826, 828 (Bankr. M.D. Fla. 1989); In re Moore, 88 Bankr. 385, 386 (Bankr. M.D. Fla. 1988). Some courts apply the Roddenberry holding only when no clear evidence exists that the debtor had no intention to pay. See, e.g., In re Shadrer, 55 Bankr. 608, 612 (Bankr. W.D. Va. 1985) (adhering to Roddenberry, court concluded that voluntary assumption of risk on part of bank continues until unequivocal and unconditional revocation occurs).
denberry to the extent that it restricts denials of discharges to purported purchasers under section 523(a)(2)(A). The latter courts relied on either the implied representation or actual fraud theories. A third approach is to apply the Roddenberry analysis where a creditor has failed to perform even a minimal credit investigation before issuing the card. Under this approach, to be eligible for section 523(a)(2)(A) protection, a creditor must make a specific inquiry regarding each applicant. This alternative approach finds support in cases under section 523(a)(3)(B) which hold that a creditor must have performed some type of credit check in order to prevent a discharge; otherwise, the debt is deemed not to have been incurred through the making of a false written statement regarding the debtor’s financial condition.

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105 See In re Hall, 101 Bankr. 781, 784 (Bankr. M.D. Fla. 1989) (debtor’s obligations nondischargeable because of knowledge of his inability to meet them); In re Senty, 42 Bankr. 456, 461 (Bankr. S.D.N.Y. 1984) (rejects precedent to nondischarge); In re Bono, 41 Bankr. 629, 631 n.1 (Bankr. D. Mass. 1984) (rejects Roddenberry holding that concealment of insolvency does not constitute fraudulent misrepresentation); see also In re Wilson, 32 Bankr. 772, 776 (Bankr. E.D. Tenn. 1983) (rejects Roddenberry as not controlling, stating that to hold all purchases prior to revocation dischargeable per se goes too far). These courts, however, do not hesitate to apply Roddenberry to deny discharge of debts incurred after notice of revocation was sent to cardholder. See, e.g., In re Solano, 85 Bankr. 642, 643 (Bankr. S.D. Fla. 1988) (charges incurred subsequent to date revocation letter sent excepted from discharge despite claim letter never received); In re Fisher, 74 Bankr. 653, 635 (Bankr. S.D. Fla. 1987) (finding all post-revocation charges nondischargeable).

106 See Solano, 85 Bankr. at 643; Fisher, 74 Bankr. at 635; Bono, 41 Bankr. at 631.

107 See, e.g., In re Ward, 857 F.2d 1082, 1084 (6th Cir. 1988) (credit card debt held dischargeable since there was no evidence of even minimal credit check); In re Mullet, 817 F.2d 677, 681 (10th Cir. 1987) (where minimal investigation would have disclosed falsity of representation, debt is discharged if no investigation performed); In re Mitchell, 70 Bankr. 524, 528 (Bankr. N.D. Ill. 1987) (“commercial lenders ... are required to conduct a commercially reasonable investigation of the information supplied by the debtor”).


109 Ward, 857 F.2d at 1084 n.2. The Ward court’s reliance on section 523(a)(2)(B)(iii), however, may be misplaced; section 523(a)(2)(B)(iii), unlike section 523(a)(2)(A), specifically refers to a debtor’s use of a writing “on which the creditor to whom the debtor is liable for such money, property, services or credit reasonably relied.” Id. See 11 U.S.C. § 523(a)(2)(B)(iii) (1988). Reasonable reliance, like the requirement that the statement be in writing, may be a special requirement under section 523(a)(2)(B).

