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Contract Claims and the “Willful and Malicious Injury” Exception to the Discharge in Bankruptcy

by

Scott F. Norberg*

I. INTRODUCTION

As is often stated, the fresh start in bankruptcy is reserved for the honest but unfortunate debtor.¹ Thus, while the discharge generally covers pre-bankruptcy debts,² it does not extend to debts for culpable misconduct by the debtor.³ The Bankruptcy Code enforces this fundamental tenet in important part through § 523(a)(6), which bars the discharge of debts for “willful and malicious injury.”⁴ Section 523(a)(6) is the most frequently litigated of the several exceptions to the discharge, with thousands of reported trial court and appellate decisions, including a Supreme Court opinion.⁵ It is a frequent battleground for defining the limits of the scope of the discharge and distinguishing debts that are honestly incurred from those that arise from culpable misconduct by the debtor.

This article focuses on whether and how § 523(a)(6) applies to claims for breach of contract. Section 523(a)(6) requires a “willful injury,” and it is well settled that an injury is willful if the debtor acted either with the purpose of causing injury or with substantial certainty that injury would result.⁶ Literally applied, this formulation of intent makes a large proportion of contract claims potentially nondischargeable; in knowingly not performing a contract,

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¹See, e.g., *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (quoting *Grogan v. Garner*, 498 U.S. 279, 287 (1991)); *Brown v. Felsen*, 442 U.S. 127, 128 (1979) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934), *Wish Acquisition, LLC v. Salvino* (*In re Salvino*), 373 B.R. 578, 591 (Bankr. N.D. Ill. 2007), *aff'd*, 2008 WL 182241 (N.D. Ill. Jan. 18, 2008).

²11 U.S.C. §§ 727(b), 1328(a), 1141(d) (2014).

³See discussion *infra* notes 15-21 and accompanying text.

⁴11 U.S.C. § 523(a)(6) (2014). Section 523(a) applies to individual debtors in both Chapter 7 cases, *id.* § 727(b), and Chapter 11 cases, *id.* § 1141(d)(2). In Chapter 13 only, certain types of debts for “willful or malicious injury” are excepted from the discharge. *Id.* § 1325(a)(4) (emphasis added).

⁵*Kawaahua v. Geiger*, 523 U.S. 57 (1998).

⁶See discussion *infra* notes 39-40 and accompanying text.

a debtor ordinarily is substantially certain that the other party will suffer injury. This reading of the statute would dramatically reduce the scope of the fresh start in bankruptcy and bar the discharge of debts for conduct that is not generally regarded as dishonest or culpable. The courts are in agreement that claims for simple knowing breach of contract are dischargeable despite § 523(a)(6),⁷ but beyond this common ground, they are divided. The case law is in disarray regarding the application of the "willful and malicious injury" exception to contract claims.

Some courts have held that tortious conduct is an essential element for nondischargeability under § 523(a)(6), categorically excluding contract claims from the ambit of the exception unless the breach is also tortious or accompanied by an independent tort.⁸ Other courts have held or simply assumed that § 523(a)(6) may apply to any type of claim, including contract claims, without articulating a viable principle for distinguishing between a simple knowing breach of contract and one that results in a willful and malicious injury.⁹

The premise of this article is that "willfulness" under § 523(a)(6) implicitly requires voluntary and affirmative conduct by the debtor as well as deliberate and intentional injury, and that this requirement of voluntary, affirmative conduct effectively ensures the discharge of claims for simple knowing breach of contract without categorically excluding all contract claims from the compass of the exception. While the terms, "willful" and "malicious," are commonly associated with intentional torts,¹⁰ and the primary application of § 523(a)(6) is to intentional torts, the statute does not expressly exclude non-tort claims. Thus, a prudent reading of the statute will be informed by tort principles, but will not categorically exclude non-tortious conduct from the scope of the exception.

Intentional torts generally require voluntary and affirmative conduct by the tortfeasor; a failure to act ordinarily cannot give rise to liability for an intentional tort.¹¹ Because § 523(a)(6) applies only to intentional and not to other torts, as the Supreme Court held in *Kawaahau v. Geiger*,¹² it follows that any tort claim that is nondischargeable under § 523(a)(6) must arise from affirmative as well as deliberate and malicious conduct. Section 523(a)(6) should likewise be read to cover contract claims if, and only if, the debtor acted voluntarily and affirmatively as well as deliberately and mali-

⁷See 4 COLLIER ON BANKRUPTCY ¶ 523.08[1][d] (Alan Resnick & Henry Sommer eds., 16th ed. 2013).

⁸See discussion *infra* notes 58, 61, 65 and 97 and accompanying text.

⁹See discussion *infra* notes 142-44 and accompanying text.

¹⁰See *Kawaahau* at 61-62 (describing how willful and malicious injuries are often associated with tort claims).

¹¹See discussion *infra* notes 125-28 and accompanying text.

¹²523 U.S. 57 (1998) (holding that § 523(a)(6) requires intent to injure, and thus does not cover claims arising from conduct that is merely negligent or reckless).

ciously in breaching a contract. Mere nonperformance of a contract, even if specifically intended to harm the other party, would not give rise to a nondischargeable debt under § 523(a)(6). This reading of the statute parallels its application to debts for intentional torts, while remaining faithful to the text, and furthers the purpose of the statute to bar the discharge of debts for culpable misconduct by the debtor.

As a practical matter, reading § 523(a)(6) as implicitly requiring voluntary and affirmative conduct will mean that the vast majority of contract claims will be dischargeable under the statute. On the other hand, nondischargeable contract claims will likely include claims for breach of a covenant not to compete and claims for failure to remit funds from a specified source. Whereas the vast majority of claims for breach of contract involve no voluntary, affirmative conduct by the debtor, the breach of a noncompetition agreement typically involves more than mere nonperformance of a contract obligation. Likewise, the failure to pay funds from a designated source may also involve voluntary, affirmative conduct that causes a willful and malicious injury.

There are numerous scenarios in which courts have considered whether a contract claim was nondischargeable under § 523(a)(6).¹³ These cases usually involve one of three types of contracts: covenants not to compete; agreements to pay an obligation from a designated source of funds; and home construction or renovation contracts.¹⁴ Consistent with this paper's thesis that "willfulness" requires conduct that is voluntary and affirmative as well as deliberate and intentional, courts have repeatedly found debts for violation of a covenant not to compete and for misappropriation of earmarked funds to be nondischargeable. On the other hand, most courts have ruled that debts for breach of a construction or renovation contract are dischargeable. These cases almost invariably involve mere nonperformance and simple breaches of contract.

Part II of this article provides an overview of § 523(a)(6). It includes an analysis of the structure of the statute, in particular in the context of the several provisions that limit the discharge in bankruptcy to honest but unfortunate debtors. It further outlines the tests for "willful and malicious" injury. Part III catalogs the split among the circuit courts of appeal on whether tortious conduct is an essential element for nondischargeability under § 523(a)(6). Part IV frames the central dilemma of interpreting § 523(a)(6) so as to exclude claims for mere knowing breach of contract, while not categorically excluding all contract claims that arise from culpable misconduct by the debtor. It examines five possible approaches to the issue, including the

¹³See, e.g., cases cited *infra* notes 142-46.

¹⁴See cases cited *infra* notes 148-89 and accompanying text.

premise that § 523(a)(6) requires voluntary, affirmative conduct by the debtor. Part V is a brief conclusion. Finally, the article also includes an Appendix that scrutinizes the opinions of appellate courts in each circuit on whether § 523(a)(6) requires tortious conduct as an element of the exception to discharge.

II. OVERVIEW OF SECTION 523(A)(6)

A. DEBTOR MISCONDUCT AND THE DISCHARGE

Section 523(a)(6) is one of several Bankruptcy Code provisions that together operate to limit the discharge to "honest" debtors and "honestly" incurred debts.¹⁵ In Chapter 7, § 727(a) bars the discharge of all pre-bankruptcy debts when the debtor has behaved dishonestly in connection with the bankruptcy case itself,¹⁶ while § 523(a) precludes the discharge of certain categories of debts, owed to a particular creditor, including debts for "willful and malicious injury" and other debts for dishonest or other culpable misconduct.¹⁷ In Chapter 13, § 1328(a),¹⁸ like § 523(a), bars the discharge of particular types of debts, including certain debts for "willful or malicious injury" and various other debts resulting from culpable misconduct by the debtor.¹⁹ In both Chapter 7 and Chapter 13, the Code further limits relief to

¹⁵See generally *Bundy American Corp. v. Blankfort* (*In re Blankfort*), 217 B.R. 138, 144 (Bankr. S.D.N.Y. 1998) (explaining that "[t]he cases in which courts denied requests for non-dischargeability under § 523(a)(6) have as a common theme that persons of honest character could have committed the acts or mistakes which led to legal liability.").

¹⁶11 U.S.C. § 727(a)(2)-(12). These types of debts are also nondischargeable in any future bankruptcy case filed by the debtor. See 11 U.S.C. § 523(a)(10) (excepting from discharge any debt "that was or could have been listed . . . in a prior case concerning the debtor . . . in which the debtor waived discharge, or was denied a discharge").

¹⁷In addition to debts for willful and malicious injury, § 523(a) bars the discharge of debts for fraud, 11 U.S.C. § 523(a)(2) (covering debts "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud"), § 523(a)(4) (covering debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny"), § 523(a)(11) (covering debts "arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union"); § 523(a)(7) (covering debts "for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit"); § 523(a)(9) (covering debts "for death or personal injury caused by the debtor's operation of a motor vehicle, vessel or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance"); § 523(a)(12) (covering debts for malicious or reckless failure to fulfill a commitment to a federal depository institution regulatory agency to maintain required capital); § 523(a)(13) (covering debts for payment of an order of restitution for a bankruptcy crime under title 18 of the United States Code); and § 523(a)(19) (covering debts for violation of federal or state securities laws). Pursuant to Code § 523(c), claims under § 523(a)(2), (4) and (6) are discharged unless the creditor files a complaint objecting to dischargeability in the bankruptcy case and the bankruptcy court determines the debt nondischargeable. All other § 523(a) claims survive the discharge without a determination by the bankruptcy court. 11 U.S.C. § 523(c).

¹⁸11 U.S.C. § 1328(a).

¹⁹The scope of the discharge in Chapter 13 is somewhat broader than in Chapter 7. Compare 11 U.S.C. § 523(a) (listing debts that are nondischargeable in Chapter 7 and 11 cases) with 11 U.S.C.

honest but unfortunate debtors by providing for the dismissal of cases for cause²⁰ or abuse of bankruptcy laws.²¹

Section 523(a)(6) is potentially applicable in a much broader range of cases than any of the other exceptions to the discharge, thus explaining the frequency with which it is litigated. Whereas most of the other exceptions are confined to particular types of claims, for example, fraud, larceny, or driving under the influence,²² § 523(a)(6) on its face covers any type of claim, as long as it is for a willful and malicious injury.²³ Thus, § 523(a)(6) appears to be a catch-all provision. A creditor who believes that its claim arises from some misconduct on the part of the debtor, but which claim does not fall within any of the other exceptions to discharge, often seeks a nondis-

§ 1328(a) (listing debts that are nondischargeable in Chapter 13 cases). In addition, certain debts for “willful or malicious injury” and certain debts that are included in a sentence for a criminal conviction are nondischargeable in Chapter 13. *Id.* § 1328(a)(4) (debts “for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or death of an individual”) and § 1328(a)(3) (debts “for restitution, or a criminal fine, included in a sentence on the debtor’s conviction of a crime”). There is no counterpart to § 727(a) in Chapter 13 that would prevent discharge of all debts if the debtor has been dishonest in connection with the case itself, but Chapter 13, like Chapter 7, permits dismissal of a case for “cause,” including bad faith. *Id.* § 1307(c). See *infra* note 20 and accompanying text.

²⁰See §§ 707(a), 1307(c) (indicating that “cause” includes bad faith). See *Piazza v. Nueterra Healthcare Physical Therapy, LLC* (*In re Piazza*), 719 F.3d 1253, 1271-74 (11th Cir. 2013) (affirming dismissal of Chapter 7 case based on totality of the circumstances where debtor filed bankruptcy to avoid paying a large single debt, while continuing to pay the debts of insiders; failed to make life-style adjustments despite his debts; and failed to pay creditors although he had the wherewithal to pay a portion of his debts); *Industrial Ins. Svcs. v. Zick* (*In re Zick*), 931 F.2d 1124, 1129 (6th Cir. 1991) (holding that “[d]ismissal based on lack of good faith must be undertaken on an *ad hoc* basis” and that it “is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence”).

²¹See § 707(b) (describing how “abuse” may be grounds for dismissal of a Chapter 7 case where the debtor can afford to repay a meaningful amount of unsecured debt in a Chapter 13 case).

²²See *supra* note 17 (listing debts that are nondischargeable because they arise from debtor misconduct).

²³Nonbankruptcy law governs whether the claimant holds a claim, see 11 U.S.C. § 502(b)(1) (providing that the bankruptcy court shall allow a claim “except to the extent that such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured”), while bankruptcy law determines whether that claim is for a willful and malicious injury, see 11 U.S.C. § 523(a)(6). A creditor pursuing collection of its claim before bankruptcy need not prove a willful and malicious injury in the nonbankruptcy forum in order to assert an objection to the dischargeability of that debt under § 523(a)(6) in a subsequent bankruptcy proceeding. See *Brown v. Felsen*, 442 U.S. 127, 134-38 (1979) (holding that creditor was not required to prove willful and malicious injury in prebankruptcy debt collection action in order to have its debt determined nondischargeable in subsequent bankruptcy proceeding). Thus, for example, in *Banks v. Gill Distribution Centers, Inc.*, 263 F.3d 862 (9th Cir. 2001), the court held that a claim was nondischargeable under § 523(a)(6) where the debtor had converted the creditor’s collateral, although before bankruptcy the creditor had obtained judgment against the debtor in contract for breach of the security agreement, not in tort for conversion (and indeed had not filed its action to determine the debt nondischargeable until after the tort statute of limitations had run).

chargeability determination under § 523(a)(6) as a last resort to prevent the discharge of its claim in bankruptcy.²⁴ Also, § 523(a)(6) potentially overlaps with other exceptions to discharge, for example, the exceptions for fraud and embezzlement,²⁵ so that creditors frequently include counts under both § 523(a)(6) and another exception to discharge.

B. WILLFUL AND MALICIOUS INJURY: THE BASIC STANDARDS

It is generally accepted that “willful” and “malicious” are separate and distinct requirements for nondischargeability under § 523(a)(6).²⁶

1. Willful Injury

*Kawaahau v. Geiger*²⁷ is the most significant decision addressing the meaning of “willful” in Code § 523(a)(6). Before *Geiger*, courts were split on whether the § 523(a)(6) exception requires an intentional injury, or whether debts for intentional acts that result in negligent or reckless injuries qualified for the exception.²⁸ In *Geiger*, the Supreme Court held that the exception

²⁴See, e.g., *Liddell v. Peckham* (*In re Peckham*), 442 B.R. 62 (Bankr. D. Mass. 2010) (creditor's complaint sought exception to discharge under both § 523(a)(2)(A) (actual fraud) and § 523(a)(6) (willful and malicious injury; bankruptcy court entered judgment for the creditor on the actual fraud count and judgment for the debtor on the willful and malicious injury count). See also George H. Singer, Section 523 of the Bankruptcy Code: The Fundamentals of Nondischargeability in Consumer Bankruptcy, 71 AM. BANKR. L. J. 325, 375-76 (1997) (stating that § 523(a)(6) “is often relied upon by creditors as a catch-all for redressing alleged wrongs that do not fit squarely into any other provision.”).

²⁵11 U.S.C. § 523(a)(2) (excepting from discharge certain debts incurred through false pretenses, a false representation, or actual fraud); id. § 523(a)(4) (excepting from discharge debts “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny”).

²⁶See, e.g., *Geiger*, 523 U.S. 57 (focusing exclusively on the willfulness prong of § 523(a)(6)); *Tinker v. Colwell*, 193 U.S. 473, 485 (1904) (adverting to “an injury . . . which is both malicious and willful”); *Sells v. Porter* (*In re Porter*), 539 F.3d 889 (8th Cir. 2008) (showing a case of willful and malicious conduct under § 523(a)(6) that resulted in exception from discharging judgment debt from a sexual harassment case); *Blocker v. Patch* (*In re Patch*), 526 F.3d 1176, 1180 (8th Cir. 2008) (determining that “[t]o establish that a debt is nondischargeable consistent with this exception, the party seeking to prevent discharge must show by a preponderance of the evidence that the debt is for both” willful and malicious injury); *Fischer v. Scarborough* (*In re Scarborough*), 171 F.3d 638, 641 (8th Cir. 1999) (asserting that “[w]illful and malicious are two distinct requirements”); *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 463 (6th Cir. 1999) (describing willful injury as one in which debtor wants to cause a consequence or could guess consequences would result from his actions); *Monsanto Co. v. Trantham* (*In re Trantham*), 304 B.R. 298 (6th Cir. B.A.P. 2004) (holding that the debtor's debt to the patent holder was the result of willful injury). See also 11 U.S.C. § 1328(a)(4) (excepting from the discharge in Chapter 13 certain debts for “willful or malicious injuries” (emphasis added)); 11 U.S.C. § 523(a)(12) (excepting from the discharge certain debts for “malicious or reckless” acts); H.R.REP. NO. 95-595 at 365 (1977), U.S.Code Cong. & Admin. News at 5963, 6320 (separately addressing the willfulness requirement, stating that “[u]nder [§ 523(a)(6)], ‘willful’ means deliberate or intentional”); and S.REP. NO. 95-989 at 79 (1978), U.S.Code Cong. & Admin. News at 5787, 5864 (addressing separately the willfulness requirement, stating that “[u]nder [§ 523(a)(6)], ‘willful’ means deliberate or intentional”). But see *Miller v. J.D. Abrams, Inc.* (*In re Miller*), 156 F.3d 598 (5th Cir. 1998) (holding that after *Geiger*, willfulness and malice constitute a unitary standard under § 523(a)(6)).

²⁷523 U.S. 57 (1998).

²⁸*Id.* at 60.

covers only “acts done with the actual intent to cause injury.”²⁹ The creditors, Mr. and Mrs. Kawaauhau, held a state court judgment for medical malpractice against the debtor, Dr. Geiger, arising from medical treatment that the bankruptcy court found was “far below the appropriate standard of care and therefore ranked as ‘willful and malicious.’”³⁰ Mrs. Kawaauhau sought treatment for a foot injury, and as a result of Geiger’s malpractice, her foot ultimately had to be amputated.³¹ Geiger’s conduct was negligent if not reckless, but he did not act with the intent to injure Mrs. Kawaauhau.³²

The Court took a plain meaning approach to the issue, reasoning that “willful” means “deliberate or intentional,”³³ and that “[t]he word ‘willful’ in § 523(a)(6) modifies the word ‘injury.’”³⁴ The Court agreed with the eighth circuit’s observation in the decision below that “the (a)(6) formulation triggers in the lawyer’s mind the category ‘intentional torts,’ as distinguished from negligent or reckless torts.” Quoting from the Restatement (Second) of Torts’ discussion of intent, the Court explained that “[i]ntentional torts generally require that the actor intend ‘the consequences of an act,’ not simply ‘the act itself.’”³⁵

²⁹*Id.* at 61.

³⁰*Id.* at 60.

³¹*Id.* at 59.

³²*Id.* at 61. The bankruptcy court ruled that the debt was nondischargeable because Dr. Geiger’s repeated “egregious errors” of judgment in treating Mrs. Kawaauhau evidenced an extreme “disregard of acceptable medical practice.” 172 B.R. 916, 923 (1994) (quoting *Perkins v. Scharffe*, 817 F.2d 392, 394 (6th Cir. 1987)), *rev’d*, 113 F.3d 848 (8th Cir. 1997) (en banc rehearing), *aff’d*, 523 U.S. 57 (1998). The district court affirmed the bankruptcy court, and the eighth circuit, first in a panel decision, 93 F.3d 443 (8th Cir. 1996), and then on rehearing en banc, 113 F.3d 848 (8th Cir. 1997), reversed the district court. The eighth circuit reasoned that a debt cannot be nondischargeable under § 523(a)(6) unless it is based on an intentional tort where the “actor ‘desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it.’” 113 F.3d 848, 852 (quoting RESTATEMENT (SECOND) OF TORTS § 8A, comment a, at 15 (1965)).

³³As support for this proposition, the Court did not cite the Congressional reports accompanying the enactment of Code § 523(a)(6). The House Report states that “[u]nder this paragraph, ‘willful’ means deliberate or intentional. To the extent that *Tinker* held that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a ‘reckless disregard’ standard, they are overruled.” H.R. REP. NO. 95-595, at 365 (1977), U.S. Code Cong. & Admin. News at 5963, 6320. The Senate report included a nearly identical statement. See S. REP. NO. 95-989, at 79 (1978), U.S. Code Cong. & Admin. News at 5787, 5864.

³⁴The ninth circuit once made the point this way: “[The creditor] would interpret [the statute] essentially to include all acts that are not involuntary. This is wrong. ‘Willful’ refers to state of mind, not to motor control.” *Industrie Aeronautiche E. Meccaniche Rinaldo Piaggio S.p.A. v. Kasler* (*In re Kasler*), 611 F.2d 308, 310 n.5 (9th Cir. 1979) (construing § 17(a)(8) of the Bankruptcy Act, the predecessor of § 523(a)(6)).

³⁵*Geiger*, 523 U.S. at 61-62 (quoting RESTATEMENT (SECOND) OF TORTS § 8A, cmt. a, at 15 (1964)). Thus, *Geiger* does not eliminate the requirement that the debtor act intentionally, and substitute the requirement that the debtor have an intent to injure. Rather, it adds the latter to the former, so that it must be shown that the debtor acted voluntarily and intentionally so as to cause harm, and that in so acting, the debtor intended to cause harm.

The Court further reasoned that the creditors' broad interpretation of § 523(a)(6) could extend the exception to a wide range of cases in which the act was intentional but the injury was not. "Every traffic accident stemming from an initial intentional act—for example, intentionally rotating the wheel of an automobile to make a left-hand turn without first checking oncoming traffic—could fit within the description."³⁶ The Court further observed, "[a] 'knowing breach of contract' could also qualify" for nondischargeability under the plaintiffs' interpretation,³⁷ clearly suggesting that contract claims, like negligence claims, fall outside the scope of the exception.³⁸

The Supreme Court in *Geiger* ruled that § 523(a)(6) applies to "acts done with the actual intent to cause injury,"³⁹ but the Court did not elaborate on what it means for a debtor to intend to cause injury. Following the Restatement (Second) of Torts' formulation of intent, all of the post-*Geiger* circuit courts of appeal and bankruptcy appellate panel decisions to address the question have held that "willfulness" means conduct that is substantially certain to cause injury.⁴⁰ Thus, the requirement in *Geiger* that the debtor intended

³⁶*Id.* at 62.

³⁷*Id.*

³⁸The Court also reasoned that the broad interpretation of § 523(a)(6) would obviate another of the exceptions to the discharge, namely § 523(a)(9), *see* 11 U.S.C. § 523(a)(9) (excepting debts for death or personal injury caused by driving unlawfully under the influence of alcohol or drugs).

³⁹*Id.* at 61.

