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With Malice Toward One? – Defining Nondischargeability of Debts For Willful and Malicious Injury Under Section 523(a)(6) of the Bankrupcy Code

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WITH MALICE TOWARD ONE?[1]—DEFINING NONDISCHARGEABILITY OF DEBTS FOR WILLFUL AND MALICIOUS INJURY UNDER SECTION 523(A)(6) OF THE BANKRUPTCY CODE

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ABSTRACT

The federal bankruptcy system strikes a balance between the rights of debtors seeking a fresh start and the rights of creditors seeking repayment for debt. While many areas of the Bankruptcy Code provide examples of this balancing act, perhaps no area of the Code embodies this balance better than discharge of debt. Discharge of debt provides the fresh start for debtors on which the bankruptcy system rests, but the Code also protects the interests of creditors who would otherwise have their claims against the debtor discharged.

Section 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." Clearly, this section prohibits discharge for debts that result from a bad act of the debtor, and serves a punitive function by not allowing a debtor to use the bankruptcy system to avoid debts when the debtor acted wrongfully in incurring those

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[1] Adapted from the famous quotation by President Abraham Lincoln in his second inaugural address:

> With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.

JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 447 (Geoffrey O'Brien ed., 18th ed. 2012) (quoting President Abraham Lincoln, Second Inaugural Address (March 4, 1865)).

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debts. While the Supreme Court has had the opportunity to consider the definition of "willful and malicious injury," it has done so only in the context of a tort claim, leaving courts to determine the applicability of § 523(a)(6) in the context of breach of contract claims.

This article merges traditional tort doctrine regarding levels of intent to harm, traditional contract doctrine of efficient breach, and modern developments recognizing punitive damages in contract actions to conclude that § 523(a)(6) should permit nondischargeability of intentional breaches of contract that lack business justification.

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INTRODUCTION

In 1995, James Sanders filed for bankruptcy protection in the Western District of Oklahoma.[2] Like all debtors in bankruptcy cases, Mr. Sanders brought with him claims of creditors[3]: creditors who hoped to be paid but who feared the possibility of having unpaid debts discharged in the bankruptcy proceedings.[4] Those creditors included Mr. Sanders's former attorney, to whom Mr. Sanders owed a debt resulting from the attorney's representation of Mr. Sanders in a dispute with the Internal Revenue Service.[5] The attorney secured a refund of approximately $30,000 for Mr. Sanders, from which the attorney would be paid his attorney's fees.[6] Before the IRS paid the refund, Mr. Sanders revoked the power of attorney so that his refund would be sent directly to him and subsequently refused to pay the attorney for his services.[7] Not only did the attorney succeed in bringing forth a claim for his unpaid services, but he also succeeded in alleging that the payment due for his services could not be discharged in Mr. Sanders's bankruptcy proceeding.[8] What makes this particular case so noteworthy, even though the Tenth Circuit opinion on this case was not published, is that it represents a small but growing trend of cases in which a court denies discharge due to willful and malicious injury in the context of a breach of contract claim.[9]

The federal bankruptcy system strikes a balance between the rights of debtors seeking a fresh start and the rights of creditors seeking debt repayment.[10] While many areas of the Bankruptcy Code provide examples of this balancing act, perhaps no area of the Code embodies this balance better than the discharge of

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[2] Sanders v. Vaughn (*In re* Sanders), No. 99-6396, 2000 WL 328136 at *1 (10th Cir. Mar. 29, 2000).

[3] 11 U.S.C. § 501 (2012). For a description of the types of claims that may be brought under 11 U.S.C. § 501, *see generally* 11 U.S.C. § 502 (2012).

[4] 11 U.S.C. § 523 (2012).

[5] *In re* Sanders, 2000 WL 328136 at *1.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at *2.

[10] Fla. Dep't. of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 51 (2008); Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 329–31 (1999).

debt.[11] Debtors file for bankruptcy protection in large measure to take advantage of the discharge of unpaid debt that the Code allows.[12] Discharge of debt provides debtors the fresh start on which the bankruptcy system rests,[13] and clearly favors the debtor's interest over the interests of creditors.[14] Yet, the Code also protects the interests of creditors who would otherwise have their claims against the debtor discharged.[15] The debtor cannot discharge any secured portion of debt.[16] A debtor who acts egregiously may have discharge denied altogether.[17] The Code denies discharge to serial filers if the filings occurred in close proximity to each other.[18] In addition, § 523 protects particular creditors by declaring the debt owed to them nondischargeable, even as other creditors' claims are forgiven (or at least forgotten).[19]

Section 523 of the Bankruptcy Code provides for nineteen types of nondischargeable debts.[20] These exceptions to a debtor's

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[11] Cohen v. de la Cruz, 523 U.S. 213, 222 (1998); Grogan v. Garner, 498 U.S. 279, 286 (1991).

[12] *In re* Bateman, 515 F.3d 272, 283 (4th Cir. 2008) (calling discharge the "holy grail" for Chapter 13 debtors); *In re* Miller, 414 B.R. 481, 484–85 (Bankr. W.D. Wis. 2009) (noting the importance of discharge in decision to file for bankruptcy protection).

[13] Bosinger v. U.S. Airways, Inc., 510 F.3d 442, 448–49 (4th Cir. 2007) (holding that discharge, together with the requirement to file proofs of claims, gives debtor a fresh start post-bankruptcy).

[14] *In re* Kosinski, 424 B.R. 599, 607 (B.A.P. 1st Cir. Mar. 1, 2010) (noting that exceptions to discharge are narrowly construed against the creditor and in the debtor's favor to protect the debtor's fresh start).

[15] 11 U.S.C. § 727 (2012).

[16] *See* 11 U.S.C. § 724(b) (2012) (providing for the distribution of property in which a creditor has secured a lien in Chapter 7 proceedings); 11 U.S.C. § 1126 (2012) (providing for the right of any creditor whose claim is impaired in Chapter 11 to vote to accept or not accept the proposed plan of reorganization); 11 U.S.C. § 1325(a)(5) (2012) (providing that secured creditors in Chapter 13 must be paid in full or given the collateral absent the debtor's consent).

[17] 11 U.S.C. § 727(a)(2)–(7) (denying discharge for debtors who take egregious actions such as hiding property, lying under oath, or ignoring court orders); 11 U.S.C. § 727(a)(11) (denying discharge for failing to complete required instructional course).

[18] 11 U.S.C. § 727(a)(8)–(9); 11 U.S.C. § 1328(f) (2012).

[19] 11 U.S.C. § 523 (2012). Section 1328(a) also provides that many types of debts not eligible for discharge under § 523 of the Bankruptcy Code will not be discharged in a Chapter 13 proceeding. 11 U.S.C. § 1328(a).

[20] The types of debts that cannot be discharged have more than doubled since the initial adoption of the Bankruptcy Code in 1978:

discharge include debts owed to protected classes of creditors[21] and debts incurred as a result of the debtor's wrongdoing.[22] Thus, the decision to render each of these debts nondischargeable involves a policy determination by Congress that the interest of this particular type of creditor outweighs the debtor's need for a fresh start,[23] or that the debtor's bad acts require denial of that fresh start.[24]

Section 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity."[25] Clearly, this section prohibits discharge

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> In 1987, just ten short years ago, there were ten grounds for excepting a debt from discharge under 11 U.S.C. 523. Today, there are 18 [now 19] such exceptions, and the list keeps growing. Every special interest group wants Congress to carve out their particular type of debt from discharge. The result? The debtors are far from getting a fresh start—and are leaving the bankruptcy system still debt-laden. While it is understandable that certain debts incurred through willful wrongdoing should be excepted from discharge in certain situations (for moral, and public policy reasons), the current growing list of authorized exceptions is certainly far afield of this objective.

D. Jean Ryan, Esq., Statement before the Subcommittee on Administrative Oversight and the Courts, Senate Committee on the Judiciary Hearings on "The Increase in Personal Bankruptcies and the Crisis in Consumer Credit," 1997 WL 179432 (F.D.C.H.) (Apr. 11, 1997); *see also* H.R. Rep. No. 95-595 (1977) (noting "eight kinds of debts excepted from discharge" at time of adoption).

[21] *See, e.g.*, 11 U.S.C. § 523(a)(1) (tax obligations); § 523(a)(5) (alimony, child support); § 523(a)(8) (student loan debt).

[22] *See, e.g.*, 11 U.S.C. § 523(a)(2) (fraud debts); § 523(a)(4) (fraud in a fiduciary capacity); § 523(a)(9) (driving under influence claims). In some instances, a particular debt may be nondischargeable both because it protects a special creditor *and* because the debtor acted poorly. *See, e.g.*, § 523(a)(3) (discussing failure to include a creditor in the bankruptcy schedules); Cohen v. de la Cruz, 523 U.S. 213, 217 (1998) (noting that debtor must be "honest but unfortunate" to enjoy dischargeability of debt).

[23] For a general discussion of the history of bankruptcy discharge laws in the United States and a discussion of the evolution of exceptions to dischargeability, see Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 367–69 (May 1991).

[24] United States v. White, 466 F.3d 1241 (11th Cir. 2006); Field v. Mans, 157 F.3d 35, 44 (1st Cir. 1998); Grogan v. Garner, 498 U.S. 279, 287 (1991).

[25] 11 U.S.C. § 523(a)(6). While Chapter 5 of the Bankruptcy Code, in which § 523(a)(6) is located, applies to all bankruptcy proceedings, Chapter 13 has a more specific rule for bankruptcies filed under that chapter that supersedes § 523(a)(6). 11 U.S.C. § 103(i) (2012); 11 U.S.C. § 1328(a). A debtor who successfully completes a Chapter 13 bankruptcy repayment plan may discharge

for debts that result from the debtor's bad acts, and thus serves a punitive function by not allowing a debtor to use the bankruptcy system to avoid debts when the debtor acted wrongfully in incurring them.[26] However, the meaning of the phrase "willful and malicious injury," and how it relates to claims originating in contract law, causes confusion and leaves the case law mixed as to when the law permits the discharge of debt. Can a contract be breached in a willful and malicious manner? Is a willful and malicious contract breach inherently tortious?

This Article argues that breaches of contract in which the breaching party understands the likelihood of damages to the non-breaching party should serve as the basis for § 523(a)(6) nondischargeability when the breaching party lacked economic justification for the breach because the policy considerations inherent in nondischargeability are met under such circumstances. This Article begins by considering decisions of the United States Supreme Court that have considered § 523(a)(6) in the context of tort claims, and then outlines the Circuit Court split on how to apply § 523(a)(6) in contract actions. It then considers the different policies behind tort recovery and contract damages, concluding that new trends allowing the traditional tort remedy of punitive damages in contract-based actions provide support for nondischargeability of willful and malicious contract damages.

I. THE SUPREME COURT'S § 523(A)(6) JURISPRUDENCE

A. Cases Under the Bankruptcy Act

The Supreme Court has had little opportunity to consider § 523(a)(6), yet its decisions in this area provide significant guidance to the bankruptcy, district, and appellate courts. In cases predating the modern Bankruptcy Code, the Court considered the Bankruptcy Act's exception to discharge of debt for "liabilities[27] ... for willful and malicious injuries to the person or

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injury to another's *property*, despite such injury being willful and malicious, but may not discharge willful and malicious injury to another *person*. 11 U.S.C. § 1328(a)(4).

[26] 11 U.S.C. § 523(a)(6).

[27] In 1903, Congress amended the language of the Bankruptcy Act, changing the term "judgments in actions" to "liabilities." Hamby v. St. Paul Mercury

property of another."[28] In *Davis v. Aetna Acceptance Co.*, the Court determined that conversion arising from the sale of an automobile belonging to the plaintiff without the plaintiff's permission failed to satisfy the standard for nondischargeability because, while a tort occurred, the trial court found no evidence of malice in the sale.[29] In a factually similar case involving the sale of securities belonging to the plaintiff, the Court affirmed a nondischargeability determination because the debtor committed the tort of conversion with sufficient malice.[30] In both cases, the action clearly involved a tort claim—conversion[31]—but both holdings focused more on the element of *malice* in making its determination rather than on the existence of a tort claim.[32]

Likewise, in *Tinker v. Colwell*, the Court considered whether a debtor could discharge liability for "criminal conversation" arising from the debtor's affair with the plaintiff's wife.[33] While labeled "criminal conversation," this action led to *civil* tort liability akin to a trespass.[34] The Court held that such action could suffice to establish tort-like liability for injury to the husband's marital rights, and, if *also* willful and malicious, suffice to establish nondischargeability.[35] As in prior cases, the Court looked at whether the defendant-debtor acted with malice in determining dischargeability of the debt.[36] But the *Tinker* Court refused to require intent specifically to harm the plaintiff in order to establish nondischargeability:

> There may be cases where the act [of having an affair with a man's wife] has been performed without any particular malice towards the husband, but we are of opinion that, within the meaning of the exception, it is not necessary that there should be this particular, and, so to speak, personal malevolence toward the husband, but that the act itself necessarily implies that

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Indem. Co., 217 F.2d 78, 81 (4th Cir. 1954) (citing Bankr. Act, ch. 487, 32 Stat. 798 (1903)).