Relief may be granted more restrictively under section 523(a)(2)(B) than under section 523(a)(2)(A) because of a fear that creditors otherwise might employ unreasonable methods to encourage applicants to complete financial statements accurately. Thus, creditors could protect themselves from a discharge because they unofficially obtain information sufficient to approve the loan. See Note, supra note 3, at 907-08. In addition, many applicants are too unsophisticated to submit completely accurate financial information. This information, if not supported by at least a cursory credit check, may be unreliable even when the applicant acts in good faith.
3. The Actual Fraud Approach

A third line of cases has recognized that actual fraud itself is an independent ground for denying discharge under section 523(a)(2)(A). One of the first cases to adopt this position was *In re Holston.* The *Holston* court distinguished the ruling in *Davison-Paxon* by focusing on the language of section 523(a)(2)(A):

The addition of "actual fraud" in the new statute [section 523(a)(2)(A)], however, expands the scope of non-dischargeable debts to include those that arise from acts or omissions that are intentionally or consciously used to deceive or to trick another; an overt act is not necessary to actual fraud because an intentional or conscious omission can constitute fraud.

The *Holston* case concerned credit card debts incurred after the card issuer had informed the debtor that the account had been closed. The court found that by subsequent use of the credit card, the debtors led the retailers to believe that the account was in good standing. The debtors received the purchased goods and services knowing that the merchants delivered the goods and services based on this false belief. The court held that this conduct constituted actual fraud; the debts, therefore, were nondischargeable.

The issue of whether section 523(a)(2)(B) requires creditor reliance remains unsettled. Compare *Mullet,* 817 F.2d at 679 (reliance must be reasonable) with *In re Ophaug,* 827 F.2d 340, 343 (8th Cir. 1987) (reliance need not be reasonable); see also *In re Showalter,* 86 Bankr. 877, 881 (Bankr. W.D. Va. 1988) (asserting that *Ophaug* requirement of establishing only reliance should be confined to noncommercial creditors).

This debate involves a conflict between competing policies. Some cases suggest that equity requires that a creditor should not be barred from seeking payment from a purposefully fraudulent debtor. See *In re Wilson,* 12 Bankr. 363, 369-70 (Bankr. M.D. Tenn. 1981). Others argue that society would benefit from the discharge of debts incurred after a creditor's inadequate credit check. See *In re Hagedorn,* 25 Bankr. 666, 669 (Bankr. S.D. Ohio 1982); see also Note, supra note 3, at 907 ("it is inequitable to reward a possibly imprudent creditor who failed to detect the debtor's misrepresentation"). This rule would encourage creditors to perform more thorough credit checks and reduce the incidence of fraudulently incurred debts.

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111 *Id.* Bankr. 103 (Bankr. M.D. La. 1985).
112 *Id.* at 107 (footnote omitted).
113 *Id.* at 105.
114 *Id.* at 106.
116 *Id.*
In re Carpenter also adopted the actual fraud standard. There the plaintiff alleged that the debtor had made purchases while insolvent and without any intention to pay. The Carpenter court followed Roddenberry, finding that the alleged conduct did not constitute a false pretense or false representation. Nevertheless, the court asserted that section 523(a)(2)(A) establishes an actual fraud test; it maintained that where a debtor makes credit card purchases with no intent to repay the debt, the debtor has committed actual fraud and, thus, the debt is nondischargeable.

The actual fraud approach had been adopted in a number of non-credit card cases before and after Holston. This standard is preferable to the implied representation theory because it is both analytically sound and sufficiently flexible. As explained in Part II of this Article, the fraud could be found either in the debtor's overall course of conduct or in her failure to disclose "subsequently acquired information." The debtor's subsequent intent not to pay makes the initial promise to pay, made when the credit contract was formed, untrue or misleading.

B. Bad Check Cases

With respect to checks, a purported purchaser is one who issues a check to obtain goods or services knowing that it will be dishonored by the bank. Moreover, the purported purchaser has no intent to offer alternative payment in the event of that dishonor. Issuance of the check is an integral element of formation Roddenberry rationale. Interestingly, however, the court did not discuss whether the merchants were affected by the outcome of the case. See id.

Id. at 729.
Id.
Id.
Id. The court said that to hold otherwise would be to ignore the plain language of the statute. Id. Nonetheless, the debt was held dischargeable because the plaintiff failed to carry his burden of proof. Id. at 731.


Id. § 551(c) comment h.

See 11 U.S.C. § 523(a)(2)(A) (1988). This section does not apply to the issuance of bad checks used to satisfy previously incurred debts; there must be fraudulent intent at the time the debt is created. Id.

