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Filling in the Blank: Defining Breaches of Contract Excepted from Discharge as Willful and Malicious Injuries to Property Under 11I U.S.C. § 523(a)(6)

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* Candidate for J.D., Washington and Lee University School of Law, May 2010. I would like to thank Professor Margaret Howard for her advice, assistance, and patience. I would also like to thank Allen Meyers and Michael McCarthy, without whom this Note would never have taken shape. This Note is dedicated to my family—Jonathan, Leslie, Sharon, and Greg.

I. Introduction

One day, Leslie walks into her local attorney's office and declares that she wants to start a sole proprietorship selling shoes. Unfortunately, due to a teenage spending habit, Leslie does not have enough money to start the business on her own. Leslie needs funding and wants to know the legal consequences of taking out a loan. Because of the current state of the economy,[1] Leslie is concerned about what would happen if her shoe business failed. Would she still need to pay back the loan?[2]

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1. *See, e.g.*, Vikas Bajaj & Louise Story, *Mortgage Crisis Spreads Beyond Subprime Loans*, N.Y. TIMES, Feb. 12, 2008, at A1 ("Personal bankruptcy filings, which fell significantly after a 2005 federal law made it harder to wipe out debts in bankruptcy, are starting to inch up."); Peter S. Goodman, *Credit Enters a Lockdown*, N.Y. TIMES, Sept. 26, 2008, at A1 ("[M]any experts fear the fraying of the financial system could pin the nation in distress for years."); David Leonhardt, *Lesson from a Credit Crisis: When Trust Vanishes, Worry*, N.Y. TIMES, Oct. 1, 2008, at A1 ("It's not enough that markets could freeze up, loans could become impossible to get and the economy could slide into its worst downturn since the Great Depression.").

2. The fact pattern used is drawn from a couple of different cases focusing on a common § 523(a)(6) injury to property scenario—a debtor owing money under a loan agreement unable to make payments but still in possession of the creditor's property interest. *See, e.g.*, *In re* Gagle, 230 B.R. 174, 176–78 (Bankr. D. Utah 1999) (stating as facts of the case that the debtors took out a $10,000 secured loan but that the debtor stopped making payments and sold off all the value of the collateral so that the creditor had nothing in which to attach security interest); *In re* Hambley, 329 B.R. 382, 388–94 (Bankr. E.D.N.Y. 2005) (stating as facts that the debtors entered into a contract with investor-creditor under which the debtor was to receive cash investment from the creditor but the debtors failed to return investment, as required by

The lawyer's initial response, and probably what Leslie expects to hear, is that honest, good faith debts that result from a failing business are discharged in bankruptcy. The Bankruptcy Code provides the entrepreneur with the incentive to take on the risks of running a business by allowing the entrepreneur to erase debt if the business fails.[3] Several provisions of the U.S. Bankruptcy Code[4] allow for individual entrepreneurs, like Leslie, to discharge debts when in need of relief.[5]

The lawyer, however, cannot just inform Leslie that all debts, including bank loans, are dischargeable.[6] The discharge of debt is meant only for the "honest but unfortunate debtor,"[7] and in certain situations Congress provided exceptions in which debts incurred by the debtor are not dischargeable.[8] The historical reason for keeping some debts on the books despite a bankruptcy filing is to punish entrepreneurs for dishonest, unscrupulous behavior.[9] The Code seeks to promote business and economic development by providing a safety net for individuals, like Leslie, who try to run a successful business but fail, while protecting creditors when entrepreneurs incur debt for explicitly identified circumstances that Congress has deemed to be dishonest or unworthy of discharge.[10]

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agreement, and instead continued to use the funds at the expense of the creditor); *In re* Whiters, 337 B.R. 326, 350–53 (Bankr. N.D. Ind. 2006) (stating as findings of fact that the debtor entered into a refinancing agreement for debtor's vehicle and security agreement using vehicle as collateral and that debtor, experiencing trouble making payments on the agreement, transferred title of the agreement to a third party in breach of the security agreement).

3. *See* Segal v. Rochelle, 382 U.S. 375, 379 (1966) ("[O]ne purpose which is highly prominent and relevant in this case is to leave the bankrupt free after the date of his petition to accumulate new wealth in the future.").

4. *See* 11 U.S.C. §§ 727, 1141, 1128(a), 1328(b) (2006) (discharge provisions).

5. *See id.* § 727(b) ("Except as provided in section 523 of this Title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . . .").

6. *See id.* (using the language "[e]xcept as provided in section 523" to note that exceptions to discharge exist other than those listed in section 727(a)).

7. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (commenting that bankruptcy "gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt").

8. *See* 11 U.S.C. § 523 (2006) (listing all the exceptions to a discharge authorized by §§ 727, 1141, 1128(a), and 1328(b)).

9. *See* Robert J. Bein, *Subjectivity, Good Faith and the Expanded Chapter 13 Discharge*, 70 MO. L. REV. 655, 665 (2005) ("Continuing the historical emphasis on moralism, the discharge exceptions are rooted in the fundamentally equitable nature of bankruptcy itself.").

10. *See supra* note 7 and accompanying text (discussing the provision in the *Local Loan Co.* decision that states that the purpose of bankruptcy is to provide the honest but unfortunate debtor with a fresh start).

In order to give Leslie a full rundown on the types of behavior that will except debts from discharge, the lawyer must tell Leslie about 11 U.S.C. § 523(a)(6).[11] Section 523(a)(6) excepts debt from discharge "for willful and malicious injury by the debtor to another entity or to the property of another entity."[12] The exception seeks to "avoid rewarding debtors who engage in blameworthy conduct by preventing them from escaping liability."[13] For example, under this provision, the debtor cannot discharge debts resulting from a judgment entered against the debtor for intentional infliction of emotional distress.[14]

Avoiding § 523(a)(6) seems simple—avoid any wrongdoing. But Leslie will want a more detailed explanation of "wrongdoing." How can one be sure that debts incurred are debts resulting from wrongdoing?

Section 523(a)(6) excepts from discharge willful and malicious injuries to both person and property.[15] A debt incurred due to a willful and malicious injury to a person generally is a judgment entered against the debtor for an intentional tort, such as battery, in which the victim becomes the creditor.[16] Section 523(a)(6) prevents the debtor in such a case from evading the judgment by filing for bankruptcy.[17] To avoid incurring a debt from a willful and malicious injury to a person, the lawyer must simply advise Leslie to be aware of and avoid debts sustained due to past intentional torts.[18]

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11. *See* 11 U.S.C. § 523(a)(6) (2006) (excepting from discharge those wrongful debts caused by willful and malicious injury to the creditor or the creditor's property).

12. *Id.*

13. George M. Ahrend & Randall T. Thomsen, *Tort Claims and Judgments as Debts for "Willful and Malicious Injury" Nondischargeable Under Section 523(a)(6) of the Bankruptcy Code*, 100 COM. L.J. 498, 498 (1995).

14. *See In re* McNallen, 62 F.3d 619, 625–26 (4th Cir. 1995) (finding that intentional infliction of emotional distress injury was certainly willful). The court also noted that the son's conduct pushed past the bounds of decency because it might have been done knowing that the mother was susceptible to emotional distress. *Id.*

15. 11 U.S.C. § 523(a)(6) (2006).

16. *See, e.g.*, *In re* Halverson, 226 B.R. 22, 32 (Bankr. D. Minn. 1998) (concluding that debt tortfeasor incurred by battering, assaulting, and intentionally imprisoning the plaintiff was willful and malicious under § 523(a)(6)).

17. *See id.* at 31 ("[Section] 523(a)(6) of the Bankruptcy Code stands for the proposition that a debtor who has intentionally injured and intentionally harmed his creditor cannot expect bankruptcy relief to include discharging his debt for such conduct . . . .").

18. *Cf.* Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998) (defining "willful" to include all acts that intend to injure). Because "willful" requires intent to injure, when considering whether their behavior will be excepted from discharge under § 523(a)(6), debtors need not concern themselves with torts requiring anything less than such intent, such as recklessness or negligence. *See id.* at 64 ("We hold that debts arising from recklessly or negligently inflicted injuries do not fall within the compass of [§] 523(a)(6).").

Debts incurred through willful and malicious acts that injure a person's property, however, are more difficult to define.[19] Specifically, confusion arises when applying the exception in breach of contract cases. For example, in *In re Hambley*,[20] the bankruptcy court excepted from discharge a debt created when debtors refused to return the creditor's investment upon the occurrence of a certain condition in a contract requiring the return of the investment.[21] The

19. *See generally* Andrea R. Blake, *Debts Nondischargeable for "Willful and Malicious Injury": Applicability of Bankruptcy Code § 523(a)(6) in a Commercial Setting*, 104 COM. L.J. 64 (1999) (discussing different viewpoints on when certain acts causing injury to property are excepted from discharge under § 523(a)(6)); Michael D. DeFrank, *An Ineffective Escape Hatch: The Textualist Mistake in* Geiger, 16 BANKR. DEV. J. 467 (2000) (critiquing the Supreme Court's decision in interpreting "willful"); Howard B. Kleinberg, *When Does the "Willful and Malicious Injury" Exception to Discharge Apply to a Debt Stemming from a Conversion of Collateral?*, 119 BANKING L.J. 87 (2002) (discussing when debts from a conversion of collateral are excepted from discharge under § 523(a)(6) in the wake of *Kawaauhau*).

20. *In re* Hambley, 329 B.R. 382, 389 (Bankr. E.D.N.Y. 2005) (holding that $700,000 debt incurred due to breach of contract is nondischargeable under subsections (2), (4), and (6) of § 523(a)). In *Hambley*, the bankruptcy court considered whether debt created by the debtors' breach of contract by failing to return the creditor's investment was excepted from discharge under 11 U.S.C. § 523(a) when the debtors filed for Chapter 7 bankruptcy. *Id.* at 388–89. Specifically, the debtors, owners of all the equity in a company that designed software to address the so-called "Millennium Bug," were in need of investors for their business and falsely represented the company's product and the amount it invested in the product in order to solicit the creditor's business. *Id.* at 389–91. The creditor composed a preliminary agreement that stated that the creditor's investment of $300,000 was subject to the parties reaching a final agreement, and that if the parties did not reach a final agreement, the debtors were to return the creditor's investment. *Id.* at 392. The creditor then forwarded $175,000, but the creditor and debtors never reached a final agreement. *Id.* Instead of returning the money in compliance with the preliminary agreement, the debtors continued to draw salaries on it and use it for business and personal reasons, which reduced the creditor's money from $175,000 to $30,000. *Id.* at 392–93. The court found that debt caused due to the injury to the creditor's investment was excepted from discharge under § 523(a)(2) because the debtors obtained money through false pretenses, misrepresentation, and fraud. *Id.* at 395–98. The court also found the debt incurred excepted from discharge under § 523(a)(2)(B) because the debtors obtained the creditor's investment due to a materially false written statement respecting the debtors' financial condition, finding the five necessary elements: (1) the debtors used the statement in writing; (2) the writing the debtors used was materially false; (3) the materially false writing concerned the debtors' financial condition; (4) the creditor reasonably relied on debtors' false statement; and (5) the debtors caused the statement to be published with an intent to deceive. *Id.* at 399–400. The court also found the debt excepted from discharge under § 523(a)(4) because the evidence produced at trial showed that the debtors' actions constituted embezzlement. *Id.* at 401. The court finally found the debt excepted from discharge under section § 523(a)(6) because the debtors knew their acts that breached the preliminary contract caused the harm of the investor not receiving the investment back, constituting a willful and malicious injury. *Id.* at 402. Therefore, the court excepted the debt from discharge when the debtors filed for Chapter 7 Bankruptcy. *Id.* at 403.

21. *See id.* at 393 (describing in detail the debtors' refusal to return the creditor's funds upon the creditor's request, thereby violating the preliminary agreement under which the funds were lent).

court found the breach itself created a willful and malicious injury to the creditor because in breaching the contract, the debtors (1) knew of their obligation to return the investment if the contractual condition did not occur and (2) continued to act in breach of contract by keeping the investment, which caused the depreciation of that investment.[22]

This means that courts, in evaluating whether a debtor's conduct was "willful and malicious" under § 523(a)(6), will analyze the debtor's breaches of contract to determine whether those breaches caused injury to property willfully and maliciously. This may come as a complete surprise to the lawyer advising Leslie, who has studied contract law, because, unlike tort law, contract law is not based on the subjective intent of the parties to the contract.[23] When dealing with breaches of contract, courts focus on the manifestations of the contracting parties when determining whether the breach is material.[24]

Because breach of contract cases focus on the actions of both parties,[25] no clear definition in contract case law exists to help clarify when the intentions of the party breaching the contract are so wrongful and dishonest that the breach can be considered "willful and malicious."[26] Breach of contract alone is not enough to qualify as a willful and malicious injury to property under § 523(a)(6).[27] The courts are not clear or unanimous, however, when deciding what element is needed, in addition to breach of contract, to cause a willful and malicious injury.[28] While decisions on the subject focus on the bad faith intent

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22. *See id.* at 402 ("The defendants had a contractual duty under the Heads of Agreement to return the funds when they failed to enter into final contract. The defendants' failure to return the money has injured the plaintiffs. The Court finds the defendants caused a willful and malicious injury.").