⁴⁰*See In re Granoff*, 250 Fed. Appx. 494, 495-496 (3d Cir. 2007); *Conte v. Gautam (In re Conte)*, 33 F.3d 303 (3d Cir. 1994) (predating but fully consistent with *Geiger*); *Parsons v. Parks*, 91 Fed. Appx. 817 (4th Cir. 2003) (unpublished opinion); *Miller v. J.D. Abrams, Inc. (In re Miller)*, 156 F.3d 598 (5th Cir. 1998); *Berry v. Vollbracht (In re Vollbracht)*, 276 Fed. Appx. 360 (5th Cir. 2007); *Raspanti v. Keaty (In re Keaty)*, 397 F.3d 264 (5th Cir. 2005); *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 435 (6th Cir. 1999); *Sanderson Farms, Inc. v. Gasbarro*, 299 Fed. Appx. 499 (6th Cir. 2008); *Kowalski v. Romano (In re Romano)*, 59 Fed. Appx. 709 (6th Cir. 2003); *Kennedy v. Mustaine (In re Kennedy)*, 249 F.3d 576 (6th Cir. 2001); *Monsanto Company v. Trantham (In re Trantham)*, 304 B.R. 298 (6th Cir. B.A.P. 2004); *The Spring Works, Inc. v. Sarff (In re Sarff)*, 242 B.R. 620 (6th Cir. B.A.P. 2000); *Geiger v. Kawaahau (In re Geiger)*, 113 F.3d 848 (8th Cir. 1997), *aff'd*, 523 U.S. 55 (1998); *Blocker v. Patch (In re Patch)*, 526 F.3d 1176, 1180 (8th Cir. 2008); *Sells v. Porter (In re Porter)*, 529 F.3d 889, 894 (8th Cir. 2008); *Ormsby v. First Am. Title Co. of Nev.*, 591 F.3d 1199 (9th Cir. 2010); *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702 (9th Cir. 2008); *Ditto v. McCurdy*, 510 F.3d 1070 (9th Cir. 2007); *Quinn v. Barry (In re Barry)*, 138 Fed. Appx. 898 (9th Cir. 2005); *Carillo v. Su (In re Su)*, 290 F.3d 1140 (9th Cir. 2002); *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202 (9th Cir. 2001); *Peklar v. Ikerd (In re Peklar)*, 260 F.3d 1035 (9th Cir. 2001); *Jones v. Svreck (In re Jones)*, 300 B.R. 133 (1st Cir. B.A.P. 2003); *Oney v. Weinberg (In re Weinberg)*, 410 B.R. 19 (9th Cir. B.A.P. 2009); *Maaskant v. Peck (In re Peck)*, 295 B.R. 343 (9th Cir. B.A.P. 2003); *Thiara v. Spycher Brothers (In re Thiara)*, 285 B.R. 420 (9th Cir. B.A.P. 2002); *Berrien v. Van Vuuren (In re Berrien)*, 280 Fed. Appx. 762 (10th Cir. 2008); *Panalis v. Moore (In re Moore)*, 357 F.3d 1125 (10th Cir. 2004); *Mitsubishi Motors Credit of Am., Inc. v. Longley (In re Longley)*, 235 B.R. 651 (10th Cir. B.A.P. 1999); *Hope v. Walker (In re Walker)*, 48 F.3d 1161 (11th Cir. 1995) (predating but fully consistent with *Geiger*).

Several bankruptcy courts have held that actual intent to injure is required, and that knowledge that injury is certain or substantially certain is not sufficient. *See Rescuecom Corp. v. Khafaga (In re Khafaga)*, 419 B.R. 539, 549 (Bankr. E.D.N.Y. 2009) (reviewing cases holding that § 523(a)(6) does not require specific intent to injure and cases holding that § 523(a)(6) requires specific intent to injure).

to cause injury entails two alternative inquiries: whether the debtor acted with (1) actual, subjective intent to cause injury, or (2) certainty or substantial certainty that injury would result from his conduct.

There is some disagreement among the circuit courts of appeal on whether the second inquiry is subjective or objective. The sixth,⁴¹ eighth,⁴² ninth,⁴³ tenth⁴⁴ and eleventh⁴⁵ circuits have stated that both of the inquiries regarding intent are subjective. One circuit court of appeals, the fifth, has adopted the objective standard regarding whether the debtor's conduct was substantially certain to cause injury.⁴⁶ The question is still undecided in the

⁴¹See *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 464 (6th Cir. 1999) (holding that "unless the 'actor desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it' (quoting RESTATEMENT (SECOND) OF TORTS § 8A, at 15 (1964)), he has not committed a 'willful and malicious injury' as defined under § 523(a)(6)"; *Sanderson Farms, Inc. v. Gasbarro*, 299 Fed. Appx. 499, 504 (6th Cir. 2008) (reiterating *Markowitz*); *Kowalski v. Romano* (*In re Romano*), 59 Fed. Appx. 709, 715 (6th Cir. 2003) (reiterating *Markowitz*); *Kennedy v. Mustaine* (*In re Kennedy*), 249 F.3d 576, 581 (6th Cir. 2001) (reiterating *Markowitz*); *Monsanto Company v. Trantham* (*In re Trantham*), 304 B.R. 298, 304 (6th Cir. B.A.P. 2004) (reiterating *Markowitz*); *The Spring Works, Inc. v. Sarff* (*In re Sarff*), 242 B.R. 620, 626 (6th Cir. B.A.P. 2000) (reiterating *Markowitz*).

⁴²*Geiger v. Kawaahau* (*In re Geiger*), 113 F.3d at 852-53 (8th Cir. 1997), *aff'd*, 523 U.S. 55 (1998) (holding that debt for medical malpractice was dischargeable, the court reasoned that "[t]here is nothing in the record . . . that would support a finding that Dr. Geiger believed that it was substantially certain that his patient would suffer harm") (emphasis in original); *Blocker v. Patch* (*In re Patch*), 526 F.3d 1176, 1180-81 (8th Cir. 2008) (citing 8th circuit decision in *Geiger*, stating that "the 'willful' element is a subjective inquiry, requiring proof that the debtor desired to bring about the injury or was in fact substantially certain that his conduct would result in the injury that occurred"); *Sells v. Porter* (*In re Porter*), 539 F.3d 889, 894 (8th Cir. 2008) (reiterating *Patch*).

⁴³*Ormsby*, 591 F.3d at 1206-07 (articulating a subjective standard, but applying an objective standard; the debtor argued that a state court judgment for conversion and misappropriation of proprietary information did not preclude discharge of the debt because the state court refused a finding that the debtor subjectively intended to injure the plaintiff, and the court rejoined that the debtor "must have known" that injury was substantially certain to result from his conduct); *Ditto v. McCurdy*, 510 F.3d 1070, 1078 (9th Cir. 2007); *Quinn v. Barry* (*In re Barry*), 138 Fed. Appx. 898, 899 (9th Cir. 2005); *Carillo v. Su* (*In re Su*), 290 F.3d 1140, 144-45 (9th Cir. 2002); *Petralia v. Jercich* (*In re Jercich*), 238 F.3d 1202, 1208 (9th Cir. 2001) (discussing and approving the subjective standard for determining whether debtor knew that his conduct was substantially certain to cause injury); *Oney v. Weinberg* (*In re Weinberg*), 410 B.R. 19, 37 (9th Cir. B.A.P. 2009); *Maaskant v. Peck* (*In re Peck*), 295 B.R. 353, 364-65 (9th Cir. B.A.P. 2003); *Thiara v. Spycher Brothers* (*In re Thiara*), 285 B.R. 420, 427 (9th Cir. B.A.P. 2002).

⁴⁴*Panalis v. Moore* (*In re Moore*), 357 F.3d 1125, 1129 (10th Cir. 2004) (citing *In re Longley*); *Berrien v. Van Vuuren* (*In re Berrien*), 280 Fed. Appx. 762, 766 (10th Cir. 2008) (reiterating *Moore*); *Mitsubishi Motors Credit of America, Inc. v. Longley* (*In re Longley*), 235 B.R. 651, 657 (10th Cir. B.A.P. 1999) (quoting RESTATEMENT (SECOND) OF TORTS § 8A).

⁴⁵*Hope v. Walker* (*In re Walker*), 48 F.3d 1161, 1165 (11th Cir. 1995) (predating but fully consistent with *Geiger*).

⁴⁶*Berry v. Vollbracht* (*In re Vollbracht*), 276 Fed. Appx. 360, 361-62 (5th Cir. 2007) (reiterating *Miller* formulation); *Raspanti v. Keaty* (*In re Keaty*), 397 F.3d 264, 270 (5th Cir. 2005) (reiterating *Miller* formulation); *Williams v. International Brotherhood of Electrical Workers Local 520*, 337 F.3d 504, 508-509 (5th Cir. 2003) (reiterating *Miller* formulation); *Miller v. J.D. Abrams, Inc.* (*In re Miller*), 156 F.3d 598, 606 (5th Cir. 1998) (holding that "an injury is willful if the debtor subjectively intended to cause injury, or if injury was objectively substantially certain to result from the debtor's conduct.").

first,⁴⁷ second, third,⁴⁸ fourth, and seventh circuits.

2. Malicious Injury

In most circuits, the definition of the term "malicious" is derived from the Supreme Court's decision over 100 years ago in *Tinker v. Colwell*.⁴⁹ While Geiger appears to address only willfulness, *Tinker* is almost entirely concerned with malice. The core holding in *Tinker* is that "malice" does not mean special malice toward the claimant specifically or personally, and that malice may be implied from the debtor's conduct. Accordingly, the Court held that the plaintiff's judgment based on the debtor's tortious criminal conversation with plaintiff's wife was nondischargeable, although the debtor presumably harbored no personal animus toward the plaintiff, just an attraction to his wife. Thus, the holding in *Tinker* is a negative statement of what malice is not. However, in discussing what malice is not, the court quoted or summarized the definitions of malice given in several other cases,⁵⁰ and thus a

⁴⁷*Roumeliotis v. Popa (In re Popa)*, 140 F.3d 317, 318 (1st Cir. 1998); *Jones v. Svreck (In re Jones)*, 300 B.R. 133, 140 (1st Cir. B.A.P. 2003).

⁴⁸*In re Granoff*, 250 Fed. Appx. 494, 495-96 (3d Cir. 2007) (opinion not for publication) (not addressing the question, but suggesting that the court would follow the prevailing, subjective approach); *Conte v. Gautam (In re Conte)*, 33 F.3d 303 (3d Cir. 1994) (not addressing the question, but suggesting that the court would follow the prevailing, subjective approach).

⁴⁹193 U.S. 473 (1904). The Congressional reports that accompanied enactment of the Bankruptcy Code in 1978 raise a question whether § 523(a)(6) overruled *Tinker*. The House Report states that "[u]nder this paragraph, 'willful' means deliberate or intentional. To the extent that *Tinker* held that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a 'reckless disregard' standard, they are overruled." H.R. REP. NO. 95-595, p. 365 (1977), U.S. Code Cong. & Admin. News at 5963, 6320. The Senate report included a nearly identical statement. See S. REP. NO. 95-989, at 79 (1978), U.S. Code Cong. & Admin. News at 5787, 5864. These statements are inconsistent with the fact that Congress carried over the exception from § 17a of the former Bankruptcy Act with no substantive changes. (In 1970, Congress established a Commission on the Bankruptcy Laws of the United States to study the bankruptcy laws and make recommendations for reform, Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468. The Commission proposed no substantive changes to the exception as it existed under § 17a of the Bankruptcy Act of 1898). See H.R. DOC. 137, pt. I, at 136-37, 139, 176, 93d Cong. 1st Sess. (1973). The willful and malicious injury provision was 4-506(a)(7), and the Code incorporated the exception essentially as drafted by the Commission. *Id.* at 136-37, 139, 176. Further, if taken literally, the reports make little sense; *Tinker* was primarily concerned with the malice requirement, while the reports address the meaning of the willfulness requirement. Moreover, *Tinker* itself stated that the willfulness requirement meant an intentional and voluntary act. Perhaps, as Professor Tabb has written, "[t]he fairest reading of the intent of the language in the committee reports is that Congress was directing . . . courts to stop misapplying *Tinker*." See Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 78 (1990). Several courts have stated that Congress intended to overrule *Tinker* in regard to willfulness, but not as to malice. See *Hagan v. McNallen (In re McNallen)*, 62 F.3d 619 (4th Cir. 1995); *Conte v. Gautam (In re Conte)*, 33 F.3d 303 (3d Cir. 1994). (Several circuit courts mentioned this legislative history when, before *Geiger*, they adopted the more restrictive standard for willfulness later approved by *Geiger*. The Supreme Court in *Geiger*, however, did not refer to the language in the House and Senate Reports that purports to overrule *Tinker*.)

⁵⁰The three cases are: *Bromage v. Prosser*, 4 Barnwell & Cresswell 247, 107 E.R. 1051 (1825); *In re Freche*, 109 F. 620 (D.N.J. 1901); and *United States v. Reed*, 86 F. 308, 312 (C.C.N.Y. 1897).

positive definition of malice can be gleaned from these expositions. Excluding the aspects of this definition that duplicate the willfulness prong of the statute as defined in *Geiger*, *Tinker* stands for the proposition that "malice" is conduct that is "wrongful" and "without just cause or excuse." In fact, most of the circuit courts have defined malice in this way.⁵¹

⁵¹The first, *Printy v. Dean Witter Reynolds, Inc.*, 110 F.3d 853 (1st Cir. 1997); *Jones v. Svreck* (*In re Jones*), 300 B.R. 133 (1st Cir. B.A.P. 2003); second, *Ball v. A. O. Smith Corp.*, 451 F.3d 66, 69 (2d Cir. 2002); *Navistar Financial Corp. v. Stelluti* (*In re Stelluti*), 94 F.3d 84 (2d Cir. 1996); and third, *Conte v. Gautam* (*In re Conte*), 33 F.3d 303 (3d Cir. 1994); *Laganella v. Braen* (*In re Braen*), 900 F.2d 621 (1990) circuits have stated a standard for malice that is readily traced to *Tinker*, that an act is "malicious" if it was "wrongful and without just cause or excuse, even in the absence of hatred, spite or ill-will." The sixth, *Monsanto Company v. Trantham* (*In re Trantham*), 304 B.R. 298 (6th Cir. B.A.P. 2004); *Gonzalez v. Moffitt* (*In re Moffitt*), 252 B.R. 916 (6th Cir. B.A.P. 2000); and seventh, *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994) (quoting *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986) (relying on *Tinker v. Colwell*) circuits have articulated a standard that is closely similar to that of the first, second and third circuits: "malicious means in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent." Likewise, the eleventh circuit has stated that "malicious" means "wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will." *Lee v. Ikner* (*In re Ikner*), 883 F.2d 986 (11th Cir. 1989); *Chrysler Credit Corp. v. Rebhan*, 842 F.2d 1257 (11th Cir. 1988); *Hope v. Walker* (*In re Walker*), 48 F.3d 1161 (11th Cir. 1995). The ninth circuit uses a four-part test that also incorporates the *Tinker* definition: "[a] malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." See *Ormsby v. First Am. Title Co. of Nev.*, 591 F.3d 1199, 1207 (9th Cir. 2010); *Barboza v. New Form, Inc.* (*In re Barboza*), 545 F.3d 702 (9th Cir. 2008); *Jett v. Sicroff* (*In re Sicroff*), 401 F.3d 1101, 1105-06 (9th Cir. 2005); *Carillo v. Su* (*In re Su*), 290 F.3d 1140, 1146-47 (9th Cir. 2002); *Petralia v. Jercich* (*In re Jercich*), 238 F.3d 1202, 1209 (9th Cir. 2001); *Murray v. Bammer* (*In re Bammer*), 131 F.3d 788 (9th Cir. 1997); *Suarez v. Barrett* (*In re Suarez*), 400 B.R. 732 (9th Cir. B.A.P. 2009); *Maaskant v. Peck* (*In re Peck*), 295 B.R. 353 (9th Cir. B.A.P. 2003); *Thiara v. Spycher Brothers* (*In re Thiara*), 285 B.R. 420, 433 (9th Cir. B.A.P. 2002); *Nahman v. Jacks* (*In re Jacks*), 266 B.R. 728, 743 (9th Cir. B.A.P. 2001). The fifth circuit is alone in holding explicitly that "willful and malicious" constitute a unitary standard. *Miller v. J.D. Abrams Inc.* (*In re Miller*), 156 F.3d 598 (5th Cir. 1998). The fourth, eighth and tenth circuits appear to have not-quite explicitly adopted a standard for malice that is subsumed by willfulness as defined in *Geiger*. The fourth circuit has not considered malice since *Geiger*, but in its most recent consideration of the subject, stated that "malice" entails "a subjective, knowing disregard of the creditor's rights." *St. Paul Fire & Marine Ins. Co. v. Vaughn* (*In re Vaughn*), 779 F.2d 1003 (4th Cir. 1985); *Hagan v. McNallen* (*In re McNallen*), 62 F.3d 619 (4th Cir. 1995); *Maryland v. Stanley* (*In re Stanley*), 66 F.3d 664 (4th Cir. 1995). The tenth circuit has stated that "'malicious' requires proof 'that the debtor either intend the resulting injury or intentionally take action that is substantially certain to cause the injury.'" *Dorr, Bentley & Pecha, CPAs, P.C. v. Pasek* (*In re Pasek*), 983 F.2d 1524 (10th Cir. 1993); *Panalis v. Moore* (*In re Moore*), 357 F.3d 1125 (10th Cir. 2004). The eighth circuit states that conduct is malicious when it is "'targeted at the creditor . . . at least in the sense that the conduct is certain or almost certain to cause . . . harm to the creditor.'" This standard evolved from a standard that required special malice, but this current formulation includes an alternative to special malice that is subsumed by the willfulness standard of *Geiger*. See *Sells v. Porter* (*In re Porter*), 539 F.3d 889, 894 (8th Cir. 2008); *Siemer v. Nangle* (*In re Nangle*), 274 F.3d 481, 484 (8th Cir. 2001); *Hobson Mould Works, Inc. v. Madsen* (*In re Madsen*), 195 F.3d 988, 989 (1999); *Fischer v. Scarborough* (*In re Scarborough*), 171 F.3d 638, 641 (8th Cir. 1999), *cert. denied*, 528 U.S. 931 (1999); *Waugh v. Eldridge* (*In re Waugh*), 95 F.3d 706, 711 (8th Cir. 1996); *Johnson v. Miera* (*In re Miera*), 926 F.2d 741, 743-44 (8th Cir. 1991); *Barclays Am. Bus. Credit, Inc. v. Long* (*In re Long*), 774 F.2d 875, 881 (8th Cir. 1985); *Jamrose v. D'Amato* (*In re D'Amato*), 341 B.R. 1, 4-5 (8th Cir. B.A.P. 2006); *Osborne v. Stage* (*In re Stage*), 321 B.R. 486, 493 (8th B.A.P. 2005); *Johnson v. Fors* (*In re Fors*),

3. *The Legislative History of Section 523(a)(6) as it Relates to Contract Claims*

The legislative history of the various versions of the "willful and malicious injury" exception to the discharge over the course of the history of American bankruptcy law sheds scant light on the question whether the statute covers claims for breach of contract. The exception was first enacted as § 17a(2) of the Bankruptcy Act of 1898,⁵² and there was no explanation of the provision in the accompanying Congressional report.⁵³ The Bankruptcy Act of 1978 (the Code) incorporated the willful and malicious injury exception without any substantive changes to the text of § 17a(2).⁵⁴ The Congressional reports accompanying the Code state that the enactment of § 523(a)(6) abrogated pre-Code law regarding the meaning of "willfulness,"⁵⁵ but did not touch on whether the exception applied to contract claims or was limited to tort claims. As discussed in more detail below,⁵⁶ the absence of any

259 B.R. 131, 136 (8th Cir. B.A.P. 2001); *Johnson v. Logue (In re Logue)*, 294 B.R. 59, 63 (8th Cir. B.A.P. 2003).

⁵²Section 17a(2) of the Bankruptcy Act of 1898 provided, in relevant part: "a discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (2) are judgments . . . for willful and malicious injuries to the person or property of another." An Act to establish a uniform system of bankruptcy throughout the United States, ch. 541, § 17a(2), 30 Stat. 544, 550 (repealed 1978).

⁵³See H. REP. NO. at 65, 55th Cong., 2d Sess. (accompanying S. 1035) (Dec. 16, 1897).

⁵⁴The enactment of the Bankruptcy Code in 1978 was preceded by extensive study and debate. In 1970, Congress established a Commission on the Bankruptcy Laws of the United States. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468. In 1973, the Commission issued its report, including a draft statute. H.R. DOC. NO. 93-137, pts. I & II, 93rd Cong., 1st Sess. (1973) (hereinafter the *Commission Report*). The Commission proposed no substantive changes to the willful and malicious injury exception as it existed under § 17a of the Bankruptcy Act of 1898. The Commission bill, § 506(a)(7), reversed a 1970 amendment, Act of Oct. 19, 1970, Pub. L. No. 91-467, 84 Stat. 992, by reincorporating the willful and malicious conversion exception into the general willful and malicious injury provision. H.R. DOC. NO. 93-137, pt. II, at 136, 139-40. Congress incorporated the exception in the Code essentially as drafted by the Commission. See generally Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 61-78 (1990) (recounting a detailed and careful history of the willful and malicious injury exception and its adoption in the Bankruptcy Act of 1978). Congress considered bills drafted by the Commission, the National Conference of Bankruptcy Judges and the National Bankruptcy Conference. All three of these bills used the Commission text of the exception, which obviously was derived from § 17a(2). The bill considered by the Senate in 1977 was phrased a bit differently than the House bill; it sought to reincorporate willful and malicious conversions into the general willful and malicious injury exception by specifically referring to "conversion." S. 2266, 95th Cong., 2d Sess., 123 CONG. REC. 36091 (1977). While the final statute did not include the Senate bill reference to "conversion," the floor managers stated that the exception still covered willful and malicious conversions. 124 CONG. REC. H32399 (Sept. 28, 1978).

⁵⁵The House Report states that "[u]nder this paragraph, 'willful' means deliberate or intentional. To the extent that *Tinker* held that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a 'reckless disregard' standard, they are overruled." H.R. REP. NO. 95-595, p. 365 (1977), U.S. Code Cong. & Admin. News pp. 5963, 6320. The Senate report included a nearly identical statement. See S. REP. NO. 95-989, at 79 (1978), U.S. Code Cong. & Admin. News at 5787, 5864.

⁵⁶See *infra* notes 118-21 and accompanying text.

other comment regarding the scope of the exception arguably supports the inference that Congress intended to ratify pre-Code case law that generally (but not uniformly) limited the exception to tortious conduct.

III. CIRCUIT COURT OF APPEALS SPLIT ON TORTIOUS CONDUCT AS WILLFUL AND MALICIOUS INJURY

The circuit courts of appeal are split on whether contract claims can be nondischargeable under § 523(a)(6) when the debtor has not also acted tortiously. As one commentator has observed, “[a]bsent a decision of the Supreme Court or an amendment to § 523(a)(6), uniformity in this area of bankruptcy law is unlikely in the foreseeable future.”⁵⁷ The ninth circuit has held that § 523(a)(6) requires tortious conduct.⁵⁸ On the other hand, the fifth⁵⁹ and tenth⁶⁰ circuits have ruled that contract claims may be nondis-

⁵⁷Neil Berman, *When is an Intentional Breach of Contract Nondischargeable under § 523(a)(6)?*, *NORTON BANKRUPTCY LAW ADVISOR* 13 (Thomson Reuters/West Dec. 2008).

⁵⁸*Lockerby v. Sierra*, 535 F.3d 1038 (9th Cir. 2008) (holding that debt for nonpayment of commissions under employment contract was nondischargeable where the breach was also tortious under California law); *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202 (9th Cir. 2001) (holding that a knowing breach of a contract constitutes a nondischargeable debt under § 523(a)(6) if the breach was tortious even if there was no tort apart from the breach); *Del Bino v. Bailey (In re Bailey)*, 197 F.3d 997 (9th Cir. 1999) (holding that debt was dischargeable where debtor's conduct did not constitute conversion under California law). See also *Snoke v. Riso (In re Riso)*, 978 F.2d 1151 (9th Cir. 1992) (holding that a right of first refusal is not property within the meaning of § 523(a)(6), so that the debtor's breach of the agreement did not constitute a nondischargeable liability; and stating that “[i]t is well settled that a simple breach of contract is not the type of injury addressed by § 523(a)(6),” and that “[a]n intentional breach of contract is excepted from discharge under § 523(a)(6) only when it is accompanied by malicious and willful tortious conduct.”). Cf. *Banks v. Gill Distribution Centers, Inc.*, 263 F.3d 862 (9th Cir. 2001) (holding that a fraud claim was for willful and malicious injury, however, the only fraud was that the debtor failed to pay the plaintiff his portion of a law suit recovery with the purpose either to extract an agreement to accept substantially less than the promised payment, or to delay payment until after the statute of limitations had run so as to avoid payment altogether).

⁵⁹*Williams v. Int'l Bhd. of Elec. Workers Local 520*, 337 F.3d 504, 510 (5th Cir. 2003) (stating that a claim for breach of contract can be nondischargeable under § 523(a)(6), but holding that on the facts of the case, the plaintiff labor union (as distinct from its members) did not suffer a willful and malicious injury).