[28] Bankruptcy Act, ch. 487, 32 Stat. 798 § 17(2) (1903).

[29] Davis v. Aetna Acceptance Co., 293 U.S. 328, 331–32 (1934).

[30] McIntyre v. Kavanaugh, 242 U.S. 138, 142 (1916).

[31] *Davis*, 293 U.S. at 331–32; *McIntyre*, 242 U.S. at 139.

[32] *Davis*, 293 U.S. at 332; *McIntyre*, 242 U.S. at 139, 142.

[33] Tinker v. Colwell, 193 U.S. 473, 480 (1904).

[34] *Id.* at 481–84.

[35] *Id.* at 485.

[36] *Id.*

> degree of malice which is sufficient to bring the case within the exception stated in the statute. The act is willful, of course, in the sense that it is intentional and voluntary, and we think that it is also malicious within the meaning of the statute.[37]

The Court continued, finding that a debtor's malice is sufficient to establish nondischargeability when the debtor commits "a wrongful act, done intentionally, *without just cause or excuse*."[38] While the Court did not require that the debtor commit a tort, but instead required that the debtor commit simply a "wrongful act," the crux of the opinion lies in the definition of malice, not in the type of act committed.[39]

Early Supreme Court cases under the Bankruptcy Act clearly established the precedent that nondischargeability of willful and malicious acts depends more on the existence of malicious or wrongful behavior.[40] However, because each of the cases involved a tort claim, it is impossible to determine whether the Court presumed that such an act would necessarily be a tort. Faced with an argument that a contract debt would be nondischargeable due to willful and malicious behavior, the Court might have used the same analysis it used in the tort context to determine whether the debtor acted with the requisite intent to establish

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[37] *Id.* The legislature specified the standard more clearly in enacting the Bankruptcy Code in 1978:

> Paragraph (5) [now (6)] provides that debts for willful and malicious conversion or injury by the debtor to another entity or the property of another entity are nondischargeable. Under this paragraph "willful" means deliberate or intentional. To the extent that *Tinker v. Colwell* ... held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

Revision Notes and Legislative Reports, 11 U.S.C. § 523, Pub. L. 95-598, 92 Stat. 2590 (1978) (internal citations omitted).

[38] *Tinker*, 193 U.S. at 486 (emphasis added). The Court provided a particularly compelling example of the difference between specific malice and malice under this definition: "If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally* and without just cause or excuse." *Id.* (quoting Bromage v. Prosser, 4 B. & C. 247 (1825)). While such harm to a complete stranger may not result from malice specifically toward that person, few would argue that such harm did not include malicious behavior.

[39] *Id.* at 475, 486.

[40] *See* Davis v. Aetna Acceptance Co., 293 U.S. 328, 331–32 (1934); McIntyre v. Kavanaugh, 242 U.S. 138, 142 (1916); *Tinker*, 193 U.S. at 475.

nondischargeability; the Court simply did not have the opportunity to make that determination in the context of a contract claim.

B. Cases Under the Bankruptcy Code

The Bankruptcy Act was repealed and replaced by the Bankruptcy Code in 1978.[41] However, the Code provision mirrored the Act, again providing nondischargeability for "willful and malicious injury."[42] The Supreme Court again had a few opportunities to consider § 523(a)(6) nondischargeability pursuant to the Bankruptcy Code. *Grogan v. Garner* involved the burden of proof on the creditor seeking nondischargeability of a fraud claim under § 523(a)(2) of the Bankruptcy Code.[43] Though it considered a different subsection of § 523, *Grogan* included a short reference to § 523(a)(6): "Arguably, fraud judgments in cases in which the defendant did not obtain money, property, or services from the plaintiffs and those judgments that include punitive damages awards are more appropriately governed by § 523(a)(6)."[44]

Through dicta in the case, the Court presumed that § 523(a)(6) includes certain types of fraud judgments and claims eligible for punitive damages.[45] Fraud claims and punitive damage claims generally involve torts.[46] Of course, the Court did not go on to say that § 523(a)(6) *only* includes claims for fraud or punitive damage,

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[41] Bankruptcy Code of 1978, Pub. L. 95-598, 92 Stat. 2549 (1978).

[42] 11 U.S.C. § 523(a)(6) (2012).

[43] Grogan v. Garner, 498 U.S. 279, 285–86, 288 (1991).

[44] *Id.* at 282 n.2 (citing Rubin v. West (*In re* Rubin), 875 F.2d 758 n.1 (1989)). The Supreme Court later addressed the question that the *Grogan* case left open in footnote 2, "whether § 523(a)(2)(A) excepts from discharge that part of a judgment in excess of the actual value of money or property a debtor received by virtue of fraud." *Id.* In *Cohen v. de la Cruz*, the Supreme Court held that treble damages awarded for fraud could not be discharged, despite the debtor's argument that nondischargeability should be limited to the plaintiff's losses as a result of the fraud. 523 U.S. at 223 (1998).

[45] *Grogan*, 498 U.S. at 282 n.2. In a similar reference under the Bankruptcy Act § 17, the Court tied the exception to discharge for willful and malicious injuries to tort claims, holding that this section of the Act "plainly indicates that Congress understood that under § 63a judgments for torts were 'provable debts,' and is strongly persuasive as a construction of that section." Lewis v. Roberts, 267 U.S. 467, 469 (1925).

[46] RESTATEMENT (SECOND) OF TORTS § 908 (1977) (indicating that punitive damages "punish [the tortfeasor] for his outrageous conduct" or because of his "evil motive or his reckless indifference"); 37 AM. JUR. 2D, *Fraud and Deceit*, § 12 (2010) (indicating that fraud constitutes a "willful tort").

but instead left open the question of how broadly to interpret § 523(a)(6).[47]

1. Kawaauhau v. Geiger

The most definitive statement from the Supreme Court regarding § 523(a)(6) came in the 1998 case of *Kawaauhau v. Geiger*.[48] In *Geiger*, a unanimous Court determined that § 523(a)(6) nondischargeability did not apply to the plaintiff's claim for medical malpractice.[49] The debtor, Dr. Paul Geiger, treated Ms. Kawaauhau's foot, prescribing oral medications rather than intravenous medications in order to reduce costs.[50] He also stopped the medications altogether when he believed that Ms. Kawaauhau's condition had improved.[51] Ultimately, Ms. Kawaauhau's condition worsened, leading to amputation of her foot, and she obtained a judgment against Dr. Geiger for medical malpractice.[52] Because Dr. Geiger failed to carry medical malpractice insurance, he bore sole responsibility for payment of the judgment.[53] When Dr. Geiger filed for bankruptcy protection and sought to discharge the debt, Ms. Kawaauhau responded by requesting nondischargeability of the debt as a "willful and malicious injury" under § 523(a)(6) of the Bankruptcy Code.[54] The Bankruptcy Court agreed that Dr. Geiger had acted in such a manner consistent with § 523(a)(6), declaring the debt nondischargeable; the District Court affirmed.[55] In reversing the decision of the lower courts, the Eighth Circuit Court of Appeals required an intentional tort in order to establish nondischargeability under § 523(a)(6).[56] As the Supreme Court's decision noted, the Court granted certiorari in order to resolve a split among the circuit courts as to the necessity that an intentional tort exist to establish § 523(a)(6) nondischargeability.[57]

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[47] *Grogan*, 498 U.S. at 290.
[48] 523 U.S. 57 (1998).
[49] *Id.* at 59.
[50] *Id.* at 57.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 59–60.
[54] *Id.* at 60.
[55] *Id.*
[56] *Id.*
[57] *Id.* While the Eighth Circuit opinion required an intentional *harm* for nondischargeability, both the Sixth and Tenth Circuits permitted nondischargeability

Ms. Kawaauhau's argument for nondischargeability centered on the intentionality of Dr. Geiger's treatment, and her resulting injury due to inadequate care.[58] Thus, the Supreme Court faced the issue of whether § 523(a)(6)'s willful and malicious injury requirement focused on the intent to commit the act that ultimately caused injury or the intent to cause the injury itself.[59] In determining that § 523(a)(6) required that the debtor intend the *injury* in order to establish nondischargeability, the Court noted that the *injury* must satisfy the willful and malicious standard—the Code does not provide nondischargeability merely for willful and malicious acts.[60] Though the Court did not discuss non-tort situations in its opinion, the question of other types of debt did arise during oral arguments before the Supreme Court.[61] This discussion demonstrated a concern that a broad interpretation of willful and malicious injury could affect normal consumer indebtedness such as contract-based credit card debts. But the petitioners' attorney continued to refer to a "conversion"—a tort—in his responses to the Court.[62] Ultimately, the *Geiger* court determined that even if Dr.

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upon the finding of an intentional *act* leading to harm. *See* Perkins v. Scharffe, 817 F.2d 392, 394 (6th Cir. 1987); First Nat'l Bank of Albuquerque v. Franklin (*In re* Franklin), 726 F.2d 606, 610 (10th Cir. 1984).

[58] *Geiger*, 523 U.S. at 61.

[59] *Id.*

[60] *Id.* Circuit courts modified their own jurisprudence in recognition of the importance of this holding. *See, e.g.*, Steier v. Best (*In re* Best), No. 03-5098, 2004 WL 1544066, at *5 (6th Cir. June 30, 2004) ("Prior to *Geiger* we had held the § 523(a)(6) exception covered debts arising out of acts that were done intentionally and caused injury, without regard to whether the debtor intended the resulting injury to the creditor. ... The Supreme Court unanimously rejected that construction...."); Ditto v. McCurdy, 510 F.3d 1070, 1076 (9th Cir. 2007) (discussing the effect of the *Geiger* decision in overruling prior Ninth Circuit precedent).

[61] Transcript of Oral Argument at 20–21, Kawaauhau v. Geiger, 523 U.S. 57 (1998) (No. 97-115).

[62] *Id.* The following dialogue occurred between counsel and the Justices:

> QUESTION: Explain to me how consumers would not be hurt by your position. Most consumer debt is probably credit card debt. Let's assume a consumer who has a lot of credit card debt seeks a discharge in bankruptcy and the credit card company comes in and says, at a time when you knew you were insolvent you sought additional credit. * * * That's a willful—willful act and therefore all of your charges, once you knew you couldn't pay them, are not dischargeable in bankruptcy. Wouldn't that be the consequence? I think it would.

Geiger intentionally provided substandard care, absent evidence that Dr. Geiger intended that such care harm Ms. Kawaauhau, no basis existed for nondischargeability of the debt in bankruptcy.[63]

What is clear from the *Geiger* court's decision is that for a *tort* claim to qualify for nondischargeability under § 523(a)(6), the tort must qualify as an *intentional* tort, with intent to harm the tort victim.[64] The Eighth Circuit's opinion specifically required an intentional tort rather than another tort form to render debt nondischargeable under § 523(a)(6).[65] Two factors indicate that the Supreme Court also focused on the type of tort needed, rather than the need for a tort at all. First, in dicta, the Supreme Court indicated that "the (a)(6) formulation triggers in the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts."[66] In addition, the question presented to the Supreme Court provided guidance indicating that the Court likely intended to limit nondischargeability under § 523(a)(6) to intentional torts. In its opinion, the Court noted that the Eighth Circuit held that "Section 523(a)(6)'s exemption from discharge ... is confined to debts 'based on what the law has for generations called

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> MR. PRESSMAN: It's a matter of what the facts are before the judge. In that situation, I think it would be. The point I think the amicus made was that in credit card debt in this country, if I buy a refrigerator at Sears, I give a lien on my refrigerator to Sears and the concern is that people will buy a refrigerator and maybe give it to their aunt, or sell it and 2 years later file and then find themselves being charged with committing a willful and malicious conversion, as the act used to mention, and in the Davis case, someone who converted collateral in accordance with an ordinary practice, a custom that was agreed upon with the lender, was found not to have acted willfully and maliciously. In the example given by the amicus, I'd say if someone bought 25 refrigerators from Sears and then filed bankruptcy 3 days later, or a month later, I think that would be willful and malicious, at least if I were the judge hearing that evidence.