23. *See* RESTATEMENT (SECOND) OF CONTRACTS § 5(2) (1981) ("A term of a contract is that portion of the legal relations resulting from the promise or set of promises which relates to a particular matter, whether or not the parties manifest an intention to create those relations.").

24. *See* Frank J. Cavico, Jr., *Punitive Damages for Breach of Contract—A Principled Approach*, 22 ST. MARY'S L.J. 357, 389 (1990) ("Non-performance, without justification, equals a simple breach of contract which entitles the aggrieved party to pursue relief without the need to prove that the breach was intentional, negligent, or otherwise wrongful.").

25. *See* Amy B. Cohen, *Revising* Jacob and Youngs, Inc. v. Kent*: Material Breach Doctrine Reconsidered*, 42 VILL. L. REV. 65, 65–69 (1997) (discussing the qualifications necessary for finding a material breach of contract).

26. *But see* Cavico, *supra* note 24, at 388–92 (discussing the difficulties in separating tort and contract law when the plaintiff wants to sue on tort grounds for a cause of action arising out of a breach of contract).

27. *See, e.g.*, *In re* Wikel, 229 B.R. 6, 11 (Bankr. N.D. Ohio 1998) ("Though the Plaintiff argues that the Defendant's actions blatantly breached the security agreement, § 523(a)(6) requires more than a knowing breach of contract." (citing *In re* Bullock-Williams, 220 B.R. 345, 347 (B.A.P. 6th Cir. 1998))).

28. *Compare In re* Williams, 337 F.3d 504, 510 (5th Cir. 2003) ("[A] knowing breach of

of the debtor when breaching a contract, the court does not always require a separate tort.[29]

Without clear authority explaining what constitutes a willful and malicious breach of contract, court decisions interpreting § 523(a)(6) seem to rely not on principles of settled law, but on the sentiments and inclinations of the judge determining the case.[30] This has created a mess of decisions, muddling law with personal opinion. The result is a lack of certainty as each decision is solely dependent on the facts of the case and the judge.[31]

Leslie's lawyer will struggle to identify "bad faith" breaches that are truly willful and malicious under § 523(a)(6). As a result, Leslie might avoid using the discharge safety valve that Congress created. Leslie might also decide not to take out a loan because she does not know exactly what conduct will prevent her debts from being discharged.[32]

The purpose of this Note is to look in depth at the problems discussed above and to expose the confusion caused when § 523(a)(6)'s willful and malicious requirement is applied to breaches of contract. Specifically, Part II explores the differences between contract law and tort law to flesh out the difficulties caused when analysis of a debtor's intent is used to evaluate a breach of contract. Part III analyzes the Supreme Court's failed attempt in *Kawaauhau v. Geiger*[33] to clarify the confusion caused by § 523(a)(6)'s willful

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a clear contractual obligation that is certain to cause injury may prevent discharge under [§] 523(a)(6), regardless of the existence of separate tortious conduct."), *and In re* Smith, 160 B.R. 549, 552–53 (N.D. Tex. 1993) (requiring that the debtor injured intentionally a creditor without an excuse, but not requiring "ill will or specific intent to do harm" to the creditor), *with In re* Jercich, 238 F.3d 1202, 1206 (9th Cir. 2001) ("An intentional breach of contract is excepted from discharge under § 523(a)(6) only when it is accompanied by malicious willful and tortious conduct." (emphasis omitted) (quoting *In re* Riso, 978 F.2d 1151, 1154 (9th Cir. 1992))), *and In re* Guillory, 285 B.R. 307, 316 (Bankr. C.D. Cal. 2002) ("[W]hen an intentional breach of contract is accompanied by tortious conduct which results in willful and malicious injury, the resulting debt is excepted from discharge under § 523(a)(6).").

29. *See, e.g.*, *Smith*, 160 B.R. at 553 ("[Section] 523(a)(6) does not mandate proof of an independent, recognized tort, but instead requires only the showing that the debtor's actions were willful and malicious, *i.e.*, done intentionally and without just cause or excuse.").

30. *See infra* Part III (examining in detail the decisions of different jurisdictions when applying the malice requirement of § 523(a)(6) to breach of contract scenarios).

31. *See infra* Part III (discussing the varying interpretations of willful and malicious and the confusion that such interpretations created).

32. *See infra* Part III.D (discussing the problems created by the unclear case law concerning what sort of breach of contract is considered willful and malicious).

33. *See* Kawaauhau v. Geiger, 523 U.S. 57, 64 (1998) (holding that a debt arising from a medical malpractice judgment attributable to negligent or reckless conduct does not fall within the § 523(a)(6) exception, and, therefore, that the debt is dischargeable). In *Geiger*, the Supreme Court considered whether "willful" under § 523(a)(6) encompassed injuries caused by reckless or negligent actions. *Id.* at 61. Specifically, a doctor prescribed the wrong drug for a

and malicious injury terminology. Part III then investigates the application of *Geiger* to breach of contract scenarios in various jurisdictions, concluding that the Supreme Court effectively wrote "malicious" out of § 523(a)(6) and that courts are excepting debts from discharge without basing their conclusions on any legal standard or rule. Finally, Part IV suggests an alternative to the traditional analysis: Require that an intentional tort accompany the breach of contract and that such intentional tort be eligible for punitive damages under state law.[34] By requiring an independent tort eligible for punitive damages before excepting such debt from discharge under § 523(a)(6), Leslie's lawyer will have clearer, more assuring answers to articulate to Leslie when she is deciding whether to take on debt.

II. Compatibility of Intent Analysis with Contract Law

A. Comparison of Conventional Contract and Tort Doctrines

In the conventional view, contracts and torts comprise separate and distinct areas of law.[35] The distinction between the two doctrines is based on the respective duties contract and tort law impose.[36] Contract law enforces "duties . . . created by the promises of parties,"[37] while "tort duties are created by the courts and imposed as rules of law."[38] The focus in contract law is on

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patient and recommended the wrong course of action for that patient, resulting in the patient's loss of limb. *Id.* at 59. The patient sued, won a malpractice suit, and, in this case, tried to except the doctor from discharging the debt in bankruptcy under § 523(a)(6). *Id.* at 60. The Court determined that "willful" required not only that the debtor be cognizant of the act being done but also that the debtor intend the injury or be substantially certain that the injury will occur. *Id.* at 61–62. The Court concluded that although the doctor intended the medical advice he gave to the patient, the doctor did not have the intent to harm the patient, and, therefore, the malpractice judgment against the doctor was dischargeable. *Id.* at 64.

34. *See infra* Part IV (discussing a suggested solution to the lack of clarity surrounding "willful and malicious" in a breach of contract scenario).

35. *See* DAN B. DOBBS, THE LAW OF TORTS § 3 (2000) (noting that the conventional view holds that "the fields of tort and contract are entirely distinct").

36. *See* Cavico, *supra* note 24, at 360 ("Historically, the law has assigned different objectives to tort and contract actions.").

37. DOBBS, *supra* note 35, § 3; *see also* ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1.1 (1952) ("That portion of the field of law that is classified and described as the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise."); Cavico, *supra* note 24, at 361 ("Contract law serves society by promoting standardized conduct in the performance of promises and produces certain, uniform, stable, and efficient business transactions.").

38. DOBBS, *supra* note 35, § 3.

the *promise* that arises out of the agreements between the contracting parties, whereas the focus in tort law is on the *wrongs* that result from violations of court-created rules.[39]

It only seems logical that in order to enforce these distinct duties, contract law and tort law contain distinct sets of remedies. In contract law, when a promise between contracting parties is broken, the breaching party usually must compensate the aggrieved party in order to "place the aggrieved party in the same economic position the aggrieved party would have attained if the contract had been performed."[40] Therefore, the main remedy available in contract law is compensatory—recouping the economic injury suffered due to the breach of a promise.[41]

In tort law, however, courts create the duties.[42] The court decides what acts constitute wrongs to individuals.[43] When someone is injured due to the tortious actions of another party, the injured person is entitled to damages in an attempt to make that person whole.[44] This seems to be on par with contract law's compensatory remedy.[45] Tort law, however, also provides a second type of damages, known as punitive damages—damages awarded to the tort victim in order to punish the tortfeasor and deter others from similar behavior.[46] Tort

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39. *See id.* ("[T]he province of torts is wrongs and the province of contract is agreements or promises.").

40. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 14.4(a) (5th ed. 2003).

41. *See id.* § 14.1 (stating that compensatory damages are the main form of contract damages while noting that punitive and nominal damages play a small role). The role of nominal damages in contract law is to award the aggrieved party a small amount of monetary damages—that is, one dollar—to symbolize vindication of the wrong done and is awarded only in those circumstances in which the aggrieved party suffered no compensable damages. *Id.* § 14.2. Punitive damages, awarded to punish and deter malicious, willful, or wanton conduct, are usually not awarded in breach of contract actions, but have been awarded where: the breach also involves the malicious or wanton violation of a fiduciary duty; the breach constitutes or is accompanied by an independent malicious or wanton tort; or, in some jurisdictions, elements of fraud, malice, gross negligence or oppression mingle with the breach. *Id.* § 14.3.

42. *See supra* notes 38–39 and accompanying text (discussing the source of the duties created in tort law and how such duties focus tort law on wrongful actions).

43. *See* DOBBS, *supra* note 35, § 1 ("[T]orts are traditionally associated with wrongdoing in some moral sense. In the great majority of cases today, tort liability is grounded in the conclusion that the wrongdoer was at fault in a legally recognizable way."); *id.* ("[J]udges rather than legislatures usually define what counts as a tort and how compensation is to be measured.").

44. *See* Cavico, *supra* note 24, at 362–63 ("The primary remedial objective in tort, of course, is to restore the victim to the position held before the tort, usually by replacing or correcting the loss through compensation.").

45. *See supra* notes 40–41 and accompanying text (discussing the compensatory objectives present in contract law).

46. *See* RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) ("Punitive damages are

law, unlike contract law,[47] serves not only to compensate an injured party but also to prevent torts from being committed by punishing the wrongdoer.[48]

B. Why Punitive Damages Are Awarded in Tort and Not in Contract: Intent as the Deciding Factor

As a result of the separation of tort and contract doctrine, punitive damages, traditionally, are associated only with tort law.[49] Because courts create the duties in tort law, courts define what is wrongful and, in doing so, have required an inquiry into an alleged wrongdoer's state of mind.[50] In other

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damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.").

47. *See* RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981) ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."); PERILLO, *supra* note 40, § 14.3 ("Although such awards are increasingly important in tort litigation, punitive damages are usually not awarded in contract actions, no matter how egregious the breach."). More recently, some jurisdictions are allowing punitive damages for a breach of contract in certain scenarios. *See id.* ("[S]ome jurisdictions have gone beyond the independent tort and fiduciary violation cases and permit an award of punitive damages where elements of fraud, malice, gross negligence or oppression 'mingle' with the breach."). The point, however, is that punitive damages traditionally were available only in tort law. The introduction and impact of punitive damages in contract law is more thoroughly discussed in Part II.C, *infra*.

48. *See, e.g.*, Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1217 (8th Cir. 1981) ("So long as the party subject to the breach is compensated to the extent of his loss, there is no reason to penalize the breaching party for refusing to perform his contractual obligations. The breach frees the latter's resources to be used in a more efficient manner elsewhere."). This statement represents the common law approach to breach of contract known as efficient breach theory—"if a party breaches, and is still better off after paying damages to compensate the victim of the breach, . . . the parties are better off because of the breach and the breach makes no party worse off." PERILLO, *supra* note 40, § 14.36. This theory has been criticized as an academic theory incompatible with real world scenarios, *see id.* ("The efficient breach theory contains a number of simplifying assumptions that do not hold in the real world."), but the important point is that common law contract theory seeks not as much to deter breach than it does to compensate the victims of a breach. *See Dependahl*, 653 F.2d at 1217 ("The common law of contract refuses to allow an award of punitive damages.").

49. *See supra* Part II.A (discussing the traditional distinctions between tort and contract law).

50. *Cf., e.g.*, RESTATEMENT (SECOND) OF TORTS § 13 (1979) (requiring an intent to cause a harmful or offensive contact with another person in order to find that a battery occurred); *id.* § 21(1)(a) (requiring an intent to cause a harmful contact with another or intent to cause apprehension of a harmful contact in order to find assault); *id.* § 500 (defining reckless disregard to safety as failing to act on facts known or facts that the person should have known); *id.* § 282 (defining negligence as failing to behave in the manner of a reasonable person, suggesting that the state of mind of the reasonable person—what that person would have

words, because most torts require that the defendant either intend the act or be reckless or negligent in causing the injury,[51] tort law requires the court to determine whether the alleged tortfeasor had the requisite state of mind to have committed the tort.

Tort law, therefore, lends itself well to a determination of whether punitive damages should be awarded. The purpose of punitive damages is to punish tortfeasors and to deter future wrongful behavior.[52] To accomplish this purpose, courts return to the actor's state of mind: Punish "[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with a crime."[53] When evaluating whether to award punitive damages in the tort context, a finding already has been made regarding the defendant's state of mind. The factfinder need only return to that state of mind determination to see if it is aggravated enough to justify punitive damages.