⁶⁰*Sanders v. Vaughn (In re Sanders)*, 210 F.3d 390 (10th Cir. 2000) (unpublished opinion). In *Sanders*, the court of appeals affirmed the bankruptcy court's decision that the plaintiff's contract claim was nondischargeable under § 523(a)(6). The debtor had hired the plaintiff attorney on a contingency fee basis to seek a tax refund from the IRS. The contract gave the plaintiff a power of attorney and stipulated that tax refund checks would be sent to the plaintiff. The debtor thereafter wrote a letter to the IRS revoking the power of attorney and directing that the refund check be sent to him. In this way, the bankruptcy court said, the debtor “beat [the plaintiff] out of the fee.” *Id.* at 390. See also *Dorr, Bentley & Pecha, CPAs, PC v. Pasek (In re Pasek)*, 983 F.2d 1524 (10th Cir. 1993) (indicating that contract claim for breach of covenant not to compete could be nondischargeable under § 523(a)(6), while affirming the lower court decisions that on the facts of the case the injury was not willful and malicious where the debtor acted with just cause or excuse because the plaintiff had sought to materially alter the partnership agreement by regulating aspects of the debtor's personal and family life and imposing an unreasonable billable hour quota on the debtor, and further because the debtor reasonably relied on a legal opinion that the covenant not to compete was not enforceable). Accord, *Berger v. Buck (In re Buck)*, 220 B.R. 999, 1004-05 (10th Cir. B.A.P. 1998) (assuming that contract claims are within the scope of § 523(a)(6), while holding that on the

chargeable under § 523(a)(6), although in an unpublished decision the fifth circuit has also held that the statute requires tortious conduct for nondischargeability.⁶¹ In an unpublished decision, the sixth circuit has held that § 523(a)(6) does not except from discharge debts for breach of contract.⁶² However, in an earlier published decision, the sixth circuit bankruptcy appellate panel ruled that breach of contract claims may be excepted from discharge for willful and malicious injury.⁶³ In a pre-*Geiger* decision, the seventh circuit affirmed a judgment that a claim arising from the breach of a covenant not to compete was nondischargeable under § 523(a)(6), but the court did not address the scope of the exception.⁶⁴ In an unpublished, post-*Geiger* decision, the seventh circuit suggested that § 523(a)(6) covers only intentional tort claims.⁶⁵

The Appendix contains a detailed review of the circuit court decisions on whether § 523(a)(6) requires tortious conduct for nondischargeability. It is the author's view that the decisions holding that § 523(a)(6) requires tortious conduct are wrongly decided. At the same time, the appellate decisions holding that § 523(a)(6) excepts breach of contract claims either lack reasoning or are poorly reasoned.

IV. APPROACHES TO NONDISCHARGEABILITY OF CONTRACT CLAIMS UNDER SECTION 523(A)(6)

While it is clear that § 523(a)(6) does not cover claims for a simple but knowing breach of contract, it is far from clear how the terms of the statute yield this interpretation. The exception addresses culpable misconduct, and an intentional breach of contract standing alone is not culpable misconduct in

facts of the case the debtor-attorney's breach of a contract with the plaintiff client did not cause a willful and malicious injury).

⁶¹*Cotton v. Deasy* (*In re Deasy*), 66 Fed. Appx. 526, 526 (5th Cir. 2003) (unpublished decision) (holding that *Geiger* "explicitly rejects a construction of 'willful' under which a breach of contract could qualify").

⁶²*Steir v. Best* (*In re Best*), 109 Fed. Appx. 1 (6th Cir. 2004) (unpublished opinion).

⁶³*The Spring Works, Inc. v. Sarff* (*In re Sarff*), 242 B.R. 620 (6th Cir. B.A.P. 2000). In *Sarff*, the B.A.P. held that a state court judgment for breach of a covenant not to compete, breach of contract, breach of duty of loyalty, misappropriation of trade secrets, intentional interference with business relations and discovery sanctions collaterally estopped the debtor to contest nondischargeability of the debt under § 523(a)(6). The state court made findings that supported an inference of malice, including that the debtor had taken springs and customers from the plaintiff, and awarded punitive damages which required malice as an element. *Id.* at 625-28. Citing *Geiger* and *Salem Bend Condominium Association v. Bullock-Williams* (*In re Bullock-Williams*), 220 B.R. 345 (6th Cir. B.A.P. 1998), the court stated that damages for knowing breach of contract can be nondischargeable under § 523(a)(6). *Id.* at 626.

⁶⁴*N.I.S. Corporation v. Hallahan* (*In re Hallahan*), 936 F.2d 1496 (7th Cir. 1991) (unpublished opinion) (pre-*Geiger* decision, applying the looser standard for willfulness that *Geiger* disapproved).

⁶⁵*Radivojevic v. Pickens*, 234 F.3d 1273 (7th Cir. 2000) (Table), 2000 WL 1071464 at *1 (stating that § 523(a)(6) "is intended to prevent the discharge of debts incurred as a result of intentional torts" and that the plaintiff's "state court judgment is based upon a breach of contract, not an intentional tort.").

any legal sense. Contract law remedies generally compensate the non-breaching party for loss suffered as a result of the breach, and do not punish the breaching party as a means to compel performance.⁶⁶ Indeed, the widely accepted contract law theory of efficient breach⁶⁷ is that contracting parties are permitted and perhaps encouraged to breach a contract when the gain from the breach exceeds the cost of compensating the other party for losses resulting from the breach.⁶⁸ Moreover, the Bankruptcy Code itself expressly contemplates in § 365 the rejection of executory contracts after a case is filed when that is in the best interest of the bankruptcy estate.⁶⁹

At the same time, almost all courts, including every circuit court that has considered the question, have held that “willful” means conduct intended to cause injury or that the debtor knew was substantially certain to cause injury.⁷⁰ Because a debtor who knowingly breaches a contract normally knows that injury is substantially certain to result from the breach, most breaches of contract could be termed “willful,” unless the statute is read to implicitly exclude at least the garden-variety claims.

Accepting that § 523(a)(6) does not bar the discharge of claims for simple knowing breach of contract, this Part considers five possible approaches to interpreting the statute. First, the “willful” prong of § 523(a)(6) arguably requires actual intent to injure, and does not cover conduct that the debtor knows is substantially certain to cause injury. Second, several courts have found that an injury was willful because the debtor knew that the injury was substantially certain to follow from the breach, but found that the debt was dischargeable because the injury was not malicious.⁷¹ Third, it can be argued that a contract claim arises when a contract is made, so that the debt can be for a willful or malicious injury only if the putative debtor had no intent to perform at the time the contract was made—which is the basis for an inten-

⁶⁶See RESTATEMENT (SECOND) OF CONTRACTS § 344 (explaining that “[j]udicial remedies under the rules stated in this Restatement serve to protect one or more of the [expectation, reliance or restitution] interests of a promisee”); *id.* at § 355 (providing that “[p]unitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable”).

⁶⁷See R. Posner, *Economic Analysis of Law* § 4.9, at 89-90 (2d ed. 1977) (explaining that contract remedies permit breach of contract where breaching party compensates the other party for the costs of breach, and ordinarily do not require performance of the contract; and thus contracting parties are free to breach when it is efficient, *i.e.*, where benefits of the breach outweigh the costs).

⁶⁸See, *e.g.*, E. ALLAN FARNSWORTH, *CONTRACTS* § 12.3 at 736-37 (4th ed. 2004) (citing cases endorsing the theory).

⁶⁹11 U.S.C. § 365(a). “[T]he rejection of an executory contract or unexpired lease [generally] constitutes a [prepetition] breach of such contract or lease” *Id.* § 365(g).

⁷⁰See *supra* note 40 and accompanying text.

⁷¹See cases cited *infra* note 83.

tional tort claim for fraud.⁷² Fourth, some courts, including several courts of appeal, have held that § 523(a)(6) implicitly requires tortious conduct.⁷³ Finally, the thesis of this article is that § 523(a)(6) implicitly requires a voluntary and affirmative act, which would exclude the great majority of but not all claims for knowing breach of contract from the scope of the exception to discharge. Each of these approaches is discussed in the following subsections.

A. WILLFULNESS REQUIRES SUBJECTIVE INTENT TO INJURE, AND NOT MERELY KNOWLEDGE THAT INJURY IS SUBSTANTIALLY CERTAIN

Geiger and § 523(a)(6) can be read to require that the debtor have acted with the specific purpose to injure the claimant, and not merely with knowledge that injury was substantially certain to result from his conduct. If this is the correct reading of *Geiger*, the statute would not apply to except from discharge the vast majority of contract claims. While a debtor who knowingly breaches a contract ordinarily knows that the creditor will suffer injury, it is rare that a party breaches a contract with the purpose of causing that injury. Rather, a debtor typically breaches a contract for reasons that are not motivated to cause harm to the creditor—the debtor breaches unintentionally, because it is thought to be economically efficient, or because he is unable to perform.

In *Geiger*, the Court held that § 523(a)(6) does not apply to debts for negligent or reckless injuries, ruling that the statute applies to “acts done with the actual intent to cause injury.”⁷⁴ Thus, this language in *Geiger* can readily be interpreted to require that “willfulness” presupposes a subjective purpose to cause injury, and that it is not enough that the debtor knew that injury was substantially certain to result. The dictum in *Geiger* regarding contract claims⁷⁵ arguably reinforces this interpretation of the Court’s holding. In dismissing claims for knowing breach of contract as clearly beyond the scope of § 523(a)(6), the Court may have assumed that willfulness does not comprehend conduct that the debtor knows is substantially certain to result in injury.

The Supreme Court in *Geiger* relied on the Restatement (Second) of Torts’ definition of intent in holding that § 523(a)(6) does not apply to torts

⁷²See RESTATEMENT (SECOND) OF TORTS § 530 (stating that “[a] representation of the maker’s own intention to do or not do a particular thing is fraudulent if he does not have that intention”).

⁷³See cases cited *infra* notes 97-98.

⁷⁴*Geiger*, 523 U.S. at 61. It is beyond the scope of this article to develop all of the doctrinal, policy and theoretical arguments regarding what constitutes “willfulness.” Suffice it to say that at this point, it is firmly established that “willful injury” includes an injury that the debtor did not desire but which the debtor knew was substantially certain to result from his conduct.

⁷⁵*Id.* at 62.

for negligent or reckless conduct.⁷⁶ The Restatement defines the term intent to cover both acts undertaken with the purpose of causing injury and acts undertaken with knowledge that injury is substantially certain to result.⁷⁷ Moreover, the decision by the eighth circuit in *Geiger*, which the Supreme Court affirmed, did define intent in the broader sense.⁷⁸ The great majority of post-*Geiger* decisions on the question, including every appellate level decision to address it, have held that the willfulness prong of § 523(a)(6) is satisfied if the debtor believed that harm was certain or substantially certain to result from his conduct.⁷⁹

B. THE MALICIOUS PRONG OF § 523(A)(6) EXCLUDES MOST BREACH OF CONTRACT CLAIMS

As discussed above, the prevailing definition of malice, derived from *Tinker v. Colwell*, is that malice entails conduct that is wrongful and without just cause or excuse.⁸⁰ On both counts, a simple knowing breach of a contract ordinarily should not be viewed as giving rise to a malicious injury. First, a breach of a contract is rarely wrongful in any legal sense.⁸¹ Second, there is “just cause or excuse” for a knowing breach of contract where the debtor lacks the ability to pay obligations, and thus defaults, albeit intentionally, on some or all of them. Although a breach could be wrongful where the debtor acted negligently or recklessly in performing a contract, such conduct would not be willful.⁸²

Thus, although a simple knowing breach of contract is willful, it is rare that it will be malicious. There are a few decisions in which courts have found that a contract claim was for willful but not malicious injury.⁸³ How-

⁷⁶*Id.* at 61-62.

⁷⁷RESTATEMENT (SECOND) OF TORTS § 8A cmt. b.

⁷⁸*Geiger v. Kawaauhau (In re Geiger)*, 113 F.3d 848, 852 (8th Cir. 1997), *aff'd*, 523 U.S. 57 (1998).

⁷⁹See discussion *supra* notes 39-48 and accompanying text. There is limited support for the narrower view of intent to injure. See *Rescuecom Corp. v. Kfahaga (In re Kfahaga)*, 419 B.R. 539, 549 (Bankr. E.D.N.Y. 2009) (reviewing cases). In *Cadillac Vending Co. v. Haynes (In re Haynes)*, 19 B.R. 849 (Bankr. E.D. Mich. 1982), which was decided shortly after the enactment of the Code and well before *Geiger*, the debtor breached a contract with the plaintiff so that he could enter into a more financially advantageous contract with another lessor of vending machines and game tables. The court stated that “whatever interpretation the cases appear to support, it is amply clear that a debt arising out of a mere breach of contract absent any showing that the purpose of the breach was to cause injury is not a non-dischargeable debt within the meaning of § 523(a)(6).” *Id.* at 851. The court concluded that the debt was dischargeable, explaining that “[t]he debtor did not terminate the contract to cause injury to [the plaintiff]. The debtor terminated the contract to enhance his own economic interest.” *Id.* at 852. The *Haynes* court is in the sixth circuit, which has adopted the broader view of intent. See cases cited *supra* note 41.

⁸⁰See *supra* note 51 and accompanying text.

⁸¹See *supra* notes 66-69 and accompanying text.

⁸²See *Geiger*, 523 U.S. at 62. See also *infra* notes 183-89 and accompanying text (describing the construction contract cases).

⁸³In *Wish Acquisition, LLC v. Salvino*, 2008 WL 182241 (D. N.D. Ill. Jan. 18, 2008), *aff'g*, 373 B.R. 578 (Bankr. N.D. Ill. 2007), the district court agreed with the bankruptcy court's conclusion that

ever, where a breach of contract is knowing and voluntary, it is at least arguable that it is "without just cause or excuse." The decisions in which the courts held that a breach of contract claim was for willful but not malicious injury do not appear to have involved efficient breaches.⁸⁴

Further, *Geiger* provides indirect support for the conclusion that contract claims generally are dischargeable under § 523(a)(6) because the breach typically is not willful. *Geiger* appears to address only the willful prong of the statute, and in rejecting the claimants' argument that the exception extends to deliberate acts that cause injury, the Court explained that such a broad interpretation would inappropriately extend the exception to a wide range of cases, including claims for knowing breach of contract.⁸⁵

§ 523(a)(6) requires tortious conduct. In addition, the court noted that willful and malicious are distinct inquiries, and stated that "[a]n intentional breach of contract is certainly willful, but it need not be malicious." *Id.* at *4. In elaborating the point, the district court wrote:

The vast majority of contracts are entered into for reasons of pecuniary gain, and the foreseeable consequences of breach are also pecuniary. Thus, a party may intentionally breach a contract with the knowledge that an injury may result, but the nature of the injury is in large part foreseeable, and, more importantly, assumed by both parties as part of the risk, or cost, of doing business. The injury is real, but it is not 'malicious' in the sense that it deserves exception from discharge under the Bankruptcy Code. This is especially true in light of the general rule that exceptions to discharge should be narrowly construed, in order to effectuate the mostly-still-intact congressional policy of permitting bankrupts a fresh start. [citation omitted] Without the tortious conduct requirement, the exception under § 523(a)(6) would be unduly expanded and the opportunity for a fresh start would be thwarted. A primary purpose of bankruptcy legislation is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes. [citation omitted] This purpose would be frustrated if debt incurred as the result of business judgment rose to the level of intentional injury within the meaning of § 523(a)(6). Something more must be required. For these reasons, I find that a debt arising from an intentional breach of contract standing alone is insufficient to except a debt from discharge. Therefore, the Bankruptcy Court's finding that tortious conduct is an essential element of a 'willful and malicious' injury under § 523(a)(6) is affirmed.

Id. The court's reasoning is not entirely coherent. The court indicates that an intentional breach of contract is "willful," but not necessarily malicious, and also states that tortious conduct is an essential element of the exception. The latter does not necessarily follow from the former, as malicious might encompass more than tortious. See also *Wickes Lumber Co. v. Magee (In re Magee)*, 164 B.R. 530, 538 (Bankr. S.D. Miss. 1994) (holding that debt for construction materials was for willful but not malicious injury; the debtor builder purchased the materials on credit, and failed to use his construction loan to pay for the materials although he executed affidavits to the construction lender representing that there were no unpaid claims for materials); *Goodstein Realty Boca Raton, LLC v. Gelinas (In re Gelinas)*, 2007 WL 2965046 at *9 (Bankr. S.D. Fla. Oct. 9, 2007) (finding that "a debt arising from a breach of contract standing alone is insufficient to except a debt from discharge for willful and malicious injury. Plaintiff's argument that Defendants necessarily knew or were substantially certain that their breach of contract would cause injury to Plaintiff may establish the 'willful' prong but it does not establish malice.").

⁸⁴See *supra* note 67 (defining "efficient breach").

⁸⁵523 U.S. at 62.

C. A CONTRACT CLAIM ARISES AT THE TIME THE CONTRACT WAS MADE

Section 523(a)(6) should not apply to breach of contract claims if such claims are said to arise when the contract was made and not when it is breached. This approach, based on the Code's definition of "claim," distinguishes between claim and cause of action. Section 523(a)(6) excepts from discharge "any debt . . . for willful and malicious injury."⁸⁶ The Code defines "debt" as "liability on a claim."⁸⁷ And "claim" means "right to payment, whether or not such right is . . . liquidated, . . . contingent, [or] . . . unmatured."⁸⁸ Unlike tort claims, where the claim and the cause of action are almost invariably one and the same, a contract claim arises at the time the contract was made, while a cause of action in contract arises if and when there is a breach. In other words, a claim, albeit contingent and perhaps unliquidated and unmatured, arises at the time a contract is made. Certainly, the non-debtor party to a contract has a claim in bankruptcy regardless of whether the debtor has breached the contract, and the claim exists independent of any cause of action for breach under non-bankruptcy law.⁸⁹ That claim could be for willful and malicious injury only if the debtor made the contract with the intent not to perform it, in which case, the other party may have a claim in tort for fraud, an intentional tort, which would be excepted from discharge under § 523(a)(2)(A).⁹⁰

This line of reasoning is consistent with the dicta in *Geiger*. There, the Court appears to have assumed that contract claims, like negligence claims, are categorically beyond the scope of § 523(a)(6).⁹¹ Moreover, this approach

⁸⁶11 U.S.C. § 523(a)(6).

⁸⁷*Id.* § 101(12).

⁸⁸*Id.* § 101(5).

⁸⁹The court in *Cadillac Vending Co. v. Haynes (In re Haynes)*, 19 B.R. 849 (Bankr.E.D. Mich. 1982), hinted at this point, although it did not distinguish between claim and cause of action. In explaining that a claim for "mere breach of contract" was dischargeable, the court stated that "[t]he vast majority of contracts are entered into for reasons of pecuniary gain, and the foreseeable consequences of breach are also pecuniary. Thus, a party may intentionally breach a contract with knowledge that an injury may result, but the nature of the injury is in large part foreseeable and assumed as part of the risk of doing business. The injury is real, but it is not 'malicious' in the sense that it deserved exception from discharge . . ." *Id.* at 852.

⁹⁰11 U.S.C. § 523(a)(2)(A) ("A discharge . . . does not discharge an individual debtor from any debt . . . to the extent obtained by false pretenses, a false representation, or actual fraud"). See, e.g., *Palmacci v. Umpierrez*, 121 F.3d 781, 786-88 (1st Cir. 1997) (holding that "[i]f, at the time he made his promise, the debtor did not intend to perform, then he has made a false representation (false as to his intent) and the debt that arose as a result thereof is not dischargeable (if the other elements of § 523(a)(2)(A) are met)"); *Rubin v. West (In re Rubin)*, 875 F.2d 755, 759 (9th Cir. 1989) (finding debt nondischargeable under § 523(a)(2)(A) where debtor made a promise that he did not intend to perform); *Lewis v. Lowery (In re Lowery)*, 440 B.R. 914, 924-25 (Bankr. N.D. Ga. 2010) (holding debt nondischargeable under § 523(a)(2)(A) where debtor lacked subjective intent to perform promise at time he made it).

⁹¹*Geiger*, 523 U.S. at 62.

does not require any interpretive gloss, such as an implicit requirement of tortious conduct or an affirmative act. It might also explain why contract claims are not covered by the exception, but many other non-tort claims, such as litigation sanctions or debts for contempt of court or violation of a court order are covered. As discussed below, the courts that hold that § 523(a)(6) requires tortious conduct apparently overlook that many non-contract, non-tort claims that are frequently and unremarkably excepted from discharge under the exception.⁹² In these cases, the claim and the cause of action are almost invariably synonymous.

This approach proves to be flawed, however. Although a contingent claim does arise when a contract is made, before and regardless of whether the debtor ultimately breaches, a claim within the meaning of § 101(5) also arises upon breach of the contract. There is no reason in law or logic that a claim does not arise upon breach because there was a claim upon formation of the contract. Thus, the Code provides that a trustee may assume an executory contract,⁹³ and the breach or rejection of a contract that has been assumed will be a postpetition obligation and likely an administrative expense.⁹⁴ Likewise, the trustee may reject an executory contract,⁹⁵ in which case the claim is treated as if it had arisen immediately before the filing.⁹⁶ In neither case is the claim regarded as dating to the time that the contract was originally made. Not surprisingly, it does not appear that any court has considered this approach.

D. TORTIOUS CONDUCT IS AN ESSENTIAL ELEMENT FOR NONDISCHARGEABILITY UNDER SECTION 523(a)(6)

A number of courts have held or stated that § 523(a)(6) requires tortious conduct for nondischargeability.⁹⁷ These courts find support for their con-

⁹²See *infra* notes 134-38 and accompanying text.

⁹³11 U.S.C. § 365(a).

⁹⁴*Id.* at § 503(b), § 365(g)(2).

⁹⁵*Id.* at § 365(a).

⁹⁶*Id.* at §§ 365(g)(1), 502(g)(1).

⁹⁷In addition to the cases cited *supra* notes 58, 61 and 65, the following cases hold or state, with little or no discussion, that § 523(a)(6) requires tortious conduct: *Sandow v. Burke* (*In re Burke*), 416 B.R. 136, 144 (Bankr. E.D. Pa. 2009) (stating that "[a] claim . . . for breach of an oral promise does not constitute an intentional tort and thus does not establish willful and malicious injury"); *Woo, Inc. v. Donelson* (*In re Donelson*), 410 B.R. 495, 505 (Bankr. S.D. Tex. 2009) (stating that "[p]roof of debt based on a 'knowing breach of contract' is insufficient under 11 U.S.C. § 523(a)(6) . . . [plaintiffs'] debt arises solely from a breach of contract . . . [and plaintiff] has failed to prove that her debt should be excepted from discharge."); *Prewett v. Iberg* (*In re Iberg*), 395 B.R. 83, 90 (Bankr. E.D. Ark. 2008) (holding that claim for breach of construction contract was dischargeable under § 523(a)(6), although the construction work "revealed the most blatant disregard for [the plaintiff's] physical safety and financial waste" that an inspector had ever seen, the court found that the debtor's performance was incompetent but not willful and malicious); *A.K.D., Inc. v. Treon* (*In re Treon*), 2008 WL 65575 at *3-6 (Bankr. D. Or. Jan. 4, 2008) (holding that debtor did not commit the independent tort of intentional interference with economic relations, and there-

clusion in the context of the statute; the policies underlying the discharge and the willful and malicious injury exception to the discharge; the common understanding of "willful and malicious" as associated with intentional torts; and the interpretation of the exception under pre-Code case law.⁹⁸ These rationales are considered in turn.

1. *The Context of Section 523(a)(6)*

Courts that hold that § 523(a)(6) requires tortious conduct point to § 365(a), which authorizes the rejection of executory contracts and unexpired leases.⁹⁹ The underlying principle is the maximization of the value of the bankruptcy estate; if the contract is not profitable, it should be rejected. Rejection gives rise to a prepetition unsecured claim that will be discharged to the extent that it is not paid.¹⁰⁰ An interpretation of § 523(a)(6) that prevents the discharge of claims for knowing breach of contract is inconsistent with the provisions in § 365 that expressly authorize the intentional breach of executory contracts and unexpired leases.¹⁰¹

While § 365 manifestly conflicts with the conclusion that claims for mere knowing breach of contract are nondischargeable, it does not necessarily follow that § 523(a)(6) requires tortious conduct. As long as § 523(a)(6) in

fore the debt was dischargeable); *Grobel v. Johnson (In re Johnson)*, 2007 WL 5065545 at *3-4 (Bankr. D. Minn. Nov. 14, 2007) (discharging contract claim where plaintiff transferred his accounting business in exchange for debtor's promise to pay the purchase price in installments, but did not take a security interest in the business or its assets to secure the purchase price; debtor made just a few payments, and then sold the business to a third party and spent the funds); *Neiman v. Irmen (In re Irmen)*, 379 B.R. 299, 313 (Bankr. N.D. Ill. 2007) (indicating that the debt could be nondischargeable under § 523(a)(6) where the plaintiff pleaded that the contract had been induced by misrepresentation); *Gabel v. Olson (In re Olson)*, 355 B.R. 660, 665-66 (Bankr. E.D. Tenn. 2006) (asserting a contract claim was not nondischargeable under § 523(a)(6) where debtor failed to make payments to the plaintiff under a partnership agreement); *Donaldson v. Hayes (In re Hayes)*, 315 B.R. 579, 590 (Bankr. C.D. Cal. 2004); *Legendary Leasing v. Glatt (In re Glatt)*, 315 B.R. 501, 511 (Bankr. D. N.D. 2004); *Cutler v. Lazzara (In re Lazzara)*, 287 B.R. 714, 722-23 (Bankr. N.D. Ill. 2002); *Baltimore County Savings Bank v. Malinowski (In re Malinowski)*, 249 B.R. 672, 675 (Bankr. D. Md. 2000) (stating that § 523(a)(6) "relates to tortious conduct and not to mere breaches of contract"); *Spinoso v. Heilman (In re Heilman)*, 241 B.R. 137, 172 (Bankr. D. Md. 1999); *Clarks Delivery, Inc. v. Moultrie (In re Moultrie)*, 51 B.R. 368, 373 (Bankr. W.D. Wash. 1985); *Creditthrift of Am., Inc. v. Howard (In re Howard)*, 6 B.R. 256, 258 (Bankr. M.D. Fla. 1980) (stating that "[t]he exception to discharge in § 523(a)(6) sounds in tort, not breach of contract.") See also *Tari v. Huggins (In re Huggins)*, 252 B.R. 567, 569 (Bankr. M.D. Fla. 2000) (holding that claim for breaches under lease agreement were not nondischargeable under § 523(a)(6), reasoning that "[i]t is abundantly clear that the claim of nondischargeability is a claim for breach of contract."); *Lytle v. Abraham (In re Abraham)*, 247 B.R. 479, 484 (Bankr. D. Kan. 2000) (holding that claim for simple breach of contract was not nondischargeable under § 523(a)(6)).