Id. Arguably, the claim in the final hypothetical would be nondischargeable under another Code section that prohibits discharge for "luxury goods or services" shortly before a bankruptcy filing. 11 U.S.C. § 523(a)(2)(C) (2012).

[63] *Geiger*, 523 U.S. at 61, 64 (1998).

[64] *Id.* at 60.

[65] Geiger v. Kawaauhau (*In re* Geiger), 113 F.3d 848, 852 (8th Cir. 1997).

[66] *Geiger*, 523 U.S. at 61.

an intentional tort[,]'" that "[w]e granted certiorari to resolve this conflict [between the Eighth Circuit's decision and those of the Sixth and Tenth Circuits],"[67] and that the Court "now affirm[s] the Eighth Circuit's judgment."[68] Each of the circuit court cases referenced by the Supreme Court considered nondischargeability in the context of a tort claim.[69] But this decision failed to answer the question of whether an intentional breach of contract could also rise to the level of causing willful and malicious injury.[70]

II. SPLIT REGARDING NONDISCHARGEABILITY OF CONTRACTUAL DEBTS UNDER SECTION 523(A)(6) OF THE BANKRUPTCY CODE

Since the *Geiger* decision, most appellate courts considering whether to allow contract claims as a basis for § 523(a)(6) nondischargeability have discharged contract claims lacking an associated tort claim, without consideration of the intentionality of harm.[71] However, several circuits have not rendered a decision on that issue,[72] and some circuits' pre-*Geiger* decisions allowing a

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[67] *Id.* at 59, citing Perkins v. Scharffe, 817 F.2d 392 (6th Cir. 1987); First Nat'l Bank of Albuquerque v. Franklin (*In re* Franklin), 726 F.2d 606, 607–08 (10th Cir. 1984). Both *Perkins* and *Franklin* involved medical malpractice claims, like *Geiger*, and the question of whether reckless or negligent tort actions are sufficient to establish nondischargeability under § 523(a)(6).

[68] *Geiger*, 523 U.S. at 60.

[69] *See generally In re* Geiger, 113 F.3d 848; *Perkins*, 817 F.2d 392; *see also In re* Franklin, 726 F.2d at 607.

[70] Michael D. Martinez, *Where There's a "Will," There Should Be a Way: Why* In re *Salvino Unjustifiably Restricts the Application of § 523(a)(6) to Exclude Willful and Malicious Breaches of Contract*, 29 N. ILL. U. L. REV. 441, 454–55, 449–50 (2009) (arguing that because the *Geiger* case involved a tort, these statements only indicate that in situations involving a tort, the Court required that it include an *intentional* tort—leaving open the possibility that a contract breach in which the breaching party *intended* to cause injury to the non-breaching party could suffice for nondischargeability under § 523(a)(6)).

[71] *See* Steier v. Best (*In re* Best), No. 03-5098, 2004 WL 1544066, at *6 (6th Cir. June 30, 2004); Petralia v. Jercich (*In re* Jercich), 238 F.3d 1202, 1205 (9th Cir. 2001); Dowdy v. Bower (*In re* Bower), No. 97-1903, 1998 WL 372816, at *2 (4th Cir. June 5, 1998).

[72] The First, Second, Third, Eleventh, Federal, and D.C. Circuits have not rendered decisions on this issue. *But see In re* Desmarais, 518 F. App'x 671 (11th Cir. 2013) (quickly dismissing appeal brought on basis that § 523(a)(6) nondischargeability did not apply to breach of contract because claim involved fraudulent transfer, rendering the issue moot).

breach of contract action to create nondischargeability remain effective.[73] Several lower courts have permitted nondischargeability for contract breaches intentionally harming the non-breaching party.[74]

A. Circuit Courts Requiring a Tort Claim to Qualify for Section 523(a)(6)[75]

The Ninth Circuit Court of Appeals only permits nondischargeability under § 523(a)(6) when the claim includes a tort cause of action.[76] In *Petralia v. Jercich*,[77] the debtor was liable to a former employer for unpaid commissions, having engaged in "oppression" under California law.[78] Jercich filed for bankruptcy protection after the judgment was entered, and both the Bankruptcy Court and the Bankruptcy Appellate Panel discharged the debt owed to the former employer.[79] The Bankruptcy Court found that the employer had not proven that the debtor intended to harm his former employer; however, the Bankruptcy Appellate Panel held that the tort action of oppression must exist separately from the breach of contract action, rather than being tied to the same set of facts, to create nondischargeability.[80] In reversing the lower courts' decisions, the Ninth Circuit required a tort to establish nondischargeability under § 523(a)(6), but it did not require that the tort exist independently of the contract

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[73] *See In re* Jercich, 238 F.3d at 1205 (9th Cir. 2001); Diamond v. Kolcum (*In re* Diamond), 285 F.3d 822, 828 (9th Cir. 2001).

[74] *See infra* notes 110–28 and accompanying text.

[75] *See In re* Bower, No. 97-1903, 1998 WL 372816 at *2 (4th Cir. June 5, 1998) (unpublished table decision) (vacating district court judgment requiring creditor to establish tort of intentional infliction of emotional distress to establish § 523(a)(6) nondischargeability because Virginia recognizes tort for wrongful discharge in sexual discrimination cases, allowing plaintiff to establish nondischargeable tort claim with lower burden of proof).

[76] *Id.* (citing *In re* Akridge, 71 B.R. 151, 154 (Bankr. S.D. Cal. 1987)).

[77] 238 F.3d 1202 (9th Cir. 2001).

[78] *Id.* at 1204.

[79] *Id.*

[80] *Id.*

claim.[81] The Ninth Circuit affirmed this tort requirement in another 2001 case,[82] as well as in 2007[83] and 2008.[84]

In an unpublished opinion, the Sixth Circuit also required a tortious act in order to find nondischargeability under § 523(a)(6).[85]

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[81] *Id.* at 1205. The court recognized that in some cases California law might turn a contract claim into a tort claim when "defendant's conduct violates a fundamental public policy of the state." *Id.* at 1206 (citing Rattan v. United Servs. Auto Assoc., 84 Cal. App. 4th 715 (2000)).

[82] Diamond v. Kolcum (*In re* Diamond), 285 F.3d 822, 828 (9th Cir. 2001). *Diamond* involved the sale of a house and concealment by the sellers of problems with the house. *Id.* at 825. The jury specifically found fraud, and "that the defendants intentionally caused injury to the plaintiffs without just cause or excuse," and the court held that such a finding established the requirements for nondischargeability under § 523(a)(6). *Id.* at 825–26.

[83] Ditto v. McCurdy, 510 F.3d 1070, 1076 (9th Cir. 2007). The *McCurdy* case involved medical malpractice, and the Ninth Circuit cited to *Geiger* in requiring an intentional tort, rather than a reckless or negligent tort, to establish nondischargeability under § 523(a)(6). *Id.* However, the issue of tort versus contract was not considered in the *McCurdy* case. *But see* Hughes v. Arnold (*In re* Hughes), 347 F. App'x 359, 361 (9th Cir. 2009) (unpublished) ("Hughes's contention that nondischargeability under 11 U.S.C. § 523(a)(6) is conditioned on an intentional tort, rather than a general intention to cause injury, is equally unavailing.") (citing *Ditto*, 510 F.3d at 1078).

[84] Lockerby v. Sierra, 535 F.3d 1038, 1040 (9th Cir. 2008). *Lockerby* involved a breach of a settlement agreement. *Id.* The court, citing to the *Geiger* decision and several prior decisions of the Ninth Circuit, noted that in affirming the Eighth Circuit's decision, the Supreme Court impliedly affirmed the requirement of a tort. *Id.* at 1041. *See also* Snoke v. Riso (*In re* Riso), 978 F.2d 1151, 1152–53 (9th Cir. 1992) (pre-*Geiger* decision denying nondischargeability under § 523(a)(6) for claim resulting from failure to comply with right of first refusal provision in sale agreement). *See also* Stout v. Marshack (*In re* Stout), 2014 WL 1724506, at *17 (B.A.P. 9th Cir. 2014) (requiring tort for § 523(a)(6) nondischargeability).

[85] Steier v. Best (*In re* Best), No. 03-5098, 2004 WL 1544066, at *8 (6th Cir. 2004). However, a recent decision from the Bankruptcy Court for the Western District of Michigan, located within the Sixth Circuit, permitted a finding of willful and malicious injury on a tortious interference of contract claim. Nat'l Sign & Signal v. Livingston, 422 B.R. 645, 657 (W.D. Mich. 2009). *National Sign* considered three bases for nondischargeability of a judgment by an employer against a former employee who had used trade secrets and client lists post-employment in violation of contract provisions: fraud, embezzlement, and willful and malicious injury. *Id.* at 649. The District Court reversed the Bankruptcy Court's finding that the debt was dischargeable, finding that the tortious interference with a business relationship sufficed for a finding of willful and malicious injury under § 523(a)(6). *Id.* at 657. However,

In that case, the damages to the plaintiff arose when the defendant-debtor breached terms of a contract for the sale of debtor's business.[86] Ultimately, the court held that the breach of contract action could not support a finding of nondischargeability.[87] While the debtor had committed some wrongful, tort-like acts against the plaintiff, the tortious acts related to collection of that contract judgment rather than to the original contract claim.[88] Thus, the contract judgment itself could be discharged, but any damages resulting from torts occurring in the collection process would not be dischargeable if the injury qualified as "willful and intentional."[89]

Though not a circuit court decision, the case of *In re Iberg*[90] provides extensive discussion regarding the need for a determination of "willful and malicious injury" under § 523(a)(6). *Iberg* involved a cause of action against the debtor, a contractor, for failure to

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the opinion focused on the distinction between tortious interference with a contract and tortious interference with a business relationship, rather than the distinction between a separate tort or a tort tied to a contract action. *Id.* at 654–56. The independent tort issue might not have changed the court's opinion, however, as one can interfere with another's contract or business relationships even if there is no employment contract involved:

> The basic elements which establish a prima facie tortious interference with a business relationship are the existence of a valid business relationship (not necessarily evidenced by the existence of a valid contract) or expectancy; knowledge of the relationship or expectancy on the part of the interferer; an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted.

See id. at 657 (quoting N. Plumbing & Heating, Inc. v. Henderson Bros., Inc., 268 N.W.2d 296, 299 (1978)) (internal quotation omitted).

[86] *In re* Best, 2004 WL 1544066, at *1 (6th Cir. 2004).

[87] *Id.* at *8.

[88] *Id.* at *7.

[89] Circuit courts have followed the precedent requiring both a tort and intent to cause injury to establish nondischargeability. *See, e.g.*, Peklar v. Ikerd (*In re* Peklar), 260 F.3d 1035, 1038 (9th Cir. 2001) (holding that "a failure to prove conversion is fatal to an argument that defendant's conduct caused 'willful and malicious injury' ... [but that it] does not mean the converse—that proof of conversion necessarily establishes such injury."); Texas v. Walker, 142 F.3d 813, 824 (5th Cir. 1998) (finding professor's breach of contract with University of Tennessee to qualify for intentional tort of conversion, but allowing discharge because of lower court finding that the professor acted innocently).

[90] Prewett v. Iberg (*In re* Iberg), 395 B.R. 83, 91–92 (Bankr. E.D. Ark. 2008).

complete a new home construction agreement.[91] Beyond a simple failure to comply with the deadlines and terms of the construction agreement, the debtor failed to meet basic safety standards, prompting an inspector to note that the debtor's actions constituted "the most blatant disregard for [someone's] physical safety and financial waste I have witnessed in my over 30 years in this profession."[92] In addition, the debtor misrepresented his qualifications to the homeowners when bidding for the new home construction, including inaccurately stating that he was a licensed contractor.[93] As a result, the homeowners held, at a minimum, a breach of contract claim against the debtor and the possibility of a fraud action as well.[94] The court immediately denied nondischargeability for the breach of contract claim, noting that "it is a well-settled principle of law that 'a simple breach of contract is not the type of injury addressed by § 523(a)(6).'"[95]

B. Circuit Courts Permitting a Contract Action as the Basis for Nondischargeability Under § 523(a)(6)

One could interpret *Geiger*'s "intentional tort" language to merely provide an example of the type of *tort* action that might satisfy § 523(a)(6)'s willful and malicious requirement, without making any indication of the type of contract action that might suffice under § 523(a)(6).[96] However, even if one accepts this

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[91] *Id.* at 86.