Contract law, however, does not account for state of mind in the same manner as tort law because contract law does not focus on the contracting parties' subjective intent.[54] In order to find that punitive damages are appropriate, contract law would require a new and separate inquiry into the breaching party's state of mind.[55] Conventional views of contract law pay very little attention to the parties' state of mind, so findings based on state of mind seem contrived and out of place in contract theory.

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thought was appropriate—controls the standard).

51. *See supra* note 50 and accompanying text (listing several torts and the state of mind requirements necessary to find the torts).

52. *See supra* notes 46–48 and accompanying text (discussing the definition and objectives of punitive damages).

53. W. PAGE KEETON, ED., PROSSER AND KEETON ON THE LAW OF TORTS § 2 (5th ed. 1984).

54. *See* PERILLO, *supra* note 40, § 2.4 ("The parties to a contract need not manifest an intent to be bound or think about any legal consequences that might flow from their agreement."). Parties to a contract must to some extent intend their actions that create a contractual relationship. *See id.* § 2.2 ("[T]he acts manifesting assent must be done either intentionally or negligently."). The inquiry, however, is more focused on the factual scenario created by the parties' actions and not on the intent to form a contractual relationship. *See id.* ("A party's intention will be held to be what a reasonable person in the position of the other party would conclude the manifestation to mean.").

55. *See* RICHARD A. LORD, 23 WILLISTON ON CONTRACTS § 63:1 (4th ed. 2002) (stating that a breach of contract "is a failure, without legal excuse, to perform any promise that forms the whole or part of a contract," but does not require intent to not perform in order to find a breach).

C. *Modern Trends: Difficulty of Incorporating State of Mind Analysis in Contract Law*

Despite the conventional separation of tort and contract doctrines, some believe that the doctrines overlap or that the distinction between the two is strictly formalistic and not practically useful.[56] This is because tort duties generally apply in all circumstances so that when parties enter into a contract, not only have they created contractual duties to each other via their own promises, but they also must observe the tort duties created by the courts.[57] For example, a party to a contract might have intentionally misrepresented facts in order to obtain assent. If a court rules that the party's actions amount to fraud, the court can apply contract law and declare the contract void, discharging any duties the affected party owed to the party committing the misrepresentation.[58] Monetary damages for fraudulent misrepresentation are not available under contract law.[59] In order to recover monetary damages, the victimized party also must bring an action under tort law for fraudulent misrepresentation.[60] A person commits fraudulent misrepresentation under tort law when that person misrepresents a fact for the purpose of inducing another to act or refrain from

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56. *See* DOBBS, *supra* note 35, § 3 ("The fields of tort and contract do in fact overlap and share many of the same premises."); KEETON, *supra* note 53, § 92 ("The distinction between tort and contract liability, as between parties to a contract, has become an increasingly difficult distinction to make. . . . The availability of both kinds of liability for precisely the same kind of harm has brought about confusion and unnecessary complexity."); *see also* DOBBS, *supra* note 35, § 3 ("A more radical view is that the distinction between tort and contract is entirely manipulative . . . . In this view, the distinction between tort and contract does not represent any underlying legal reality; it is merely instead a distinction invoked to facilitate the court's analysis and conclusions.").

57. *See* KEETON, *supra* note 53, § 92 (stating that obligations created in tort law "are often owed to all those within the range of harm or at least to some considerable class of people that can include parties to a contract").

58. *See* RESTATEMENT (SECOND) OF CONTRACTS § 162(1) (1981) (finding a fraudulent misrepresentation when the party making the statement intends his statement to induce the other party to manifest consent and knows that the statement made was false or without basis in fact); *id.* § 164(1) ("If a party's manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.").

59. *See id.* ch. 7 intro. (noting that misrepresentation has three distinct effects in contract law: (1) prevents the formation of a contract; (2) makes a contract voidable; and (3) mandates a decree to reform the contract); *id.* ("A misrepresentation may also be the basis for an affirmative claim for liability for misrepresentation under the law of torts.").

60. *See id.* ("[B]ecause tort law imposes liability in damages for misrepresentation, while contract law does not, the requirements imposed by contract law are in some instances less stringent.").

acting in reliance upon it.[61] If the court finds this form of fraudulent misrepresentation, the victim is entitled to receive a monetary award to compensate for pecuniary damages caused by the misrepresentation.[62]

In sum, while one fraudulent act could create a situation in which the victimized party can both void the contract and receive compensation for the resulting injuries, the victimized party would need to institute both a tort- and a contract-based cause of action in order to get both remedies.[63] Some scholars believe that this distinction requiring two different types of actions for one set of circumstances is formalistic, trite, and unnecessary.[64] The distinction, however, illustrates the incapacity of contract law to incorporate state of mind analysis. Scholars who suggest that the formalities between contract and tort law should be dropped also recognize that their approach will have to take into account the major difference between the two doctrines—contract law's focus on enforcing promises and tort law's focus on enforcing court-imposed duties that monitor conduct.[65] For example, when determining the types of damages to award for a breach of contract, it has been suggested that the court should establish a clear standard for awarding punitive damages, like tort law does, separate from traditional contract law remedies.[66] This standard would resemble a tort-like inquiry, focusing on the state of mind of the breaching party to determine whether that party's behavior should be punished.[67]

The bottom line is that, to punish conduct in the contract context, it is necessary to import tort law principles to determine the breaching party's state

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61. RESTATEMENT (SECOND) OF TORTS § 525 (1979).

62. *See id.* § 549(1) (stating that the victim of fraudulent misrepresentation receives both the difference in value between what was received and the purchase price and an amount for the pecuniary loss suffered as a consequence of relying on the misrepresentation).

63. *See supra* notes 58–59 and accompanying text (discussing the remedies available for misrepresentation in contract and tort law).

64. *See* Cavico, *supra* note 24, at 390–91 (noting that a lawyer attempting to recover monetary damages for a tort arising out of a contract scenario must be clear in distinguishing tort theory from contract theory or else run the risk of the court dismissing the case, denying recovery, or refusing to award damages).

65. *See id.* at 398 (stating that a breach becomes tortious when the conduct constituting the breach violates the superimposed duty of good faith conduct and does not deal primarily with a contractual promise).

66. *See, e.g., id.* at 445 ("The solution, therefore, requires providing a remedy for a recognizable wrong, and assuring that a breacher is required to pay the higher measure of damages only when the breacher's misconduct justifies the heightened liability.").

67. *See id.* (requiring an outrageous breach before awarding punitive damages for a breach of contract, defining outrageous breach as "an intentional breach where the defendant maliciously or oppressively caused harm to the plaintiff").

of mind.[68] The result of such an importation, even if viewed as equitable by the courts, is to take contract law outside its traditional bounds. This leads to unpredictable results and unclear standards.[69]

III. Introducing Uncertainty: § 523(a)(6)'s Willful and Malicious Requirement

A. Introduction

Despite the confusion that results from introducing a tort state of mind inquiry into contract law, Congress drafted such an element into the Bankruptcy Code in an effort to restrict the benefits of bankruptcy to the honest, unfortunate debtor.[70] Under 11 U.S.C. § 523(a)(6), a debtor who willfully and maliciously injures a person's property cannot discharge the resulting debt.[71] The tort element in the provision is "willful and malicious." In order to be excepted from discharge under § 523(a)(6), the debtor's state of mind must deserve punishment, a concept carried over from tort law.[72] The provision that implicates contract law is "injury to property." In sum, note the two separate elements under § 523(a)(6) regarding property: (1) an injury to property, such as a breach of contract (contract inquiry), (2) done willfully and maliciously (tort inquiry).

Often, the injury to property that a creditor wishes to except from discharge is an injury arising from a breach of contract—the debtor refuses to comply with the terms of a contract and does not return the creditor's monetary investment, knowing that the failure to repay will financially injure the

68. *See id.* ("[T]he standard must distinguish between misconduct which merely entails the breach of the contract duty, rendering traditional contract remedies applicable, and outrageous misconduct accompanying the breach which contravenes punitive damage standards, rendering punitive damages applicable."); *see also supra* notes 65–67 and accompanying text (discussing the transfer of a state of mind inquiry in tort law into the contract context to punish certain breaches of contract).

69. *See* Cavico, *supra* note 24, at 433 ("The imposition of potentially large liability in the absence of precise standards, although obviously fulfilling a compensatory function, may produce great uncertainty for all contracting parties.").

70. *See supra* notes 9–12 and accompanying text (discussing the purposes of bankruptcy law as attempting to allow the honest but unfortunate debtor a chance to discharge debts that he cannot pay).

71. 11 U.S.C. § 523(a)(6) (2006).

72. *See supra* note 50 and accompanying text (describing different torts and the requisite state of mind necessary to find the existence of each tort).

creditor.[73] Refusal to discharge would frustrate the purpose of a fresh start to the debtor by forcing the debtor to pay debts resulting from an inability to pay.[74] Courts, therefore, require more than just a breach[75]—they require a heightened state of mental culpability.[76] Congress defined that heightened state of mind as "willful and malicious."[77] The trouble is that no clear definition of a willful and malicious breach of contract exists.[78] Courts have been left with the task of defining a willful and malicious breach of contract.[79] As noted in Part II of this Note, such a hybrid inquiry into the state of mind of a party breaching a contract has never proven to be simple or to have predictable results.[80]

This Part of the Note traces the courts' attempts to define a willful and malicious breach of contract by (1) examining the courts' definitions of willful and malicious before the Supreme Court's decision in *Geiger*, (2) analyzing the Supreme Court's seminal decision on the topic in *Geiger*, and (3) critiquing the various lines of interpretation post-*Geiger*.

*B. Pre-*Geiger *Analysis of "Willful and Malicious"*

The first attempt to clearly define "willful and malicious injury" came in the form of a 1904 decision by the United States Supreme Court—*Tinker v.*

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73. *See In re* Hambley, 329 B.R. 382, 392–93 (Bankr. E.D.N.Y. 2005) (finding a willful and malicious injury to property when the debtors falsely induced the creditor to invest and then failed to return the investment in compliance with the terms in the contract, knowing such actions would injure the creditor); *see also supra* note 20 and accompanying text (discussing in full the specific situation of the debtors in *Hambley* and the different provisions of the Code in which the debts created were excepted from discharge).

74. *Cf.* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (stating that by discharging debts, bankruptcy gives to the honest but unfortunate debtor an opportunity for a fresh start).

75. *See, e.g.*, *In re* Guillory, 285 B.R. 307, 313 (Bankr. C.D. Cal. 2002) ("Generally, debts arising from intentional breaches of contract are not excepted from discharge under § 523(a)(6).").

76. *See* 11 U.S.C. § 523(a)(6) (requiring that injury caused to person or property be willful and malicious).

77. *Id.*

78. *See* Jeff Weinberg, Comment, *Accidental 'Willful and Malicious Injury': The Intoxicated Driver and Section 523(a)(6)*, 1 BANKR. DEV. J. 135, 140–41 (1984) (commenting that the legislative history behind the enactment of § 523(a)(6) only increased the confusion of how to interpret the language of the provision).

79. Deborah A. Ballam, *The "Willful and Malicious" Injury Exception to Discharge in Bankruptcy: An Analysis and Recommended Revision*, 28 AM. BUS. L.J. 87, 89 (1990) ("Congress, however, has not provided a definition of 'willful and malicious.'").

80. *See supra* Part II.C (discussing the difficulties of tailoring a state of mind inquiry to a breach of contract situation, focusing specifically on punitive damages for breach of contract).

Colwell[81]—which interpreted the "willful and malicious injury" language under the 1894 Bankruptcy Act.[82] In *Tinker*, a creditor wished to except from discharge a $50,000 judgment obtained against the debtor for criminal conversation by classifying the debt as a willful and malicious injury.[83] The Court decided that the injury to the creditor was willful and malicious even though the creditor did not prove that the debtor intended to injure or that the debtor caused the injury with a malicious intent.[84] The Court stated that, in order for an act to be willful and malicious, no specific intent to cause injury or malignant spirit is required[85] as long as willfulness and malice can be implied from the circumstances surrounding the injury.[86] All that is required is (1) an

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81. *See* Tinker v. Colwell, 193 U.S. 473, 490 (1904) (affirming the order of the Court of Appeals of New York that a debt under criminal conversation with creditor's wife was willful and malicious under § 17(a)(2) of the 1898 Bankruptcy Act). In this case, the issue was whether a judgment for $50,000 for criminal conversation (a phrase used to denote the crime of adultery) was excepted from discharge as a willful and malicious injury. *Id.* at 480. Specifically, the debtor incurred a $50,000 judgment against him for partaking in "criminal conversation" with the creditor's wife. *Id.* at 481. The Court first found that criminal conversation was a trespass on the marital rights of the husband. *Id.* at 484. Finding such trespass, the Court then found that such a trespass was willful and malicious injury to the husband. *Id.* at 485. In making that finding, the Court articulated the meaning of "willful and malicious"—no specific intent to injure or malice toward the creditor need be proven as long as the act causing the injury was intended and that after looking at the circumstances it can be concluded that the act was of a malicious nature. *Id.* at 488–89. Applying this standard to the facts of the case, the Court found that the criminal conversation with the creditor's wife was willful and malicious, even though no specific intent to injure or harm the creditor was proven, because the Court concluded that act, looking at the circumstances, was one of the most harmful things a man could do to another man's marriage. *Id.* at 489–90.