The debtor may know there are insufficient funds or, if there are funds, the debtor may plan to remove the funds or close the account before the check is presented. See, e.g., In re Fitzgerald, 109 Bankr. 893, 894 (Bankr. N.D. Ind. 1989) (debtor not only removed
of the debtor's purchase contract and should give rise to an implicit representation of the drawee bank's intent to honor the check. Indeed, under the rule enunciated in Ames v. Moir, the debtor's receipt of goods purchased with the intent not to pay should itself constitute fraud, even if no check were issued.

Bad check cases, however, have applied extensively some form of the implied misrepresentation paradigm. Most courts found that issuance of the check constituted some representation which, at least if supported by evidence of fraudulent intent, would result in a determination of nondischargeability under section 523(a)(2)(A). Misapplying nonbankruptcy precedent, some courts have

[127] See Restatement (Second) of Torts § 530 comment c (1977).
[129] See In re Kurdoghlian, 30 Bankr. 500, 502 (Bankr. 9th Cir. 1983) (issuance of checks is implicit representation that checks are good); In re Horwitz, 100 Bankr. 395, 398 (Bankr. N.D. Ill. 1983) (issuance of checks alone does not constitute false representations under § 523(a)(2)(A)); In re Tuggle, 86 Bankr. 612, 619 (Bankr. E.D. Mo. 1988) (issuance of dishonored check without more not actionable representation under § 523(a)(2)(A)); In re Lewsadder, 84 Bankr. 711, 714 (Bankr. D. Ore. 1988) (tender of check is implicit representation of sufficient funds); In re Hunter, 83 Bankr. 803, 804 (M.D. Fla. 1988) (for purposes of § 523(a)(2)(A), issuance of check not representation that it will be honored); In re Gonzalez Seijo, 76 Bankr. 11, 13-14 (Bankr. D.P.R. 1987) (after citing § 523 (a)(2)(A) requirement that there be "representation," court found debtor issuing postdated check had promised to pay at future date but debt nonetheless dischargeable because no fraudulent intent); In re Boyer, 62 Bankr. 648, 649 (Bankr. D. Mont. 1986) (after identifying § 523 (a)(2)(A) requirement that debtor make representation, court found that debt incurred through issuance of bad check was dischargeable because debtor lacked fraudulent intent); In re Pokrandt, 54 Bankr. 691, 692 (Bankr. W.D. Wis. 1985) (issuance of insufficient funds check to fraudulently obtain merchandise would be misrepresentation under § 523(a)(2)(A)); In re Mullin, 51 Bankr. 377, 378 (Bankr. S.D. Ind. 1985) (issuance of check carries implied representation of sufficient available funds); In re Hammett, 49 Bankr. 533, 535 (Bankr. M.D. Fla. 1985) (issuance of check does not constitute § 523(a)(2)(A) representation); In re Anderson, 10 Bankr. 296, 297 (Bankr. W.D. Wis. 1981) (issuance of check is implied representation of available funds). But see In re Ethridge, 80 Bankr. 581, 587 (Bankr. M.D. Ga. 1987) (section 523(a)(2)(A) establishes three grounds for nondischargeability; thus actual fraud recognized as separate ground).

[130] See Kurdoghlian, 30 Bankr. at 502 (issuance of check with knowledge of insufficient funds is fraudulent misrepresentation under § 523(a)(2)(A)); Lewsadder, 84 Bankr. at 716 (tender of bad check in reckless disregard of truth sufficient to amount to false representation under § 523(a)(2)(A)); Gonzalez Seijo, 76 Bankr. at 13-14 (delivery of check with fraudulent intent would satisfy representation requirement); Boyer, 62 Bankr. at 649 (delivery of check with fraudulent intent is § 523(a)(2)(A) misrepresentation); Pokrandt, 54 Bankr. at 692 (issuance of check with intent to defraud is § 523(a)(2)(A) misrepresentation); Mullin, 51 Bankr. at 377 (if debtor knew funds were insufficient, debtor's implied representation that check is good is fraudulent); cf. In re Burgstaler, 58 Bankr. 508, 514 (Bankr. D. Minn. 1986) (even if issuance of check were § 523(a)(2)(A) representation, there must be proof debtor did not intend to make checks good).
recently concluded that issuance of a check does not constitute an implied representation; instead, they have found the purported purchaser’s debts dischargeable, despite the debtor’s intent not to pay.\textsuperscript{131}

In cases involving the issuance of bad checks, the application of the implied misrepresentation theory differs from that previously discussed.\textsuperscript{132} This section will briefly review this version of the theory and then examine the impact of the nonbankruptcy precedent which has been used in bad check cases.