[92] *Id.* at 87.

[93] *Id.* at 87–88.

[94] *Id.* at 89.

[95] *Id.* (quoting Snoke v. Riso (*In re* Riso), 978 F.2d 1151, 1154 (9th Cir. 1992)). However, noting that tortious fraud may have occurred, the court then considered whether the tortious conduct would suffice under a willful and malicious injury standard. *Id.* Finding that any tortious conduct lacked an "intent to build a house that would economically or physically harm" the homeowners, the court denied nondischargeability under § 523(a)(6). *Id.* at 92. The court further discussed what one might think of as contributory negligence—the homeowner's failure to adequately investigate a low bid from the contractor. *Id.* at 88, 92. The court repeatedly expressed concern that the homeowner should have conducted more investigation into the contractor's qualifications when faced with a bid that was significantly lower than competing bids. *Id.*

[96] Martinez, *supra* note 70, at 454 (2009):

> In explaining its holding, the Court simply stated that "the (a)(6) formulation triggers in the lawyer's mind the category

construction of *Geiger*, it does not indicate that any type of contract action meets the § 523(a)(6) standard. Clearly, as in the tort context, the injury from the contract breach would need to be intentional.

The Tenth Circuit Court of Appeals allowed nondischargeability for a contract breach in *Sanders v. Vaughn*.[97] Vaughn served as Sanders's attorney in proceedings before the IRS, but was fired shortly before Sanders received his refund checks.[98] Sanders then refused to pay Vaughn; Vaughn sued and received a judgment against Sanders.[99] The Bankruptcy Court held that Sanders acted willfully and maliciously in breaching the contingency fee contract with Vaughn and granted Vaughn's motion to deny discharge under § 523(a)(6).[100] The District Court and the Court of Appeals each affirmed, rejecting Sanders's argument that a breach of contract could not invoke nondischargeability under § 523(a)(6).[101]

Likewise, the Fifth Circuit allowed nondischargeability for the intentional failure to comply with a settlement agreement in *Williams v. Int'l Brotherhood of Electrical Workers*.[102] *Williams* involved a disagreement between Williams's contracting business and the union, which Williams's employees joined after being hired.[103] The court recognized that Williams breached the agreement by hiring non-unionized employees for financial reasons, not out of ill will toward the union.[104] However, the breach of the

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> 'intentional torts,' as distinguished from negligent or reckless torts," in order to illustrate the fact that recklessly and negligently caused injuries do not qualify for exception to discharge under § 523(a)(6).

[97] Sanders v. Vaughn (*In re* Sanders), No. 99-6396, 2000 WL 328136 at *2 (10th Cir. Mar. 29, 2000).

[98] *Id.* at *1.

[99] *Id.*

[100] *Id.*

[101] *Id.* at *1, *2.

[102] Williams v. Int'l Bhd. of Elec. Workers (*In re* Williams), 337 F.3d 504, 508, 512 (5th Cir. 2003). *Williams* post-dates the *Miller* case, also from the Fifth Circuit, creating an apparent split in authority within the Fifth Circuit regarding whether a contract claim can serve as the basis for § 523(a)(6) nondischargeability. *See infra* notes 157–72 and accompanying text.

[103] *In re Williams*, 337 F.3d at 506–07.

[104] *Id.* at 510.

collective bargaining agreement also violated an order of the District Court that approved the agreement as part of settling a prior legal proceeding, and the Bankruptcy Court held that because the breach also included contempt of court, it satisfied the willful and malicious standard of § 523(a)(6).[105] In each of these cases, the court focused on the intent to harm, or at least "substantial certainty" of harm, to the other party by the breach of contract to establish the malicious requirement under § 523(a)(6).[106]

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[105] *Id.* at 512.

[106] *Id. at* 508–09; *In re* Sanders, 2000 WL 328136 at *2; Rescuecom Corp. v. Khafaga (*In re* Khafaga), 419 B.R. 539, 549 (Bankr. E.D.N.Y. 2009); Girardi v. Shaffer (*In re* Shaffer), No. 94-33189-T, 2003 WL 23138445, at *12 (Bankr. E.D. Va. 2003). *But see* Fowler v. Jenkins (*In re* Jenkins), 258 B.R. 251, 267–68 (Bankr. N.D. Ala. 2001):

> In response to the Supreme Court opinion in *Kawaauhau*, there are several circuits that are yet again broadening the scope of § 523(a)(6). This Court is acutely aware that the conflicting case law post-*Kawaauhau* seeks to determine intentional acts that are substantially certain to cause injury should be nondischargeable. However, after a careful reading of *Kawaauhau*, this Court concludes that the Supreme Court and § 523(a)(6) does not permit anything less than a debtor's intent to cause an injury. By broadening the holding of *Kawaauhau*, as the Fifth, Sixth, and Tenth Circuit Courts of Appeals have, not only judicially legislated dischargeability issues that Congress specifically limited, they also portrayed a judicial activism to overrule the Supreme Court by attacking the issue through the backdoor. These circuits bring intentional acts that are substantially certain to cause injury, through a backdoor, permitting them to be deemed nondischargeable. These are the same deliberate acts which Congress and the Supreme Court have repetitively and consistently held do not sustain a willful and malicious injury under § 523(a)(6). There are many actions that a debtor can take which will create a debt; some of those actions will require a deliberate act. Fewer of those actions will rise to that of an intentional tort; and even fewer will be had with the requisite and specific intent to injure. ... It is those actions which Congress intends to be nondischargeable. This narrow interpretation affords a debtor the true intent of a "fresh start" as anticipated by Congress, yet ensures that culpable debtors do not gain an unfettered advantage over their creditors and abuse the bankruptcy system as a protective blanket for such culpable actions.

Prior to the Supreme Court's decision in *Geiger*, the Seventh Circuit[107] denied discharge of contractual claims under the "willful and malicious injury" standard, and the Eighth Circuit[108] suggested that a breach of contract claim may suffice for nondischargeability in unusual circumstances.

Several district and bankruptcy courts have also suggested that a contract action may suffice for § 523(a)(6) nondischargeability when the court finds intent to injure connected to a breach

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Markowitz v. Campbell (*In re* Markowitz), 190 F.3d 455, 462–64 (6th Cir. 1999); Caton v. Trudeau (*In re* Caton), 157 F.3d 1025, 1030 (5th Cir. 1998); Miller v. J.D. Abrams, Inc. (*In re* Miller), 156 F.3d 598, 606 (5th Cir. 1998); Bd. of Regents of Univ. of Tex. Sys. v. Walker, 142 F.3d 813, 824 (5th Cir. 1998).

[107] In a case predating the *Geiger* decision, the Seventh Circuit affirmed a nondischargeability finding under § 523(a)(6) in connection with the intentional breach of a contractual non-compete clause. N.I.S. Corp. v. Hallahan (*In re* Hallahan), 936 F.2d 1496, 1501 (7th Cir. 1991). The debtor violated a non-compete agreement with his former employer. *Id.* at 1498–99. The former employer obtained a breach of contract judgment and an injunction against the debtor. *Id.* at 1499. In a relatively lengthy opinion discussing the ability to enforce the covenant not to compete, the calculation of damages, and the right to a jury trial to establish damages, the court gave little attention to the issue of whether § 523(a)(6) could even provide for nondischargeability of contract claims. *Id.* at 1501–02, 1507. The court affirmed the Bankruptcy Court's nondischargeability finding "[b]ecause Hallahan concedes that he breached the contract willfully." *Id.* at 1501. This result would change under the standard established by *Geiger*, which requires not only intent to act but also intent to cause harm in doing so. Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998).

[108] Barclays Am./Bus. Credit, Inc. v. Long, 774 F.2d 875, 882 (8th Cir. 1985). The debtor guaranteed a loan for his business but breached the guaranty agreement. *Id.* at 876. In affirming the bankruptcy and district courts' granting of discharge, the Eighth Circuit held that:

> Debtors who willfully break security agreements are testing the outer bounds of their right to a fresh start, but unless they act with malice by intending or fully expecting to harm the economic interests of the creditor, such a breach of contract does not, in and of itself, preclude a discharge.

Id. at 882. This statement indicates that a breach of contract may serve as the basis for nondischargeability under § 523(a)(6), and provides for the same "malicious" injury requirement that came from the *Geiger* court several years later. *Geiger*, 523 U.S. at 61 (1998). Interestingly, the court also noted a line of cases requiring that the breach of contract rise to the level of a "conversion" of property in order to create nondischargeability. *Long*, 774 F.2d at 880.

of contract.[109] In *Girardi v. Shaffer*,[110] the debtor entered into an agreement to purchase real property from the Girardis.[111] The contract required the debtor to provide financial information to the Girardis, but she failed to do so.[112] She also closed a bank account from which she had written a deposit check before the Girardis cashed it.[113] Substantial evidence existed of similar situations in which the debtor had entered into purchase agreements but failed to close them.[114] She lacked the financial resources to purchase the homes when she entered into these agreements.[115] Even so, the court denied the Girardis' request for nondischargeability of their claim against the debtor, noting that "[w]hile there would seem little doubt that under the right circumstances,

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[109] In addition to the cases discussed herein, see the recent cases of Pioneer Const., Inc. v. May (*In re* May), 518 B.R. 99, 124–25 (Bankr. S.D. Ga. 2014) and Weatherall Radiation Oncology v. Caletri (*In re* Caletri), 517 B.R. 655, 663 (Bankr. E.D. La. 2014), both of which recognize the possibility of contract-based nondischargeability under § 523(a)(6). In a post-*Geiger* decision, the Bankruptcy Court for the Western District of Missouri considered a case in which the debtor engaged in allegedly willful and malicious injury in connection with a repossession of collateral. Bank of Iberia v. Jeffries (*In re* Jeffries), 378 B.R. 248, 251 (Bankr. W.D. Mo. 2007). While not discussing the tort of conversion, the debtor's conduct in that case might have risen to the level of a tort. The debtor borrowed money to purchase a truck, giving the lender a purchase-money security interest in the truck. *Id.* When the debtor failed to make payments on the truck, the lender repossessed the truck. *Id.* However, the debtor redeemed the truck from the lender and regained possession of it. *Id.* Thereafter, the debtor filed for bankruptcy protection, and the lender successfully motioned the bankruptcy court for relief from the automatic stay in order to again repossess the truck. *Id.* After the second repossession, which occurred just six months after the initial repossession, the lender noted that significant modifications had been made to the truck, including removal and replacement of several parts of the truck such that the truck was no longer operable and had negligible resale value. *Id.* at 251–52. Granting nondischargeability under § 523(a)(6), the court held that the "[d]ebtor's conduct was targeted at the Bank in that it was certain to substantially reduce the value of the Vehicle and harm its economic interest," but did not make a specific determination of a tort violation. *Id.* at 256.

[110] *In re* Shaffer, 2003 WL 23138445. The *Girardi* case post-dated the Fourth Circuit's decision in *Bower*, which required a tort action as the basis for nondischargeability under § 523(a)(6). *See supra* note 77.

[111] *In re* Shaffer, 2003 WL 23138445, at *3.

[112] *Id.*

[113] *Id.*

[114] *Id.* at *5.