82. *See* Ballam, *supra* note 79, at 90 (stating that the issue in *Tinker* was "whether the judgment for criminal conversation was a 'willful and malicious injury' within the meaning of [§] 17(a)(2), thereby precluding the debtor's discharge in bankruptcy").

83. *See Tinker*, 193 U.S. at 474 (describing the details behind the injury to the creditor that caused him to move for an exception to discharge).

84. *See id.* at 485 ("We think that such an act is also a willful and malicious injury to the person or property of the husband, within the meaning of the exception in the statute."); *id.* at 487 ("[A] malignant spirit or a specific intention to hurt a particular person is not an essential element.").

85. *See id.* at 489 (stating that specific intent to injure or malice towards the individual injured is not required). The Court specifically stated:

> It might be conceded that the language of the exception could be so construed as to make the exception refer only to those injuries to person or property which were accompanied by particular malice, or, in other words, a malevolent purpose towards the injured person, and where the action could only be maintained upon proof of the existence of such malice. But we do not think the fair meaning of the statute would thereby be carried out.

Id.

86. *See id.* at 487 ("'[I]f he acted wantonly against what any man of reasonable

intent to do only the act itself, and (2) a result that causes the court to conclude that the act was wrongful.[87]

Initially, courts interpreted the *Tinker* standard to include reckless acts in which the actor intended the act but not its result, and the result was caused wantonly.[88] For example, courts denied discharge to a debt resulting from the debtor's wanton operation of a motor vehicle that caused personal injury.[89] The court specifically stated that "wanton and reckless conduct is conclusive evidence of every element of 'willful and malicious' conduct as defined by the Supreme Court in *Tinker v. Colwell*."[90] Under *Tinker*, no specific intent, intent to injure, or malice need be shown.[91]

Such a loose interpretation of willful and malicious, however, did not rest well with Congress. After enacting § 523(a)(6) in the 1978 Bankruptcy Code, Congress included in the Code's legislative history a comment that overruled *Tinker* to the extent that *Tinker* excepted from discharge debts arising from reckless behavior.[92] Congress mandated that "willful" be interpreted as

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intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice.'" (quoting *In re* Freche, 109 F. 620, 621 (D.N.J. 1901))).

87. *See id.* at 485 (noting that intent is necessary to the extent that it is intention to do the act itself). On this topic, the Court stated that in terms of a willful and malicious act:

> [T]he act itself necessarily implies that 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.

Id.

88. *See* Ballam, *supra* note 79, at 90 ("Subsequent to *Tinker*, some courts interpreted that case as prohibiting the discharge under § 17(a)(2) of debts based on merely reckless conduct.").

89. *See* Den Haerynck v. Thompson, 228 F.2d 72, 75 (10th Cir. 1955) (finding as a willful and malicious injury a reckless driving accident that resulted in the death of the creditor's son and also resulted in a manslaughter charge against the defendant); Harrison v. Donnelly, 153 F.2d 588, 591 (8th Cir. 1946) (excepting from discharge as willful and malicious conduct a debt incurred through the debtor's willful and wanton operation of a truck).

90. *Harrison*, 153 F.2d at 591; *see also Den Haerynck*, 228 F.2d at 74 ("A willful disregard of that which one knows to be his duty, or an act which is wrongful in and of itself, and which necessarily causes injury, if done intentionally, is done willfully and maliciously, within the scope of the exception to dischargeability created by the statute.").

91. *See supra* note 81 and accompanying text (describing the United States Supreme Court decision in *Tinker* that interpreted willful and malicious to require only reckless conduct and not specific intent to injure).

92. *See* H.R. REP. NO. 95-595, at 365 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320–21 ("Under this paragraph, 'willful' means deliberate or intentional. To the extent that *Tinker v. Colwell*, 193 U.S. 473 (1902), held that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a 'reckless disregard' standard, they are overruled."); *see also* Ballam, *supra* note 79, at 90 ("[T]he legislative history for [§] 523(a)(6) indicates that Congress was overruling post-*Tinker* judicial interpretations that a looser standard requiring less than actual intent was intended, or that reckless disregard could satisfy the

deliberate or intentional.[93] Debts arising from acts caused by reckless behavior no longer were excepted from discharge.[94]

Congress, however, did not entirely clear up the § 523(a)(6) interpretation problem. While Congress mandated that "willful" means intentional, courts differed in their interpretation of intentional—some interpreted it to mean acting with the intent to inflict an injury while others interpreted it to mean intending to do an act that necessarily causes injury.[95] The Court in *Geiger* eventually attempted to clarify the meaning of willful and defined it to require an intent to injure.[96]

Still, the analysis of the courts that required an intent to injure before *Geiger* mandated such an interpretation is of interest. While all these courts arrived at the same solution, the analysis the courts used varied.[97] One line of cases interpreted willful and malicious by splitting the terms apart and giving each a specific meaning to arrive at requiring an intention to injure—willful meaning intentional act and malicious meaning harmful or wrongful.[98] The other line of cases, however, focused on the word willful, finding that willful required an intent to injure.[99] Even when courts interpreted willful and malicious to obtain the same result as the Supreme Court in *Geiger*, those

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willfulness standard within the meaning of that section. Rather, said Congress, 'willful' means deliberate or intentional.").

93. *See* H.R. REP. NO. 95-595, at 365 ("'[W]illful' means deliberate or intentional."); *see also supra* note 93 and accompanying text (discussing the legislative history behind § 523(a)(6), specifically stating that willful and malicious injury is not supposed to include reckless acts).

94. *See supra* notes 92–93 and accompanying text (discussing the legislative history to § 523(a)(6) that specifically states that intent is required in order for an act to be willful and malicious).

95. *See* Ballam, *supra* note 79, at 90 ("The interpretative problem that remained, however, was whether in the legislative history clarifying [§] 523(a)(6) the term 'willful' required an actual intent to inflict an injury (a narrow standard), or merely required intent to do an act that necessarily results in injury (a broad standard).").

96. *See infra* Part III.C (discussing the *Geiger* Court's interpretation of willful and malicious as requiring an intent to injure).

97. *Compare In re* Hodges, 4 B.R. 513, 516 (Bankr. W.D. Va. 1980) (interpreting willful to mean an intentional act and interpreting the term malicious as the piece that makes willful and malicious require an intentional injury), *with In re* Cecchini, 37 B.R. 671, 674 (B.A.P. 9th Cir. 1984) (interpreting willful and malicious as requiring an intentional injury after interpreting willful as requiring an intentional injury).

98. *See Hodges*, 4 B.R. at 516 ("While a wilful act is not a malicious act unless the intent is to do harm or to act in utter disregard of another's rights, it is not necessary that one be incited by a malevolent or malicious motive . . . .").

99. *See Cecchini*, 37 B.R. at 674 ("If we substitute 'intentional' for 'willful' in the statute, we get 'intentional and malicious injury,' or simply 'intentional injury.'").

courts still disagreed on the meanings assigned to each term and how the two terms combined so that willful and malicious required an intent to harm.[100]

C. Kawaauhau v. Geiger*: Attempt at Clarifying the Meaning of Willful and Malicious*

In 1998, the United States Supreme Court granted certiorari in *Kawaauhau v. Geiger* in order to address the issue of whether the "willful and malicious injury" exception to discharge under § 523(a)(6) covered only those acts with an intent to injure or covered all intentional acts in which injury necessarily followed.[101] In the case, creditor Margaret Kawaauhau sought treatment from Dr. Geiger for a foot injury.[102] In order to treat the leg for infection, Dr. Geiger prescribed a less effective form of penicillin based on what he thought Kawaauhau could afford.[103] Dr. Geiger also left town immediately after prescribing the penicillin and, upon return, canceled Kawaauhau's scheduled treatments in the belief that the injury had subsided.[104] As a result, "Kawaauhau's condition deteriorated over the next few days, requiring the amputation of her right leg below the knee."[105] Kawaauhau filed suit against Dr. Geiger for malpractice and won an approximately $355,000 judgment from the jury.[106] Dr. Geiger eventually filed for bankruptcy and Kawaauhau, under § 523(a)(6), sought to except from discharge the judgment obtained from the malpractice claim as a willful and malicious injury.[107]

The Court focused on the state of mind required to be found guilty of malpractice. Malpractice is not necessarily an intentional tort—while an actor can commit malpractice by intending the act that causes injury to the patient, the actor need not intend the injury in order to establish a malpractice suit.[108] The Court stated that "'willful' in (a)(6) modifies the word 'injury,' indicating

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100. *See supra* notes 95–99 and accompanying text (discussing the two lines of cases that vary in their analysis in finding that willful and malicious requires an intention to injure).

101. *See* Kawaauhau v. Geiger, 523 U.S. 57, 60 (1998) (stating that certiorari was granted in order to clear up conflicting interpretations between circuits as to whether what is excepted under § 523(a)(6) is confined to debts based on an intentional tort).

102. *Id.* at 59.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 60.

108. *See id.* at 61–62 ("Intentional torts generally require that the actor intend the consequences of an act, not simply the act itself." (citations and emphasis omitted)).

that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury."[109] If every injury of that type was excepted from discharge, an overly broad range of injuries, including reckless and negligent injuries, could be seen as "willful and malicious."[110] The Court, in fact, even suggested that § 523(a)(6) should be limited to intentional torts,[111] but that commentary was not accepted by every jurisdiction.[112] The Court concluded that because a "willful injury" under § 523(a)(6) required an intent to injure and because Dr. Geiger did not intend the injury he caused to Kawaauhau, Kawaauhau's injury was not a willful injury and the judgment was not excepted from discharge.[113]

The significance of the *Geiger* decision is that it gave a definition to the term willful—willful modifies injury so that an injury excepted from discharge under § 523(a)(6) must be an intentional injury.[114] This conclusion seems to

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109. *Id.* at 61.

110. *See id.* at 62 ("A construction so broad would be incompatible with the 'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed.'" (quoting Gleason v. Thaw, 236 U.S. 558, 562 (1915))).

111. *See id.* at 61–62 ("[T]he (a)(6) formulation triggers in the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend 'the consequences of an act,' not simply 'the act itself.'" (emphasis omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (1964))).

112. *See, e.g.*, Hughes v. Arnold, 393 B.R. 712, 719 (E.D. Cal. 2008) ("Nondischargeable debt under § 523(a)(6) is not limited to debt arising out of an intentional tort.").

113. *See* Kawaauhau v. Geiger, 523 U.S. 57, 64 (1998) (holding that debts arising from reckless or negligent behavior do not fall within the scope of § 523(a)(6) and, therefore, that the debts in this case did not fall within the exception).

114. It is important to note that even after *Geiger* the exact meaning of "willful," while requiring an intent to injure, is not clear. *See, e.g.*, *In re* Whiters, 337 B.R. 326, 340–41 (Bankr. N.D. Ind. 2006) ("The next diversion in post-*Geiger* cases is whether the 'willful' standard enunciated by *Geiger* is a totally subjective standard which relates solely to the internal workings of the debtor's mind, or whether there are elements of objective evaluation which may be weighted in the 'willful' standard."). Under the subjective approach, the debtor must have intended the injury to the creditor or at least believed that the injury was substantially certain to occur. *Id.* at 343; *see also In re* Markowitz, 190 F.3d 455, 464 (6th Cir. 1999) ("[U]nless the actor desires to cause the consequences of his act, or . . . believes that the consequences are substantially certain to result from it, he has not committed a willful and malicious injury as defined under § 523(a)(6)." (quotations omitted)). Under the objective approach, the creditor need not prove subjective intent as long as the injury was substantially certain to occur from the act. *See, e.g.*, *Whiters*, 337 B.R. at 341 ("[S]ome courts have developed a standard that the 'willful' element may be established by either proof that there was an 'objective substantial certainty of harm,' or a subjective motive to do harm."); Miller v. J.D. Abrams, Inc. (*In re* Miller), 156 F.3d 598, 603 (5th Cir. 1998) ("[E]ither objective substantial certainty or subjective motive meets the Supreme Court's definition of 'willful . . . injury' under § 523(a)(6)."). The subjective approach appears to be the more reasonable approach because allowing for debts to be "willful" just because the act was substantially certain to cause injury, without any analysis of the intentions of the debtor, seems to go against the main principle of

comply with Congress's intent to exclude from § 523(a)(6) those debts arising from recklessly and negligently committed harms,[115] but in its analysis the Court focused its attention on defining willful.[116] The questions remaining after *Geiger* center around the term malicious.[117] Specifically, if "willful" requires that the debtor intended to injure the creditor, then what more is added by requiring that such injury also be malicious?[118]

D. Interpretations of "Willful and Malicious Injury" in a Breach of Contract Scenario After Geiger*: Overbroad Interpretation of "Malicious"*

An interpretation of terms in a statute should not render any term meaningless.[119] Therefore, "malicious" needs some interpretation that adds to the definition of "willful." "Willful" after *Geiger*, however, requires an intent to injure—that is, both an intentional act *and* an intentional injury.[120] The

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Geiger—an intentional injury is required. *See Whiters*, 337 B.R. at 343 ("After *Geiger*, there is no room for the 'objective' inquiry into the probabilities of harm, because to do so renders the 'willful' element of § 523(a)(6) tantamount to the mere intention to act without intending the consequences of the act in relation to the injury.").