1. Implied Misrepresentation Approach

In the great majority of bad check cases courts have applied the same implied misrepresentation analysis used in connection with credit card debts.\textsuperscript{133} In other words, the debtor’s issuance of a check impliedly represents that she has both the ability and the intent to pay for the items or services purchased. The debtor does not represent that she definitely has sufficient funds in her account to cover the check.\textsuperscript{134} Consequently, even if the debtor issues a check knowing that there are insufficient funds to cover it, the debt may be dischargeable.\textsuperscript{135} Very few cases, however, have held that when the debtor issues a check she impliedly represents that there is enough money in her account to cover it.\textsuperscript{136}

\textsuperscript{131} See Horwitz, 100 Bankr. at 398 (issuance of check not § 523(a)(2)(A) representation); Tuggle, 86 Bankr. at 614 (delivery of check not representation that check will be honored); Hunter, 83 Bankr. at 804 (issuance of check not § 523(a)(2)(A) representation that check is good); In re Jenkins, 61 Bankr. 30, 39 (Bankr. D.N.D. 1986) (issuance of checks not representation that checks will be honored); In re Hunt, 30 Bankr. 425, 437-38 (M.D. Tenn. 1983) (delivery of check without more not false representation under § 523(a)(2)(A)); cf. Hammett, 49 Bankr. at 534-35 (Williams not limited to criminal prosecution).

\textsuperscript{132} See supra text accompanying notes 62-121.

\textsuperscript{133} See cases cited supra note 130.

\textsuperscript{134} See, e.g., Pokrandt, 54 Bankr. at 692 (knowing issuance of check on insufficient funds does not establish misrepresentation); In re Sutton, 39 Bankr. 390, 397 (Bankr. M.D. Tenn. 1984) (mere fact that debtor knowingly writes check on insufficient funds does not establish misrepresentation); Hunt, 30 Bankr. at 442 (issuance of check on insufficient funds not by itself proof of intent).

\textsuperscript{135} See Gonzalez Seijo, 76 Bankr. at 14; Hunt, 30 Bankr. at 452.

\textsuperscript{136} See In re Kurdoghlian, 30 Bankr. 500, 502 (Bankr. 9th Cir. 1983) (tendering check is implicit representation it will be honored); In re Mullin, 51 Bankr. 377, 378-79 (Bankr. S.D. Ind. 1985) (inference of fraudulent intent allowed under state statute); In re Tabers, 28 Bankr. 679, 680 (Bankr. W.D. Ky. 1983) (same); In re Anderson, 10 Bankr. 296, 297 (Bankr. W.D. Wis. 1981) (same).

A similar issue could have arisen in the credit card context. Use of a credit card may have been found to be an implied representation that the purchase did not exceed the debtor’s credit limit. Nevertheless, this argument does not seem to have been adopted by
Nevertheless, the practical difference between these two approaches may be limited. The cases which find that no representation is made as to the sufficiency of funds in the debtor’s account upon issuance of a check might declare a debt nondischargeable if the debtor had issued the check to defraud the creditor.\textsuperscript{137} The cases finding a specific representation as to the sufficiency of funds would declare the debt dischargeable only to the extent that the debtor did not know the representation was false.\textsuperscript{138} The only significant difference between the two approaches arises where the debtor knew that her check was drawn on insufficient funds but anticipated future income to make the check “good.”