[115] *Id.* at *10.

breach of contract can qualify as willful and malicious injury, the court has been unable to find a reported decision involving a breach of contract to purchase property."[116] In *Rescuecom Corp. v. Khafaga*,[117] the court permitted nondischargeability without any indication of a tort claim.[118] The debtor entered into a franchise agreement with Rescuecom, which prohibited him from engaging in any competing business.[119] In violation of the contract, the debtor created a competing business under his wife's name in order to do computer consulting work without having to pay Rescuecom any franchise royalties.[120] The court found that the debtor's egregious behavior in connection with the breach of contract sufficed to establish nondischargeability.[121] Finally, in *In re Marklin*,[122] a case from the Sixth Circuit,[123] the debtors borrowed through a line of credit, securing the debt with proceeds of their forthcoming crops.[124] After harvesting and selling the crops, the debtors kept the proceeds without making any payments against the debt owed and secured by those proceeds.[125] Without any discussion of the need for a tortious injury, the Bankruptcy Court held the debt nondischargeable under § 523(a)(6):

> Sherman Marklin testified that he knew he owed the money to Farm Credit, he knew the crops served as security for the debt and that he was to use the crop proceeds to repay the loan. Instead, he willfully placed the crop proceeds into his own bank account and used the funds as if they were his own. The Marklins' intentional actions in using the crop proceeds for their own benefit meet the standard for a willful and malicious injury to Farm Credit.[126]

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[116] *Id.*

[117] Rescuecom Corp. v. Khafaga (*In re* Khafaga), 419 B.R. 539 (Bankr. E.D.N.Y. 2009).

[118] *Id.*

[119] *Id.* at 543.

[120] *Id.* at 543–44.

[121] *Id.* at 552.

[122] Farm Credit Servs. Of Mid-Am., PCA v. Marklin (*In re* Marklin), 429 B.R. 880 (Bankr. W.D. Ky. 2010).

[123] The Sixth Circuit has previously required the commission of a tort in order to find nondischargeability under § 523(a)(6). *See infra* notes 88–92.

[124] *In re* Marklin, 429 B.R. at 881.

[125] *Id.*

[126] *Id.* at 882. The *Marklin* decision focuses on the debtors' intentional *actions*, despite being decided more than a decade after *Geiger* made clear

C. Non-Tort and Non-Contract Actions as the Basis for Nondischargeability Under § 523(a)(6)

While the question of nondischargeability arises most frequently in torts and contracts, courts have declared debts nondischargeable on the basis of the "willful and malicious injury," without a discussion of whether the action must include a tort claim, in other contexts. For example, several bankruptcy courts dealing with family law matters have denied a debtor's discharge when the debtor wrongfully and willfully takes marital assets from the former spouse.[127] Courts have also permitted nondischargeability for copyright infringement claims.[128] And, though

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that debtor must intend the harm, not just the action, to create nondischargeability. Kawaauhau v. Geiger, 523 U.S. 57, 57–58 (1998). Though the court did not discuss tort causes of action, Marklin's actions might have constituted the tort of conversion because he took proceeds not belonging to him and put them into his own bank account. The tort of conversion includes "[t]he wrongful possession or disposition of another's property as if it were one's own." BLACK'S LAW DICTIONARY 356 (8th ed. 2004) (defining conversion in "Tort & criminal law").

[127] *See, e.g.*, Alessi v. Alessi (*In re* Alessi), 405 B.R. 65, 67–68 (Bankr. W.D.N.Y. 2009) (finding willful and malicious injury under § 523(a)(6) when debtor, ex-wife, failed to pay creditor, ex-husband, the amount due under their divorce agreement upon sale of jointly-owned property). For a case discussing several of these cases, see Ker v. Ker (*In re* Ker), 365 B.R. 807, 813–15 (Bankr. S.D. Ohio 2007). In many of these cases, including *Alessi*, the parties agreed to a distribution of property, essentially creating a contract. *See Alessi*, 405 B.R. at 67–68. The breach of that agreement in a willful and malicious manner suffices for nondischargeability. While traditional contract principles assume that contractual breaches occur for purely economic reasons, in family law, and particularly in the divorce area, it is not difficult to envision contract breaches that occur for reasons other than pure economic considerations. *See Ker*, 365 B.R. at 815 (outlining factors, including voluntary unemployment by debtor, that indicated willful and malicious nature of injury to former wife); *see also* Hamilton v. Hamilton (*In re* Hamilton), 390 B.R. 618 (Bankr. E.D. Ark. 2008) (finding willful and malicious injury in ex-husband-debtor's failure to care for ex-wife's horses, as required by divorce agreement, leading to death of several horses).

[128] Star's Edge, Inc. v. Braun (*In re* Braun), 327 B.R. 447 (Bankr. N.D. Cal. 2005) (holding claim for copyright infringement nondischargeable under § 523(a)(6) and noting congressional determination that damages exist whenever copyrights are infringed in response to debtor's argument that debt can be discharged due to lack of finding of an actual injury to copyright holder); *see also* Entrepreneur Media, Inc. v. Smith (*In re* Smith), No. 00-56559, 2009

the majority of courts considering unpaid workers' compensation claims have permitted discharge of those claims, at least one court has recognized the possibility that such claims may be declared nondischargeable if willful and malicious intent in failing to pay the claim exists.[129] In each of these areas, the courts focused on the "willful and malicious injury" language of § 523(a)(6), and while in some cases a tort such as conversion or fraud may co-exist with the claim, the court never discussed a tort requirement in establishing nondischargeability.[130]

III. DISTINGUISHING TORTS AND CONTRACTS

Distinguishing torts from contracts presents a challenge because actions based in contract may lead to tortious conduct, such as fraud,[131] conversion, or tortious interference with contract. Yet, they are legally different concepts with different policy considerations.[132] Traditional contract law seeks to provide each

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WL 6058677 (B.A.P. 9th Cir. 2009) (allowing nondischargeability for willful violation of trademark).

[129] Leahy v. Collora (*In re* Leahy), 170 B.R. 10, 13–17 (Bankr. D. Me. 1994) (pre-*Geiger* case).

[130] *See generally In re* Leahy, 170 B.R. 10; *In re* Braun, 327 B.R. 447; *In re* Hamilton, 390 B.R. 618.

[131] In cases involving fraudulent conduct, however, nondischargeability under § 523(a)(6) need not be an issue because the Bankruptcy Code provides for nondischargeability for fraud debts. 11 U.S.C. § 523(a)(2) (2012).

[132] Morrow v. L.A. Goldschmidt Assocs., Inc., 492 N.E.2d 181, 184 (Ill. 1986). Even when parties feel comfortable in that distinction, the importance of that distinction for the litigants has been noted by scholars:

> The line drawn between tort and contract recovery has more than theoretical and classificatory significance, grounded as it is in society's understanding of socially acceptable conduct. For society as a whole, the distinctions articulate a set of values, whereas for the litigating parties, the theoretical divide takes on immense practical meaning because it determines the availability of damages. ... Despite this grave significance to society and to the parties, and in the face of frequent difficulty in distinguishing between tort and contract claims, courts and scholars attempt to maintain the line to ensure that contracting parties cannot drag their claims for breach into tort territory. ... But it is not difficult to envision situations in which a person suffers both contractual and tortious harms .... [T]he complexity is introduced only when the wrongs arise (or seem to arise) from the same acts.

party with the benefit of their bargain; tort law seeks to reimburse victims and provide disincentives for wrongdoing. Matching these purposes to the goals of the bankruptcy system sheds light on how tort and contract law fit into the nondischargeability scheme of the Bankruptcy Code, but modifications to these traditional remedy schemes also support expansion of what might be included as nondischargeable debts in bankruptcy.

Black's Law Dictionary defines a tort as "a civil wrong, other than a breach of contract," leaving the definition of a contract breach as the critical determination of whether a tort exists.[133] Black's defines a breach of contract, then, as the "[v]iolation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance."[134] Thus, a party who fails to perform or who causes another not to perform breaches a contract; other civil wrongs generally qualify as torts. But beyond the legal distinction between torts and contracts lies another distinction—the policy behind varying damages inherent in each cause of action.

Tort law seeks to "vindicate social policy;"[135] contract law seeks to ensure a non-breaching party the benefit of the bargain.[136] Contract law generally assumes that a party who breaches a contract does so for economic reasons because it costs less to breach the contract than to comply with it.[137] This ensures commercial efficiency

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Catherine Paskoff Chang, *Two Wrongs Can Make Two Rights: Why Courts Should Allow Tortious Recovery for Intentional Concealment of Contract Breach*, 39 COLUM. J.L. & SOC. PROBS. 47, 55–57 (Fall 2005).

[133] BLACK'S LAW DICTIONARY 1626 (9th ed. 2009).

[134] *Id.* at 213.

[135] Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 459–60 (Cal. 1994) ("[C]ontract law exists to enforce legally binding agreements between parties; tort law is designed to vindicate social policy.").

[136] Demczyk v. Mutual Life Ins. Co. of N.Y. (*In re* Graham Square, Inc.), 126 F.3d 823, 828–29 (6th Cir. 1997) (discussing the difference between contract remedies and tort remedies).

[137] RESTATEMENT (SECOND) OF CONTRACTS ch. 16, topic 1, reporter's note (1979). The Restatement of Contracts discusses remedies available to the non-breaching party to the contract by discussing the reasons why a party chooses to breach a contract:

> A contract that he once thought would be profitable may therefore become unprofitable for him. If the contract is still profitable for the other party, however, a question arises as to whether the reluctant party should be compelled to perform.

by allowing contracts to fulfill the function of putting something into the hands of "the person who values it most highly" while not disadvantaging parties who entered into contracts that were later deemed not sufficiently valuable for compliance.[138] While it is easy to envision a situation in which a contract breach is intended, the breaching party generally has no intention to *harm* the non-breaching party and, indeed, may have no intention—benevolent or ill—toward the other party at all.

The Bankruptcy Code's treatment of claims mirrors some of these policy considerations. The allowance of claims, like contract law, gives a remedy to the non-breaching party by giving that party a chance at repayment through the bankruptcy claim and payment processes.[139] Nondischargeability under § 523 of the

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> The answer provided by at least some economic analysis tends to confirm the traditional response of common-law judges in dealing with this question.

Id. The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise, but compensation of the promisee for the loss resulting from the breach. "Willful" breaches have not been distinguished from other breaches, punitive damages have not been awarded for breach of contract, and specific performance has not been granted where compensation in damages is an adequate substitute for the injured party. In general, therefore, a party may find it advantageous to refuse to perform a contract if he will still have a net gain after he has fully compensated the injured party for the resulting loss.

This traditional response is not without its shortcomings. Its focus on the pecuniary aspects of breach fails to take account of notions of the sanctity of contract and the resulting moral obligation to honor one's promises. The analysis of breach of contract in purely economic terms assumes an ability to measure value with a certainty that is not often possible in the judicial process. The analysis also ignores the "transaction costs" inherent in the bargaining process and in the resolution of disputes, a defect that is especially significant where the amount in controversy is small. *Id.*

[138] *Id.* ("A bargain from which both parties benefit results in a gain in 'economic efficiency' by moving the exchanged assets to higher valued uses. Economic theory assumes that the parties to an agreement strive to maximize their own welfare and that, absent some impediment such as mistake, misrepresentation, or duress, each party places a value on the other's performance that is greater than the anticipated cost to him of his own performance.").

[139] It is rare that a claim will be paid in full in a bankruptcy proceeding. Indeed, most individual Chapter 7 bankruptcy filings are "no asset" cases, in which the creditors will receive *no* payout on their claims. UNITED STATES COURTS, CHAPTER 7 – BANKRUPTCY BASICS, http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics [http://perma

Bankruptcy Code serves the same goal as tort law—furthering social policy by protecting creditors who were particularly wronged or protecting creditors deemed most worthy of additional protections.[140] Furthermore, § 523(a)(6) and intentional tort law specifically look at the motive of the wrongdoer, which state contract law generally refuses to do.[141] While those parallels suggest that § 523(a)(6) nondischargeability should not be extended to the typical economically motivated breach of contract,[142] looking at the levels of intent within tort law, as well as the willingness to extend punitive damages to breach of contract actions, suggests that in extraordinary circumstances nondischargeability should apply in intentional breach of contract situations.

A. Levels of Intent

The modern understanding of intentional torts includes language similar to that of § 523(a)(6), referring to "frauds, or malicious or willful injuries."[143] Tort law considers various levels of

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.cc/7AEV-YVPM]. However, even a state law contract claim is not a guaranty of payment, but a right to seek that payment.

[140] Hon. Bernice B. Donald & Kenneth J. Cooper, *Collateral Estoppel In Section 523(C) Dischargeability Proceedings: When Is A Default Judgment Actually Litigated?*, 12 BANKR. DEV. J. 321, 323–24 (1996) (noting dual policies of protecting particular creditors and preventing debtor wrongdoing).