115. *See* Ballam, *supra* note 79, at 98 ("[T]he plain meaning of 'willful . . . injury' is that the injury itself must be intentional; an intentional act causing injury simply does not fit within the plain meaning of the statute's words.").

116. *See, e.g.*, *Whiters*, 337 B.R. at 335 ("Thus far, then, *Geiger* clearly teaches that in order to fall within 11 U.S.C. § 523(a)(6), an alleged act by the debtor must have been 'willful' . . . and must have been directed to causing the injury . . . . There is no hint in the decision that the term 'malicious' was ever considered as part of the willful standard . . . ." (emphasis omitted)); *In re* Moffitt, 254 B.R. 389, 394–95 (Bankr. N.D. Ohio 2000) ("The Supreme Court of the United States, in the case of *Kawaauhau v. Geiger* . . . , recently held that in order for an act to be considered willful under § 523(a)(6), a debtor must not only intend the act itself, but must also intend the consequences of the act." (citations omitted)); *In re* Rogers, 239 B.R. 318, 321 (Bankr. E.D.N.C. 1999) ("The United States Supreme Court observed in *Geiger* that '[t]he word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional act that leads to injury.'" (quoting *Geiger*, 523 U.S. at 61)).

117. *See, e.g.*, Kleinberg, *supra* note 19, at 87 ("Since the Supreme Court's ruling in *Geiger*, courts have split over whether willful and malicious injury is established solely by proving intentional injury, or whether 'willful' requires a finding of intentional injury and 'malicious' requires that the act be without just cause or excuse.").

118. *See supra* notes 114–17 and accompanying text (discussing the current circuit split over the issue of how to interpret "willful and malicious" after *Geiger*).

119. *See* Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.").

120. *See supra* note 114 and accompanying text (discussing interpretation of willful in

Court in *Geiger* defined willful to include wrongful behavior.[121] Malicious, however, traditionally incorporates the element of wrongdoing,[122] so confusion surrounds the new role of the term malicious—how much more wrongdoing does malicious require in order for an injury to be excepted under § 523(a)(6)?

When dealing with injuries to a person, similar to *Geiger*, this confusion is not so great. *Geiger* set the precedent for determining the sort of conduct required in order for an *injury to a person* to qualify as a willful and malicious injury. The Court addressed the problem that Congress attempted to solve when drafting the Bankruptcy Code and included only those injuries that were caused with an intent to injure. This is not a new inquiry—tort law often requires the factfinder to look at the tortfeasor's state of mind and determine whether that tortfeasor intended to injure the victim.

The mixing of the terms willful and malicious causes the greatest confusion when trying to discern whether an injury to property arising from a breach of contract is willful and malicious. A knowing breach of contract alone never is excepted from discharge under § 523(a)(6).[123] Wrongful conduct accompanying a breach of contract, however, can amount to a willful and malicious injury, even if such conduct in the absence of a contract would not constitute a separate tort.[124] The question is, how do courts decide what conduct accompanying a breach of contract is enough to constitute a willful and malicious injury under § 523(a)(6)?

There are many different interpretations as to what is required for conduct accompanying a breach of contract to cause a debt to be excepted from discharge under § 523(a)(6). These interpretations turn on post-*Geiger* interpretations of what *Geiger* meant by defining willful as requiring an intentional injury.[125] While *Geiger* says willful means an intentional injury to

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Geiger).

121. *See supra* notes 114–17 and accompanying text (describing interpretation in *Geiger* of willful as requiring more than a deliberate act but also an intent to injure).

122. *See supra* notes 97–98 and accompanying text (explaining that "malicious" under § 523(a)(6) is the term that requires debts excepted from discharge under this section to be wrongful).

123. *See* Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998) ("A 'knowing breach of contract' could also qualify. A construction so broad would be incompatible with the 'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed.'" (quoting Gleason v. Thaw, 236 U.S. 558, 562 (1915))).

124. *See, e.g.*, *In re* Riso, 978 F.2d 1151, 1154 (9th Cir. 1992) ("An intentional breach of contract is excepted from discharge under § 523(a)(6) only when it is accompanied by malicious and willful tortious conduct.").

125. *Compare* Hughes v. Arnold, 393 B.R. 712, 719 (E.D. Cal. 2008) (citing *In re Jercich* for direct support of the proposition that "intentional injury" language from *Geiger* did not require that an intentional tort be present for an injury to be excepted under § 523(a)(6)), *with*

the creditor, courts have split on what an intentional injury actually requires—does it require that the conduct surrounding the breach of contract constitute an intentional tort as defined by state law,[126] or that the conduct need not constitute an independent tort, but that the debtor intended the injury or believe that the injury was substantially certain to occur?[127] The meaning of the term malicious changes and the debts excepted as "willful and malicious" differ depending on how a jurisdiction defines *Geiger*'s "intentional injury" requirement under willful.

In order to see how "willful and malicious" is interpreted post-*Geiger*, the rest of this Part explores: (1) the meaning of "malicious" in jurisdictions reading willful to require that an intentional tort accompany the breach of contract; (2) the meaning of "malicious" in jurisdictions reading willful to require no more than an intent to injure or belief that injury was substantially certain to occur; and (3) the problems and confusion that result from the lack of a clear understanding as to exactly what "malicious" requires.

1. Interpretation of Malicious in Jurisdictions Requiring Conduct Accompanying a Breach of Contract to Constitute an Intentional Tort

Jurisdictions requiring an intentional tort to accompany a breach of contract point to the language of *Geiger* for justification: "[T]he [§ 523] (a)(6) formulation triggers in the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts."[128] Under this view, conduct accompanying a breach of contract must constitute an intentional tort in order to provide courts with a clear rule as to what wrongful conduct is eligible for exception. This is to prevent courts from twisting the words "intent to injure"

Lockerby v. Sierra, 535 F.3d 1038, 1041 (9th Cir. 2008) (citing *In re Jercich* for direct support of the proposition that § 523(a)(6) requires an intentional tort as defined by state law).

126. *See, e.g.*, *Lockerby*, 535 F.3d at 1042 (requiring an intentional tort). The court specifically stated:

> That the Supreme Court in *Geiger* assumed that § 523(a)(6) encompassed only intentional torts, not intentional breaches of contract, strongly suggests the Court would not approve of a definition of "tortious conduct" that would include intentional breaches of contract whenever it is substantially certain that the breach will cause injury.

Id.

127. *See, e.g.*, *In re* Williams, 337 F.3d 504, 510 (5th Cir. 2003) ("[A] knowing breach of a clear contractual obligation that is certain to cause injury may prevent discharge under [§] 523(a)(6), regardless of the existence of separate tortious conduct.").

128. *Geiger*, 523 U.S. at 62.

to include a knowing breach of contract and to keep the courts' focus on wrongful acts.[129]

Once courts find an intentional tort accompanying the breach of contract, the next question relates to the interpretation of malicious—whether the intentional tort was wrongful enough to be excepted from discharge. Courts after *Geiger* have not agreed on how to interpret malicious so that the term adds meaning to "willful and malicious injury." Specifically, one line of decisions requires "specific malice"—specific, subjective intent to injure the creditor[130]—while a second line of cases requires only "implied malice"—objective and circumstantial inquiry finding wrongful conduct.[131]

If a jurisdiction requires an intentional tort and specific malice, to give both terms meaning, the court may break down "willful and malicious" by defining the terms as follows: "willful"—an intentional tort accompanying the breach; "malicious"—that the intentional tort was committed with the specific intent to harm the creditor.[132] This breakdown provides a clear interpretation for courts to follow because, to find an intentional tort, the factfinder must inquire into the state of mind of the alleged tortfeasor.[133] To find a willful and malicious injury, the factfinder need only reexamine the state of mind of the tortfeasor and determine whether the actor behaved in a fashion aggravated enough to warrant exception to discharge—whether the actor intended the harm to the creditor. Indeed, such an inquiry should seem familiar—it is exactly what the factfinder does when determining whether to award punitive damages.[134]

The practical result of requiring courts to make such strict findings of subjective intent, however, is to render § 523(a)(6) inapplicable to injuries

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129. *See Lockerby*, 535 F.3d at 1042 ("Expanding the scope of § 523(a)(6) to include contracts that are intentionally breached whenever it is substantially certain that injury will occur would severely circumscribe the ability of debtors to 'start afresh.'").

130. *See, e.g., In re* Bren, 284 B.R. 681, 699 (Bankr. D. Minn. 2002) ("The word 'malicious' in 11 U.S.C. § 523(a)(6) is defined as conduct targeted at the creditor at least in the sense that the conduct is certain or almost certain to cause harm.").

131. *See, e.g., In re* Hambley, 329 B.R. 382, 402 (Bankr. E.D.N.Y. 2005) ("A malicious injury is a wrongful injury, caused without just cause or excuse but does not require 'personal hatred, spite, or ill will.'").

132. *Cf, e.g., Bren*, 284 B.R. at 699 (finding no willful and malicious injury under § 523(a)(6) because there was no intentional tort accompanying the breach of contract and the debtor did not intend the harm caused to the creditor).

133. *See supra* note 50 and accompanying text (listing several intentional torts and their respective state of mind elements).

134. *See supra* Part II.B (describing the subjective elements involved in tort law and explaining why such elements make tort law compatible with findings for punitive damages).

resulting from a breach of contract.[135] A party that breaches a contract rarely, if ever, does so intending to harm the creditor, even if the conduct constituting the breach also constitutes an intentional tort. The breaching party usually fails to meet a contract's payment plan[136] or interferes with a security agreement because the breaching party is forced to do so by a troubled financial situation.[137] If courts required that an intent to harm the creditor accompany a breach, injury to property resulting from a breach of contract would rarely fall within the scope of a willful and malicious injury.

A majority of the courts recognize the impracticality of such a reading and do not require that the debtor subjectively intend to harm the creditor.[138] Instead, in an implied malice jurisdiction, once an intentional tort is found, the court looks at the circumstances surrounding the intentional tort and decides whether such conduct is wrongful enough to be within the scope of § 523(a)(6).[139] The language used to define malice by implied malice courts, however, does not clearly define what malicious requires because the language was the same language used to define "malicious" pre-*Geiger*.[140]

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135. *See* St. Paul Fire & Marine & Ins. Co. v. Vaughn, 779 F.2d 1003, 1009 (4th Cir. 1985) ("To require specific malice or some other strict standard of malice for non-dischargeability of a debt under the Bankruptcy Code would undermine the purposes of that provision and place a 'nearly impossible burden' on a creditor who wishes to show that a debtor intended to do him harm." (quoting United Bank of Southgate v. Nelson, 35 B.R. 766, 772 (N.D. Ill. 1983))).

136. *See, e.g.*, *In re* Whiters, 337 B.R. 326, 353 (Bankr. N.D. Ind. 2006) (describing debtor's situation as one in which debtor had serious financial difficulties and in order to make loan payments signed over, in contradiction of security agreement, collateral securing debtor's loan).

137. *See, e.g.*, *In re* Gagle, 230 B.R. 174, 176–78 (Bankr. D. Utah 1999) (finding as fact that the debtor was in a difficult financial situation and had sold off parts of the collateral, thereby altering the collateral in contradiction of security agreement).

138. *See In re* Jacobs, 381 B.R. 128, 137 (Bankr. E.D. Pa. 2008) ("In the overwhelming majority of cases, courts have taken a broader view, holding that the 'willful and malicious' nature of the injury caused by a debtor's conduct may be inferred from the nature of the act itself.").

139. *See id.* at 138 ("To be 'malicious,' the debtor's actions either must have been taken with the specific goal of causing harm to the creditor or must have been substantially certain to have caused harm.").

140. *See, e.g.*, *Jacobs*, 381 B.R. at 137 (citing a pre-*Geiger* Third Circuit definition when defining malicious) (citing *In re* Conte, 33 F.3d 303, 305 (3d Cir. 1994)); *Whiters*, 337 B.R. at 343–44 (citing a pre-*Geiger* Seventh Circuit Decision defining malicious as a "'conscious disregard of one's duties without just cause or excuse'" (quoting Matter of Thirtyacre, 36 F.3d 697, 700 (7th Cir. 1994))); *In re* Scheller, 265 B.R. 39, 54–55 (Bankr. S.D.N.Y. 2001) (citing a pre-*Geiger* Second Circuit definition when defining malicious as an injurious act done without just cause or excuse) (citing *In re* Stelluti, 94 F.3d 84, 87 (2d Cir. 1996)); *Gagle*, 230 B.R. at 180 (citing a pre-*Geiger* Tenth Circuit decision defining a malicious act as one done without justification or excuse and declaring it binding on post-*Geiger* case) (citing *In re* Pasek, 983

To demonstrate the ineffectiveness of pre-*Geiger* language defining "malicious," it is important to examine that language in context. Conversion is an intentional tort that often accompanies a breach of contract.[141] Conversion "is an intentional exercise of dominion or control of a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel."[142] In the breach of contract scenario, conversion commonly occurs when a debtor retains possession of collateral after defaulting on a security agreement and then proceeds to make material changes to that collateral in contradiction to the security agreement.[143]

Once conversion is found, courts in an implied malice jurisdiction look to the definition of malicious to see whether the conversion was wrongful enough to be excepted from discharge. The definition of malicious varies in each implied malice jurisdiction, but common phrases are: (1) injury caused without just cause or excuse;[144] (2) "conscious disregard of one's duties without just cause or excuse;"[145] and (3) "aggravated conduct."[146] As noted above, these phrases are not adjusted to the *Geiger* interpretation of willful as requiring an intentional injury[147] and, therefore, do not add much guidance in deciding which intentional torts are more wrongful and within the scope of § 523(a)(6).