2. The \textit{Williams} Case

\textit{Williams v. United States}\textsuperscript{139} involved a criminal prosecution for knowingly making a “false statement or report” for the purpose of influencing action of certain federally insured banks.\textsuperscript{140} The defendant had engaged in “check kiting” between his accounts in several federally insured banks.\textsuperscript{141} He knowingly drew checks for amounts in excess of his account balance at one bank to deposit them in the other, then reversed the process.\textsuperscript{142} This reversal was timed to prevent the checks from being returned for insufficient funds.\textsuperscript{143} The purpose of the scheme was to obtain the interest-free use of money provisionally credited at each account, although no funds had actually been deposited.\textsuperscript{144}

In a five-to-four decision, the United States Supreme Court ruled that the defendant’s conduct did not constitute the making of a “false statement.”\textsuperscript{145} The issuance of a check was deemed not to be “any representation as to the state of petitioner’s bank balance.”\textsuperscript{146} Instead, it was considered merely the defendant’s engagement that upon dishonor of the check he would give the payee the

\begin{footnotesize}
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\item[138] See \textit{Kurdoghlian}, 30 Bankr. at 501; \textit{Tabers}, 28 Bankr. at 681; \textit{Anderson}, 10 Bankr. at 297.
\item[139] 458 U.S. 279 (1982).
\item[140] \textit{Id.} at 282.
\item[141] \textit{Id.} at 281.
\item[142] \textit{Id.} at 281-82.
\item[143] \textit{Id.} at 282.
\item[144] \textit{Id.} at 281 n.1.
\item[145] \textit{Id.} at 284.
\item[146] \textit{Id.} at 285.
\end{itemize}
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amount of the drawn check.\textsuperscript{147}

A number of bankruptcy court decisions have recently demonstrated the application of \textit{Williams} to section 523(a)(2)(A).\textsuperscript{148} Courts have construed \textit{Williams} to stand for the rule that knowing issuance of a check on insufficient funds does not constitute a false representation.\textsuperscript{149} Therefore, the issuance of such a check by a purported purchaser cannot satisfy the "false representation" test of section 523(a)(2)(A). \textit{Williams} has been applied even when the debtor had no intention to pay for the goods for which she drew the check.

\textit{Williams} is distinguishable on at least six bases from the implied misrepresentation theory.\textsuperscript{150} First, the \textit{Williams} Court never concluded that the defendant's conduct was not fraudulent. On the contrary, the Court tacitly admitted that Williams' conduct may have been fraudulent, but held that the fraud fell outside the scope of criminal prosecution.\textsuperscript{151} The Court emphasized that the indictment did not charge the defendant with engaging in a fraudulent scheme to obtain credit, but merely referred to the specific acts of depositing individual checks when there were insufficient funds.\textsuperscript{152} The relevant statute did not apply expressly to fraud.\textsuperscript{153} In narrowing the breadth of the statute so that it did not apply to the defendant's conduct, the Court determined that a federal law against fraudulent checking activities was unnecessary: "Federal action was not necessary to interdict the deposit of bad checks, for, as

\textsuperscript{147} Id.


\textsuperscript{149} See cases cited \textit{supra} note 147.

\textsuperscript{150} See \textit{In re Roberts}, 82 Bankr. 179, 182-83 (Bankr. D. Mass. 1987) (discussing some of these distinctions). Under even the most expansive interpretation, \textit{Williams} would only limit the bad check cases which were most protective of the creditor by holding that issuance of a check gave rise to an implied representation that the debtor had sufficient funds in his account. But \textit{Williams} in no way refuted the notion that the issuance of a check gives rise to an implied representation that the debtor intends to make sure the check is honored. See \textit{Williams}, 458 U.S. at 279.

\textsuperscript{151} See \textit{Williams}, 458 U.S. at 287.

\textsuperscript{152} Id.

\textsuperscript{153} Id. at 286-87; see 18 U.S.C. § 1014 (1988).
Congress surely knew, fraudulent checking activities already were addressed in comprehensive fashion by state law.”\textsuperscript{154} The underpinnings of this argument indicates that the defendant in Williams had, in fact, committed fraud. Similarly, where a purported purchaser incurs debt for goods and services by issuing a check, the debt might be nondischargeable in light of the actual fraud language of section 523(a)(2)(A).