⁹⁸See generally *Wish Acquisition, LLC v. Salvino (In re Salvino)*, 373 B.R. 578, 589-91 (Bankr. N.D. Ill. 2007), *aff'd*, 2008 WL 182241 (N.D. Ill. Jan. 18, 2008).

⁹⁹11 U.S.C. § 365(a).

¹⁰⁰*Id.* § 365(g)(1), § 502(g)(1).

¹⁰¹See *Lockerby v. Sierra*, 535 F.3d 1038, 1042-43 (9th Cir. 2008); *In re Salvino*, 373 B.R. at 589-91; *Palazzolo v. Colclazier (In re Colclazier)*, 134 B.R. 29, 33 (Bankr. W.D. Okla. 1991); *In re Haynes*, 19 B.R. at 852-53.

some way effectively distinguishes between debts for simple knowing breaches of contract and debts for breaches involving culpable misconduct, there is no inconsistency between the exception and the Code provisions for rejection of executory contracts.

Although most breaches of contract do not entail culpable misconduct, a breach can be culpable, although not necessarily tortious. Consider, for example, the breach of a covenant not to compete.¹⁰² The knowing breach of a covenant by competing with the other party in a way that the debtor knows will cause injury is no less wrongful than tortiously interfering with a contract with knowledge that the interference will cause injury. The latter claim is clearly within the scope of § 523(a)(6).¹⁰³

2. *The Policies Underlying the Discharge and the Section 523(a)(6) Exception to the Discharge*

Courts that require tortious conduct for nondischargeability under § 523(a)(6) also rely on the policies underlying the discharge and the exception. The policy underlying the discharge is to “relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.”¹⁰⁴ The policy underlying § 523(a)(6), along with several of the other exceptions to the discharge,¹⁰⁵ is to limit the scope of the discharge to debts that are not incurred through culpable misconduct by the debtor.¹⁰⁶ Relatedly, it is well-established that the various exceptions to discharge are to be interpreted narrowly so as to advance the fresh start policy.¹⁰⁷ This maxim supports a narrow reading of § 523(a)(6) that excludes claims for breach of contract.¹⁰⁸

¹⁰²See *infra* notes 147-63 and accompanying text.

¹⁰³See, e.g., *National Sign & Signal v. Livingston*, 422 B.R. 645, (D. W.D. Mich. 2009); *Kymn, Inc. v. Langeslag* (*In re Langeslag*), 366 B.R. 51 (Bankr. D. Minn. 2007); *Rainbird Corporation v. Milton* (*In re Milton*), 355 B.R. 575 (Bankr. N.D. Miss. 2006). Moreover, as discussed *infra* notes 164-68 and accompanying text, § 365 may not apply to covenants not to compete.

¹⁰⁴*Local Loan v. Hunt*, 292 U.S. 234, 244 (1934). See also *Wish Acquisition, LLC v. Salvino* (*In re Salvino*), 373 B.R. 578, 591 (Bankr. N.D. Ill. 2007), *aff'd*, 2008 WL 182241 (N.D. Ill. Jan. 18, 2008); *Palazzolo v. Colclazier* (*In re Colclazier*), 134 B.R. 29, 32-33 (Bankr. W.D. Okla. 1991); *Communications Workers of America, Local No. 11500 v. Akridge* (*In re Akridge*), 71 B.R. 151, 154 (Bankr. S.D. Cal. 1987) (observing that “[d]ebtors routinely breach contracts since they lack the financial resources to perform. Further, many contracts are breached by their terms upon the debtor’s insolvency or upon the filing of the petition. Chapter 7 debtors in particular are often burdened by onerous contracts and need to reject them. If intentionally breached contracts were held to create nondischargeable debts, few debtors could ever get a fresh start. Charge card debt, bank loans, mortgages, car loans and household finance loans would all be routinely nondischargeable.”).

¹⁰⁵See *supra* notes 15-21 and accompanying text.

¹⁰⁶*Grogan v. Garner*, 498 U.S. 279, 286-87 (1991).

¹⁰⁷See *Geiger*, 523 U.S. at 62; *Gleason v. Thaw*, 236 U.S. 558, 562 (1915).

¹⁰⁸*Geiger*, 523 U.S. at 61 (quoting *Gleason v. Thaw*, 236 U.S. 558, 562 (1915) (explaining that an interpretation of § 523(a)(6) that encompassed intentional acts that cause injury, which could include

Courts that adhere to this view reason that, if claims for knowing breach of contract are nondischargeable under § 523(a)(6), the scope of the fresh start will be dramatically curtailed.¹⁰⁹ The Supreme Court recognized this point in *Geiger* when it observed that excepting claims for intentional breach of contract from the discharge would greatly expand the category of nondischargeable debts.¹¹⁰ Moreover, given that the promisor's intent is irrelevant in a breach of contract action, and that the law of contracts appears to sanction if not encourage efficient (and intentional) breach, excepting claims for knowing breach of contract would bring within the exception debts that did not entail any misconduct by the debtor.¹¹¹ An intentional breach of contract is simply not viewed as legally culpable, dishonest or wrongful. Thus, punitive damages are not available in actions for breach of contract, except when the breach amounts to an independent tort.¹¹²

Like the context argument, the policy argument assumes that if § 523(a)(6) does not require tortious conduct, virtually all debts for knowing breach of contract would be potentially nondischargeable. Again, this view fails to take into account whether the "willful and malicious" prerequisites for nondischargeability can distinguish the ordinary from the opprobrious breach of contract without requiring tortious conduct. A reading of § 523(a)(6) that both discharges debts for routine knowing breach of contract and excepts from discharge debts for culpable misconduct more fully serves the policies underlying both the discharge and the misconduct exceptions to the discharge.

3. *The Common Understanding of "Willful and Malicious"*

As the Supreme Court stated in *Geiger*, "willful and malicious injury" "triggers in the lawyer's mind the category 'intentional torts.'"¹¹³ Whereas

claims for knowing breach of contract, "would be incompatible with the 'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed.'"); *Cotton v. Deasy* (*In re Deasy*), 66 Fed. Appx. 526, 526 (5th Cir. 2003) (unpublished opinion); *Palazzolo v. Colclazier* (*In re Colclazier*), 134 B.R. 29, 32-33 (Bankr. W.D. Okla. 1991) (explaining how the court does not want to extend discharging debts for intentional breach of contract).

¹⁰⁹See, e.g., *Cloyd v. GRP Records*, 238 B.R. 328, 336 (Bankr. E.D. Mich. 1999) (asserting that "[i]f taken to its logical conclusion, [plaintiff's] novel assertion [that its claim for breach of contract was nondischargeable] implies that all bankruptcy petitions could give rise to claims for willful and malicious injury. . . .").

¹¹⁰*Geiger*, 523 U.S. at 61.

¹¹¹See *Lockerby v. Sierra*, 535 F.3d 1038, 1042-43 (9th Cir. 2008); *Wish Acquisition, LLC v. Salvino* (*In re Salvino*), 373 B.R. 578, 590 (Bankr. N.D. Ill. 2007) (explaining that "treating breaches of contracts as willful and malicious injuries would . . . dramatically expand the number of nondischargeable debts and diminish the scope of the bankruptcy discharge."); *Cadillac Vending Co. v. Haynes* (*In re Haynes*), 19 B.R. 849, 852 (1982) (holding that debts "incurred as the result of a business judgment constitute an intentional injury to property within the meaning of section 523(a)(6) would frustrate this purpose").

¹¹²See RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981).

¹¹³*Geiger*, 523 U.S. at 61.

liability for an intentional tort depends on the alleged tortfeasor's state of mind, the breaching party's state of mind is irrelevant in an action for breach of contract.¹¹⁴ Likewise, willfulness and malice are commonly required for an award of punitive damages in a tort action, whereas punitive damages are not permitted in contract actions except when the breach is accompanied by tortious or egregious conduct.¹¹⁵ In *Lockerby v. Sierra*, the ninth circuit explained the point this way:

This approach [of requiring tortious conduct] is consistent with basic principles of tort and contract law. Historically, injuries resulting from breaches of contract are treated very differently from injuries resulting from torts. In contract law, "[t]he motive for the breach commonly is immaterial in an action on the contract." . . . The concept of "efficient breach" is built into our system of contracts, with the understanding that people will sometimes intentionally break their contracts for no other reason than that it benefits them financially. The definition of intent to injure as the commission of an act "substantially certain" to cause harm was born from tort principles, not contract law principles.¹¹⁶

As discussed more fully in the Part IV.E.2 below, this contention equally well supports the conclusion that tort principles should guide the interpretation of § 523(a)(6) but do not categorically exclude non-tort based claims from the ambit of the exception.¹¹⁷

4. Pre-Code Practice

Finally, courts that hold that tortious conduct is an essential element for nondischargeability under § 523(a)(6) have found support in pre-Code case law. The majority of courts applying the "willful and malicious injury" exception under the former Bankruptcy Act held debts to be nondischargeable only when the debtor had acted tortiously, even if the language in some of the opinions indicated that claims for willful breach of contract were excepted from discharge by the statute.¹¹⁸ Congress is presumed to have

¹¹⁴See RESTATEMENT (SECOND) OF CONTRACTS, ch. 16, introductory cmt. (1981) ("[w]illful breaches have not been distinguished from other breaches, [and] punitive damages have not been awarded for breach of contract.").

¹¹⁵See *Wish Acquisition, LLC v. Salvino* (*In re Salvino*), 373 B.R. 578, 589 (Bankr. N.D. Ill. 2007), *aff'd*, 2008 WL 182241 (N.D. Ill. Jan. 18, 2008) (citing William Prosser, *The Law of Torts* § 2 at 9-10 (4th ed. 1971), the edition in use at the time the Code was enacted in 1978).

¹¹⁶535 F.3d 1038, 1042 (9th Cir. 2008).

¹¹⁷See *infra* notes 125-33 and accompanying text.

¹¹⁸See *Barbachano v. Allen*, 192 F.2d 836, 838 (9th Cir. 1951); *Gafni v. Barton* (*In re Barton*), 465 F.Supp. 918, 924 (D.S.D.N.Y. 1979) (describing how "[m]any earlier decisions under [section 17a(8) of the former Bankruptcy Act] . . . have limited its application to cases sounding in tort, not in contract.");

known the connotation of “willful and malicious” when it reenacted the willful and malicious injury exception in the current Code. Thus, in reenacting the exception without any substantive change, it can be inferred that Congress intended to continue the pre-Code practice of limiting the exception to debts arising from tortious conduct.¹¹⁹

This last contention is debatable, however. In actuality, there were some decisions under the Act holding that breach of contract claims were nondischargeable under § 17a(2).¹²⁰ Courts that held that the exception required tortious conduct sometimes acknowledged that there was contradictory authority or that the requirement may not be categorical.¹²¹

E. “WILLFULNESS” REQUIRES CONDUCT THAT IS VOLUNTARY AND AFFIRMATIVE AS WELL AS DELIBERATE AND INTENTIONAL

An interpretation of “willful” that requires voluntary and affirmative as well as deliberate and intentional conduct is consistent with the text of § 523(a)(6) and the holding and dicta in *Geiger*. This construction incorpo-

Cadillac Vending Co. v. Haynes (*In re Haynes*), 19 B.R. 849, 850 (1982) (surveying pre-Code cases, stating that “[s]ection 17(a)(8), from which section 523(a)(6) was derived, has generally been held to cover liabilities attributable to tortious conduct of the debtor”); Holder v. Brazington (*In re Brazington*), 3 B.R. 309, 311 (Bankr. D. Idaho 1980) (applying § 17(a)(8) of the former Bankruptcy Act, stating that “[t]he majority of the case law also holds that Section 17a(8) refers only to actions in tort.”). *But see* cases cited *infra* note 120.

¹¹⁹See Hamilton v. Lanning, 560 U.S. 505, (2010); Wish Acquisition, LLC v. Salvino (*In re Salvino*), 373 B.R. 578, 589-90 (Bankr. N.D. Ill. 2007).

¹²⁰See, e.g., Nat’l Homes Corp. v. Lester Industries, Inc., 336 F.Supp. 644, 647 (D.W.D.Va. 1972) (stating that debts may be nondischargeable under the willful and malicious injury exception regardless of whether they sound in tort or in contract, however, the case apparently involved an independent willful tort). See also Rivera v. Moore-McCormack, 238 F. Supp. 233, 234 (D.S.D.N.Y. 1965) (stating that “[a]n act may be . . . the result of willfulness and malice. This is an issue to be resolved before dischargeability is determined, and the theory of recovery — tort or contract — is immaterial.”).

Rivera has been repeatedly cited for the proposition that contract claims may be nondischargeable under the willful and malicious injury exception. However, this statement of the rule seems to conflate the basis for a prior state court judgment (in *Rivera*, the plaintiff had obtained a judgment in state court for breach of contract) with whether there is not also a tort basis for liability that need not be asserted unless and until the debtor files for bankruptcy. A seaman had brought a claim against the creditor for injuries he suffered in an altercation with the debtor. The creditor in turn obtained a judgment against the debtor for breach of his employment agreement by failing to properly perform his duties. When the debtor thereafter filed for bankruptcy, the creditor sought to except the debt from the discharge as one for willful and malicious injury. The better statement of the rule in the case is that, although a state court judgment is based on contract, when the debtor later files for bankruptcy, the claim will be nondischargeable if it was for a willful and malicious injury. Here, the claim apparently arose from a battery. *Accord*, Western Surety Co. v. Rich, 141 F. Supp. 872, 873 (D. W.D. Okl. 1956) (holding debt nondischargeable where the creditor, a surety bondsman for the debtor when the debtor was county sheriff, paid a judgment against the debtor for assault and battery; although the obligation to the plaintiff was in contract, not in tort).

¹²¹See, e.g., Gafni v. Barton (*In re Barton*), 465 F. Supp. 918, 924 (D.C.D.N.Y. 1979) (“Others have questioned this compartmentalized construction of the section. Yet, it is instructive that decisions holding liabilities formally grounded in contract nondischargeable by force of § 17(a)(8) have involved, in some respect, recognizable intentional torts such as are regularly deemed comprehended within the section.”).

rates the intentional tort connotation of the terms, "willful and malicious," without categorically excluding non-tort debts from the ambit of the statute. Further, it serves the policies underlying both the discharge and the § 523(a)(6) exception to the discharge to except debts for culpable misconduct. Under this approach, the breach of a contract through affirmative conduct that is intended to cause a willful and malicious injury gives rise to a nondischargeable liability, while simple failure to perform, even when intended to cause harm, does not. In some cases it will be difficult to ascertain whether the breach was a failure to perform or entails affirmative conduct. However, the same problem can and does arise with respect to tort claims. Indeed, it is this uncertain line between acting and failing to act that lies at the heart of many of the closest cases under § 523(a)(6).¹²²

1. *Tort principles inform interpretation of Section 523(a)(6)*

As the Supreme Court observed in *Geiger*, "the (a)(6) formulation triggers in the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts."¹²³ At the same time, the statute is not by its express terms limited to intentional torts, and the Court in *Geiger* carefully avoided doing so. It follows that, while tort principles may inform interpretation of § 523(a)(6), the nondischargeability of a debt is not rigidly confined to intentional torts. Certainly, not all debts for intentional torts are for willful and malicious injury under § 523(a)(6). Some intentional torts, for example, battery and false imprisonment, require an intentional act but may not require an intent to injure,¹²⁴ and thus injuries resulting from these torts would not necessarily be willful for purposes of § 523(a)(6). By a parity of reasoning, intentional torts are not the only debts that are nondischargeable under § 523(a)(6). In other words, the statute requires tort-like conduct, but does not categorically require conduct that is technically or literally tortious.

2. *"Willful Injury" entails voluntary and affirmative conduct*

It is well established in the law of torts that liability for an intentional tort requires a voluntary, affirmative act, and that a failure to act generally cannot constitute an intentional tort. The Restatement (Second) of Torts

¹²²See, e.g., *Blocker v. Patch (In re Patch)*, 526 F.3d 1176, 1181-83 (8th Cir. 2008) (holding that debtor's failure to act to protect her son from severe physical abuse by her boyfriend, which ultimately resulted in the boy's death, was not "willful").

¹²³523 U.S. at 61.

¹²⁴See generally Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1066 (2006) (regarding the tort of battery, "[t]he courts are split on the issue: a substantial group follows the so-called *dual-intent* approach, requiring both an intent to contact and an intent to either harm or offend; another substantial group follows the *single-intent* approach, requiring only an intent to contact."); *id.* at 1081 (explaining that false imprisonment is an intentional tort that requires only an intent to confine, and not an intent to harm the plaintiff). See also *id.* at 1091 (explaining that liability for trespass to land, an intentional tort, turns on an intent to enter the lands of another and that the defendant is liable regardless of whether the entry was mistaken).

provides: “[t]he word ‘act’ . . . denote[s] an external manifestation of the actor’s will.”¹²⁵ “The Restatement structures analysis of battery and other trespassory torts¹²⁶ by requiring an ‘act’ of the defendant. . . . The term ‘act’ . . . emphasize[s] a distinction between affirmative deeds on the one hand and omissions or passive behavior on the other.”¹²⁷ The Restatement refers only to an act and not to an omission in defining intent.¹²⁸ Applying these principles to § 523(a)(6), in requiring an intention to cause injury for nondischargeability under § 523(a)(6), that section of the statute necessarily also requires that the debtor have acted affirmatively.

The Supreme Court’s opinion in *Geiger* somewhat obscures the aspect of “willfulness” that contemplates an affirmative act by the debtor. The heart of the Court’s reasoning in *Geiger* is that “willful” modifies “injury,” so that it is the injury that must be intended; an intentional act that that necessarily causes injury is not sufficient for nondischargeability.¹²⁹ While an injury can

¹²⁵RESTATEMENT (SECOND) OF TORTS § 2 cmt. a to § 3 (explaining that “the word ‘actor’ [which is defined in § 3] is used . . . not only in its primary sense of denoting one who acts, but also as denoting one who deliberately or inadvertently fails to act.”).

¹²⁶A trespassory tort is an intentional tort that is accomplished through physical force and is actionable regardless of whether the plaintiff suffers physical harm. DAN B. DOBBS THE LAW OF TORTS at 47 (2000).

¹²⁷*Id.* at 62. Dobbs further explains:

Can a defendant be liable for a battery when the defendant does nothing to stop another’s bodily contact with the plaintiff? Analogies from negligence law suggest that the defendant who has no special relationship with the plaintiff or her attacker would not be liable for a battery if he merely failed to prevent the attacker from hitting the plaintiff. . . .

On the other hand, the defendant might be under a duty to protect the plaintiff. Employers, for example, are under a duty to protect employees from sexual batteries If an employer knows that an employee is being sexually battered by another employee, it is not implausible to say that the employer is also guilty of a battery, though he has not committed any “act.” . . . In practice, however, courts are likely to think of both kinds of claims as negligence claims turning on reasonableness rather than battery claims turning upon intent.

Id. at 62-63. Thus, for example, the intentional tort of battery requires an affirmative act. RESTATEMENT (SECOND) OF TORTS § 14. The comment explains that “[t]here is perhaps no essential reason why, under the modern law, liability for battery might not be based on inaction Apparently, however, no such case has arisen, and what little authority there is denies the liability.” RESTATEMENT (SECOND) OF TORTS § 14 cmt. c. See also *In Blocker v. Patch (In re Patch)*, 526 F.3d 1176, 1181-82 (8th Cir. 2008), *rev’g*, 356 B.R. 450 (8th Cir. B.A.P. 2006), where the court, citing the RESTATEMENT (SECOND) OF TORTS, reversed the BAP’s holding that the failure to act in the face of a legal duty can constitute an intentional tort, and “question[ed] whether a debtor’s breach of a legal duty can ever constitute a ‘willful injury.’”

¹²⁸See RESTATEMENT (SECOND) OF TORTS § 8A and comments (stating that intentionally failing to act in the face of a legal duty constitutes negligence). *Id.* § 13, at 24 (stating that “failure to perform [a duty to protect others] constitutes negligence . . . irrespective of whether his failure is or is not deliberate and done for the very purpose of causing the other to suffer the bodily harm from which it was the actor’s duty to protect him.”).

¹²⁹523 U.S. at 61.

be characterized as “willful” — meaning intentional and deliberate—and “malicious” —without excuse — it is inapt to describe an injury as “affirmative.” Manifestly, however, the Court’s definition of “willful” in *Geiger* requires that the debtor intend both the injury and the act that caused the injury.¹³⁰ The latter is subsumed within the former, as there can be no intentional injury in the absence of an intentional act, and accordingly the understanding that “willful” also requires affirmative conduct is entirely consistent with the point that “willful” modifies “injury.”

There is no basis in the text of § 523(a)(6) to require affirmative conduct for purposes of excepting a tort debt from the discharge but not a contract debt. Indeed, reading “willful” to require affirmative conduct recognizes that a mere failure to perform a contract is not conduct that is sufficiently culpable to warrant nondischargeability, just as in the law of torts a failure to act cannot give rise to liability for an intentional tort.

On the other hand, affirmative conduct in the breach of a contract, like affirmative conduct in the violation of a legal duty in tort, sometimes may constitute culpable misconduct.¹³¹ While the objective of contract remedies generally is to compensate a party for losses suffered as a result of the breach,¹³² and punitive damages are generally disallowed unless the breach is also a tort for which punitive damages may be awarded,¹³³ it does not follow that the breach of contract can not entail culpable conduct absent an accompanying tort. Section 523(a)(6) does not require that an intentional tort warrant punitive damages for nondischargeability. Likewise, there may be breaches of contract that do not warrant an award of punitive damages, but which may entail a level of culpability that precludes discharge of the debt. Just as § 523(a)(6) does not require that an intentional tort committed by the debtor warrant punitive damages before the debt is nondischargeable, this article posits that it also does not require that the breach of a contract warrant imposition of punitive damages before the debt can be nondischargeable.

Moreover, culpability does not attach to a debtor’s conduct that is not voluntary. If the debtor breaches a contract by failing to pay for goods or services because he does not have the wherewithal to pay the obligation, the conduct ordinarily is not culpable. Although in some cases the debtor may have failed to act prudently in incurring the debt, there is nothing willful

¹³⁰*Id.* (explaining that “[t]he word ‘willful’ in (a)(6) modifies the word ‘injury,’ indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury”). In stating that nondischargeability entails “not merely a deliberate or intentional *act*,” the Court acknowledged that the act, too, must be deliberate and intentional.

¹³¹See *infra* notes 142-89 and accompanying text (discussing cases in which courts have found debts for breach of contract to be nondischargeable under § 523(a)(6)).

¹³²See RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981).

¹³³*Id.* at § 355.

about nonpayment unless the debtor incurred the debt with the intention of not repaying it.