Specifically, after a court finds conversion, thereby finding "willfulness," is such conduct accompanying a breach any more wrongful because it is (1) "without just cause or excuse?" Unlike a situation in which the tortfeasor

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F.2d 1524, 1527 (10th Cir. 1993)).

141. *See, e.g.*, *In re* Bren, 284 B.R. 681, 699 (Bankr. D. Minn. 2002) (finding, in part, no willful and malicious injury because the debtor's acts did not constitute conversion); *Gagle*, 230 B.R. at 185 (concluding that a debtor who converted creditor's security interest knowing that such conversion would injure the debtor was willful and malicious under § 523(a)(6)).

142. RESTATEMENT (SECOND) OF TORTS § 222A(1) (1965).

143. *See, e.g.*, *In re* Gagle, 230 B.R. 174, 181 (Bankr. D. Utah) (finding conversion when debtor substantially interfered with creditor's security interest in a truck by selling off all of the truck's value).

144. *See, e.g.*, *In re* Hambley, 329 B.R. 382, 402 (Bankr. E.D.N.Y. 2005) ("A malicious injury is a wrongful injury, caused without just cause or excuse but does not require 'personal hatred, spite, or ill will.'" (quoting *In re* Scheller, 265 B.R. 39, 54–55 (Bankr. S.D.N.Y. 2001))).

145. *See, e.g.*, *Matter of Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994) ("Under § 523(a)(6) . . . malicious means in conscious disregard of one's duties or without just cause or excuse . . . .").

146. *See, e.g.*, *In re* Jacobs, 381 B.R. 128, 139 (Bankr. E.D. Pa. 2008) ("The *Long* Court's teaching, that conduct must be is [sic] 'more culpable' or involve 'aggravated circumstances' to rise to the level of malice, is helpful.").

147. *See supra* note 140 and accompanying text (listing jurisdictions that use pre-*Geiger* interpretations of "malicious" to analyze whether an injury is "willful and malicious" post-*Geiger*).

strikes a victim intentionally in the face without any explanation,[148] parties breaching a contract and converting property usually have an excuse—hard financial circumstances forced the party to breach the contract and convert property in order to survive.[149] The question not answered by this definition of malicious is how the courts are supposed to differentiate between excuses when a party breaches contract. Requiring an excuse is not much help in distinguishing one conversion as more culpable than another.

Is a conversion resulting from a breach of contract more wrongful because it is (2) "in conscious disregard of one's duties?" This language seems completely out of place because it is borrowed from the definition of reckless conduct.[150] Furthermore, tort law defines one's duties. When a debtor breaches a contract *and* commits conversion, the debtor has disregarded a duty.[151] Nothing further is required by this definition other than the commission of an intentional tort. This definition of malicious does not require any heightened culpability and it is not of much assistance when trying to determine what malicious requires.

Is a conversion resulting from a breach of contract more wrongful because it (3) resulted from a heightened level of aggravated conduct? Conversion does not require any intent to harm the creditor—it only requires an intention to interfere with the creditor's ownership interests in property.[152] "Aggravated conduct" looks to the debtor's state of mind and requires a more culpable state of mind than that required by conversion.[153] This language, however, does not seem to be any more useful because it does not clarify what conduct qualifies as "aggravated conduct."

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148. *Cf. In re* Whiters, 337 B.R. 326, 344 n.6 (Bankr. N.D. Ind. 1999) (articulating the difference between willful and malicious in a personal injury scenario involving an intentional tort of battery and then saying that such an intent to harm someone physically is without just cause or excuse). Note, however, that the footnote chooses a physical injury resulting from an intentional tort to illustrate clearly the meaning of malicious, even though the facts of the case involve a breach of contract. *Id.*

149. *See, e.g., In re* Gagle, 230 B.R. 174, 177 (Bankr. D. Utah 1999) ("In the beginning he sold only a few parts with the intent that when his financial condition improved, he would replace the parts.").

150. *See* RESTATEMENT (SECOND) OF TORTS § 500 (1965) ("An actor's conduct is . . . reckless . . . if he does an act intentionally . . . knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another . . . .").

151. *See supra* notes 38–39 and accompanying text (explaining that tort law focuses on addressing societal wrongs).

152. *See supra* note 142 and accompanying text (defining conversion).

153. *See Whiters*, 337 B.R. at 338 ("[A] willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances.").

Therefore, in jurisdictions that use the language in (1) and (2), it seems as though defining "willful" as requiring an intentional tort has completely rendered the definitions of malicious without any meaning. In jurisdictions that use the language in (3), it seems that the tort to be excepted under § 523(a)(6) must be more culpable than a simple conversion of property. Requiring "aggravated conduct," however, does not specify the sort of conduct accompanying conversion that would make conversion surrounding a breach of contract an aggravated action. Overall, it appears that courts, after finding an intentional tort, are left to their own devices to decide what torts are accompanied by wrongful conduct so as to fit the requirements of § 523(a)(6).[154] While this allows courts some flexibility to craft equitable decisions that reflect the purposes of bankruptcy law,[155] the lack of a clear standard creates a great deal of uncertainty.[156]

2. *Interpretations of Malicious in Jurisdictions Requiring an Intentional Injury or Belief that an Injury Is Substantially Certain to Occur*

While some uncertainty exists in jurisdictions that require an intentional tort in a breach of contract scenario, uncertainty reigns supreme when no intentional tort is required. In these jurisdictions, "willful" requires only what *Geiger* articulates—that the breaching party intended to injure the creditor or that the injury was substantially certain to occur.[157] Such a definition of willful broadens the scope of conduct under § 523(a)(6) to include nontortious acts.[158]

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154. *See id.* at 345 ("The Court has embarked upon its own literacy campaign, seeking to read most of the post-*Geiger* cases which in any way analyze the § 523(a)(6) standards, and especially those which relate to the tort of 'conversion' within the parameters of those standards.").

155. *See In re* Jacobs, 381 B.R. 128, 139 (Bankr. E.D. Pa. 2008) (discussing the importance of courts being able to use § 523(a)(6) to be able to catch all wrongful debts and except them from discharge).

156. *See id.* ("There is surprisingly little judicial and scholarly commentary discussing the degree or nature of 'wrongfulness' that constitutes 'malice' under § 523(a)(6)."); *see also Whiters*, 337 B.R. at 345 ("[F]ederal bankruptcy courts are not supposed to make the law themselves; rather, they are to apply the law as it has been established by courts of higher authority.").

157. *See In re* Keaty, 397 F.3d 264, 270 (5th Cir. 2005) ("[E]ither objective substantial certainty [of injury] or subjective motive [to injure] meets the Supreme Court's definition of 'willful . . . injury' in § 523(a)(6)."); *see also supra* note 114 (noting that courts interpreting willful after *Geiger* argue over whether "willful" requires a wholly subjective inquiry or if it could be satisfied objectively by analyzing the circumstances surrounding the act).

158. *See In re* Williams, 337 F.3d 504, 510 (5th Cir. 2003) ("[D]ischargeability of contractual debts under [§] 523(a)(6) depends upon the knowledge and intent of the debtor at

The danger of allowing courts greater flexibility is that courts will include knowing breaches of contract within the scope of § 523(a)(6).[159] *Geiger*, however, intended to prevent § 523(a)(6) from including debts resulting from reckless behavior.[160] Requiring that an injury, in order to be "willful," need only be substantially certain to cause injury presents courts with the opportunity to devolve into the old and rejected *Tinker* standard[161]—finding debts "willful and malicious" if the act that caused the injury was deliberate and necessarily caused injury.[162] Such a result clearly would be in direct opposition to the principle decided in *Geiger*—the injury to the debtor must be intentional and not the result of reckless conduct.[163]

In order to make sure a knowing breach of contract is not included within the scope of § 523(a)(6), in jurisdictions that do not require that an intentional tort accompany the breach of contract, the term "malicious" must require that the conduct be the type of wrongful conduct the provision is meant to except. While a knowing breach of contract may be considered willful (because the debtor knew breaching the contract would result in financial harm to the creditor), whether or not the breach of contract is excepted from discharge depends on the court's definition of malicious.

As noted in Part III.D.1, jurisdictions require either specific malice or implied malice.[164] Similar to the analysis in jurisdictions that require

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the time of the breach, rather than whether conduct is classified as a tort.").

159. *See* Lockerby v. Sierra, 535 F.3d 1038, 1042 (9th Cir. 2008) (finding that § 523(a)(6) does not include knowing breaches of contract). The court specifically stated:

> That the Supreme Court in *Geiger* assumed that § 523(a)(6) encompassed only intentional torts, not intentional breaches of contract, strongly suggests the Court would not approve of a definition of 'tortious conduct' that would include intentional breaches of contract whenever it is substantially certain that the breach will cause injury.

Id.

160. *See supra* note 110 and accompanying text (noting the discussion in *Geiger* regarding the evils that result from including reckless and negligent conduct within the scope of § 523(a)(6)).

161. *See supra* notes 92–93 and accompanying text (discussing Congress's rejection of the definition of "willful and malicious" found in *Tinker*).

162. *See supra* notes 88–97 and accompanying text (discussing the interpretations of "willful and malicious" after the Supreme Court's decision in *Tinker* that required only reckless, but not intentional wrongdoing).

163. *See supra* notes 115–16 and accompanying text (discussing how the decision in *Geiger* was supposed to eliminate from the scope of § 523(a)(6) injuries caused by reckless conduct).

164. *See supra* notes 130–31 and accompanying text (defining specific malice as requiring a subjective intent to harm a creditor and implied malice as requiring only that the act objectively be deemed wrongful based on the surrounding circumstances).

intentional torts, courts in jurisdictions that do not require an intentional tort generally do not require specific malice[165]—that the debtor specifically intended to harm the creditor when breaching a contract.[166] In a breach of contract scenario, the breaching party usually cannot meet the demands of the contract because of a tough financial situation, not because of any ill will toward a creditor.[167] Requiring that the debtor, in breaching a contract, intended to harm the creditor is impractical.

Also, in jurisdictions that do not require an intentional tort to accompany a breach of contract, it may be more difficult to analyze a breach of contract by focusing on the breaching party's subjective state of mind.[168] When an intentional tort is required, the breaching party already had some sort of culpable state of mind to commit the intentional tort.[169] Reexamining the state of mind of a tortfeasor is not a difficult task.[170] In a breach of contract scenario, however, contract law does not traditionally accommodate a state of mind inquiry.[171] Instead of attempting to justify the personal reasons behind why each party breaches a contractual agreement, courts that do not require an intentional tort examine the circumstances surrounding the breach to determine whether the breach was wrongful.[172]

Shifting focus from the subjective intentions of the breaching party to the unfortunate circumstances surrounding the creditor is dangerous because in a breach of contract scenario, there is no clear definition of what outcomes are wrongful, and focusing too much on the creditor's unfortunate circumstances can distract the court from the main issue—whether the debtor acted

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165. *See, e.g.*, *Hambley*, 329 B.R. at 402 (stating that a malicious injury is a wrongful injury, but that malicious does not require spite or ill-will toward the creditor).

166. *See supra* note 130 and accompanying text (defining "malicious" in implied malice jurisdictions).

167. *See supra* notes 135–37 and accompanying text (describing the impracticality of requiring specific malice when analyzing conduct accompanying a breach of contract under § 523(a)(6)).

168. *See supra* notes 54–55 and accompanying text (discussing the inability of contract law to accommodate a state of mind inquiry).

169. *See supra* note 50 and accompanying text (listing several intentional torts and their state of mind requirements).

170. *See supra* notes 133–34 and accompanying text (discussing the ease of applying a specific malice inquiry when courts require an intentional tort to accompany a breach of contract).

171. *See supra* note 55 and accompanying text (discussing contract law's focus in a breach of contract scenario on the actions of the breach but not on the breaching parties' intentions).