Second, the rules of statutory construction require that criminal statutes be interpreted narrowly.\textsuperscript{155} Liberal application of a criminal law would endanger personal liberty, as well as economic independence. Although exceptions to bankruptcy discharge are generally not broadly construed,\textsuperscript{156} this policy seems less compelling than that regarding a criminal statute. However, according to some courts, once a debtor’s dishonesty has been proved, there is no longer any public policy favoring a restrictive reading of exceptions to discharge.\textsuperscript{157} A purported purchaser is, by definition, a dishonest debtor.

Third, the language of the statute in Williams provided special guidance for its construction;\textsuperscript{158} it proscribed the making of a “false statement,”\textsuperscript{159} not a false “representation.” In some contexts, a distinction has been made between the word “statement” and the word “representation.”\textsuperscript{160} The word “statement,” for in-

\textsuperscript{154} Williams, 458 U.S. at 287 (emphasis added).
\textsuperscript{155} Id. at 290.
\textsuperscript{156} See, e.g., In re Blackburn, 68 Bankr. 870, 875 (Bankr. N.D. Ind. 1987) (exceptions to rule of dischargeability of debts to be strictly construed); In re Faulk, 69 Bankr. 743, 748 (Bankr. N.D. Ind. 1986) (same).
\textsuperscript{157} See Hartford Accident & Indem. Co. v. Flanagan, 28 F. Supp. 415, 419 (S.D. Ohio 1939) (construction of 1898 Bankruptcy Act prevents discharge of liability caused by debtor’s fraudulent conduct); see also In re Hunter, 771 F.2d 1126, 1130 (8th Cir. 1988) (objectives of bankruptcy law of permitting debtor fresh start are applicable only to honest debtors). The Hunter court stated:

Different considerations apply once a creditor has carried the burden of showing that a debt falls within the fraud exception to discharge and, therefore, has demonstrated the debtor’s dishonesty as to that debt. When dishonesty is demonstrated with respect to a specific debt, “the debtor is no longer entitled to the benefit of debtor rehabilitation policy considerations.”

\textsuperscript{158} Williams, 458 U.S. at 286. The Court felt that any linguistic ambiguity in the context of a criminal case should be resolved in favor of the defendant. Id.
\textsuperscript{159} Id. The court focused on the word “statement,” commenting that “[i]n any event, whatever the general understanding of a check’s function, ‘false statement’ is not a term that, in common usage, is often applied to characterize ‘bad checks.’” Id.
\textsuperscript{160} See Obrist v. Christensen, 337 F.2d 220, 220 (9th Cir. 1964) (check is not financial statement); Richland Farm Bureau v. Durbin, 8 Ohio App. 2d 312, 313, 222 N.E.2d 315, 317
stance, may apply only to written representations, while "representation" may apply to both written and oral assertions. Such a distinction seems implicit in section 523(a) of the Code. For example, section 523(a)(2)(A) refers to a false "representation," while section 523(a)(2)(B) refers to "use of a statement in writing."163 "Statement," therefore, under the statute, may be an express communication, while a "representation" or "pretense" may be one that is implied.162

Fourth, even if there were no difference between the terms "statement" and "representation," the unique factual setting of Williams made it more difficult for the Court to conclude that the defendant had made an intentionally false statement. Ultimately, the Court construed the defendant's conduct as conveying messages which were either true or at least not intentionally false.163 The check-kiting scheme in Williams involved no purchases; the defendant made no implied promise to pay for anything. Although the issuance of a check, as a matter of law, constitutes a promise to pay if the check is dishonored,164 the Williams defendant, relying on the timing of his deposits, did not expect that any of his checks would be dishonored.165 Moreover, even if one of the checks had been dishonored, the check arguably could have been "good" if the bank could debit the defendant's account. In contrast, the purported purchaser's implied representation of intent to pay or to honor the check is, by definition, untruthful.