[141] Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 461 (Cal. 1994) ("In an intentional tort action, motives amounting to malice, oppression, or fraud may justify punitive damages. ... But the law generally does not distinguish between good and bad motives for breaching a contract.").

[142] Most of the nondischargeability provisions consider tort-like actions. *See* 11 U.S.C. § 523(a)(2)(A) (fraud); § 523(a)(4), (a)(11) (fiduciary "fraud or defalcation"); § 523(a)(9) (personal injury resulting from driving under the influence of alcohol or drugs); § 523(a)(19) (fraud in securities trading). However, several nondischargeability provisions may apply in the contract setting. *See* 11 U.S.C. § 523(a)(2) (2012) (permitting nondischargeability also for credit received on basis of false representations or excessive consumer debt owed to one creditor and incurred shortly before bankruptcy filing); § 523(a)(3) (permitting nondischargeability for debts not included in the bankruptcy schedules); § 523 (a)(16) (permitting nondischargeability for fee due to homeowners' or similar associations); § 523(a)(18) (permitting nondischargeability for repayment to certain "pension, profit-sharing, stock bonus, or other plan[s]").

[143] Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 478 (1990) (citing Oliver W. Holmes, *The Theory of Torts*, 7 AM. L. REV. 652, 653 (1872–73)). Despite the similarity in language, however, Professor Vandevelde notes

mental culpability, including intent, recklessness, and negligence.[144] A tortfeasor acts with intent when he or she acts either for the purpose of causing the consequence *or* with substantial certainty that such a consequence will occur as a result of the action.[145] But tort law also recognizes a difference between one whose intent is to harm and one whose intent is to act in spite of the natural consequences of that action:

> There are obvious differences between the actor who acts with the desire to cause harm and the actor who engages in conduct knowing that harm is substantially certain to happen. There is a clear element of wrongfulness in conduct whose very purpose is to cause harm. While there are circumstances in which acting in such a way is appropriate, tort law can fashion affirmative defenses (such as necessity and defense of self and of property) that take those circumstances into account. Whether the objective of tort law is fairness or deterrence or some combination of the two, liability for purposeful harms is generally easy to justify.
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> When the actor chooses to engage in conduct with knowledge that harm is certain to follow, this choice, with its known consequence, provides a distinctive argument in favor of liability. Nevertheless, there are complications in considering the liability implications of harms that are intentional only in the sense that the actor who engages in conduct knows that harm is substantially certain to result. *Not only does the actor not desire to produce the harmful result, but the actor may be engaging in a generally proper activity for generally proper reasons, even though the activity produces harm as an unavoidable but unwanted byproduct. This can provide an element of justification or reasonableness that is lacking for purposeful harms.*[146]

In the tort context, knowledge of the likelihood of harm arising from an action satisfies the definition of "intent" because even if the actor did not desire that the harm occur, the actor knew it was substantially likely to occur as a result of the action.[147] But an issue remains as to whether this satisfies the *Geiger* definition

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that Holmes's intentional torts differed from modern intentional torts and in some cases, liability "was imposed when public policy so required, not because of the moral shortcoming of the tortfeasor." Thus, intentional torts were based less in the intent of the tortfeasor. *Id.*

[144] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM §§ 1–3 (2010).

[145] *Id.* § 1, § 8A (2010).

[146] *Id.* § 1 cmt. a (2010) (emphasis added).

[147] *Id.* § 1 (2010).

for nondischargeability.[148] Arguably, because substantial likelihood qualifies as intent, the substantial likelihood of harm equates to intent to harm. Yet the actor may lack a *desire* to inflict harm upon the other party, even if he or she knows it will likely occur.

The Supreme Court considered levels of intent in a slightly different context,[149] the defalcation exception to discharge under § 523(a)(4).[150] The case involved the debtor's role as trustee of his father's trust assets.[151] The Supreme Court considered the level of intent required to commit nondischargeable defalcation, concluding that defalcation requires an "intentional wrong."[152] The Court further defined such intent to "include … not only conduct that the fiduciary knows is improper but also reckless conduct" including situations in which the "fiduciary 'consciously disregards … a substantial and unjustifiable risk.'"[153] While the decision focuses on the defalcation exception to discharge, the Court considered the standard applicable to another discharge exception—fraud—in crafting its standard.[154] In doing so, the Court indicated that intent includes situations in which the actor knowingly causes harm or does so without regard or justification for the risks associated with the action.[155] But, unlike the other fraud exceptions, § 523(a)(6) requires more than just intent—it also requires malice.[156] Thus, while knowledge of the risk may suffice to establish some requirements of § 523(a)(6) nondischargeability, it cannot be the end of the analysis.

In a case decided the same year as the *Geiger* decision,[157] the Fifth Circuit Court of Appeals considered nondischargeability for

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[148] Guerra & Moore Ltd. v. Cantu (*In re* Cantu), 389 F. App'x 342, 345 (5th Cir. 2010); Carrillo v. SU (*In re* SU), 290 F.3d 1140, 1144 (9th Cir. 2002); Miller v. J.D. Abrams, Inc. (*In re* Miller), 156 F.3d 598, 603 (5th Cir. 1998).

[149] Bullock v. BankChampaign, N.A., 133 S. Ct. 1754, 1756 (2013).

[150] Section 523(a)(4) prohibits discharge of debts incurred through "fraud or defalcation while acting in a fiduciary capacity." 11 U.S.C. § 523(a)(4).

[151] *Bullock*, 133 S. Ct. at 1757.

[152] *Id.* at 1759.

[153] *Id.* (citing MODEL PENAL CODE § 2.02 cmt. 9).

[154] *Id.* (citing 11 U.S.C. § 523(a)(2)). The Court later noted that the defalcation exception falls within the same set of policy considerations as other fault-based exceptions, including the willful and malicious injury exception. *Id.* at 1761 (citing 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), (a)(6), and (a)(9)).

[155] MODEL PENAL CODE § 2.02(2)(b).

[156] 11 U.S.C. § 523(a)(6).

[157] Miller v. J.D. Abrams Inc. (*In re* Miller), 156 F.3d 598, 598 (5th Cir. 1998).

an intentional tort under § 523(a)(6).[158] Debtor-defendant disclosed trade secrets of his former employer in order to secure a position with a competing firm.[159] Misappropriation of such information clearly constituted an intentional tort, but the question remained of whether the intentional tort sufficed for nondischargeability in bankruptcy.[160] The Appellate Court remanded for a finding on the intentional and malicious injury requirements.[161] In so doing, the court considered numerous potential interpretations of the willful and malicious injury standard: "The standard might be met by any tort generally classified as an intentional tort, by any tort substantially certain to result in injury, or any tort motivated by a desire to inflict injury."[162] In rejecting the first option, the requirement of an intentional tort, the court noted that such an interpretation could be both over- and under-inclusive, as some intentional torts are not malicious, and some malicious injuries are not intentional torts.[163] In addition to intent, the creditor must also establish the "malicious injury" requirement of § 523(a)(6).[164] After a lengthy discussion of implied versus actual malice, the court settled on a definition of malice that borrowed from the First and Fifth Circuits' definitions of malice, requiring either a lack of "just cause or excuse"[165] for the tortious behavior or "knowing disregard of the rights of another."[166] As the court noted, this definition of malice focuses on similar elements to the definition of intentional tort that the court had already laid

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[158] *Id.* at 601.

[159] *Id.* at 600–01.

[160] *Id.* at 603.

[161] *Id.* at 598.

[162] *Id.* at 603.

[163] *Id.* at 603–04. Nonetheless, the court conceded that in most cases, an intentional tort would suffice as a proxy for "willful and malicious injury" under § 523(a)(6), stating "[m]ost often, an intentional tort requires either objective substantial certainty of harm or subjective motive to do harm. Indeed, the presence of one of these factors is both necessary and sufficient for a tort to be classified as an 'intentional tort' under the traditional modern definition."

[164] *Id.* at 604. 11 U.S.C. § 523(a)(6).

[165] This mirrors the Supreme Court's "just cause or excuse" standard for § 523(a)(6), as stated in Tinker v. Colwell, 193 U.S. 473, 486 (1903). *See supra* note 38 and accompanying text.

[166] *Miller*, 156 F.3d at 605 (citing *In re* Nance, 556 F.2d 602, 611 (1st Cir. 1977) (internal quotation marks omitted)).

out: "objective substantial certainty of harm or subjective motive to do harm."[167] Other circuits have followed suit in defining malice to indicate behavior that is likely to harm another without just cause.[168]

The ability to use just cause in defense of an intentional harm—even an intentional tort—is not a new concept in legal doctrine. Professor Kenneth Vandevelde discussed the origins of the idea in his oft-cited piece, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*:

> In analyzing the lawfulness of the defendants' conduct, Lord Bowen began with this principle: "[I]ntentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse." Lord Bowen concluded, however, that the defendants' intentional infliction of injury to the plaintiff's trade was justified by the defendants' commercial motive of advancing their own trade, and, therefore, defendants were not liable.
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> Seven years after Pollock's treatise appeared, Holmes articulated a general theory of intentional tort in his 1894 article, *Privilege, Malice, and Intent.* Holmes wrote that "the intentional infliction of temporal damage, or the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause."[169]

The just cause test adopted by the Fifth Circuit fits with the *Geiger* court's distinction between intent to act and intent of the consequences of that act as an element of malice by focusing on why the tortfeasor acted in spite of known consequences, and of the tortfeasor's intent regarding the consequences of that action.[170] It also furthers the "without just cause" standard of the Supreme Court's *Tinker* decision,[171] and mirrors the standard

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[167] *Miller*, 156 F.3d at 605.

[168] Maxfield v. Jennings (*In re* Jennings), 670 F.3d 1329, 1334 (11th Cir. 2012) (citing Hope v. Walker (*In re* Walker), 48 F.3d 1161, 1164 (11th Cir. 1995)); *see, e.g.*, Jett v. Sicroff (*In re* Sicroff), 401 F.3d 1101, 1106 (9th Cir. 2005). *But cf. Miller*, 156 F.3d at 605 (arguing that the *Geiger* court "displaced" the just cause standard espoused by *Tinker*).

[169] Vandevelde, *supra* note 143, at 473 (quoting Mogul Steamship Co. v. McGregor, Gow, & Co., 23 Q.B.D. 598, 613 (1889), *aff'd* by [1892] App. Cas. 25); Walker v. Cronin, 107 Mass. 555 (1871).

[170] Kawaauhau v. Geiger, 523 U.S. 57, 58 (1998).

[171] 193 U.S. 473 (1904). *See supra* text accompanying notes 33–39.

already applied by the Supreme Court for defalcation claims.[172] Applying this standard in the tort context would prohibit discharge of a debt under § 523(a)(6) in situations in which the tortfeasor acted with the purpose of harming the victim or with knowledge that the act would likely cause harm, and without justification for acting in such a manner.

This standard could also be applied in the context of a breach of contract claim. Applying tort levels of intent, parties often breach contracts intentionally, perhaps even with knowledge of the likely harm to the non-breaching party.[173] Imagine, for example, a simple contract to ship goods from one state to another. If the party producing the goods suddenly finds a less expensive way to transport its goods and chooses to breach the shipping agreement, the breaching party knows it has chosen to breach the contract. It likely understands that as a result, the non-breaching shipping company will have unused capacity in one of its shipping vessels that it could otherwise have filled with another customer's goods. Indeed, contracts frequently provide that each party recognizes the economic harm that will occur in the event of a breach and agrees to the damages to be paid upon breach.[174] This clearly satisfies the tort definition of intent because the breaching party understands the substantial likelihood of harm. However, unlike many tort scenarios, the breaching party could argue "just cause" for breaching the contract, as this is a classic efficient breach designed to ensure an effective economic system.[175] Thus, while intentional, the breach would not be malicious. In the rare instance of a contract breach where the standard of intent is met and no justification exists for the breach

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[172] Bullock v. BankChampaign, N.A., 133 S. Ct. 1754 (2013).

[173] *See, e.g.*, Korea Supply Co. v. Lockheed Martin Corp., 131 Cal. Rptr. 2d 29, 54 (Cal. 2003); Lama Holding Co. v. Smith Barney Inc., 646 N.Y.S.2d 76, 79, 82 (N.Y. App. Div. 1996); Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 28 Cal. Rptr. 2d 475, 476 (Cal. 1994).