3. Section 523(a)(6) covers tort and non-tort debts

If “tortious conduct” is an essential element of § 523(a)(6), courts will be required to resolve a number of additional questions that are not capable of being answered by the text of the statute or its legislative history. These complications weigh in favor of interpreting the statute according to its plain terms, which do not state any requirement of tortious conduct for nondischargeability. Is “tortious conduct” limited to conduct that satisfies the essential elements of a recognized tort, or does it also include tort-like conduct? If taken literally, the tortious conduct requirement would discharge debts for a wide range of debtor misconduct that courts consistently have found to be excepted from discharge under § 523(a)(6) without much debate, including claims for patent and copyright infringement,¹³⁴ discrimination,¹³⁵ sexual harassment,¹³⁶ litigation sanctions,¹³⁷ and violation of a court order.¹³⁸ These claims are not technically tort claims, although like tort claims, they involve the violation of a legal standard as opposed to a contractual obligation. If § 523(a)(6) does not require conduct that is literally tortious, but only tort-like, there seems to be no principled reason to exclude claims for breach of

¹³⁴See, e.g., *Barboza v. New Form, Inc.* (*In re Barboza*), 545 F.3d 702, 709-11 (9th Cir. 2008); *Albarran v. New Form, Inc.* (*In re Albarran*), 347 B.R. 369, 383 (9th Cir. B.A.P. 2006); *Monsanto Company v. Trantham* (*In re Trantham*) 304 B.R. 298, 308 (6th Cir. B.A.P. 2004); *Yash Raj Films (USA) v. Ahmed* (*In re Ahmed*), 359 B.R. 34, 41-42 (Bankr. E.D.N.Y. 2005); *Monsanto Co. v. Wood* (*In re Wood*), 309 B.R. 745, 754 (Bankr. W.D.Tenn. 2004).

¹³⁵See, e.g., *Bernal v. Benham* (*In re Benham*), 2008 WL 397668 at *3-4 (Bankr. D. Mass. Feb. 11, 2008); *Jones v. Svreck* (*In re Jones*), 300 B.R. 133 (1st Cir. B.A.P. 2003).

¹³⁶See, e.g., *Sells v. Porter* (*In re Porter*), 539 F.3d 889, 894-95 (8th Cir. 2008); *Gee v. Hammond* (*In re Gee*), 173 B.R. 189, 192-93 (9th Cir. B.A.P. 1994). In *Gee*, the plaintiff had obtained a judgment under Washington state law for sexual harassment. The debtor argued that the debt was not nondischargeable under § 523(a)(6) because sex discrimination is not an intentional tort under Washington law. The BAP rejected the argument, stating: “this characterization of ‘wrongful’ is too narrow. Wrongful acts include conduct that infringes on the rights of others, particularly those rights protected by state or federal statutes.” *Gee* was decided by the ninth circuit B.A.P. before *Jercich* and *Lockerby*, in which the ninth circuit court of appeals held that tortious conduct is an essential element for nondischargeability under § 523(a)(6). Thus, it appears that *Jercich* and *Lockerby* overrule *Gee*. However, in *Hughes v. Arnold* (*In re Hughes*), 347 Fed. Appx. 359 (9th Cir. 2009), the ninth circuit affirmed the bankruptcy court’s holding giving preclusive effect to a state court order awarding attorney’s fees. The court of appeals stated that “the issue of [the debtor’s] willfulness and maliciousness was squarely before the state court when it determined that he conduct was “unreasonable, frivolous, meritless, or in bad faith,” and rejected the debtor’s contention that § 523(a)(6) is conditional on an intentional tort, rather than a general intention to cause injury.” *Id.* at 361.

¹³⁷See, e.g., *Hughes v. Arnold* (*In re Hughes*), 347 Fed. Appx. 359, 360 (9th Cir. 2009); *Papadakis v. Zelis* (*In re Zelis*), 66 F.3d 205, 209 (9th Cir. 1995); *Suarez v. Barrett* (*In re Suarez*), 400 B.R. 732, 738 (9th Cir. B.A.P. 2009)

¹³⁸See, e.g., *Carter v. Trammell* (*In re Trammell*), 172 B.R. 41, 44-45 (Bankr. W.D. Ark. 1994) (holding that claim for breach of covenant not to compete and violation of injunction was nondischargeable under § 523(a)(6)).

contract where the debtor's conduct is tort-like but not literally tortious.¹³⁹

Furthermore, a requirement of tortious conduct raises other peculiar questions, each of which takes a court another step further from the text of the statute. For example, if "tortious conduct" does not include tort-like conduct, does it require an independent tort, or does it include a breach of contract that is also a tort?¹⁴⁰ If the statute requires conduct that amounts to a tort, does applicable state law, or federal common law, determine what is tortious? If the former, the requirement of a tort introduces some lack of uniformity into the application of the federal statute, a result that runs counter to one of the purposes of the Bankruptcy Code.¹⁴¹

4. *Existing case law is consistent with an interpretation of Section 523(a)(6) requiring affirmative conduct by the debtor*

The courts that have held that contract claims can be nondischargeable under § 523(a)(6) typically reason or simply assume that the statute covers contract claims because it does not by its terms limit the types of claims that it covers.¹⁴² However, no court has held that a knowing breach of contract

¹³⁹See, e.g., *Nat'l Homes Corp. v. Lester Indus., Inc.*, 336 F. Supp. 644, 647 (D.W.D. Va. 1972) (applying § 17(a)(8) of the former Bankruptcy Act, stating that "the words of the statute are plain: a debt is not dischargeable if it is 'for willful and malicious injuries to the person or property of another.' The statute does not attempt to distinguish whether such debt arose on account of contract or tort theory.").

¹⁴⁰See, e.g., *Petralia v. Jercich (In re Jercich)* 238 F.3d 1202, 1205-06 (9th Cir. 2001) (holding that § 523(a)(6) does not require conduct that is a tort independent of the breach, and that it is sufficient if the breach is tortious). The court found that the breach of a contract to pay commissions to the plaintiff was tortious under California law because a fundamental public policy of California favors the prompt payment of wages owed to an employee. *Id.* at 1207.

¹⁴¹For example, in *Jercich*, *supra* note 140, the ninth circuit court of appeals found that the breach of a contract was tortious under state law based on a fundamental public policy of the state, California. *Id.* Other states may not classify such conduct as tortious. Thus, the ninth circuit approach would exclude from the scope of the exception conduct that may generally be considered tortious, such as under the RESTATEMENT OF TORTS, but which is not tortious under the law of the particular state in which the debtor acted. Conversely, the ninth circuit approach means that the scope of the discharge will be narrower in states that more liberally define tortious conduct or recognize more torts. In other words, the ninth circuit's decision in this case allows for the non-uniform application of the exception, so that the same conduct by debtors in two different states may lead to discharge of the debt by one debtor but not the other.

¹⁴²See, e.g., *Dorr, Bentley & Pecha, CPAs, PC v. Pasek (In re Pasek)*, 983 F.2d 1524, 1526 (10th Cir. 1993) (indicating that contract claim for breach of covenant not to compete in a partnership agreement could be nondischargeable under § 523(a)(6), while affirming the lower court decisions that in this case the injury was not willful and malicious because the debtor acted with just cause or excuse; the plaintiff had sought to materially alter the partnership agreement by regulating aspects of the debtor's personal and family life and imposing an unreasonable billable hour quota on the debtor; and further the debtor reasonably relied on a legal opinion that the covenant not to compete was not enforceable); *N.I.S. Corp. v. Hallahan (In re Hallahan)*, 936 F.2d 1496, 1500-01 (7th Cir. 1991); *The Spring Works, Inc. v. Sarff (In re Sarff)*, 242 B.R. 620, 626 (6th Cir. B.A.P. 2000); *Nat'l Homes Corp. v. Lester Indus., Inc.*, 336 F. Supp. at 647 (applying § 17(a)(8) of the former Bankruptcy Act, stating that "the words of the statute are plain: a debt is not dischargeable if it is 'for willful and malicious injuries to the person or property of another.' The statute does not attempt to distinguish whether such debt arose on account of contract or tort theory."); *Humility of Mary Health Ptns. v. Garritano (In re Garritano)*, 427 B.R. 602, 613-14 (Bankr.

without more is nondischargeable under § 523(a)(6). Some courts state that the claim must involve “aggravating circumstances,”¹⁴³ but have not further articulated what distinguishes a dischargeable from a nondischargeable debt for breach of contract. Many cases involve both contract and tort or other

N.D. Ohio 2009); *Iberia v. Jeffries* (*In re Jeffries*), 378 B.R. 248, 254-56 (Bankr. W.D. Mo. 2007) (holding that debt for damage to secured creditor’s collateral was nondischargeable without addressing whether the claim was in tort for conversion or for breach of contract); *Custom Heating & Air, Inc. v. Andress* (*In re Andress*), 345 B.R. 358, 371 (Bankr. N.D. Okla. 2006) (holding that the debtor acted willfully and with malice in violating covenant not to compete, but the plaintiff failed to prove injury); *Killough v. Hebert* (*In re Hebert*), 347 B.R. 541, 549 (Bankr. E.D. La. 2006) (indicating that breach of contract claims can be nondischargeable under § 523(a)(6), but holding that the evidence in this case did not show that the debtor “did anything to [the plaintiff] that objectively could have been certain to cause harm . . . or that [the debtor] was motivated to cause [the plaintiff] harm.”); *Prairie Eye Center v. Butler* (*In re Butler*), 297 B.R. 741, 747-49 (Bankr. C.D. Ill. 2003) (holding that debt arising from breach of covenant not to compete and violation of injunction was nondischargeable); *A.V. Reilly Int’l Ltd. v. Rosenzweig* (*In re Rosenzweig*), 237 B.R. 453, 459 (Bankr. N.D. Ill. 1999) (holding debt for breach of covenant not to compete was nondischargeable under § 523(a)(6) where the debtor “not only intended to commit the wrongful acts of violating the continuing covenants under the employment contract . . . by setting up [a new company] with two [of plaintiff’s] employees and taking some of the [plaintiff’s] customers with them, he also intended to injure [the plaintiff’s] property interests in its protected trade secrets by diverting to [his own company] business which otherwise would have gone to [the plaintiff]. The Debtor candidly admitted . . . that he knew what he was doing and what its effect upon [the plaintiff] would be.”); *Novartis Corp. v. Luppino* (*In re Luppino*), 221 B.R. 693, 699-700 (Bankr. S.D.N.Y. 1998) (indicating that contract claims can be nondischargeable under § 523(a)(6) if there are aggravating circumstances, but holding that state court judgment for commercial bribery and breach of duty of loyalty was dischargeable under § 523(a)(6)); *Bundy Am. Corp. v. Blankfort* (*In re Blankfort*), 217 B.R. 138, 144-46 (Bankr. S.D.N.Y. 1998) (stating that malice “will be found by imputation where the debtor has breached a duty to the plaintiff founded in contract, statute or tort law,” and holding that debt for breach of franchise agreement and trademark infringement was dischargeable, but that debt for the debtor’s continuing breach of the agreement and infringement,” coupled with repeated and blatant violations of four district court orders, was nondischargeable); *Carter v. Trammell* (*In re Trammell*), 172 B.R. 41, 44 (Bankr. W.D. Ark. 1994) (explaining that “to fall within the purview of section 523(a)(6), it is sufficient that (1) [the debtor] intentionally disregarded the provisions of the agreements, and (2) knowing that the breach would harm [the creditor], proceeded to act in contravention of the agreements”); *Traditional Industries, Inc. v. Ketaner* (*In re Ketaner*), 149 B.R. 395, 400-01 (Bankr. E.D. Va. 1992) (finding that debtor caused a willful and malicious injury in breaching a covenant not to compete). See also *Stevens v. Antonious* (*In re Antonious*), 358 B.R. 172, 187 (Bankr. E.D. Pa. 2006) (holding that negligent performance of a home improvement contract does not give rise to nondischargeable debt under § 523(a)(6)); *Mutum v. Rickabaugh* (*In re Rickabaugh*), 355 B.R. 743, 758 (Bankr. S.D. Iowa 2006) (holding that debt for ordinary breach of contract was dischargeable under § 523(a)(6)); *Rezin v. Barr* (*In re Barr*), 194 B.R. 1009, 1024 (Bankr. N.D. Ill. 1996) (holding that breach of contract was not willful and malicious, therefore debt was dischargeable); *Rose v. Rose* (*In re Rose*), 155 B.R. 394, 397-99 (Bankr. W.D. La. 1993) (involving breach of a property settlement agreement); *FDIC v. Smith* (*In re Smith*), 160 B.R. 549, 553 (D. N.D. Tex. 1993) (holding that “§ 523(a)(6) does not mandate proof of an independent, recognized tort, but instead requires only the showing that the debtor’s actions were willful and malicious, i.e., done intentionally and without just cause or excuse.”); *Worldwide Bearing and Auto. Parts, Inc. v. Springer* (*In re Springer*), 85 B.R. 634, 635 (Bankr. S.D. Fla. 1988) (involving a claim based on civil theft and misappropriation of trade secrets, not for breach of contract; the court stated that “[h]ow the debt arose is of no real consequence. The theory of recovery is immaterial.”).

¹⁴³See, e.g., *Rescuecom Corp. v. Khafaga* (*In re Khafaga*), 2009 WL 4269441 at *8 (Bankr. E.D.N.Y. Nov. 30, 2009); *In re Luppino*, 221 B.R. at 700; *In re Blankfort*, 217 B.R. at 144-45 (Bankr. S.D.N.Y. 1998).

non-contract claims, so that the statements regarding nondischargeability of the contract claims may be read as dicta.¹⁴⁴ Although it does not appear that any court has explicitly recognized that "willfulness" requires voluntary, affirmative conduct by the debtor, the decisions by courts applying § 523(a)(6) to contract claims are generally consistent with this reading of the statute.

The cases in which a creditor seeks to except a contract claim from discharge under § 523(a)(6) often involve covenants not to compete; contracts to pay an obligation from a designated source of funds; and home construction or home improvement contracts.¹⁴⁵ In the noncompetition agreement cases, the debtor has not merely failed to perform, but has acted affirmatively in violating the contract. Courts that have analyzed this scenario have repeatedly, although not invariably, held the debt from the breach of contract to be nondischargeable. Likewise, in the cases involving misappropriation of earmarked funds, the debtor usually has not only failed to pay over funds to the creditor, but has acted by diverting the funds to other purposes. By contrast, in the cases involving home construction or improvement contracts, a debtor's failure to perform in accordance with the contract is properly regarded as a breach by failure to perform, and not as affirmative conduct in violation of the contract. In these cases, it can be difficult to discern whether the breach was by nonfeasance rather than malfeasance, which may help explain why these cases have arisen repeatedly under § 523(a)(6). The courts in these cases have consistently held that the debt was dischargeable under § 523(a)(6).¹⁴⁶

¹⁴⁴See, e.g., *The Spring Works, Inc. v. Sarff* (*In re Sarff*), 242 B.R. 620, 625-29 (6th Cir. B.A.P. 2000) (holding that a state court judgment for breach of a covenant not to compete, breach of contract, breach of duty of loyalty, misappropriation of trade secrets, intentional interference with business relations and discovery sanctions collaterally estopped the debtor to contest nondischargeability of the debt under § 523(a)(6)); *Voyatzoglou v. Hambley* (*In re Hambley*), 329 B.R. 382, 402 (Bankr. E.D.N.Y. 2005) (holding that breach of agreement to return payments in the event that a deal was not finalized constituted a debt for willful and malicious injury; the plaintiff also asserted claims for conversion, fraud, RICO violations and civil theft); *Prairie Eye Center v. Butler* (*In re Butler*), 297 B.R. 741, 747-49 (Bankr. C.D. Ill. 2004) (holding that debt for breach of covenant not to compete and violation of injunction was nondischargeable); *In re Blankfort*, 217 B.R. at 144-46 (holding that debt for breach of franchise agreement and trademark infringement was dischargeable, but that debt for debtor's continuing breach of the agreement and infringement, coupled with repeated and blatant violations of four district court orders was nondischargeable). See also *In re Colclazier*, 134 B.R. at 33 (stating that "from a review of the decisions of those courts which have excepted from discharge damages from injuries arising from the breach of a contract, that they have done so only upon finding an independent, willful tort").

¹⁴⁵See *infra* notes 147-89 and accompanying text.

¹⁴⁶There are a number of § 523(a)(6) cases involving the breach of a contract other than a covenant not to compete, promise to pay an obligation from a designated source or agreement for home improvements. These cases, too, should be analyzed on the basis of whether the breach involved a failure to act in accordance with the contract, or affirmative conduct in violation of the contract that is also willful and malicious. A leading case and a good example is *Williams v. Int'l Bhd. of Elec. Workers Local 520*, 337 F.3d 504 (5th Cir. 2003). In *Williams*, the debtor operated an electrical contracting business. He entered into a collective bargaining agreement with the plaintiff union, promising that he would hire exclusively

a. Cases involving covenants not to compete

Except in the ninth circuit, where the court of appeals has held that § 523(a)(6) requires tortious conduct,¹⁴⁷ courts have repeatedly found that debts arising from a knowing breach of a covenant not to compete are nondischargeable. In these cases, the debtor's conduct in violating the noncompetition agreement was affirmative as well as intentional, deliberate and without just cause or excuse.¹⁴⁸

through union referrals. He knowingly breached this contract by hiring non-union electricians, and the union obtained a judgment in federal court for payment of restitution of wages and benefits to the affected union members and the union's attorney's fees. *Id.* at 506-08. When the debtor filed for bankruptcy, the plaintiff sought a determination that this debt was nondischargeable under § 523(a)(6).

The fifth circuit concluded that contract claims may be nondischargeable under § 523(a)(6) if the breach is willful, but held that in this case, any injury to the union (as opposed to individual members of the union) was neither intended nor substantially certain. *Id.* at 510-11. The court found that when the debtor hired non-union electricians, he was motivated by a desire to complete the pending project and to save his business, and thus did not intend to injure the Union. *Id.* at 511. The court stated that whether the breach was substantially certain to harm the union was a closer question, but did not resolve the question because it concluded that it was the union members, and not the plaintiff union, that were substantially certain to suffer injury as a result of the breach. *Id.* The court stated that the only direct injuries suffered by the union were to its prestige and to its capacity to uphold its contracts, and that neither of these injuries was substantially certain to flow from the breach. *Id.*

At first blush, the facts of *Williams* suggest that the debtor acted affirmatively in breaching the CBA. He hired non-union electricians instead of union referrals. But upon closer inspection, the injury to the plaintiff union or to the members of the union resulted exclusively from the failure to use union referrals and not from the hiring of the non-union electricians. The case is quite different than the misuse of funds designated for payment of a particular obligation, or the violation of a covenant not to compete, where the injury is the result of what the debtor has done, and not what he has failed to do vis a vis the plaintiff. The breach of the CBA in *Williams* is indistinguishable from the typical efficient breach, where a contracting party enters into a substitute transaction for economic reasons. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.9, at 89-90 (2d ed. 1977). The breach in *Williams* was no more willful than a buyer's decision to buy goods from another supplier at a lower price than contracted with the original supplier. Thus, although *Williams* was correct in concluding that § 523(a)(6) can apply to contract claims, it did not articulate any principle that effectively distinguished that case from an ordinary knowing breach of contract. (The *Williams* opinion is strained on several points, as discussed in the Appendix, *infra* notes 191-203 and accompanying text.)

¹⁴⁷See *Petralia v. Jercich* (*In re Jercich*), 238 F.3d 1202, 1205 (9th Cir. 2001) (holding that deliberate breach of contract had to be accompanied by a tort to be excepted from discharge for willful and malicious injury); *JB Constr., Inc. v. King* (*In re King*), 403 B.R. 86, 93-95 (Bankr. D. Idaho 2009) (holding that debt for violation of covenant not to compete was dischargeable where debtor did not commit associated tort of intentional interference with contract or intentional interference with prospective economic advantage); *A.K.D., Inc. v. Treon* (*In re Treon*), 2008 WL 65575 at *3 (Bankr. D.Or. Jan. 4, 2008) (holding that the debt for breach of a covenant not to compete was dischargeable because there was no associated tortious conduct).

¹⁴⁸See *The Spring Works, Inc. v. Sarff* (*In re Sarff*), 242 B.R. 620, 625-26 (6th Cir. B.A.P. 2000); *Nat'l Home Corp. v. Lester Indus., Inc.*, 336 F. Supp. 644, 646-48 (D. W.D. Va. 1972); *Expressdrop, Inc. v. Mateyko* (*In re Mateyko*), 437 B.R. 313, 320-22 (Bankr. N.D.Ill. 2010) (holding that debt for violation of covenant not to compete in franchise agreement was nondischargeable where debtor operated a competing business in knowing violation of the covenant and told plaintiff he wanted to break the agreement and would get away with it); *Custom Heating & Air, Inc. v. Andress* (*In re Andress*), 345 B.R. 358, 371 (Bankr. N.D.Okla. 2006) (holding that debt for debtor's violation of covenant not to compete with business he sold to plaintiff was for willful and malicious injury; reasoning that the debtor had "admitted that

*Rescuecom Corporation v. Khafaga (In re Khafaga)*¹⁴⁹ is illustrative. There, the court held that the plaintiff's complaint stated a claim under § 523(a)(6) in alleging that the debtor breached the covenants not to compete in two franchise agreements by secretly diverting clients from the two franchises to a company owned by his wife.¹⁵⁰ The debtor's income reports to the plaintiff franchisor misstated the franchise's income by not reporting any of the revenue generated by the competing business.¹⁵¹ The court held that the complaint sufficiently alleged that the debtor acted willfully because it alleged that the debtor acted with intent to injure the plaintiff and that the debtor knew that injury would result from his breach of the franchise agreement.¹⁵² Regarding malice, the court stated that a "knowing breach of contract generally does not satisfy the malicious element of § 523(a)(6) absent 'some aggravating circumstance evidencing conduct so reprehensible as to warrant denial of the "fresh start" to which the "honest but unfortunate" debtor would normally be entitled under the Bankruptcy Code.'"¹⁵³ The court added that generally a debtor has not acted maliciously if he was seeking profit or other benefit.¹⁵⁴ In this case, the court held that the plaintiff alleged aggravating circumstances that would create a factual question

he . . . diverted potential customers . . . with knowledge of his contractual obligations . . . and he fully intended the consequences of his actions."); *Prairie Eye Ctr. v. Butler (In re Butler)*, 297 B.R. 741, 748-49 (Bankr. C.D.Ill. 2003) (holding that debt for debtor's violation of covenant not to compete with employer for period following termination of employment was nondischargeable; reasoning that the debtor "repeatedly and purposefully engaged in acts which he knew to be in violation of the covenant," and that while "debtor may dispute that he subjectively intended to injure Plaintiff by intentionally violating the covenant not to compete, . . . [he] does not (and could not) seriously dispute the fact that he had subjective knowledge that injury to Plaintiff was substantially certain to result from his intentional acts."); *Carter v. Trammell (In re Trammell)*, 172 B.R. 41, 44-46 (Bankr. W.D. Ark. 1994) (holding debt nondischargeable under § 523(a)(6) where debtor violated covenant not to compete by working for clients whose accounts he had sold to the plaintiff; reasoning that the injury was willful because debtor intended to breach the contract, and that the injury was malicious because the debtor was aware of the contract terms, and proceeded nevertheless to violate the plaintiff's rights under the contract); *Trad. Indus., Inc. v. Ketaner (In re Ketaner)*, 149 B.R. 395, 401 (Bankr. E.D.Va. 1992) (holding that debt for breach of covenant not to compete was nondischargeable where debtor opened a new company to compete with the business he had sold to the debtor, and induced nearly the entire staff of his former company to work for his new company); *A.V. Reilly Int'l, Ltd. v. Rosenzweig (In re Rosenzweig)*, 237 B.R. 453, 459 (Bankr. N.D. Ill. 1999) (holding that debt for breach of covenant not to compete and violation of Illinois Trade Secrets Act was nondischargeable where the debtor "knew what he was doing and what its effect upon [the plaintiff] would be."). See also *N.I.S. Corp. v. Hallahan (In re Hallahan)*, 936 F.2d 1496, 1500 (7th Cir. 1991) (conceding by debtor that if the covenant not to compete was valid, his breach of the covenant was willful and malicious).

¹⁴⁹419 B.R. 539 (Bankr. E.D. N.Y. 2009).

¹⁵⁰*Id.* at 548-52.

¹⁵¹*Id.* at 552.

¹⁵²*Id.* at 549.

¹⁵³*Id.* at 550 (quoting *Novartis v. Luppino (In re Luppino)*, 221 B.R. 693, 700 (Bankr. S.D.N.Y. 1998)).