172. *See, e.g.*, *In re* Ahmed, 359 B.R. 34, 42 (Bankr. E.D.N.Y. 2005) ("Malice may be implied from 'the acts and conduct of the debtor in the context of [the] surrounding circumstances.'" (quoting *In re* Stelluti, 94 F.3d 84, 88 (2d Cir. 1996))).

wrongfully. To illustrate these dangers, consider two differing interpretations of implied malice: (1) courts under the Second Circuit define malice to require aggravated conduct and a conscious disregard of one's own societal duties;[173] while (2) courts under the Fifth Circuit mash the meanings of willful and malicious together to require only the language specified in *Geiger*—an intentional injury.[174]

Regarding interpretation (1), courts in the Second Circuit require: conduct causing injury to the creditor under some aggravating circumstance; and conduct in conscious disregard of one's commonly accepted duties.[175] Something more culpable than a substantially certain injury is required—the conduct must demonstrate an aggravating circumstance. The "conscious disregard" language, however, does not seem to require more than recklessness—the debtor need not subjectively intend to injure the creditor so long as the injury was substantially certain to occur and the breach of contract was found to be in conscious disregard of one's duties.[176] Therefore, in order to be excepted from discharge under § 523(a)(6), conduct accompanying a breach of contract must cause injury to the creditor under some aggravating circumstance.

The phrase "some aggravating circumstance," however, is vague and will be difficult to distinguish from case to case. To illustrate this point, look at the following examples and consider which seem to be more aggravated and, therefore, deserving of exception from discharge: (a) the debtor defaulted on one payment but did not return the investment as instructed under the agreement because the debtor believed the business eventually would turn a profit—the business never turned a profit and the investor lost all of the investment;[177] (b) the contractor-debtor failed to use payments as specified under a contract to build a house for the creditor while still intending to build

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173. *See, e.g.*, *In re* Hambley, 329 B.R. 382, 402 (Bankr. E.D.N.Y. 2005) ("Malice 'is implied when anyone of reasonable intelligence knows that the act in question is contrary to commonly accepted duties in the ordinary relationships among people, and injurious to another.'" (quoting United Orient Bank v. Green, 215 B.R. 916, 928 (S.D.N.Y. 1997))).

174. *See, e.g.*, *In re* Williams, 337 F.3d 504, 509 (5th Cir. 2003) ("The test for willful and malicious injury under [§] 523(a)(6), thus, is condensed into a single inquiry of whether there exists 'either an objective substantial certainty of harm or a subjective motive to cause harm' on the part of the debtor.").

175. *See Hambley*, 329 B.R. at 402 (describing implied malice as both a conscious disregard of one's duties and an injury to a creditor under some aggravating circumstances).

176. *See supra* notes 150–51 and accompanying text (discussing the impact of "conscious disregard" language in jurisdictions requiring an intentional tort accompany breach of contract).

177. *See Hambley*, 329 B.R. at 388–94 (discussing the financial scenario that caused the debtor to breach contract). In this case, the debt was excepted from discharge under § 523(a)(6). *Id.* at 389.

the house as specified by the creditor—the debtor went insolvent and could not build the house as specified;[178] (c) the debtor sold off all the value on a truck serving as collateral for a loan due to financial hard times with the intent of restoring the value of the truck—the debtor defaulted on the loan and the creditor had nothing to which to attach its security interest because the debtor sold off all the truck's value.[179] The lack of a clear standard makes it difficult to discern which situations are more wrongful than others. For the most part, courts determine whether conduct is excepted under § 523(a)(6) by deciding on their own, without guidance from the Code, what constitutes wrongful conduct.[180] Such a lack of clarity makes it difficult to predict how a court will decide a fact pattern until after the decision is handed down.

Regarding interpretation (2), the Fifth Circuit does not read "willful and malicious" separately. Instead, the court combines the terms together.[181] Therefore, under this reading, in order for conduct accompanying a breach of contract to be excepted from discharge under § 523(a)(6), the debtor must have either subjectively intended to injure the creditor or acted in such a way that was substantially certain to harm the creditor.[182] Furthermore, the Fifth Circuit acknowledged that, under its reading, a knowing breach of contract could fall within the scope of § 523(a)(6) as long as the breaching party acted in a way substantially certain to injure the creditor.[183]

The immediate problem, similar to that existing in the Second Circuit, is a lack of any standard that identifies the conduct accompanying a knowing breach of contract as more wrongful than other conduct. When a debtor fails to make payments under a loan agreement, the debtor normally does so believing

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178. *See In re* Bren, 284 B.R. 681, 686–89 (Bankr. D. Minn. 2002) (discussing the financial scenario that caused debtor to use funds for purposes in contradiction to security agreement). In this case, in a specific malice jurisdiction that required an intentional tort, the debt was not excepted from discharge under § 523(a)(6). *Id.* at 699.

179. *See In re* Gagle, 230 B.R. 174, 176–78 (Bankr. D. Utah) (discussing the debtor's financial situation that caused him to sell off parts of his truck in breach of a security agreement). In this case, in an implied malice jurisdiction requiring an intentional tort, the court excepted the injury from discharge under § 523(a)(6). *Id.* at 183.

180. *See supra* notes 154, 156 and accompanying text (discussing the statement in *In re Whiters* that judges are making decisions based on their own thoughts without giving heed to the words of § 523(a)(6)).

181. *See In re* Williams, 337 F.3d 504, 509 (5th Cir. 2003) ("This definition of implied malice is identical to the *Kawaauhau* Court's explanation of a willful injury.").

182. *See id.* ("The test for willful and malicious injury under [§] 523(a)(6), thus, is condensed into a single inquiry of whether there exists 'either an objective substantial certainty of harm or a subjective motive to cause harm' on the part of the debtor.").

183. *See id.* at 510 ("The Fifth Circuit has acknowledged that a breach of contract may involve an intentional or substantially certain injury.").

that such a failure is substantially certain to harm the creditor—an unreimbursed lender suffers a financial injury.[184] Because a knowing breach of contract alone is not enough to fall within the scope of § 523(a)(6), an additional element requiring wrongdoing under § 523(a)(6) is needed.[185] No such narrowing language exists under the Fifth Circuit's interpretation, and so, once again, the courts have complete discretion to decide what debts are wrongful and excepted from discharge.

The lack of a meaningful standard presents an additional problem. The purpose of § 523(a)(6) is to except from discharge only those debts resulting from wrongful acts.[186] The focus is on the wrongful actor—a debtor who wrongfully commits an injury should not be allowed to escape the consequences by filing for bankruptcy. The Fifth Circuit, however, does not require any subjective wrongdoing; as stated above, a knowing breach of contract almost always is certain to injure the creditor.[187] A court, under this standard, could except a debt from discharge not because the debtor acted wrongfully, but because the court sympathizes with the creditor's situation. Such a reading strays from the Code's goal of allowing honest and good faith debtors to start anew.[188] Without any finding of specific wrongdoing on the part of the debtor, a court should not be able to except a debt from discharge under § 523(a)(6).

While the standards in the Fifth Circuit and Second Circuit differ, both readings of "willful and malicious" suffer from a lack of clarity. When trying to find willful and malicious injuries in a breach of contract scenario without first finding an intentional tort, courts are forced to look at the surrounding circumstances and make a judgment based on whether the outcome resulting from the breach seems wrong. Unless the standard is clarified, it appears that debtors breaching a contract in these jurisdictions will be at the whim of the

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184. *See In re* Kidd, 219 B.R. 278, 284 (Bankr. D. Mont. 1998) (noting that the difficulty in the breach of contract scenario "is that rarely are the debtors acting out of a desire to injure the creditors, even though the injury to the creditor, although not desired, is almost always substantially certain to result from a debtor's actions").

185. *See* Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998) (commenting that a knowing breach of contract is not meant to be within the scope of § 523(a)(6)).

186. *See supra* note 13 and accompanying text (discussing the purpose of § 523(a)(6) as restricting discharge to the honest, good faith debtor).

187. *See supra* note 184 and accompanying text (noting that the problem in breach of contract scenarios is that the breaching party usually is substantially certain that the breach will result in injury).

188. *See supra* note 7 and accompanying text (discussing the Bankruptcy Code's purpose of giving honest, but unfortunate, debtors a fresh start).

courts more so than debtors in a jurisdiction requiring an intentional tort because of the lack of guidance and structure existing in the law.

3. Conclusion: *Effect of Varying Interpretations*

To illustrate the effect of the unclear and conflicting interpretations of "willful and malicious" post-*Geiger*, it is appropriate to return to the hypothetical in Part I. Leslie wants to know what will happen in a bankruptcy proceeding if she takes out a loan to start a sole proprietorship but fails to make payments on the loan because the business becomes insolvent. While the lawyer initially would want to tell Leslie that bankruptcy could wipe out all of the debts resulting from the failing business, the lawyer would have to consider whether § 523(a)(6) applied to any debts.

Leslie would want to know under what circumstances her debts would be excepted as willful and malicious injuries, specifically those debts arising from a breach of Leslie's loan agreement. In response to such an inquiry, the lawyer would have to spend a great deal of time researching the decisions under § 523(a)(6). Of course, the lawyer's job would be easiest in a jurisdiction requiring an intentional tort and subjective intent to harm the creditor, but that sort of jurisdiction is rare.[189]

Leslie most likely will be in an implied malice jurisdiction. If such a jurisdiction requires that an intentional tort accompany the breach in contract, then Leslie's lawyer has an easier task. The initial advice would be simple: "Leslie, do not commit an intentional tort." If Leslie knew that she could be liable for conversion if she breached her loan agreement,[190] then Leslie would want to know what sorts of intentional torts are wrongful enough to fall within the scope of § 523(a)(6). The lawyer, again, would not be able to articulate a clear standard. The tort would have to require some sort of aggravated conduct, but the requisite degree of culpability would remain uncertain.[191] Still, at least Leslie would know that in order for her breach even to be eligible under § 523(a)(6), the conduct accompanying the breach must constitute an intentional tort.

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189. *See supra* notes 135–37 and accompanying text (discussing the impracticalities inherent in applying a specific malice standard).

190. *See supra* note 141 and accompanying text (listing cases that involved conversion in a breach of contract scenario).

191. *See supra* notes 144–53 and accompanying text (noting that standards used to articulate what in addition to an intentional tort is required under § 523(a)(6) are unclear).

In an implied malice jurisdiction that does not require an intentional tort, Leslie's lawyer will not have much luck explaining exactly what a court requires to accompany the breach of contract. The lawyer would have to admit that being unable to make payments under a loan agreement or security agreement most likely will result in a knowing breach of contract in which harm is substantially certain to befall the creditor.[192] This satisfies "willful" under this type of jurisdiction.[193] If the circumstances surrounding the injury imply that the injury to the creditor was wrongful, then without any subjective intent to harm the creditor, Leslie's conduct could be deemed wrongful and the resulting debt excepted from discharge under § 523(a)(6). The lawyer also would not be able to articulate any clear standard for what outcomes resulting from a breach usually are wrongful. The analysis is entirely fact specific with great discretion given to the court. For the lawyer to render any effective advice, Leslie would have to hop into a time machine, determine the specific factual scenario in which she breaches the contract, and then return to the lawyer and allow the lawyer to take a guess as to what the court would do.[194] Even then, after time travel, any advice given to Leslie about whether the debt would be excepted would not be fully accurate because one judge that hears the case might be more sympathetic to the creditor than another.

Overall, then, the lawyer cannot, in any jurisdiction, give an accurate articulation of what § 523(a)(6) requires. Such a result is disparaging because Leslie will want to know if she can use bankruptcy to shed her honest debts and arise from insolvency afresh. The Code was written so that the debtor, absent wrongful conduct, can do so. Without clear boundaries for courts to abide by, potential entrepreneurs like Leslie probably will be more hesitant to consider bankruptcy as an option and more hesitant to start businesses.

IV. Clarifying "Willful and Malicious Injury to Property" Under § 523(a)(6)

Due to the vast and overwhelming variety of different interpretations regarding "willful and malicious" under § 523(a)(6), there is a need for a unifying definition to lend more predictability and clarity to the statute. This

192. *See supra* note 184 and accompanying text (noting that a knowing breach of contract results in the debtor being substantially certain that injury will befall the creditor).

193. *See In re* Williams, 337 F.3d 504, 510 (5th Cir. 2003) ("[A] knowing breach of a clear contractual obligation that is certain to cause injury may prevent discharge under [§] 523(a)(6), regardless of the existence of separate tortious conduct.").

194. *See supra* notes 154, 156 and accompanying text (noting that judges often make their own decisions on what they think should be excepted from discharge under § 523(a)(6)).

Part offers a solution regarding the sort of breach of contract that should be excepted from discharge under § 523(a)(6) and defends that solution as the best alternative to solve the lack of clarity surrounding the statute.

A. Conduct Accompanying a Breach of Contract Must Be a Tort Defined by State Law

As noted in Part II, confusion results when a tort-like state of mind inquiry is used to evaluate a breach of contract scenario. In a 2008 opinion, the Ninth Circuit Court of Appeals specifically commented on the problems that result in application of § 523(a)(6) to breaches of contract:

> Historically, injuries resulting from breaches of contract are treated very differently from injuries resulting from torts. In contract law, "[t]he motive for the breach commonly is immaterial in an action on the contract." The concept of "efficient breach" is built into our system of contracts, with the understanding that people will sometimes intentionally break their contracts for no other reason than that it benefits them financially. The definition of intent to injure as the commission of an act "substantially certain" to cause harm was born from *tort* principles, not contract law principles.[195]

The breach of contract analysis in a § 523(a)(6) inquiry also tends to undermine the bankruptcy policy of giving debtors a fresh start by presenting courts with an opportunity to except from discharge intentional breaches of contract instead of the intended result—excepting intentional injuries.[196]

The solution suggested by the Ninth Circuit,[197] and the one this Note adopts, mandates that the conduct accompanying a breach must constitute an intentional tort as defined by the state in which the proceeding is brought.[198] The reasons for such a solution are threefold: (1) such a rule creates a clear interpretation for courts and clients to follow; (2) requiring a state-defined tort most adequately addresses the purpose of § 523(a)(6)—excepting debts that

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195. Lockerby v. Sierra, 535 F.3d 1038, 1042 (9th Cir. 2008) (citations omitted).