(1986) (issue is whether bad checks are liabilities for obtaining money or property by false representations); In re Rea Bros., 251 F. 431, 432 (D. Mont. 1917) (debtor's check was false representation that check would be paid on presentation, not "false statement").


164 See In re Roberts, 82 Bankr. 179, 182 (Bankr. D. Mass. 1987). "The court in Williams was dealing with a statute which speaks of 'statement or report' rather than one referring to 'false pretense' or 'false representations' which are more apt phrases for describing the act of negotiating a check." Id. (emphasis in original).

165 Williams, 458 U.S. at 284.

166 Id. at 285. The Court stated:

As defined in the Uniform Commercial Code, 2 U.L.A. 17 (1977), a check is simply "a draft drawn on a bank and payable on demand," § 3-104(2)(b), which "contain[s] an unconditional promise or order to pay a sum certain in money," [citation omitted]. As such, "[t]he drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder."

Id. (quoting § 3-413(2), 2 U.L.A. 424 (1977)).
Fifth, the Williams Court was troubled by the effect of the government's approach. That is, if it were to find an implied representation that the drawer did have "funds on deposit sufficient to cover the face value [of the check]," its judgment could lead to successful criminal prosecution of persons who acted without any intent to defraud. However, application of an implied representation approach to a purported purchaser under section 523(a)(2)(A) would impose no hardship on an honest debtor. The creditor would still be required to prove that the debtor had acted with fraudulent intent.

Finally, in deciding that the defendant's conduct did not fall within the "false statement" language of the statute before it, the Williams Court relied heavily on legislative history. The legislative history of section 523(a)(2)(A), in contrast, requires that the section apply to the purported purchaser. Despite the many ways in which the Williams decision is distinguishable, a number of courts have found it to be persuasive. In the recent decision of In re Horwitz, the court determined whether the issuance of a check amounts to an implied representation of sufficient funds on account to cover the check. Acknowledging that a number of courts have found such an implied representation, the Horwitz court declared that cases taking the contrary position "ha[d] the support of a Supreme Court case[,]" namely Williams. Specifically, the court stated:

[Williams] analyzed the nature of a check and stated that issuing a check "did not involve the making of a 'false statement,' for a simple reason: technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false'" [citation omitted]. Thus, the necessary element under Section 1014 of a false statement is missing. By a parity of reasoning, the necessary element under Section 523(a)(2)(A) of a false representation is similarly missing.

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166 Id. at 286.
167 Id. at 286 n.7.
168 Id. at 286-87.
169 Id. at 288-90.
170 See supra notes 18-39 and accompanying text.
172 Id. at 398.
173 Id.
174 Id.
Citing other recent opinions which followed Williams, the Horwitz court concluded that the issuance of a check drawn on insufficient funds does not constitute a false representation under section 523(a)(2)(A). Yet, the court did not consider the possibility that the word "representation," as used in section 523(a)(2)(A), might be broader than the word "statement."

Most importantly, Horwitz ignored the fact that section 523(a)(2)(A) designates actual fraud as a separate ground for denying a discharge; the defendant in Williams was, notably, not found innocent of actual fraud. Even if the words "statement" and "representation" were synonymous, Williams is irrelevant to a denial of discharge under section 523(a)(2)(A). Purported purchasers commit actual fraud by buying goods or services without the intent to pay for them. The fact that a purported purchaser promotes the deception by issuing a check in no way diminishes the fraud.

A number of other courts have relied on Williams in interpret-

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176 Id. The court cited three cases it believed were governed by the Williams decision which concerned issues under section 523(a)(2)(A). In re Tuggle, 86 Bankr. 612 (Bankr. E.D. Mo. 1988); In re Hunter, 83 Bankr. 803 (M.D. Fla. 1988); In re Ethridge, 80 Bankr. 581 (Bankr. M.D. Ga. 1987). An argument can be made that the Horwitz court misinterpreted both Ethridge and Tuggle. Ethridge, for example, can be read as having rejected the creditor's argument for reasons unrelated to Williams. The Ethridge court acknowledged that section 523(a)(2)(A) established three standards for nondischargeability. However, it specifically resolved the issue without relying on or even mentioning Williams. Specifically, the Ethridge court stated:

"Courts are divided on the question of whether the issuance of a check that is ultimately dishonored for insufficient funds is a false representation. This Court need not address this issue in the present adversary proceeding, however, since Plaintiff has failed to prove by clear and convincing evidence that Defendant had the requisite intent to deceive Plaintiff when the first set of checks was issued."