¹⁵⁴*Id.*

whether the debtor acted in a socially reprehensible way.¹⁵⁵

The Complaint does not merely allege that the Defendant violated the non-compete clause, and failed to pay royalties pursuant to the Franchise Agreements. Rather, it goes further, alleging that the Defendant secretly opened a competing business under his wife's name in order to avoid detection, actively diverted customers and business away from his own Rescuecom franchises and submitted false reports to Rescuecom to conceal his actions, with the specific intent to deprive the Plaintiff of royalties under the Franchise Agreements.¹⁵⁶

In *Khafaga* the debtor acted affirmatively and with knowledge that his conduct would cause injury, although the court concludes that the plaintiff's injury was willful based solely on the finding that the debtor knew that injury would result from his conduct.¹⁵⁷ This can be said of any knowing breach of contract, so that according to this analysis, it was the malice prong of the statute that distinguished dischargeable from nondischargeable claims for knowing breach of contract. As discussed above, reliance on the malice prong of the statute to distinguish between dischargeable and nondischargeable contract claims is analytically unsound.¹⁵⁸

That the breach of a covenant not to compete entails affirmative conduct does not inevitably lead to the conclusion that the debt is nondischargeable under § 523(a)(6). Recall that in *Geiger*, the debtor acted affirmatively in committing malpractice, but the debt was not for a willful injury. Similarly, in several of the noncompetition agreement cases, the courts have held that the debt was dischargeable when the plaintiff's injury was either not intentional or not malicious, although in violating the covenant the debtor acted affirmatively and did not simply fail to perform. For example, in *A.K.D., Inc. v. Treon (In re Treon)*,¹⁵⁹ the court held that the debtor did not knowingly, and thus did not willfully, violate a covenant not to compete where her attorney advised her that her conduct was not prohibited by the covenant.¹⁶⁰ For the same reason, the court found that the breach was not without excuse, and

¹⁵⁵*Id.* at 550-52.

¹⁵⁶*Id.* at 552.

¹⁵⁷419 B.R. at 549.

¹⁵⁸See *supra* notes 80-85 and accompanying text (discussing use of the "malicious" requirement in § 523(a)(6) to distinguish dischargeable from nondischargeable claims for breach of contract).

¹⁵⁹2008 WL 65575 (Bankr. D. Or. Jan. 4, 2008). The *Treon* court is in the ninth circuit. The court based its conclusion on the alternative grounds that the debtor did not commit an independent tort and that the injury was not willful and malicious. *Id.* at *3-7.

¹⁶⁰*Id.* at *7.

therefore was not malicious.¹⁶¹ The debtor's contract with the plaintiff to provide home health service prohibited her from working for any of the plaintiff's clients for three months after termination of employment.¹⁶² Her attorney advised her that the covenant did not apply to former clients, and the debtor thereafter accepted a job with a former client within three months of leaving her employment with the plaintiff.¹⁶³

As discussed earlier, an interpretation of § 523(a)(6) that prevents the discharge of claims for knowing breach of contract would be inconsistent with the provisions in § 365 that expressly authorize the intentional breach — rejection — of executory contracts.¹⁶⁴ In the case of noncompetition agreements, this conflict largely disappears. While the case law is not consistent, the prevailing view is that noncompetition agreements are not executory, and therefore cannot be rejected.¹⁶⁵ Also, some courts have held that the breach of a noncompetition agreement does not give rise to a "claim"

¹⁶¹*Id.*

¹⁶²*Id.*

¹⁶³*Id.* at *6-7. See also *Dorr, Bentley & Pecha, CPA's, P.C. v. Pasek (In re Pasek)*, 983 F.2d 1524, 1528 (10th Cir. 1993) (affirming lower court's holding that the debtor acted with just cause or excuse in violating a covenant not to compete where the debtor's former employer had sought to materially alter its agreement with the debtor to regulate his and his wife's personal affairs and to impose an unreasonable billable hours requirement on the debtor, and the debtor had reasonably relied on advice from his attorney that the covenant was unenforceable); *Bundy Am. Corp. v. Blankfort (In re Blankfort)*, 217 B.R. 138, 143-46 (Bankr. S.D.N.Y. 1998) (holding that debtor's breach of post-termination provision of franchise agreement by continuing to operate the franchise and use the trade and service marks and logo of the plaintiff after the franchise had been terminated was not malicious because there were not sufficient aggravating circumstances). Cf. *Carter v. Trammell (In re Trammell)*, 172 B.R. 41, 46 (Bankr. W.D.Ark. 1994) (stating that court did not believe the debtor's assertion that he acted on the advice of an attorney in violating a covenant not to compete). Accord, *Prairie Eye Ctr. v. Butler (In re Butler)*, 297 B.R. 741, 749 (Bankr. C.D.Ill. 2003) (rejecting the debtor's argument that his violation of noncompetition clause was not willful because he was seeking to serve his patients and to support two families).

¹⁶⁴See *supra* notes 99-101 and accompanying text.

¹⁶⁵See, e.g., *In re Drake*, 136 B.R. 325, 328 (Bankr. D. Mass 1992) (holding that neither the debtor's obligation not to compete nor the plaintiff's obligation to make monthly payments made contract executory); *Oseen v. Walker (In re Oseen)*, 133 B.R. 527, 529-30 (Bankr. D. Idaho) (holding that contract was not executory where sole performance remaining was debtor's duty not to compete); *In re Bluman*, 125 B.R. 359, 361-65 (Bankr. E.D.N.Y. 1991) (holding that neither the debtor's obligation not to compete nor the plaintiff's obligation to make monthly payments made contract executory); *In re Noco, Inc.*, 76 B.R. 839, 843 (Bankr. N.D. Fla. 1987) (holding that noncompetition agreement was not an executory contract where there was no remaining performance obligation, only debtor's obligation not to complete). See also *In re Spectrum Info. Techs., Inc.*, 190 B.R. 741, 747-48 (Bankr. E.D.N.Y. 1996) (involving obligations of confidentiality and noninterference). But see *In re Teligent*, 268 B.R. 723, 729-32 (Bankr. S.D.N.Y. 2001) (finding that merger agreement was an executory contract where debtor had remaining obligation not to compete and plaintiff had continuing obligation to make monthly payments); *Burger King Corp. v. Rovine Corp. (In re Rovine Corp.)*, 5 B.R. 402, 404 (Bankr. W.D. Tenn. 1980) (holding that covenant not to compete was an executory contract). See generally 2 NORTON BANKRUPTCY LAW & PRACTICE 46:9 (West 3d ed. 2010).

within the meaning of Code § 101(5)¹⁶⁶ because the claimant has an equitable remedy, and not a right to payment.¹⁶⁷ As such, the obligation is not subject to discharge.¹⁶⁸ These approaches to the treatment of noncompetition agreements are consistent with the view that a claim for the prepetition breach of a covenant not to compete may be nondischargeable under § 523(a)(6). These approaches may be criticized, however, as a means to exclude claims from discharge without subjecting them to analysis under § 523(a)(6) or another of the exceptions to discharge in Code § 523(a).

b. Cases involving agreements to pay funds from a designated source

In breaching a contract to pay monies from a designated source, the debtor not only fails to perform the obligation to the promisee, but may also act voluntarily and affirmatively in using the monies for other purposes. In such cases, the nonbreaching party is injured both by the debtor's nonpayment of the debt and by his diversion of the designated funds.

Outside of the ninth circuit¹⁶⁹ courts have consistently found these debts to be nondischargeable under § 523(a)(6) upon proof that the debtor diverted the funds. In *Sanders v. Vaughn (In re Sanders)*,¹⁷⁰ the debtor had hired the plaintiff attorney on a contingency fee basis to seek a tax refund from the IRS.¹⁷¹ The contract gave the plaintiff a power of attorney and provided that tax refund checks would be sent to him and that he would deduct his fee from those funds.¹⁷² Upon learning that the IRS was willing to pay him \$30,000 to settle his claim, the debtor wrote a letter to the IRS revoking the power of attorney and directing that the refund check be sent to him.¹⁷³ In this way, the debtor "beat [the plaintiff] out of the fee."¹⁷⁴ The tenth circuit

¹⁶⁶11 U.S.C. § 101(5) ("[T]he term 'claim' means—(A) right to payment . . . ; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment").

¹⁶⁷*Kennedy v. Medicap Pharmacies, Inc.*, 267 F.3d 493, 496-98 (6th Cir. 2001); *In re Udell*, 18 F.3d 403, 408-10 (7th Cir. 1994); 2 COLLIER ON BANKRUPTCY p 101.05[5] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). *Contra*, *The Maids Int'l, Inc. v. Ward (In re Ward)*, 194 B.R. 703, 714-15 (Bankr. D. Mass. 1996) (holding that plaintiff's injunctive rights with respect to debtor's breach of a covenant not to compete constituted a claim).

¹⁶⁸A discharge in bankruptcy discharges the debtor from "debts." See 11 U.S.C. §§ 727(b), 1328(a), 1141(d). "Debt" is defined as "liability on a claim." *Id.* at § 101(12).

¹⁶⁹In the ninth circuit, the rule that § 523(a)(6) requires tortious conduct has in several cases led to the discharge of a debt for diversion of earmarked funds. See *Lockerby v. Sierra*, 535 F.3d 1038, 1039, 1043-44 (9th Cir. 2008) (involving agreement by which the debtor attorney assigned to plaintiff fifty percent of the fees from four pending cases); *Del Bino v. Bailey (In re Bailey)*, 197 F.3d 997, 999, 1002-03 (9th Cir. 1999) (involving agreement to pay attorney's fees and costs from settlement of case).

¹⁷⁰210 F.3d 390 (Table), 2000 WL 328136 (10th Cir. Mar. 29, 2000).

¹⁷¹*Id.* at *1.

¹⁷²*Id.*

¹⁷³*Id.*

¹⁷⁴*Sanders*, 210 F.3d at 390 (quoting the bankruptcy court, Adversary Proceeding 98-1157-BH, at 2 (Bankr. W.D. Okla. Oct. 14, 1998) (unpublished decision)).

court of appeals affirmed in an unpublished opinion that did not separately consider the “willful” and “malicious” prongs of the statute.¹⁷⁵

In *Alessi v. Alessi (In re Alessi)*,¹⁷⁶ the debtor and her ex-husband agreed that, upon sale of a house, the debtor would remit a portion of the net proceeds to her ex-husband.¹⁷⁷ Instead, she sold the house and paid various credit card debts, effectively dissipating the home sale proceeds.¹⁷⁸ The bankruptcy court held that the debt was nondischargeable under § 523(a)(6), explaining:

In most instances, a knowing breach of contract does not create an injury that is both willful and malicious. However, the present facts indicate more than a simple knowing failure to pay a contractual obligation. By agreement, Lee and Amy had identified the time and source of payment. . . . Then, after the start of an action in state court to compel the promised disbursement of funds, she paid the moneys to other creditors. . . .

This case presents not just a failure to pay a debt, but a failure to pay from funds that the debtor had agreed specifically to earmark for that purpose. . . . the funds were accessible and not otherwise encumbered . . . the debtor knew of her obligation to turn over the funds. . . .¹⁷⁹

¹⁷⁵*Id.*

¹⁷⁶405 B.R. 65 (Bankr. W.D.N.Y. 2009).

¹⁷⁷*Id.* at 66.

¹⁷⁸*Id.* at 66-67.

¹⁷⁹*Id.* at 68. *Accord*, *Rose v. Rose (In re Rose)*, 155 B.R. 394, 397-98 (Bankr. W.D. La. 1993) (holding that debt for failure to pay monies owed under property division agreement was nondischargeable under § 523(a)(6)). *See also* *Banks v. Gill Distrib. (In re Banks)*, 263 F.3d 862 (9th Cir. 2001) (holding debt nondischargeable where debtor attorney failed to pay portion of law suit recovery to another party in the case as agreed to in a settlement agreement, in an attempt to force the plaintiff to accept less than it was entitled to or to delay payment until the statute of limitations had run on the plaintiff's claim); *Humility of Mary Health Partners v. Garritano (In re Garritano)*, 427 B.R. 602, 613-14 (Bankr. N.D. Ohio 2009) (holding that debtor's failure to remit income from medical practice to his employer (who was paying him a salary of \$250,000 per year) pursuant to employment agreement constituted willful and malicious injury); *Voyatzoglou v. Hambley (In re Hambley)*, 329 B.R. 382, 402 (Bankr. E.D.N.Y. 2005) (holding that debt for breach of agreement to return payments in the event that a deal was not finalized was for willful and malicious injury); *Stephens v. Morrison (In re Morrison)*, 450 B.R. 734, 752-54 (Bankr. W.D. Tenn. 2011) (holding that debtor's use of monies paid by plaintiff under home renovation contract for personal expenses instead of for the renovation work gave rise to debt for willful and malicious injury). *Cf.* *Goldberg Sec., Inc. v. Scarlata (In re Scarlata)*, 979 F.2d 521, 526-27 (7th Cir. 1992), reh'g denied, 979 F.2d 521, 528 n.9 (holding that the bankruptcy court did not err in holding that the debtor, a market maker who traded options on plaintiff's account in violation of their agreement, acted willfully but not with malice; debtor's misuse of plaintiff's credit is comparable to a misappropriation of earmarked funds); *In re Nance*, 556 F.2d 602, 610-11 (1st Cir. 1977) (holding that debt was for willful and malicious injury and nondischargeable under former Bankruptcy Act where the debtor had assigned to plaintiff deferred income to be paid to the debtor by his employer); *Condon Oil Co. v. Wood (In re Wood)*, 503 B.R. 705 (Bankr. W.D. Wis. 2013)

The cases involving breach of a contract to remit identified funds are very similar to the cases involving conversion of a secured creditor's collateral or proceeds of collateral.¹⁸⁰ In both types of cases, specific property has been identified with payment of the creditor's claim, and the debtor injures the creditor by misappropriating that property to other purposes.

In the conversion of collateral cases, the creditor obviously has a cognizable legal interest in the collateral or proceeds, and the misappropriation typically constitutes the tort of conversion as well as a breach of a contract. In many of the cases involving breach of a contract to remit designated funds, it likewise appears that the creditor had a property interest in the funds, enforceable in bankruptcy, for example, by assignment from the debtor. The courts' reasoning in these cases does not depend on the promisee having a property interest in the funds.¹⁸¹ In these cases, the misappropriation is not necessarily a tort because traditionally, the tort requires conversion of a chattel and may not cover the taking of money or contract rights or intangible property interests.¹⁸²

(holding debt nondischargeable under § 523(a)(6) where debtor, an owner/operator of two gas stations, posted signs on the gas pumps stating that only cash or checks would be accepted as payment, knowing that under contract with creditor, all credit sales were credited to the creditor's account).

¹⁸⁰See, e.g., *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 330 (1934) (holding that debt for conversion of secured creditor's collateral was dischargeable absent "aggravating features"); *Friendly Fin. Svc. Mid-City, Inc. v. Modicue* (*In re Modicue*), 926 F.2d 452, 452-53 (5th Cir. 1991) (holding debt for conversion of secured creditor's collateral nondischargeable where debtor sold the property worth \$1300 at a rummage sale for \$120); *Vulcan Coals, Inc. v. Howard*, 946 F.2d 1226, 1229 (6th Cir. 1991) (holding that creditor sufficiently alleged claim for nondischargeability under § 523(a)(6) where it alleged that debtor participated in transfer of mortgaged property without notifying the creditor); *Bank of Western Oklahoma v. Cantrell* (*In re Cantrell*), 208 B.R. 498, 502 (10th Cir. B.A.P. 1997) (affirming nondischargeability determination under § 523(a)(6) where debtor was an experienced businessman, had knowledge of the creditor's security interest, transferred the property without the creditor's consent, and concealed the transfer).

¹⁸¹See *Humility of Mary Health Partners v. Garritano* (*In re Garritano*), 427 B.R. 602, 613-14 (Bankr. N.D. Ohio 2009) (holding debt nondischargeable where debtor doctor had diverted certain income from a medical practice that he had previously assigned to plaintiff); *Texas v. Walker*, 142 F.3d 813, 824 (5th Cir. 1998) (holding debt nondischargeable where debtor university professor had diverted income from outside professional services that he had previously assigned to his employer). See also *In re Nance*, 556 F.2d 602, 611 (1st Cir. 1977) (holding debt nondischargeable where debtor diverted deferred income owed to him by his employer and which he had previously equitably assigned to plaintiff).

¹⁸²The RESTATEMENT (SECOND) OF TORTS § 222A defines "conversion" as an "intentional exercise of dominion or control over a chattel" Chattel is generally understood to mean tangible, personal property, and not to comprehend money or intangible rights in property. See *Black's Law Dictionary* (9th ed. 2009) (defining "chattel" as "[m]ovable or transferable property; personal property; esp., a physical object capable of manual delivery"). Over time, the scope of the tort has been expanded beyond chattels, but does not necessarily cover all property interests. See RESTATEMENT (SECOND) OF TORTS § 242 cmt. f (providing that "[i]t is at present the prevailing view that there can be no conversion of an ordinary debt not represented by a document, or of such intangible rights as the goodwill of a business or the names of customers.").

c. Cases involving home construction and improvement contracts

The courts have consistently held that debts arising from the breach of a construction or renovation contract are not for willful and malicious injury.¹⁸³ In these cases, the home owner's injury is not willful where the debtor acted negligently or incompetently, even grossly negligently or incompetently, in performing the contract.¹⁸⁴ In the case of *Prewett v. Iberg* (*In re Iberg*),¹⁸⁵ "the debtor used substandard materials as well as unacceptable and inadequate construction practices," and the construction was so bad that an expert reported that his "inspections revealed the most blatant disregard for [the homeowner's] physical safety and financial waste I have ever witnessed in my over 30 years in this profession."¹⁸⁶ The debtor was not licensed (he used his wife's construction license on the contract because he was incapable of passing the licensing exam himself), and the court found that he "completely lacked the requisite skill sets to hold himself out as a contractor."¹⁸⁷ His supervision of the work site was so poor that "someone defecated in the attic, leaving the remains to be discovered by" the homeowner's structural engineer.¹⁸⁸ The bankruptcy court concluded that the debt was dischargeable under § 523(a)(6), explaining that "[t]he concept of 'willful' requires something greater than recklessness or negligence; it requires an intention or desire to injure the aggrieved party. The debtor is simply an incompetent contractor. . . . The record does not sufficiently reflect that the debtor acted in bad faith or had an active intent to build a house that would economically or physically harm" the homeowner.¹⁸⁹

¹⁸³See, e.g., cases cited *infra* note 206.

¹⁸⁴See, e.g., *Prewett v. Iberg* (*In re Iberg*), 395 B.R. 83 (Bankr. E.D.Ark. 2008) (holding debt dischargeable where debtor was incompetent, but did not intend or desire to cause injury) and cases cited *infra* note 189.

¹⁸⁵*In re Iberg*, 395 B.R. 83.

¹⁸⁶*Id.* at 87.

¹⁸⁷*Id.* at 87-88.

¹⁸⁸*Id.* at 88.

¹⁸⁹*Id.* at 92. *Accord*, *Siebanoller v. Rahrig* (*In re Rahrig*), 373 B.R. 829, 835-36 (Bankr. N.D. Ohio 2007) (holding that, although debtor's roofing work may have been unprofessional, it could not be characterized as willful and malicious within the meaning of § 523(a)(6) and was "at worst, negligent"); *Stevens v. Antonious* (*In re Antonious*), 358 B.R. 172, 187 (Bankr. E.D. Pa. 2006) (stating that "[n]egligent performance of a home repair contract falls outside the scope of section 523(a)(6)"); *Rezin v. Barr* (*In re Barr*), 194 B.R. 1009, 1024 (Bankr. N.D. Ill. 1996) (finding that plaintiffs did not prove that debtor "intended to build the property with defects . . . though the evidence showed that he was obviously negligent . . . and breached the contract and building code in many ways;" holding that debt was dischargeable under § 523(a)(6)); *Vaughn v. Quinn* (*In re Quinn*), 180 B.R. 550, 553 (Bankr. E.D. Mo. 1995) (finding that debtor's faulty plumbing repairs did not rise to the level of willful and malicious injury under § 523(a)(6)); *Taylor v. Kaufmann* (*In re Kaufmann*), 57 B.R. 644, 648 (Bankr. E.D. Wis. 1986) (holding that debt was dischargeable under § 523(a)(6) where "debtor negligently but with good intentions undertook and then

V. CONCLUSION

The courts are closely divided on whether Code § 523(a)(6)'s exception to discharge applies to contract claims or require tortious conduct. The courts that apply the statute to contract claims uniformly hold that § 523(a)(6) does not except from discharge debts for ordinary breach of contract, but have not articulated a coherent doctrine for distinguishing between claims for ordinary intentional breach of contract from those that cause a willful and malicious injury. This article has considered various alternative approaches to interpreting the exception as it applies to contract claims. The thesis is that the statute by its terms potentially applies to any claim for willful and malicious injury, including contract claims; and that the statute requires voluntary and affirmative conduct, as well as deliberate and malicious injury, for nondischargeability. The requirement of affirmative conduct parallels the application of the statute to tort and other sorts of claims, and effectively excludes from the scope of the exception to discharge claims for ordinary, but knowing, breaches of contract.

APPENDIX: APPELLATE DECISIONS ON WHETHER CODE SECTION 523(a)(6) EXCEPTS FROM DISCHARGE CLAIMS FOR KNOWING BREACH OF CONTRACT

This Appendix reviews the circuit court of appeals and bankruptcy appellate panel decisions that bear on whether § 523(a)(6) requires tortious conduct. This review does not cover cases involving a claim for conversion of a secured creditor's collateral or proceeds of collateral; while the secured creditor in these cases may have a claim for breach of contract, conversion is a tort, and thus the cases do not involve the breach of a contract independent of any claim in tort. The objective is to provide a detailed examination of the appellate case law in each circuit that will be useful in seeking or opposing the discharge of a contract claim under § 523(a)(6) in a given bankruptcy court. The fifth, sixth, seventh, eighth, ninth and tenth circuit appellate courts have addressed the dischargeability of contract claims under § 523(a)(6), while the first, second, third, fourth and eleventh circuits have not. While published circuit court decisions are binding on all lower courts within the circuit,¹⁹⁰ BAP decisions are not; however, in the absence of bind-

performed a job he thought he could handle but, after experiencing various problems, discovered that he was unable to undo the resulting damages.”).

¹⁹⁰Four of the circuit court decisions — one each from the fifth, sixth, seventh and tenth circuit courts of appeals — are unpublished opinions issued before 2007. Federal Rule of Appellate Procedure 32.1 states that “[a] court may not prohibit or restrict the citation of federal judicial opinions . . . that have been . . . designated as ‘unpublished’ . . . or the like; and . . . issued on or after January 1, 2007.” F.R.A.P. 32.1. The effect of unpublished decisions, and whether pre-2007 unpublished decisions may be cited, are matters left to the local rules of each circuit. See Robert Timothy Reagan, *Citing Unpublished Federal*

ing circuit court authority, BAP decisions may be especially persuasive.

In summary, the fifth and tenth circuits have clearly stated that contract claims can be excepted from the discharge under § 523(a)(6). The reasoning in the leading fifth circuit decision is flimsy, and an unpublished fifth circuit decision contradicts it. The most recent of the two tenth circuit decisions does state that contract claims can be nondischargeable under § 523(a)(6), but the statement is dicta. The other tenth circuit case was decided before *Geiger*, so its conclusory reasoning is subject to reconsideration in light of *Geiger*. The ninth circuit has unequivocally held that tortious conduct is an essential element of § 523(a)(6), and the eighth circuit has somewhat less definitively stated the same rule in dicta. The two seventh circuit cases that address the issue are inconclusive.

A. FIFTH CIRCUIT

In *Williams v. International Brotherhood of Electrical Workers Local 520*,¹⁹¹ the fifth circuit stated that a claim for breach of contract can be nondischargeable under § 523(a)(6), but held that on the facts of the case the injury suffered by the plaintiff union (as distinct from its members) was not willful and malicious. Thus, the pronouncement on the scope of § 523(a)(6) was not necessary to the decision in the case; the court could have ignored the question whether § 523(a)(6) requires tortious conduct, and held that in any event the debt was not nondischargeable on the facts of the case. In no case has the fifth circuit actually held that a contract claim was nondischargeable in the absence of an independent tort.

The court in *Williams* did not consider the merits of the competing interpretations of § 523(a)(6). Rather, it based its conclusion that a breach of contract may involve a willful and malicious injury apart from any tortious conduct on the Supreme Court's decision in *Geiger* and two fifth circuit decisions, *Texas v. Walker (In re Walker)*¹⁹² and *Miller v. J.D. Abrams Inc. (In re Miller)*.¹⁹³ However, *Geiger* is not authority for the conclusion that § 523(a)(6) applies to contract claims, and moreover, the court misconstrued both *Walker* and *Miller*. Neither case addressed whether debts for knowing breach of contract can be nondischargeable under § 523(a)(6) absent tortious conduct. Indeed, contrary to the *Williams* court's reading of it, *Walker* almost certainly assumed that § 523(a)(6) requires tortious conduct, as the

Appellate Opinions Issued Before 2007, 241 F.R.D. 328 (2007). The fifth, sixth and tenth circuit local rules permit citation of any unpublished opinions, while the seventh circuit prohibits citation of unpublished decisions issued before 2007. *Id.*

¹⁹¹337 F.3d 504 (5th Cir. 2003).