196. *See id.* ("Expanding the scope of § 523(a)(6) to include contracts that are intentionally breached whenever it is substantially certain that injury will occur would severely circumscribe the ability of debtors to 'start afresh.'").

197. *See supra* note 129 and accompanying text (discussing the success of jurisdictions that require that an intentional tort accompany a breach of contract before excepting the injury from discharge under § 523(a)(6)—a clearer standard of what conduct is wrongful when defined by tort law).

198. *See Lockerby*, 535 F.3d at 1041 (noting that in order for a breach of contract to be excepted from discharge under § 523(a)(6), the breach must be accompanied by conduct that "constitutes a tort under state law").

result from wrongful conduct;[199] and (3) allowing § 523(a)(6) to extend to the breach of contract scenario is consistent with the current rule of not requiring an independent tort outside of the breach of contract scenario.[200] While some may view this solution as overly restrictive of courts, it is beneficial because courts will be limited to the tort law framework used for the purpose of wrongful conduct, thereby keeping § 523(a)(6) consistent with its purpose;[201] and the restrictions add to the statute's clarity, making the administration of § 523(a)(6) more predictable.

B. Defining "Malicious" in the Breach of Contract Scenario to Require an Intentional Tort Eligible for Punitive Damages

With the term "willful" requiring that an intentional tort accompany a breach of contract, the meaning of the term "malicious" must be clarified. As already mentioned in Part III.D.1, in implied malice jurisdictions that already require an intentional tort, the language used to define malicious is imported from pre-*Geiger* decisions, which do not add much to the post-*Geiger* definition of "willful." Although the interpretation of malicious that required aggravated conduct in addition to the intentional tort gave malicious meaning, the degree of aggravation required remained uncertain. On the other hand, requiring, as specific malice jurisdictions require, that the breaching party intend the injury to the specific creditor narrows the scope of § 523(a)(6) too much. A solution to this problem must clarify what is required in addition to an intentional tort that will make conduct accompanying a breach of contract wrongful enough to be within the scope of § 523(a)(6) while still capturing wrongful intentional torts in breach of contract scenarios.

Because the purpose of § 523(a)(6) is to except *wrongful* acts from discharge,[202] the best place to look for a rule on how to determine what constitutes a wrongful act is tort law.[203] Tort law compensates the injured party

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199. *See supra* note 196 and accompanying text (discussing rationale in *Lockerby* that § 523(a)(6) was meant to except intentional injuries and not intentional breaches of contract).

200. *See supra* note 124 and accompanying text (discussing well-accepted principle that an independent tort existing regardless of a contractual scenario is not required under § 523(a)(6)).

201. *See supra* note 196 and accompanying text (noting that § 523(a)(6) was passed to except intentional injuries from discharge—a concept best addressed by tort law).

202. *See supra* notes 8–13 and accompanying text (discussing the purpose of the Bankruptcy Code's exceptions to discharge and specifically the purpose of § 523(a)(6)'s exception of debts caused by "willful and malicious" conduct).

203. *See supra* Part II.B (discussing the origins and purposes of contract and tort law and explaining why punitive damages are issued in tort but normally not in contract).

in an amount equal to the damages resulting from the injury.[204] Tort law also deters the commission of wrongful torts by adding punitive damages on top of the compensatory award.[205]

Does § 523(a)(6) except from discharge debts caused by willful or malicious injury to compensate the injured, punish and deter the wrongful debtor, or both? While it may seem that the purpose of keeping the wrongful injury on the books is to both punish the debtor and make sure that the injured creditor is made whole, it is arguable that the main focus of § 523(a)(6) is on punishment and deterrence. Courts debating § 523(a)(6) focus on the principles of equity—deterring the abuse of bankruptcy law by those who would commit these wrongful injuries without any repercussion.[206] If § 523(a)(6) seeks to deter and punish those debtors who wrongfully inflict injuries, instead of carving a new path in the case law, bankruptcy courts should follow tort law devices for punishment and deterrence.

Under tort law, to determine whether punitive damages should be awarded, states usually require that the tort involve an aggravated act or heightened sense of culpability.[207] Only wanton and vile acts are subject to punitive damages. Based on the purpose of § 523(a)(6), it is those same wanton and vile acts that the Bankruptcy Code wishes to except from discharge.[208] Therefore, when determining whether the tort accompanying a breach of contract is "malicious," the bankruptcy court should inquire as follows: If an intentional tort accompanying a breach of contract is eligible for punitive damages under state law, then such conduct is "malicious" under § 523(a)(6) and the resulting debt is excepted from discharge.

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204. *See supra* note 44 and accompanying text (discussing the compensatory purpose of tort damages).

205. *See supra* notes 46–48 and accompanying text (explaining that tort law, unlike contract law, allows for the awarding of punitive damages to deter and punish tortfeasors).

206. *See supra* note 196 and accompanying text (noting that the purpose of giving the court the power to investigate the circumstances surrounding a breach in contract is to limit discharge to the honest but unfortunate debtor).

207. *See supra* note 53 and accompanying text (defining what is required in order for an award of punitive damages to be appropriate).

208. *See, e.g.*, *In re* Jacobs, 381 B.R. 128, 139 (Bankr. E.D. Pa. 2008) (requiring aggravated conduct for a finding of malice); *In re* Logue, 294 B.R. 59, 63 (B.A.P. 8th Cir. 2003) ("The debtor's knowledge that he or she is violating the creditor's legal rights is insufficient to establish 'malice' absent some additional aggravated circumstances.").

C. Critiques and Defenses of the New Rule

Opponents of the proposed definition of malicious most likely will assert that the rule takes away all the discretion bankruptcy courts have to craft equitable solutions to the complex problems resulting from breaches of contract. The current state of the law allows judges to decide on a case-by-case basis what is wrongful, and a definition requiring punitive damages denies judges that flexibility.[209]

That argument, however, seems to support the proposed definition. The definition prohibits the courts only from excepting from discharge those debts that are not supposed to be excepted—specifically, intentional breaches of contract that recklessly or negligently, but not intentionally, injure the creditor.[210] Excepting only those debts in a contract scenario that include punitive damages limits the application of § 523(a)(6) to wrongful acts. Indeed, some jurisdictions already interpret malicious as requiring aggravated conduct or highly culpable acts.[211] The new definition would make the job of the bankruptcy court easier by having state courts or federal trial courts in tort actions essentially mark those decisions eligible for exception to discharge by awarding punitive damages. If the case has not been decided by a trial court, the bankruptcy judge at least could look to the body of state tort law already in existence and see whether the conduct in question would be eligible for punitive damages. Either way, the bankruptcy court would not have to do the trial court's job of assessing an alleged tort claim for wrongful conduct.

Most importantly, judicial flexibility is maintained. That flexibility would not lie with the bankruptcy judge, but with a state or federal district court that hears tort actions, knows the state law on those actions, knows which torts contain aggravated conduct, and therefore, is more capable of making the determination that certain conduct accompanying a breach constitutes a wrongful intentional tort.[212] Trial courts and legislators have flexibility: Legislators can craft causes of action for bad faith/wrongful breaches of contract,[213] and trial courts can evaluate

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209. *See Jacobs*, 381 B.R. at 139 ("Perhaps the analysis is best understood as an expression of the fundamental policy underlying the bankruptcy discharge: [O]f providing a fresh start only to the 'honest but unfortunate debtor.'" (citations omitted)).

210. *See supra* Part III.B (discussing the evolution of the interpretation of "willful" from requiring only an intentional act to requiring an intent to injure).

211. *See supra* note 146 (listing a jurisdiction that requires aggravated conduct for the injury to be "malicious" under § 523(a)(6)).

212. *Cf., e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971) ("The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state . . . .").

213. *See* Cavico, *supra* note 24, at 381 ("Punitive damages are imposed for a breach in

a case arising under such a cause of action and determine that the conduct associated with a breach of contract was aggravated enough to warrant punitive damages.[214] Even if the state does not have a tort cause of action for a bad faith breach of contract, conversion is a common intentional tort in which punitive damages are available.[215] Some flexibility still is retained.

Opponents, however, most likely will respond that in many situations involving willful and malicious injuries to property, the debtor files for bankruptcy before a judgment can be awarded on the tort claim (or maybe even before the claim is filed). The automatic stay provision in the Bankruptcy Code stops all state court proceedings, and any proceeding on a pre-petition debt would be put on pause.[216] Opponents may argue that injuries never will be marked by state court proceedings, so requiring that injuries be eligible for punitive damages under state law accomplishes nothing—bankruptcy courts still will have to make circumstantial, fact-based decisions.

This argument fails for two reasons. First, the argument fails to realize that this problem is a valuation problem—that is, this situation of waiting for a judgment to see whether there are punitive damages is no different than when parties are depending on state court judgments on existing tort proceedings to determine the amount of debts owed. The solution under the Code for valuation problems is to have the bankruptcy court lift the stay so that the tort claims can be valued, or, if the state court proceeding would unduly delay the bankruptcy proceeding, make the calculation by itself.[217] The same analysis should be applied to possible punitive damages in a tort judgment. In some cases in which a creditor filed a tort action, the bankruptcy court could lift the stay on the state proceeding and allow a determination on the judgment.

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contract when the breach constitutes or amounts to a separate and distinct independent tort, the commission of which is sufficiently aggravated.").

214. *See In re* Jercich, 238 F.3d 1202, 1206 (9th Cir. 2001) ("Outside the area of insurance contracts, tort recovery for the bad faith breach of contract is permitted only when, 'in addition to the breach of the covenant [of good faith and fair dealing] a defendant's conduct violates a fundamental public policy of the state.'" (quoting Rattan v. United Servs. Auto Ass'n, 101 Cal. Rptr. 2d 6, 11 (Cal. App. 2000))).

215. *See* RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) (containing no limitations on the torts in which punitive damages are eligible).

216. *See* 11 U.S.C. § 362(a)(1) (2006) (subjecting to automatic stay those proceedings that have been brought or could have been brought before commencement of bankruptcy case).

217. *See id.* § 502(c) (allowing the bankruptcy court to estimate unliquidated claims if the fixing would "unduly delay the administration of the case"); *see also In re* Baldwin-United Corp., 57 B.R. 751, 758 (S.D. Ohio 1985) (suggesting in a Chapter 11 case that the estimated value may provide a ceiling on the claim, but that estimation may be for the purposes of confirmation and voting but not for distribution).

Second, even though bankruptcy courts might still have to decide whether some intentional torts meet the requirements for punitive damages under state law, state tort law precedent would serve as a guide to bankruptcy courts. Potential debtors would be able to predict the sort of conduct excepted under § 523(a)(6) and lawyers would have a better idea on how to advise their clients. Even appellate courts reviewing decisions of bankruptcy courts would be better off because appellate courts could evaluate the lower courts' decisions based on case law instead of gut-feelings. Because bankruptcy courts would have an established doctrine of law to follow when excepting a debt from discharge under § 523(a)(6), this infinitely increases the clarity of what is required under a willful and malicious standard.[218]

V. Conclusion

Returning to the hypothetical situation in which Leslie is seeking legal advice, under the proposed solution, Leslie's attorney will have an easier job communicating the types of debts that are excepted from discharge under § 523(a)(6). Leslie's attorney can tell her that only when her conduct amounts to a tort under state law can the resulting injury be excepted from discharge. Next, Leslie's attorney can explain the certain torts that might arise under a contractual scenario—conversion, fraud, embezzlement, etc. The attorney can advise Leslie as to what conduct from which she should refrain in order to avoid committing any of those torts. That explanation is much clearer than telling Leslie that she better not do anything that is substantially certain to lead to injury—Leslie, after all, is no mind reader!

After explaining the torts, the attorney can further ease Leslie's fears by explaining that even if an intentional tort is found, in order for the resulting debt to be excepted from discharge, the possible damages for the tort must include punitive damages. The attorney could use past state law decisions involving torts such as fraud or conversion to demonstrate when punitive damages were eligible. This provides a much clearer picture for Leslie to use than attempting to predict the bankruptcy court's sentiments toward a particular set of facts. While helping Leslie, the clarification also tells bankruptcy courts more precisely where the § 523(a)(6) boundaries are. With this clarification, the Bankruptcy Code truly will offer Leslie the opportunity for a fresh start.

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218. *See supra* notes 154, 156 and accompanying text (discussing the judge's decision in *In re Whiters*, specifically pointing out the argument that under § 523(a)(6) judges are making up their own law based on what they feel is right).