Id. at 587-88.

Tuggle, on the other hand, did cite Williams for the proposition that the mere issuance of checks drawn on insufficient funds is not enough to constitute "actionable representation" under section 523(a)(2)(A). See Tuggle, 86 Bankr. at 615. Nevertheless, in a footnote supporting this proposition, Tuggle cited several cases which held that if the creditor adduces evidence proving that the debtor did not intend to make the checks good when she issued them, the debts would be nondischargeable. Id. at 615 n.1.

170 Horwitz, 100 Bankr. at 398. If the court had found that issuance of the check constituted an implied representation, it would have had to consider whether the debtor made the implied representation with fraudulent intent. At the outset of its discussion, the court distinguished these different elements of a section 523(a)(2)(A) action. Id. at 397. Another plaintiff in the consolidated action alleged that actual oral representations had accompanied issuance of checks. Id. at 399. The court noted that the oral representations would satisfy the "representation" requirement not met as to the first plaintiff, and the court proceeded to consider whether the debtor had made the oral statements with fraudulent intent. Id. at 402.
ing either section 523(a)(2)(A)\textsuperscript{177} or section 523(a)(2)(B).\textsuperscript{178} Other courts have inquired as to whether Williams is binding precedent and decided the matters before them on different grounds entirely.\textsuperscript{179} A few courts specifically have rejected Williams,\textsuperscript{180} while others, without reference to Williams, have held that the issuance of a check is an implied representation upon which a nondischarge may be predicated.\textsuperscript{181}

The Williams decision should have no significant effect on the scope of section 523(a)(2)(A) even under the implied representation theory. Under the “actual fraud” standard, Williams would obviously be irrelevant.

CONCLUSION

The dischargeability of purported purchaser debt is an issue that arises repeatedly in bankruptcy courts nationwide. Courts currently employ differing rules which result in nonuniform decisions. Some of the approaches applied by the courts are conceptually inadequate, while others seem substantively unattractive. Moreover, misconstruction of the Williams case has influenced courts to reach an incorrect outcome in bad check cases.

The actual fraud standard most flexibly and comprehensively accommodates the policy objectives of section 523(a)(2)(A). Historical indications, both legislative and judicial, confirm the conclusion that the actual fraud test was what Congress intended to be used to determine the dischargeability of purported purchaser debt. There should be no formal distinction regarding whether the purported purchaser uses a check, credit card, or open line of credit to purchase goods, property, or services. Actual fraud, which

\textsuperscript{177} See, e.g., In re Hunter, 83 Bankr. 803, 804 (M.D. Fla. 1988) (issuance of check not representation of sufficient funds in account); In re Jenkins, 61 Bankr. 30, 39-40 (Bankr. D.N.D. 1986) (same); In re Hammett, 49 Bankr. 533, 534-35 (Bankr. M.D. Fla. 1985) (same).

\textsuperscript{178} See Ethridge, 80 Bankr. at 588.


\textsuperscript{180} See In re Lewsadder, 84 Bankr. 711, 714-15 (Bankr. D. Or. 1988) (citing In re Kurodoglian, 30 Bankr. 500, 502 (Bankr. 9th Cir. 1983), which did not refer to Williams).

\textsuperscript{181} See In re Pokrandt, 54 Bankr. 691, 692 (Bankr. W.D. Wis. 1985) (issuance of check with fraudulent purpose satisfies representation requirement); In re Perkins, 52 Bankr. 355, 357 (Bankr. M.D. Fla. 1985) (issuance of checks is implied representation that funds are available to honor them); In re Mullin, 51 Bankr. 377, 378 (Bankr. S.D. Ind. 1985) (same).
may be committed without any express misrepresentation, should be sufficient to deny dischargeability under section 523(a).