¹⁹²142 F.3d 813 (1998).

¹⁹³156 F.3d 598 (5th Cir. 1998).

plaintiff's claim sounded both in contract and in tort.¹⁹⁴ *Miller* did not involve a contract claim at all, nor does the opinion contain any dictum that is pertinent to the question whether § 523(a)(6) covers contract claims. (The *Williams* court also did not acknowledge an unpublished decision by another panel of the fifth circuit several months earlier holding that *Geiger* "explicitly rejects a construction of 'willful' under which a breach of contract could qualify."¹⁹⁵) Thus, the foundation for the fifth circuit rule that § 523(a)(6) does not require tortious conduct is unsound.

In *Williams*, the debtor operated an electrical contracting business. He entered into a collective bargaining agreement with the plaintiff union, promising that he would hire exclusively through union referrals. He knowingly breached this contract, and the union initiated a grievance that was resolved when the parties agreed to an Agreed Final Judgment and Decree that was entered by the U.S. District Court for the Western District of Texas. Under the agreed judgment, the debtor was required to hire exclusively through the union. The district court also ordered the debtor to pay restitution of wages and benefits to union members denied employment under the original contract, and to pay the union's attorney's fees. The debtor thereafter violated the agreed judgment by hiring non-union electricians. The union filed a complaint, and the district court awarded restitution and attorney's fees for the debtor's violation of the judgment.¹⁹⁶

The fifth circuit acknowledged that *Geiger* "seems to reject the proposition that a debt arising from a knowing breach of contract is a willful and malicious injury excepted from discharge."¹⁹⁷ (In its discussion of the standards for willful and malicious injury, the court also noted that the Supreme Court in *Geiger* had observed that "the language of [§] 523(a)(6) mirrors the definition of an intentional tort."¹⁹⁸) Reading *Geiger* together with *Walker* and *Miller*, however, the fifth circuit concluded that nondischargeability under § 523(a)(6) turns on the knowledge and intent of the debtor at the time of breach, and not on whether his conduct is classified as a tort.¹⁹⁹

The court of appeals separately addressed the dischargeability of the dis-

¹⁹⁴*Walker*, 142 F.3d at 815.

¹⁹⁵*Cotton v. Deasy (In re Deasy)*, 66 Fed. Appx. 526, 526 (5th Cir. 2003).

¹⁹⁶*Williams*, 337 F.3d at 506-08.

¹⁹⁷*Id.* at 509 (referencing the statement in *Geiger*, 523 U.S. at 62, that gave knowing breach of contract as an example of an intentional act resulting in an unintended injury). Before addressing whether knowing breach of contract may constitute a willful and malicious injury, the court recited the standards for "willful and malicious injury" as laid out in *Geiger* and *Miller*. *Miller* is the seminal post-*Geiger* case in the fifth circuit addressing § 523(a)(6). It holds that an injury is willful if the debtor subjectively intended to injure the creditor or the debtor's conduct was objectively substantially certain to cause injury. *Miller* further holds that willful and malicious are a unitary standard, and that malice is implied from willfulness. *Miller*, 156 F.3d at 603-06.

¹⁹⁸*Williams*, 337 F.3d at 508.

¹⁹⁹*Id.* at 509.

strict court awards based on the breach of the collective bargaining agreement and the violation of the agreed judgment. As to the contract, the court stated that when the debtor hired non-union electricians, he was motivated by a desire to complete the pending project and to save his business, and thus did not intend to injure the Union. The court stated that whether the breach was objectively substantially certain to harm the union was a closer question, but did not resolve the question because it concluded that it was the individual union members, and not the union itself, that were substantially certain to suffer injury as a result of the breach. The court stated that the only direct injuries suffered by the union were to its prestige and to its capacity to uphold its contracts, and that neither of these injuries was substantially certain to flow from the breach.²⁰⁰

As to the violation of the agreed judgment, the court characterized the debt as one for sanctions for contempt. "Failure to obey a court order constitutes willful and malicious conduct," the court stated, "and a judgment against a defiant debtor is excepted from discharge."²⁰¹ The court noted that the agreed judgment was clear and unambiguous and that the debtor knew of his obligations and knowingly violated them. "Even if [the debtor] did not intend to injure the Union," the court stated, the Agreed Judgment made him substantially certain that his acts would inflict injury."²⁰² The court distinguished the debtor's violation of the agreed judgment from his breach of the collective bargaining agreement in this way: "contempt may be characterized as an act resulting in intentional injury." The court concluded without explanation that the amount awarded in the contempt proceeding "arises from the willful and malicious injury [the debtor] inflicted by refusing to obey" the order.²⁰³

In *Walker*,²⁰⁴ the fifth circuit considered whether the debtor, a university professor, caused a willful and malicious injury when he retained professional fees that he earned from outside employment in violation of his contract with the university. The contract "expressly state[d] that all fees received by a faculty member . . . are to be assigned to the University."²⁰⁵ The plaintiff's claim sounded both in tort and in contract, although it is not entirely clear from the opinion whether the claim for conversion under Texas law was ever established. The court of appeals in *Williams* stated that it was.²⁰⁶ The

²⁰⁰*Id.* at 510-11.

²⁰¹*Id.* at 512.

²⁰²*Id.*

²⁰³*Id.*

²⁰⁴142 F.3d 813, 824 (1998).

²⁰⁵*Id.*

²⁰⁶The court in *Williams* stated that "[i]n *Walker*, the debtor committed the tort of conversion by keeping professional fees instead of remitting them to the University of Texas in violation of his employment contract." *Williams*, 337 F.3d at 510. This fact or conclusion is not stated in *Walker* itself, however.

district court had determined that the claim was dischargeable. The court of appeals did not discuss the district court's reasoning, but it would not have been essential to the district court's judgment whether the plaintiff actually established its claim for conversion.

The *Walker* court held that the district court erred in holding that the debt was dischargeable, and remanded the case on the issue whether the plaintiff's injury was willful and malicious. The opinion can actually be read to mean that § 523(a)(6) requires tortious conduct. The key language is the following three sentences:

Neither a claim for breach of contract nor the tort of conversion necessarily involves an intentional injury. The act of conversion, however, can result in a "willful and malicious injury." In addition, under Texas law, a claim for breach of contract and the tort of conversion may arise from the same set of facts.²⁰⁷

A negative implication of the first quoted sentence is that a claim for breach of contract, like the tort of conversion, can involve intentional injury (and thus be nondischargeable under § 523(a)(6)). (It is this sentence that the *Williams* court cited as authority for the proposition that knowing breach of contract can be willful and malicious.²⁰⁸) However, the second sentence suggests that, while not all debts for intentional torts are nondischargeable under § 523(a)(6), some are, but contract claims standing alone are not nondischargeable. This reading is seemingly confirmed in the third sentence, which reiterates that the plaintiff's claim in this case sounded in both tort and contract.

The remainder of the *Walker* opinion focuses on whether the debtor's "retention of his professional fees was an 'innocent and technical' act rather than a 'willful and malicious injury.'"²⁰⁹ This would depend, the court explained, on whether the debtor knew of his obligations under the contract. At first blush, the ensuing discussion of whether the debtor knowingly breached the employment agreement could be read to mean that the court was addressing and implicitly approving the possible nondischargeability of a claim for knowing breach of contract.²¹⁰ But this overlooks the first sentence

²⁰⁷*Id.* at 823-24 (citations omitted).

²⁰⁸337 F.3d at 510 (citing *Miller*, 156 F.3d at 606 for the proposition that the "Fifth Circuit has acknowledged that a breach of contract may involve an intentional or substantially certain injury.")

²⁰⁹*Walker*, 142 F.3d at 824 (quoting *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 331 (1934)).

²¹⁰The court wrote:

[a]n issue of fact exists regarding whether [the debtor] was aware of his obligations to the University under the [contract] and nonetheless knowingly kept his professional fees with the intent of depriving the University of money that he owed to it. . . . The [contract] . . . language is crystal clear, and all [affected employees]

of the discussion. In quoting *Davis v. Aetna Acceptance Co.* to frame the issue as whether the debtor's retention of the professional fees was "innocent or technical," the court clearly had in mind the plaintiff's claim for conversion; in *Davis*, the Court addressed whether the debtor's conversion of a secured creditor's collateral was "innocent and technical" or "willful and malicious." As the court in *Walker* had already noted, under Texas law, conversion and breach of contract can arise from the same facts; thus, the debtor's knowledge and understanding of the contract would guide the determination whether the tort was willful and malicious.

Finally, in *Cotton v. Deasy (In re Deasy)*,²¹¹ the fifth circuit court of appeals read *Geiger* as "explicitly reject[ing] a construction of 'willful' under which a breach of contract could qualify." The court referred to Supreme Court's explanation in *Geiger* that "the (a)(6) formulation triggers in the lawyer's mind the category of 'intentional torts,' as distinguished from negligent or reckless torts," and also the Court's reasoning that the claimants' broader interpretation of § 523(a)(6) "would be incompatible with the 'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed.'" Thus, the court concluded that the plaintiff's "bare breach of contract claim fails, as a matter of law." The debtor in *Deasy* had breached a brokerage contract to pay the plaintiff a five percent commission on the sale of certain real property.²¹²

Deasy and *Williams* both were decided in 2003, by different panels of judges of the court of appeals, and neither case cites the other. In any event, the two cases are not necessarily in conflict. *Deasy* can be read narrowly to mean that debts for "bare breach of contract" without more are dischargeable under § 523(a)(6), but that the statute does not categorically exclude contract claims. Read in isolation, however, the *Deasy* panel's explanation of its holding quoted above suggests that § 523(a)(6) never applies to contract claims independent of tortious conduct.

B. SIXTH CIRCUIT

In *Steier v. Best (In re Best)*,²¹³ the sixth circuit held that "[c]onsistent

were sent a memorandum . . . reminding them that [all professional fees] . . . shall be deposited in the departmental . . . account. . . . If a factfinder were to decide that [the debtor] knew of his obligations under the . . . contract . . . , then it might also find that [he] knowingly retained his professional fees in violation of the [contract], an act which he knew would necessarily cause the University's injury. This, in turn, could result in a finding of 'willful and malicious injury.' *Id.* at 824.

²¹¹66 Fed.Appx. 526 (5th Cir. 2003) (unpublished opinion). Under the local rules of the fifth circuit court of appeals, there is no restriction on the citation of unpublished decisions. See Robert Timothy Reagan, Citing *Unpublished Federal Appellate Opinions Issued Before 2007*, 241 F.R.D. 328 (2007).

²¹²*Deasy*, 66 Fed.Appx. at 526.

²¹³109 Fed.Appx. 1 (6th Cir. 2004) (unpublished opinion). Under the local rules of the sixth circuit

with Geiger, . . . a breach of contract cannot constitute the willful and malicious injury required to trigger § 523(a)(6).”²¹⁴ The debtor had breached a stock purchase agreement by not returning the plaintiff’s investment. The plaintiff recovered a judgment in state court for breach of contract, and the debtor thereafter filed for relief under Chapter 7. In its brief discussion of the dischargeability of contract claims under § 523(a)(6), the sixth circuit noted that the plaintiff plead only breach of contract in his complaint, and did not allege conversion.²¹⁵

The *Best* court relied on *Salem Bend Condominium Assoc. v. Bullock-Williams* (*In re Bullock-Williams*),²¹⁶ decided by the sixth circuit bankruptcy appellate panel after *Geiger* in 1998, for the conclusion that a breach of contract cannot render a debt nondischargeable under § 523(a)(6). In *Bullock-Williams*, the BAP affirmed the bankruptcy court’s decision that in failing to pay condominium fees for over six years, while filing five bankruptcy petitions, the debtor did not intend to cause harm to the creditor.

Bullock-Williams can be read as supporting the holding in *Best*, or not. The creditor in *Bullock-Williams* argued that “nonpayment of a contractual obligation can be a willful and malicious injury.”²¹⁷ The BAP did not explicitly reject this contention, but agreed with the bankruptcy court that the proof did not support the conclusion that the debtor intended to injure the creditor by not paying the condominium fees.²¹⁸ Thus, the case can also be read as recognizing that contract claims can be nondischargeable under § 523(a)(6), as long as the injury is willful and malicious. In fact, other courts have cited *Bullock-Williams* as supporting the view that § 523(a)(6) does not require tortious conduct.²¹⁹ In any event, the creditor’s primary contention was that the debt for unpaid condominium fees was for a willful and malicious injury because the debtor abused the bankruptcy process by filing five

court of appeals, there is no restriction on the citation of unpublished decisions. See Robert Timothy Reagan, *Citing Unpublished Federal Appellate Opinions Issued Before 2007*, 241 F.R.D. 328 (2007).

²¹⁴*Id.* at 8.

²¹⁵*Id.* This fact does not support the inference that the creditor did not also have the tort claim, or that the breach of contract was not accompanied by an independent tort. See, e.g., *Spinneweber v. Moran* (*In re Moran*), 152 B.R. 493, 496 (Bankr. S.D. Ohio 1993) (asserting that “there is no requirement that the allegations of a complaint filed in state court prior to a debtor filing a petition in bankruptcy correspond to the elements of the grounds contained in § 523(a) of the Bankruptcy Code. Otherwise, plaintiffs in state court would be required to anticipate the bankruptcy of every defendant and litigate every conceivable issue under § 523(a) in the event a defendant should subsequently file bankruptcy”).

²¹⁶220 B.R. 345 (6th Cir. B.A.P. 1998).

²¹⁷*Id.* at 346.

²¹⁸*Id.* at 347. The BAP did not consider whether the debtor may have acted with the knowledge that injury was substantially certain to result. *Id.* 346-47.

²¹⁹See, e.g., *The Spring Works, Inc. v. Sarff* (*In re Sarff*), 242 B.R. 620, 626 (6th Cir. B.A.P. 2000) (stating that “[u]nder *Geiger*, damages for breach of contract can be nondischargeable under § 523(a)(6),” citing *Bullock-Williams*, 220 B.R. 345).

petitions in six years with the intent to avoid payment of the condominium fees. The BAP affirmed the bankruptcy court's finding that the evidence did not support the allegation.

In *The Spring Works, Inc. v. Sarff (In re Sarff)*,²²⁰ the sixth circuit BAP held that a state court judgment for breach of a covenant not to compete, breach of contract, breach of the duty of loyalty, misappropriation of trade secrets, intentional interference with business relations and discovery sanctions collaterally estopped the debtor to contest nondischargeability of the debt under Code § 523(a)(6). The state court made findings that supported an inference of malice, including that the debtor had taken springs and customers from the plaintiff, and awarded punitive damages, which required a finding of malice. Citing *Geiger* and *Bullock-Williams*, the court stated that damages for knowing breach of contract can be nondischargeable under § 523(a)(6). The case is not iron-clad authority for the proposition that contract claims may be nondischargeable under § 523(a)(6) in the absence of tortious conduct, however, because the state court also found the debtor liable for several intentional torts based on the same conduct. *Sarff* was not cited or discussed in *Best*.

C. SEVENTH CIRCUIT

In *N.I.S. Corporation v. Hallahan (In re Hallahan)*,²²¹ the seventh circuit affirmed a judgment that a claim arising from the breach of a covenant not to compete was nondischargeable under § 523(a)(6). The case is not, however, solid authority for the proposition that § 523(a)(6) covers contract claims absent tortious conduct. The court did not address that question; indeed, the debtor contested the enforceability of the covenant under Missouri law, while conceding that if it was enforceable, the debt was for willful and malicious injury. The plaintiff had also made a claim of tortious interference with contract, which the bankruptcy court did not discuss. This case was decided before *Geiger*, and the court applied the looser standard for willfulness that *Geiger* subsequently disapproved.

In *Radivojevic v. Pickens (In re Pickens)*,²²² an unpublished decision, the seventh circuit stated that § 523(a)(6) "is intended to prevent the discharge of debts incurred as a result of intentional torts."²²³ The debtor signed a one-year lease with the plaintiff, but left the premises (for public housing) and

²²⁰242 B.R. 620 (6th Cir. B.A.P. 2000).

²²¹936 F.2d 1496 (7th Cir. 1991).

²²²234 F.3d 1273 (Table), 2000 WL 1071464 (7th Cir. Aug. 1, 2000) (unpublished opinion). Under the local rules of the seventh circuit court of appeals, unpublished decisions rendered before 2007 may not be cited. See Robert Timothy Reagan, *Citing Unpublished Federal Appellate Opinions Issued Before 2007*, 241 F.R.D. 328 (2007).

²²³*Id.* at *1.

stopped paying rent three months before the expiration of the lease. A narrow reading of the quoted sentence suggests that the court did not foreclose an interpretation that would except from the discharge a debt for willful and malicious injury arising from a breach of contract.²²⁴

D. EIGHTH CIRCUIT

In its opinion in *Geiger v. Kawaauhau (In re Geiger)*, before the Supreme Court's decision,²²⁵ the eighth circuit indicated quite clearly in dicta that § 523(a)(6) concerns intentional torts, and does not cover debts for breach of contract. In holding that the plaintiffs' judgment for medical malpractice based on the debtor's reckless or negligent conduct was dischargeable, the court reasoned in relevant part:

[T]he word "intentional," by itself, will, almost as a matter of natural reflex, cause a lawyer's mind to turn to that category of wrongs known as intentional torts, a category that excludes injuries caused by acts that are merely negligent, grossly negligent, or even reckless. We presume that when Congress uses a word that has a fixed, technical meaning, it has used it as a term of art. . . .

Adopting the alternative construction, moreover, would render virtually all tort judgments exempt from discharge. Every act that is not literally compelled by the physical act of another (as when someone seizes my arm and causes it to strike another), or the result of an involuntary muscle spasm, is a "deliberate or intentional" one, and if it leads to injury, a judgment debt predicated on it would be immune from discharge under the alternative construction of the statute Indeed, we see no reason that a knowing breach of contract would not result in a judgment that would be exempt from discharge under this legal principle. Surely this proves too much. . . .

. . .

We therefore think that the correct rule is that a judgment debt cannot be exempt from discharge in bankruptcy unless it is based on what the law has for generations called an intentional tort, a legal category that is based on "the consequences of an act rather than the act itself." Restatement (Second) of Torts § 8A, comment a, at 15 (1965). . . .

²²⁴See *id.*

²²⁵113 F.3d 848 (8th Cir. 1997), *aff'd*, *Kawaauhau v. Geiger*, 523 U.S. 57 (1998).

...
Finally, we observe that in this case we hold only that for a judgment debt to be nondischargeable under the relevant statutory provision, it is necessary that it be based on the commission of an intentional tort. We believe, as we have said, that the debtor's conduct cannot otherwise be said to be "willful." . . .²²⁶

E. NINTH CIRCUIT

The ninth circuit court of appeals has addressed the dischargeability of debts for breach of contract under § 523(a)(6) more often and more extensively than any of the other circuit courts of appeals. The circuit has definitively held that § 523(a)(6) does not cover debts for knowing breach of contract unless the breach is accompanied by tortious conduct. The tortious conduct need not be a tort independent of the breach; it is sufficient if the breach itself also is a tort. Further, the ninth circuit has held that relevant state law determines what constitutes "tortious conduct" for purposes of § 523(a)(6). The court has relied on ninth circuit precedent for this latter proposition, but a close examination of the precedent reveals that it does not support the proposition.²²⁷

The ninth circuit has addressed the nondischargeability of debts for knowing breach of contract under § 523(a)(6) in four cases since the Supreme Court decided *Geiger*: *Lockerby v Sierra* (2008),²²⁸ *Petralia v. Jercich (In re Jercich)* (2001),²²⁹ *Bank\$ v. Gill Distribution Centers, Inc. (In re Bank\$)* (2001)²³⁰, and *Del Bino v. Bailey (In re Bailey)* (1999).²³¹ *Jercich* is the seminal post-*Geiger* case holding that § 523(a)(6) requires conduct that constitutes a tort under the relevant state law, while *Lockerby* more fully develops the reasons for this approach. *Bailey* implicitly required tortious conduct for nondischargeability under § 523(a)(6), and is the source of the ninth circuit's view that state law defines what is tortious for purposes of § 523(a)(6). *Bank\$* appears to conflict with *Jercich*, *Lockerby* and *Bailey*; in *Bank\$*, the court held that a debt for breach of contract was nondischargeable in the apparent absence of any associated tort. The court in *Bank\$* cited *Jercich*,

²²⁶*Id.* at 852-55 (emphasis added).

²²⁷As discussed above, it is questionable whether state law or a federal common law should govern the question whether the debtor acted tortiously for purposes of § 523(a)(6), assuming that tortious conduct is an essential element of this exception to the discharge. See *supra* notes 140-41 and accompanying text. As further discussed *infra* notes 134-39 and accompanying text, the difficulty posed by the question is itself an argument against reading a tortious conduct requirement into § 523(a)(6).

²²⁸535 F.3d 1038 (9th Cir. 2008).

²²⁹238 F.3d 1202 (9th Cir. 2001).

²³⁰263 F.3d 862 (9th Cir. 2001).

²³¹197 F.3d 997 (9th Cir. 1999).

which was decided several months earlier, but did not seem to notice the question whether a debt for breach of contract without more can be nondischargeable debt under § 523(a)(6). Each of these four cases is discussed in the following paragraphs. The ninth circuit also held in several pre-*Geiger* decisions that the “willful and malicious injury” exception requires tortious conduct.²³² The pre-*Geiger* case of *Snoke v. Riso* (*In re Riso*) is also briefly discussed below.

1. *PETRALIA V. JERCICH* (*IN RE JERCICH*)²³³

In *Jercich*, the ninth circuit held that a debt for knowing breach of a contract is nondischargeable under § 523(a)(6) if the breach was tortious, even if the debtor did not act tortiously apart from the breach. The court reversed the BAP’s holding that “where a debtor’s conduct constitutes both a breach of contract and a tort, the debt resulting from that conduct does not fit within § 523(a)(6) unless the liability for the tort is independent of the liability on the contract.”²³⁴

The plaintiff in *Jercich* was employed by the debtor, and the debtor failed to pay him commissions as required under their employment agreement. The plaintiff brought an action in state court, which found that the debtor had the “clear ability to make these payments . . . but chose not to,” instead using the money to pay for personal investments, including a horse ranch; and that the debtor’s conduct was willful and amounted to oppression under California law. The state court awarded the plaintiff punitive damages of \$20,000.²³⁵

The court of appeals found nothing in the text of § 523(a)(6) “to indicate that a debt arising from a breach of contract is excepted from the discharge only if the debtor’s conduct would be tortious even if no contract existed.”²³⁶ The court further reasoned that the discharge in bankruptcy is for the honest but unfortunate debtor, and that allowing the discharge of the debt in this

²³²See *Snoke v. Riso* (*In re Riso*), 978 F.2d 1151, 1154 (9th Cir. 1992) (stating that “[i]t is well settled that a simple breach of contract is not the type of injury addressed by § 523(a)(6)”; *Barbachano v. Allen*, 192 F.2d 836, 838 (9th Cir. 1951 (pre-Code case) (indicating that damages for breach of a contract were not for willful and malicious injury).

²³³238 F.3d 1202 (9th Cir. 2001).

²³⁴*Id.* at 1204. The BAP reasoned in part that “[t]orts have traditionally been defined as obligations giving rise to liability that are imposed by law apart from and independent of enforcement of promises made between parties to a contract,” whereas contract obligations are based on the intentions and agreement of the parties; and that “[l]imiting the scope of § 523(a)(6) in this way will assure that ordinary breaches of contract, which are often willful, are not made nondischargeable by state laws that have sometimes extended tort liability beyond the traditional view.” *Petralia v. Jercich* (*In re Jercich*), 243 B.R. 747-51 (9th Cir. B.A.P. 2000), *rev’d*, 238 F.3d 1202 (9th Cir. 2001).

²³⁵*Id.* at 1204.