[174] *See, e.g.*, 24 WILLISTON ON CONTRACTS §§ 65.33, 65.5 (4th ed. 2014) (discussing liquidated damages provisions).

[175] As one case noted, the Bankruptcy Code invites debtors to efficiently breach contracts post-petition through the executory contract provisions of 11 U.S.C. § 365, and thus to deny discharge to a debtor who efficiently breached pre-petition would seem unjust. Lockerby v. Sierra, 535 F.3d 1038, 1042–43 (9th Cir. 2008).

(e.g., the breach is not efficient by commercial law standards), the breaching party satisfies the element of malice such that the debt should not be dischargeable.

B. Punitive Damages[176]

The possibility of extending nondischargeability to breach of contract claims in the context of unjustified intentional contract breaches finds support in the growing trend of allowing punitive damages for breach of contract claims.[177] While § 523(a)(6) does not mention punitive damages,[178] the history and purpose of punitive damages at state law[179] parallel the history and purpose of nondischargeability under the Bankruptcy Code.[180] Different state

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[176] RESTATEMENT (FIRST) OF CONTRACTS ch. 12, topic 2, § 342 cmt. A:

> Damages are punitive when they are assessed by way of punishment to the wrongdoer or example to others and not as the money equivalent of harm done. All damages are in some degree punitive and preventive; but they are not so called unless they exceed just compensation measured by the harm suffered.

[177] Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 20–21 (1998).

[178] The Supreme Court has, however, tied punitive damages to § 523(a)(6) nondischargeability. *See* Grogan v. Garner, 498 U.S. 279 (1991). *See supra* note 44.

[179] While state law determines the existence of most tort and contract claims and the damages awarded for them, the Supreme Court has recognized that state law does not control the question of nondischargeability. *Grogan*, 498 U.S. at 283–84 ("The validity of a creditor's claim is determined by rules of state law. ... [T]he issue of nondischargeability has been a matter of federal law governed by the terms of the Bankruptcy Code.") (citing Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161 (1946)); Brown v. Felsen, 442 U.S. 127, 129–30 (1979). Even so, the Court has also looked to state law in determining the standards for dischargeability. Specifically, the Court has held that the standard for establishing nondischargeability under § 523(a)(2)'s fraud exception includes the lower standard of "preponderance of the evidence" rather than "clear and convincing evidence" to ensure that those able to establish fraud under state law could enjoy the benefits of nondischargeability in the bankruptcy system. *Grogan*, 498 U.S. at 285, 287. Thus, while federal law established the standard for nondischargeability of debt, state law determined the existence of the underlying fraud debt. *Cf.* Archer v. Warner, 538 U.S. 314 (2003) (allowing nondischargeability of fraud claim under § 523(a)(2) if plaintiff established existence of fraud even though claim could no longer be pursued under state law due to the settlement agreement).

[180] Charles Jordan Tabb, *The History of Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995) (discussing the history and development

standards exist as to what actions suffice for an award of punitive damages, but in each, punitive damages seek to punish extreme wrongdoing beyond the traditional "negligence" cause of action.[181] Punitive damages cannot serve as a proxy for nondischargeability because the requirements to impose punitive damages vary from state to state and sometimes differ from the *Geiger* requirements for nondischargeability under § 523(a)(6).[182] Nonetheless, the

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of bankruptcy laws in the eighteenth and nineteenth centuries in the United States); Lauren A. Helbling & Christopher M. Klein, *The Emerging Harmless Innocent Omission Defense to Nondischargeability Under Bankruptcy Code § 523(a)(3)(A): Making Sense of the Confusion Over Reopening Cases and Amending Schedules to Add Omitted Dates*, 69 AM. BANKR. L.J. 33 (1995).

[181] Topps Co. v. Cadbury Stani, S.A.I.C., 380 F. Supp. 2d 250, 261 (S.D.N.Y. 2005) (noting that punitive damages exist "to punish the defendant and to deter future egregious conduct").

[182] Duncan v. Duncan (*In re* Duncan), 448 F.3d 725, 728–29 (4th Cir. 2006) (rejecting the argument that a punitive damage judgment in a wrongful death action collaterally estopped debtor from arguing for discharge of debt because state law allowed punitive damages for reckless behavior, which is not sufficient for nondischargeability under § 523(a)(6)). *See also* Collins Entm't Corp. v. Coats and Coats Rental Amusement, 577 S.E. 2d 237, 243 (4th Cir. 2003) (noting that South Carolina allows punitive damages for "willful ... or malicious conduct"). In the *Collins Entertainment* case, the court relied in part on the breaching party's realization that the contract breach would lead to "a serious economic loss" and the fact that such a breach would take revenue from the non-breaching party and give it to the breaching party instead. 577 S.E.2d at 244. Under the *Geiger* standard, mere intention to breach without intent to cause harm by the breach would not suffice for an award of non-dischargeability and, thus, the *Collins* standard for punitive damages may allow such damages in situations that the *Geiger* standard would deem insufficient for a nondischargeability determination. Even so, some courts do look at the ability to receive punitive damages in determining nondischargeability. *See*, *e.g.*, Higgins v. Olson (*In re* Olson), 32 F. App'x 194 (8th Cir. 2002) (holding that failure to award punitive damages does not equate to finding that no willful and malicious injury occurred); Siemer v. Nangle (*In re* Nangle), 274 F.3d 481, 483 (8th Cir. 2001) (allowing jury decision to award punitive damages to collaterally estop debtor from arguing for discharge of debt). *See also* ARK. CODE ANN. § 16-55-206 (West 2015), which provides for punitive damages when the tortfeasor acted (1) with malice or "in reckless disregard of the consequences, from which malice may be inferred," or (2) intending to cause injury; FLA. STAT. ANN. § 768.72 (West 2015), which requires only that the debtor knew of or was recklessly indifferent to the risks of his or her intentional behavior; KY. REV. STAT. ANN. § 411.184 (West 1988) (permitting punitive damages in cases involving "oppression, fraud, or malice"); N.J. STAT. ANN. 2A:15-5.12 (West 2015) (requiring malice or "wanton and willful disregard" to establish punitive damages claim, but allowing negligence action to

parallels between the jurisprudence of punitive damages and the jurisprudence of nondischargeability for *willful and malicious* actions provides insight into whether *willful and malicious* nondischargeability actions could include state-law contract actions.

Historically, only tort actions justify punitive damages,[183] and the law uses punitive damages to punish the most egregious of tortfeasors.[184] Reasons for denial of punitive damages in contract actions include the ease of determining actual damages in contract actions, the unlikelihood of contract actions causing physical harm or mental anguish, and the desire to allow—even encourage—commercially efficient breaches of contract.[185] However, contract actions increasingly serve as the basis for punitive damage claims when the court finds such wrongdoing in the contract action itself to justify assessing punitive damages despite the lack of a tort cause of action.[186]

The traditional rule disallowing punitive damages in contract actions stems from the policy differences between torts and contracts themselves. Unlike contracts, torts arise from an often-involuntary relationship between two or more parties, where one

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serve as basis for punitive damages claim). *But see* MINN. STAT. ANN. § 549.20 (West 2015) (requiring findings of "deliberate disregard" for others that evoke elements of both intent and *Geiger*-type malice to establish punitive damages). *See also* Martinez, *supra* note 70, at 458–59 (2009).

[183] Demczyk v. Mutual Live Ins. Co. of N.Y. (*In re* Graham Square, Inc.), 126 F.3d 823, 828–29 (6th Cir. 1997) (discussing the difference between contract remedies and tort remedies).

[184] RESTATEMENT (SECOND) OF TORTS § 901 (citing three reasons for awarding tort damages: compensation "to determine rights," punishment, and vindication); RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (indicating that compensatory damages are to put the victim in the financial position that he or she would have been in had the tort not occurred); RESTATEMENT (SECOND) OF TORTS § 908 (indicating that punitive damages "punish [the tortfeasor] for his outrageous conduct" or because of his "evil motive or his reckless indifference").

[185] Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57, 63 (2d Cir. 1985) (denying punitive damages for damage resulting from failure to properly store cargo onboard ship per contract requirements). *See* Steven Shavell, *Why Breach of Contract May Not be Immoral Given the Incompleteness of Contracts*, 107 MICH. L. REV. 1569 (2009); Seana Shiffrin*, Could Breach of Contract be Immoral?*, 107 MICH. L. REV. 1551 (2009) (together debating whether contract obligations can equate to moral obligations such that breaches of contract may serve as a basis for punitive damage and other morality-based actions).

[186] Steven W. Feldman, *Autonomy and Accountability in the Law of Contracts: A Response to Professor Shiffrin*, 58 DRAKE L. REV. 177, 211–14 (2009).

of the parties suffers harm at the hands of the other.[187] Tort law reflects social mores, and "vindicate[s] social policy."[188] In contrast, contracts reflect an agreement between two or more parties, whereby the parties have the opportunity to define the parameters of their relationship, and the damages that result from failing to meet the requirements of the contract. Contract law focuses on what the parties to the contract anticipated, and serves only to put the parties into the financial position that the parties expected to result from the contract.[189] The reasons why a party failed to meet its obligations have no bearing on the calculation of damages because the damages will ensure that the party suffering loss from the breach receives all that the party anticipated from the contract.[190] Indeed, under this traditional rule, the non-breaching party only collects the contracted-for damages, even against a party who willfully and egregiously breaches a contract.[191]

Cases prohibiting punitive damages in contract actions note that non-breaching parties to a contract may obtain compensatory damages designed to make them whole, as if a breach had never occurred. These damages may take many forms,[192] but to permit punitive damages in addition to the contract damages

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[187] *See generally* RESTATEMENT (SECOND) OF TORTS § 281 (1965).

[188] Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 459–60 (Cal. 1994).

[189] *Id.* at 460.

[190] *Id.* at 461 ("In an intentional tort action, motives amounting to malice, oppression, or fraud may justify punitive damages. ... But the law generally does not distinguish between good and bad motives for breaching a contract."). However, many states recognize a tort of "bad faith ... refusal to pay a claim" when insurance companies fail to pay claims in bad faith. *See* John H. Bauman, *Emotional Distress Damages and the Tort of Insurance Bad Faith*, 46 DRAKE L. REV. 717, 739 (1998).

[191] A.L. Carter Lumber Co. v. Saide, 168 S.W.2d 629, 631 (Tex. 1943) (reversing a jury award of punitive damages in a breach of contract action, and noting that punitive damages may not be awarded for breach of contract "even though the breach is brought about capriciously and with malice"); Fed. Fire Prot. Corp. v. J.A. Jones/Tompkins Builders, Inc., 267 F. Supp. 2d 87, 91 (D.D.C. 2003) (allowing punitive damages claim for related conversion claim, but noting that "punitive damages are not recoverable in a breach of contract action merely because the defendant breached in bad faith").

[192] Topps Co. v. Cadbury Stani S.A.I.C., 380 F. Supp. 2d 250, 261 n.11 (S.D.N.Y. 2005) (discussing restitution, reliance, and expectancy damages as compensatory damages in contract actions).

runs the risk of making the non-breaching party more than whole.[193] In 1985, the Eighth Circuit Court of Appeals considered punitive damages for a breach of contract action.[194] In denying punitive damages, the Eighth Circuit relied on the lack of a tort action arising from the breach of contract facts.[195] The District Court for the Northern District of Illinois also restricted a plaintiff's ability to tether a tort claim to a contract claim and thus receive a punitive damages award when the non-breaching party suffers only monetary damages.[196] In its decision, the District Court focused on the connection between economic harm inherent in contract law and lack of punitive damages:

> Illinois does recognize that if the conduct complained of rises to the level of an independent tort, for which punitive damages may be sought, plaintiff may sustain claims for both that tort and a breach of contract on the same facts. ... There is a limitation, however, in that, generally, if plaintiff's damages are purely economic in nature, it cannot maintain a claim in tort based on breach of contract facts. ... Economic loss exists where "the defect is of a qualitative nature and the harm relates to the consumer's expectation that a product is of a particular quality so that it is fit for ordinary use."[197]

These cases exemplify the traditional rule that breach of contract damages cannot include punitive damages.

In some cases, however, the existence of malicious behavior in connection with a breach turns what would otherwise constitute

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[193] *Id.* at 261 (noting that punitive damages "would put the non-breaching party in a better financial position than they would have occupied but for the breach").

[194] Delta Rice Mill, Inc. v. Gen. Foods Corp., 763 F.2d 1001 (8th Cir. 1985).