²³⁶*Id.* at 1205. Of course, neither is there anything in the text of the statute to indicate that a debt arising from a breach of contract is excepted from the discharge only if accompanied by tortious conduct.

case would contravene that basic policy.²³⁷ Thus, the court concluded, "to be excepted from discharge under § 523(a)(6), a breach of contract must be accompanied by some form of 'tortious conduct' that gives rise to 'willful and malicious injury.'"²³⁸

The court then examined whether the debtor's conduct was tortious, and next whether it gave rise to a willful and malicious injury. "To determine whether [the debtor's] conduct was tortious," the court "look[ed] to California state law."²³⁹ Thus, while the court had initially referred to a requirement of "some form of 'tortious conduct,'" in this statement the court fairly clearly indicates that state law determines what is "tortious conduct" for purposes of § 523(a)(6), although it does not categorically dictate that state law is the only source for determining what is "tortious conduct." The court concluded that the debtor's bad faith breach of the contract was tortious because it contravened a fundamental public policy of California favoring the prompt payment of wages owed to an employee.²⁴⁰ The court concluded that the state court judgment established that the debt was for willful and malicious injury.²⁴¹

2. *LOCKERBY V. SIERRA*²⁴²

In *Lockerby*, the plaintiff sued the debtor, a lawyer, in state court for legal malpractice. The parties settled the suit with an agreement by which the debtor assigned to the plaintiff fifty percent of the fees from four of his pending cases. "Concluding for himself that [the plaintiff] did not have a legitimate malpractice action," the debtor did not make the payments.²⁴³ He

²³⁷*Id.* at 1206.

²³⁸*Id.*

²³⁹*Id.* The court cited *Del Bino v. Bailey (In re Bailey)*, 197 F.3d 997, 1000 (9th Cir. 1999) for this proposition. As discussed below, *infra* notes 256-67 and accompanying text, *Bailey* does not support the proposition for which the court cited it.

²⁴⁰The court explained that under California law, "tort recovery for the bad faith breach of a contract is permitted only when, 'in addition to the breach of the covenant [of good faith and fair dealing], a defendant's conduct violates a fundamental public policy of the state.'" *Jercich*, 238 F.3d at 1206.

²⁴¹Compare *id.* at 1208-09 with *Oney v. Weinberg (In re Weinberg)*, 410 B.R. 19 (9th Cir. B.A.P. 2009), which also involved a failure to pay compensation to an employee. The plaintiff employee obtained a default judgment in state court for the unpaid wages, plus treble damages and attorney fees as provided by Arizona law. The BAP affirmed the bankruptcy court decision holding that the plaintiff's claim was dischargeable. *Id.* at 37. The court explained that the plaintiff's claim was for breach of contract without an associated tort, and distinguished *Jercich* on the grounds that the debtor in *Jercich* not only failed to pay his employee but also used business funds for personal investments, and engaged in despicable conduct. *Id.* at 36-37. In contrast, in *Weinberg* the plaintiff was paid more than he originally requested, and the employer continued to pay plaintiff his percentage of receivables as they were collected. *Id.* The court further reasoned that the test for willful injury is subjective, and that the trial court did not err in concluding that the debtor did not intend to injure the plaintiff given that he continued to pay the percentage of accounts receivable as they were collected. *Id.* at 37.

²⁴²535 F.3d 1038 (9th Cir. 2008).

²⁴³*Lockerby*, 535 F.3d at 1039.

intentionally breached the settlement agreement, knowing that his action would harm the plaintiff. The bankruptcy court concluded that the debt was nondischargeable under § 523(a)(6), and the district court affirmed.²⁴⁴

In the ninth circuit, the plaintiff argued that, “while a simple breach of contract may not be the basis for an exception to discharge, absent more, an intentional breach of contract provides the *more* that is necessary when it is accompanied with knowledge that a person is bound by an agreement and without just cause chooses to ignore it with consequent harm to the [other] party.”²⁴⁵ The plaintiff also argued that conduct is tortious if injury is intended or substantially likely to cause injury.²⁴⁶ (The district court, citing *Jercich*,²⁴⁷ had agreed with this contention, and affirmed the bankruptcy court’s determination that the debt was nondischargeable.²⁴⁸)

In reversing the district court, the court of appeals, also citing *Jercich*, began with the proposition that § 523(a)(6) requires “tortious conduct.”²⁴⁹ The court found that the Supreme Court’s decision in *Geiger* appears to require tortious conduct, because the Court affirmed the eighth circuit’s holding that “523(a)(6)’s exemption from discharge . . . is confined to debts ‘based on what the law has for generations called an intentional tort;’”²⁵⁰ and “specifically rejected the notion that a ‘knowing breach of contract’ could trigger exception from discharge under § 523(a)(6).”²⁵¹

Next, the court of appeals rejected the argument that tortious conduct includes conduct that is intended or substantially certain to cause injury, and held that tortious conduct means conduct that constitutes a tort under the relevant state law. The court reasoned:

This approach is consistent with basic principles of tort and contract law. Historically, injuries resulting from breaches of contract are treated very differently from injuries resulting from torts. In contract law, “[t]he motive for the breach commonly is immaterial in an action on the con-

²⁴⁴*Id.* at 1044.

²⁴⁵*Id.* at 1043 (internal quotation marks omitted). The plaintiff did not argue that the debtor committed a tort according to Arizona law. The ninth circuit indicated that, in any event, the debtor’s conduct did not constitute conversion under Arizona law. *Id.* n.5. See *Del Bino v. Bailey (In re Bailey)*, 197 F.3d 997 (9th Cir. 1999) (discussed *infra* notes 256-67 and accompanying text). In *Bailey*, the ninth circuit held that under California law, the plaintiff attorney did not have a lien for his fees in settlement proceeds although the debtor had orally promised to pay the fees from any settlement, because the client was a minor and state law required that the fee agreement be in writing. The court therefore held that the debtor did not commit the tort of conversion. *Id.* at 1000-02.

²⁴⁶*Lockerby*, 535 F.3d at 1041-42.

²⁴⁷238 F.3d 1202, 1205 (9th Cir. 2001).

²⁴⁸*Lockerby*, 535 F.3d at 1039.

²⁴⁹*Id.*

²⁵⁰*Id.* at 1041 (citing *Geiger*, 523 U.S. at 60).

²⁵¹*Id.* (citing *Geiger*, 523 U.S. at 62).

tract." . . . The concept of "efficient breach" is built into our system of contracts, with the understanding that people will sometimes intentionally break their contracts for no other reason than that it benefits them financially. The definition of intent to injure as the commission of an act "substantially certain" to cause harm was born from *tort* principles, not contract law principles.²⁵²

The court further reasoned that the Supreme Court's decision in *Geiger* also supported this approach because it "assumed that § 523(a)(6) encompassed only intentional torts, not intentional breaches of contract."²⁵³ Furthermore, the court of appeals explained, excepting contract claims from the discharge would be inconsistent with the Code provisions on executory contracts, which expressly permit intentional breach of contract without regard to the debtor's motives;²⁵⁴ and would "severely circumscribe" the ability of debtors to obtain a fresh start by greatly expanding the scope of nondischargeable debts.²⁵⁵

3. *DEL BINO V. BAILEY (IN RE BAILEY)*²⁵⁶

In both *Lockerby* and *Jercich*, the ninth circuit held that state law determines what is tortious for purposes of § 523(a)(6). In *Lockerby*, the court cited *Jercich* and *Bailey* for the proposition, but did not otherwise address the issue. *Jercich* also cited *Bailey* without addressing the merits of the issue.²⁵⁷

In *Bailey*, the debtor attorney took over the representation of client (a minor) previously represented by the plaintiff attorney, and orally agreed to pay the plaintiff a portion of the attorney's fees and costs recovered in any settlement of the matter. However, upon settling the case, the debtor failed to remit any proceeds of the settlement to the plaintiff. When the debtor thereafter filed for bankruptcy, the plaintiff objected to the dischargeability of his claim under § 523(a)(6). In holding for the debtor, the court of appeals reasoned in four steps: (1) "conversion of another's property . . . intentionally and without justification and excuse, . . . constitutes a willful and malicious injury;"²⁵⁸ (2) "[w]hile bankruptcy law governs whether a claim is nondis-

²⁵²*Id.* at 1041-42.

²⁵³*Id.* at 1042.

²⁵⁴*Id.* (citing 11 U.S.C. § 365(a)) (permitting rejection of executory contracts and leases that do not hold value to the estate) and (g) (referring expressly to rejection as a breach).

²⁵⁵The court in *Lockerby* distinguished *Jercich* on the ground that the breach of contract in *Jercich* was accompanied by conduct that was tortious under California law, whereas *Lockerby* involved only the non-payment of an "ordinary debt" and no conduct tortious under Arizona law was alleged. *Id.* at 1043.

²⁵⁶197 F.3d 997 (9th Cir. 1999).

²⁵⁷*Jercich*, 238 F.3d at 1206 & n.16.

²⁵⁸*Id.* at 1000 (quoting *Transamerican Comm. Fin. Corp. v. Littleton (In re Littleton)*, 942 F.2d 551, 554 (9th Cir. 1994)).

chargeable under 523(a)(6), this court looks to state law to determine whether an act falls within the tort of conversion;²⁵⁹ (3) the debtor did not commit the tort of conversion as it is defined under California law;²⁶⁰ (4) therefore, although the plaintiff held a claim for payment of the fees and costs, the claim was not nondischargeable under § 523(a)(6).²⁶¹ Although the court did not expressly state that § 523(a)(6) requires tortious conduct, this conclusion necessarily underlies the court's reasoning that the debt was dischargeable because the debtor's conduct did not amount to conversion. Thus, *Bailey* can be cited along with *Lockerby*, *Jercich*, *Riso* and *Weinberg*²⁶² for the rule that tortious conduct is an essential element of § 523(a)(6).

It is the second step in the court's line of reasoning that the ninth circuit later references in *Jercich* and *Lockerby* for the proposition that state law determines what is tortious under 523(a)(6). In support of the proposition, the court in *Bailey* cited two cases, *Andrews v. Manser (In re Manser)*,²⁶³ and *Quarre' v. Saylor (In re Saylor)*,²⁶⁴ both decided by the ninth circuit bankruptcy appellate panel. However, neither *Manser* nor *Saylor* addressed whether state law determines what is tortious for purposes of the dischargeability determination under § 523(a)(6). Indeed, although the holding in *Manser* is somewhat unclear, the court states that a debt is nondischargeable where it is for a conversion that is willful and malicious under Code § 523(a)(6) without regard to whether the debtor's conduct constituted conversion under state law.²⁶⁵

In *Manser*, like *Bailey*, the court considered whether the plaintiffs' claims could be nondischargeable where the debtor's conduct did not amount to conversion under state law. In *Manser*, the debtor's corporation had entered into consignment agreements with the plaintiffs, who were artisans who supplied crafts on consignment to the debtor. The agreements required the corporation to pay over proceeds from the sale of the consigned goods, however, the debtor applied some of these funds to his personal use. The debtor argued that under California law, the failure to pay over proceeds from the sale

²⁵⁹*Id.* (citing *Quarré v. Saylor (In re Saylor)*, 178 B.R. 209, 214 (9th Cir. B.A.P. 1995), and *Andrews v. Manser (In re Manser)*, 99 B.R. 434, 435-36 (9th Cir. B.A.P. 1989)).

²⁶⁰The court reasoned that there was no conversion because the plaintiff did not have a property interest in the settlement proceeds, and that he did not have a property interest in the proceeds because the representation was of a minor and under California Family Code § 6602, "[a] contract for attorney's fees for services in litigation, made by or on behalf of a minor, is void unless the contract is approved . . . by the court." *Bailey*, 197 F.3d at 1001.

²⁶¹*Id.* at 1002. *Cf. Pekar v. Ikerd (In re Pekar)*, 260 F.3d 1035, 1038 (9th Cir. 2001) (stating that, while *Bailey* held that a debt for conduct that did not constitute conversion was not nondischargeable, this does not mean that a debt for conduct that constitutes conversion is necessarily nondischargeable).

²⁶²*Oney v. Weinberg (In re Weinberg)*, 410 B.R. 19 (9th Cir. B.A.P. 2009) (discussed *supra* note 241).

²⁶³99 B.R. 434 (9th Cir. B.A.P. 1989).

²⁶⁴178 B.R. 209 (9th Cir. B.A.P. 1995).

²⁶⁵*Manser*, 99 B.R. at 435-36.

of personal property that was authorized to be sold did not constitute conversion, and therefore the debts were dischargeable. The court rejected this contention, and, in contrast to the proposition for which the case was cited in *Bailey*, stated that "[w]hether the [debtor's] actions constitute the tort of conversion under California state law is not dispositive of whether the underlying claims are non-dischargeable." Rather, the court held, the issues are whether the conduct giving rise to the claims was willful and malicious.²⁶⁶ The holding in *Manser* is not entirely clear because the court was careful to note that the plaintiffs were entitled to the proceeds because they held a security interest in them, so presumably, the debtor's conduct was in fact a conversion under state law.

In *Saylor*,²⁶⁷ the court held that the plaintiff did not have a claim against the debtors based on a fraudulent transfer they had made several years before they filed for bankruptcy. (Rather, the plaintiff's claim was against the transferees.) There being no claim against the debtors, there was nothing to except from the discharge. Again, the underlying principle is inconsistent with the point for which the court of appeals cited the case in *Bailey*. In *Saylor*, the BAP carefully distinguishes the question whether the claimant has a claim, which is a matter of state law, from the issue whether any such claim is nondischargeable, which is a question of federal bankruptcy law. In this vein, the BAP rejected the argument that the fraudulent transfer was a conversion or another tort under state law.

In sum, the ninth circuit has held in *Lockerby*, *Jercich* and *Bailey* that state law determines what is tortious for purposes of the implied tortious conduct requirement in § 523(a)(6). The rule was conceived in *Bailey*, but the court relied on precedent that does not support the rule. While the rule may very well be preferable to defining "tortious conduct" under federal law, the ninth circuit has not expressly considered the merits of the competing approaches (nor has any other circuit court).

4. *BANKS V. GILL DISTRIBUTION CENTERS, INC.*²⁶⁸

The court in *Banks* did not discuss the question whether tortious conduct is an essential element of § 523(a)(6), but affirmed the bankruptcy court's determination that the debtor's debt for breach of a contract was nondischargeable although it appears that there was no associated tortious conduct.²⁶⁹ Thus, *Banks* is inconsistent with *Jercich*, *Lockerby* and *Bailey*. The debtor in *Banks* had agreed to pay a portion of any recovery in a pending law suit to one of the parties, however, he failed to do so. The bankruptcy

²⁶⁶*Id.*

²⁶⁷178 B.R. 209 (9th Cir. B.A.P. 1995).

²⁶⁸263 F.3d 862 (9th Cir. 2001).

²⁶⁹*Id.* at 869-70.

court found that the debtor failed to pay the plaintiff either because he sought to renegotiate the amount to which the plaintiff was entitled or to delay payment until the statute of limitations had run. Accordingly, the bankruptcy court concluded that the debtor intended to injure the plaintiff and that the plaintiff's injury was therefore willful and malicious.²⁷⁰ It is possible that the debtor committed fraud or conversion, but neither of these possibilities entered into the court's reasoning. The court cited *Jercich* regarding the standard for "willful" injury under § 523(a)(6), but not in regard to any requirement of tortious conduct.

Bank's, like *Saylor* above, could be cited for the notion that nondischargeability under § 523(a)(6) is a matter of federal law, and therefore federal law rather than state law should determine what constitutes tortious conduct for purposes of the tortious conduct requirement under the exception. The principal issue in *Bank's* concerned the debtor's contention that the debt was dischargeable because the plaintiff's action in state court was based on a claim for breach of contract, and not on a cause of action that connoted a willful and malicious injury. The plaintiff may have had a claim for fraud, but the statute of limitations on such a claim had run by the time he filed his state court suit. The debtor argued that any objection to dischargeability lapsed with the running of the statute of limitations on the fraud claim under state law. In rejecting the debtor's argument, the court explained that whether the plaintiff holds a claim is determined by state law, while its nondischargeability is determined by federal law. Here, the debtor held a claim, based on contract, under state law. "[T]here is no requirement that the allegations of a complaint filed in state court prior to a debtor filing a petition in bankruptcy correspond to the elements of the grounds contained in § 523(a)(6)," the court explained. "Otherwise plaintiffs in state court would be required to anticipate the bankruptcy of every defendant and litigate every conceivable issue under § 523(a) in the event a defendant should subsequently file bankruptcy."²⁷¹

Although *Bank's* does not appear to require tortious conduct for nondischargeability under § 523(a)(6), the holding of the case is not inconsistent with such a requirement. Reading *Bank's* with *Jercich*, *Lockerby* and *Bailey*, *Bank's* means simply that a plaintiff with claims in both tort and contract may choose to seek recovery on only the contract claim in state court without forgoing the right to later object to the discharge of the claim under

²⁷⁰*Id.*

²⁷¹*Id.* at 868 (quoting *Spinnenweber v. Moran*, 152 B.R. 493 (Bankr. S.D.Ohio 1993)). The seminal case establishing this principle followed by the court in *Gill* is *Brown v. Felsen*, 442 U.S.127, 134-39 (1979) (holding that res judicata did not preclude plaintiff from litigating the dischargeability of a debt where he had not asserted a claim for fraud in his state court collection action against the debtor prior to the filing of the bankruptcy case).

§ 523(a)(6) in a subsequent bankruptcy proceeding. In order for the debt to be excepted from the discharge in bankruptcy, however, the plaintiff will have to prove that the debtor also committed a tort.

5. *SNOKE V. RISO (IN RE RISO)*²⁷²

Finally, in *Riso*, a pre-*Geiger* decision, the ninth circuit court of appeals held that a right of first refusal is not property within the meaning of § 523(a)(6), so that the debtor's breach of the agreement did not constitute a conversion that was willful and malicious. The court rejected the plaintiff's argument that his right of first refusal was akin to a security interest in the property, which he had sold to the debtor, subject to the option. The court stated that "[i]t is well settled that a simple breach of contract is not the type of injury addressed by § 523(a)(6)," and that "[a]n intentional breach of contract is excepted from discharge under § 523(a)(6) only when it is accompanied by malicious and willful tortious conduct."²⁷³ There was no evidence in this case that the breach was tortious.

F. TENTH CIRCUIT

The tenth circuit has stated in a pre-*Geiger* published opinion and in a post-*Geiger* unpublished opinion that debts for knowing breach of contract may be excepted from the discharge under § 523(a)(6) in the absence of tortious conduct. In *Sanders v. Vaughn (In re Sanders)*,²⁷⁴ the tenth circuit affirmed the bankruptcy court's decision that the plaintiff's contract claim was nondischargeable under § 523(a)(6). The debtor had hired the plaintiff attorney on a contingency fee basis to seek a tax refund from the IRS. The contract gave the plaintiff a power of attorney and stipulated that tax refund checks would be sent to the plaintiff. Upon learning that the IRS was willing to pay him \$30,000 to settle his claim, the debtor wrote a letter to the IRS revoking the power of attorney and directing that the refund check be sent to him. In this way, the bankruptcy court said, the debtor "beat [the plaintiff] out of the fee."²⁷⁵

The court of appeals rejected the argument that *Geiger* expressly excludes breach of contract claims from § 523(a)(6), calling this a "misreading of *Geiger*, which stands rather for the proposition that an injury must be 'desired [

²⁷²978 F.2d 1151 (9th Cir. 1992).

²⁷³*Id.* at 1154.

²⁷⁴210 F.3d 390 (Table), 2000 WL 328136 (10th Cir. Mar. 29, 2000) (unpublished opinion). Under the local rules of the tenth circuit court of appeals, there is no restriction on the citation of unpublished decisions. See Robert Timothy Reagan, *Citing Unpublished Federal Appellate Opinions Issued Before 2007*, 241 F.R.D. 328 (2007).

²⁷⁵*Id.* at *2.

Jor in fact anticipated by the debtor.”²⁷⁶ “Contrary to [the debtor’s] interpretation,” the court continued, “nothing in *Geiger* indicates the Supreme Court’s intention to immunize debtors under 11 U.S.C. § 523(a)(6) for ‘willful and malicious’ breaches of contract.”²⁷⁷ In affirming the lower court, the tenth circuit did not separately consider the “willful” and “malicious” prongs of the statute.

The court addressed the issue in *Sanders* as involving the dischargeability of a breach of contract claim, but the facts might very well have supported a conclusion that the debtor had committed the tort of conversion. The agreement giving the plaintiff a power of attorney and stipulating that refund checks would be sent to the plaintiff was in effect, if not in law, an assignment of the refund, and the debtor’s breach of the contract thus was also a conversion.²⁷⁸ Accordingly, *Sanders* does not stand unequivocally for the proposition that a debt for knowing breach of contract can be excepted from discharge under § 523(a)(6) independent of any tort.

The tenth circuit in *Sanders* did not cite its pre-*Geiger* decision in *Dorr, Bentley & Pecha, C.P.A.’s, P.C. v. Pasek (In re Pasek)*.²⁷⁹ In *Pasek*, the court affirmed the bankruptcy court and BAP decisions that the debtor’s breach of a covenant not to compete did not give rise to a willful and malicious injury.²⁸⁰ The court assumed that the debtor’s debt for breach of the covenant could be nondischargeable under § 523(a)(6), while holding that the bankruptcy court was not clearly erroneous in concluding that the debt was dischargeable on the facts of the case. The debtor had knowingly and deliberately breached his covenant not to compete by recruiting past clients after leaving the plaintiff CPA firm. However, the bankruptcy court also found that he acted with just cause or excuse where the plaintiff had sought to materially alter the partnership agreement by regulating aspects of the debtor’s personal and family life and imposing an unreasonable billable hour quota on the debtor. Further, the debtor reasonably relied on a legal opinion

²⁷⁶*Id.* (quoting *Geiger*, 523 U.S. at 62).

²⁷⁷*Id.*

²⁷⁸See *supra* notes 169-82 and accompanying text for a discussion of breach of contract cases in which the debtor failed to pay monies from a source designated in the contract.

²⁷⁹983 F.2d 1524 (10th Cir. 1993).

²⁸⁰*Id.* at 1528. Accord, *Berger v. Buck (In re Buck)*, 220 B.R. 999, 1004-05 (10th Cir. B.A.P. 1998). In *Buck*, the plaintiff had obtained a judgment against the debtor-attorney in state court for breach of contract. The attorney had rejected two settlement offers without informing his client, the plaintiff, and thereafter the state court entered summary judgment for the defendant. *Id.* at 1001. The BAP affirmed the bankruptcy court’s holding that the debt was dischargeable because the debtor did not act willfully. *Id.* at 1004-05. The BAP did not expressly consider whether breach of contract claims are per se dischargeable under § 523(a)(6), but appeared to assume that there is no categorical rule. See *id.* The bankruptcy court rendered its decision before *Geiger*, and the BAP issued its opinion after *Geiger*. The BAP referred to *Geiger* for the standard for willfulness, *id.* at 1004, but did not consider *Geiger*’s dicta regarding dischargeability of breach of contract claims.

that the covenant not to compete was not enforceable.²⁸¹

Pasek is a pre-*Geiger* case in which the court applied the standard for willfulness that the Supreme Court subsequently adopted in *Geiger*. The court stated the tenth circuit rule to be that "'willful and malicious injury' occurs when the debtor, without justification or excuse, and with full knowledge of the specific consequences of his conduct, acts notwithstanding, knowing full well that his conduct will cause particularized injury." The court explained that proof of actual knowledge of injury does not per se mandate a finding of willful and malicious injury. "[T]here are no absolutes. In each case, evidence of the debtor's motives, including any claimed justification or excuse, must be examined to determine whether the requisite 'malice' in addition to 'willfulness' is present."²⁸²

In the opinion below, the BAP reasoned in part as follows regarding the nondischargeability of contract claims under § 523(a)(6):

It is almost always foreseeable in the abstract that a breach of contract will result in some form of economic harm to the other party to the contract. A breach of contract frequently results from an intentional act by the party which chooses not to complete its obligations under the contract for whatever reason. For example, a company may intentionally choose to discontinue performing under a contract that proved unprofitable. That choice is an intentional act that foreseeably will result in economic injury to the other party. However, an intentional breach of contract, without more, is not sufficient to establish a willful and malicious injury for the purposes of § 523(a)(6).

The focus, for dischargeability purposes, is not on the wrongfulness of the intentional breach. Instead, the focus for § 523(a)(6) is on the debtor's intent when he took the action. If, for example, the company . . . breached the contract for the express purpose of putting the other company, which was a business rival, out of business, then the intent to injure, and therefore the willfulness of the actions, is established.²⁸³

In affirming, the tenth circuit did not specifically endorse the BAP's reasoning, however, the BAP's reasoning is consistent with the circuit court's. The circuit court fairly clearly reasoned that, while the debtor acted will-

²⁸¹*Id.*

²⁸²*Id.* at 1527.

²⁸³*Dorr & Assocs. v. Pasek (In re Pasek)*, 129 B.R. 247, 252 (Bankr. D. Wyo. 1991), *aff'd*, 983 F.2d 1524 (10th Cir. 1993).

fully, there was just cause or excuse for his actions and therefore the injury was not malicious. Similarly, the BAP indicates that the debtor's conduct was willful, but that the statute requires something "more" than an intentional breach of contract for nondischargeability. Neither court read § 523(a)(6) to require tortious conduct.