[195] Delta Rice contracted to sell rice to General Foods. General Foods rejected a large shipment of rice and, though it claimed to do so as a result of the quality of the rice, and because the price of rice had decreased between the time of contract and the time of rejection. Delta Rice suggested General Foods's rationale for breach simply masked the true reason for the breach—a financial decision to purchase the rice elsewhere at a lower price. *Id.* at 1003. In rejecting the punitive damages claim, the Eighth Circuit noted the existence of two tort actions based solely on breach of contract—"bad faith refusal to pay" and "misperformance of a contract"—that, if shown, might suffice for punitive damage claims. *Id.* at 1005.

[196] BP Amoco Chem. v. Flint Hills Res., LLC, 489 F. Supp. 2d 853 (N.D. Ill. 2007).

[197] *Id.* at 857 (citations omitted).

a contract action into a tort-like action, which may then allow for punitive damages.[198] In *American Bank of Waco v. Waco Airmotive, Inc.*, Waco took out a small business loan from American Bank.[199] When Waco failed to make a series of payments on the loan, the bank offset the amount due against Waco's account balance at the bank to pay the loan.[200] At trial, Waco obtained a judgment as a result of a wrongful offset, which included exemplary damages for the bank's "willful, wanton or malicious" action.[201] The Texas Supreme Court started from the premise that, because the cause of action stemmed from the account agreement between the parties, the presumption against punitive damages in contract actions applied.[202] However, after considering the bank's actions in the offset, the court concluded that "a finding that a bank acted with malice or in reckless disregard of the rights of its depositor will support a depositor's recovery of exemplary damages for wrongful dishonor of its checks ...."[203] In essence, the court found the existence of a tort-like action that supported punitive damages by finding a contract breach plus malice or reckless disregard for the rights of the non-breaching party.[204]

Contracts scholars recognize a fundamental shift in the approach of courts to contract damages, infusing notions of morality and good faith into contract interpretation.[205] This transformation

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[198] In at least one jurisdiction, a public interest has also been required in order to assess punitive damages in connection with a contract breach. *Topps Co.*, 380 F. Supp. 2d at 255 (denying claim for punitive damages except for misappropriation of trade secret claim because New York only allows punitive damages on contract claims when "defendant engage[d] in a pattern of activity directed against the general public").

[199] Am. Bank of Waco v. Waco Airmotive, Inc., 818 S.W.2d 163, 167 (Tex. App. 1991).

[200] *Id.*

[201] *Id.*

[202] *Id.* at 176.

[203] *Id.*

[204] Interestingly, the *Waco* decision allows a contract action to serve as the basis for punitive damages, but the Fifth Circuit does not allow contract action nondischargeability under § 523(a)(6). Miller v. J.D. Abrams Inc. (*In re* Miller), 156 F.3d 598 (5th Cir. 1998), *supra* notes 157–63 and accompanying text.

[205] Feldman, *supra* note 186, at 183 ("[T]he great majority of state and federal jurisdictions—including the United States Supreme Court—specifically express strong legal *and* moral disapproval of unexcused, intentional breach of promise."). Mr. Feldman continues:

includes a willingness among courts to assess punitive damages for certain breach of contract actions, even in the absence of a corresponding or independent tort claim.[206] It also includes arguments from a number of contracts scholars for increased recognition of punitive damages for certain breaches of contract.[207] Though scholars recognize punitive damages in contract actions as a new approach, some courts have already recognized the ability in some states to receive punitive damages on contract actions. Judge Richard Posner penned an opinion in 1998 noting that Indiana allows punitive damages for breach of contract actions when the breach of contract also includes "elements of fraud, malice, gross negligence or oppression."[208] While fraud would independently constitute a tort action, Judge Posner did not require a tort claim to establish a basis for punitive damages.[209] He refuted the traditional notion that parties breach contracts for efficiency, rather than for ill motives:

> After an in-depth analysis of the decisions, one scholar has stated that "[t]here has been a slow but steady trend ... towards an application of higher standards of good faith, fair dealing and morality to all contracts and transactions." Another commentator takes the same position, stating that conventional relational, critical, and law and economics scholars all agree that "contract law is undergoing a 'transformation' as a result of an infusion of 'communitarian values,' such as fairness, trust, paternalism, and cooperation." More than ever, it remains a truism that "[t]he moral standard that requires individuals to keep their promises certainly has had an important effect on the development of contract law."

Id. at 189–90 (citing Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 120 (1993); G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 NW. U. L. REV. 1198, 1205 (1988); HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 1:2 (2009)).

[206] *Id.* at 211–12 ("[A] sharp upsurge has occurred in the number and amount of punitive damage awards in contract cases, which further shows the law's receptiveness to this remedy in the interests of justice.") (citing ERIK MOLLER, TRENDS IN CIVIL JURY VERDICTS SINCE 1985, 34 (1996); Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1, 8 n. 28 (1992)).

[207] *See* Chang, *supra* note 132, at 49–50 (arguing that punitive damages should be granted for "egregious" breaches of contract, and that courts should be willing to find tort-like conduct when a party intentionally misrepresents or breaches contract).

[208] Patton v. Mid-Continent Sys., Inc., 841 F.2d 742, 750 (7th Cir. 1988).

[209] *Id.*

> Not all breaches of contract are involuntary or otherwise efficient. Some are opportunistic; the promisor wants the benefit of the bargain without bearing the agreed-upon cost, and exploits the inadequacies of purely compensatory remedies (the major inadequacies being that pre- and post-judgment interest rates are frequently below market levels when the risk of nonpayment is taken into account and that the winning party cannot recover his attorney's fees). This seems the common element in most of the Indiana cases that have allowed punitive damages to be awarded in breach of contract cases ....[210]

Thus, while a traditional "efficient" breach of contract would not suffice for punitive damages, the occasional breach in which the breaching party somehow takes advantage of the other party and enjoys the benefit of the bargain without fulfilling its own part of the contract for something other than purely economic reasons would suffice for punitive damages in Indiana. In addition, even in jurisdictions that have not recognized the ability to obtain punitive damages for contract breaches, judges have criticized the distinction.[211] This willingness to consider punitive damages for

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[210] *Id.* at 751.

[211] Miller Bldg. Supply, Inc. v. Rosen, 485 A.2d 1023, 1027–28 n.2 ("While we believe that the application of an implied malice standard with respect to all contract-related fraud cases is meritorious, we are constrained by the doctrine of *stare decisis* to base our decision on binding precedents established by the Court of Appeals."); *id.* at 1031 (Adkins, J., concurring):

> The distinction [between pure tort claims and tort claims tied to contract breaches] seems to be based on notions underlying the disallowance of punitive damages in pure contract actions. It is suggested that concern for punitive damages will chill commercial transactions because "would-be contracting parties will be reluctant to enter into contracts that might ultimately result in unlimited liability." ... It is posited that the existence of contract-related punitive damages might inhibit parties to a contract from breaching the contract in order to pursue possibly more profitable and economically efficient ventures ....
>
> Whatever merit these arguments may have with respect to pure contract actions, they are less than persuasive when applied to an action for fraud arising out of a contract. Why should one who lies or cheats in connection with the performance of a contract escape liability because he is motivated by greed instead of hate for the other contracting party?

Both the majority and concurring opinions in *Miller Building* suggest that the requirement of actual malice and implied malice for contract-based tort claims and pure tort claims, respectively, be merged into an implied malice

contract breaches appears to be a recent development; in 1988, the Fourth Circuit Court of Appeals noted that:

> [I]t appears that South Carolina is the only state in the nation which permits punitive damages for conduct which does not give rise to an independent tort claim. ... [Though] New Mexico recognizes a claim for punitive damages for breach of contract accompanied by a fraudulent act, it further requires that the act be "wanton in character and maliciously intentional."[212]

Like state tort law, nondischargeability under federal bankruptcy law shares the goal to punish those who act egregiously by ensuring that only "honest" debtors enjoy the most significant benefit of the bankruptcy system.[213] To the extent that states only permitted punitive damages for tort actions, it made sense for federal bankruptcy law to follow suit in the area of nondischargeability.[214] But as states increasingly allow punitive damages in connection with certain breach of contract actions, thus indicating that those breaches meet the egregious standard so as to warrant additional damages beyond what the parties did or could have contracted for as punishment, federal bankruptcy law should also permit nondischargeability of those types of contract damages.

CONCLUSION

Generally, parties to a contract accept bankruptcy and nonpayment as a risk of business engagements.[215] While the parties

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requirement for all punitive damage claims. This does not suggest that all contract claims should be entitled to punitive damages—just that tort claims with fraud involved should be allowed punitive damages in the same manner as other tort claims allowing punitive damages to attach. *See also* Morrow v. L.A. Goldschmidt Assocs., 492 N.E.2d 181, 187 (1986) (Goldenhersh, J., dissenting) ("It is time that we acknowledge and excise from the body of law of this State the artificial distinction [between breach of contract and breach of tort claims] perpetuated by the majority opinion.").

[212] Edens v. Goodyear Tire & Rubber Co., 858 F.2d 198, 201 n. 2 (4th Cir. 1988) (citing 22 AM. JUR. 2D Damages § 245 (1965); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 14-3 (2d ed. 1977); Whitehead v. Allen, 313 P.2d 335, 336 (N.M. 1957)).

[213] *See supra* note 17 and accompanying text.

[214] *See supra* note 182 and accompanying text.

[215] Robert A. Hillman, *Contract Excuse and Bankruptcy*, 43 STAN. L. REV. 99, 128 (1990) ("[T]he law has made a discharge in bankruptcy a foreseeable risk of contracting.").

are not able to contract around discharge of debt,[216] they can effectively prevent discharge through the use of collateralization to create a secured claim.[217] Tort law, on the other hand, seeks to compensate victims—often victims who did not have an opportunity to choose to engage with the tortfeasor.[218]

Any concerns regarding discouraging commercial interaction by allowing traditional tort remedies (like punitive damages) in contract actions pose little concern in the nondischargeability context, thanks to the high standard for nondischargeability provided by the *Geiger* decision.[219] If § 523(a)(6) required only intent—even intent to cause harm to the non-breaching party—almost any breach of contract would qualify for nondischargeability if intent includes substantial certainty of harm. But the stringent standard for a finding of nondischargeability—*willful and malicious* conduct—balances the need to allow efficient breach and a fresh start for bankruptcy debtors with traditional tort concepts of retribution and punishment inherent in nondischargeability.[220] In particular, the requirement that the debtor "lack justification" for the action, even if that action would likely cause harm, ensures that those debtors who breach for purely economic reasons—a justification long accepted under American contract theory for breaching a contract—would not face nondischargeability for this

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[216] Parties cannot avoid discharge through a contract, nor can they require, pre-petition, an agreement that the debt will be reaffirmed in the event of a bankruptcy filing. *See* 11 U.S.C. § 524(c) (2012) (outlining the requirements for reaffirming debts in bankruptcy cases, including post-petition determination through attorney and/or judge that reaffirmation of debt does present an "undue hardship" for debtor and, in some cases, is in the debtor's best interest).

[217] *See*, *e.g.*, AmeriCredit Fin. Servs. v. Penrod (*In re* Penrod), 636 F.3d 1175, 1176, n.3 (9th Cir. 2011); Wilding v. CitiFinancial Consumer Fin. Servs. (*In re* Wilding), 475 F.3d 428, 430 (1st Cir. 2007).

[218] Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 460 (Cal. 1994).

[219] *See supra* notes 48–69 and accompanying text.

[220] Thus, though one court expressed concern that to allow punitive damages for intentional breaches of contract would "swallow up the general rule denying punitive damages for breach of contract," the same concern does not hold true in nondischargeability because mere intent to breach the contract would not suffice for nondischargeability under the *Geiger* standard of malice that requires intent for the harm rather than intentional action. *See* Carrico v. Delp, 490 N.E.2d 972, 977 (Ill. App. Ct. 1986).

decision.[221] This interpretation of § 523(a)(6) would avoid classifying "willful and malicious injury" as a tort injury versus a contract injury.[222] Rather, it focuses on the critical balance and purposes of nondischargeability—preventing debtors from discharging debts incurred through egregious behavior, while allowing the debtor a fresh start through the discharge of most other debts.

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[221] Kawaauhau v. Geiger, 523 U.S. 57, 57–58 (1998).
[222] *Id.*