Brooklyn Journal of Corporate, Financial & Commercial Law

Volume 4 | Issue 1 Article 6

2009

A Critical Analysis of the Bankruptcy Code's Exception to Discharge for Debts Arising From Wrongful Conduct

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NOTES

A CRITICAL ANALYSIS OF THE BANKRUPTCY CODE'S EXCEPTION TO DISCHARGE FOR DEBTS ARISING FROM WRONGFUL CONDUCT

INTRODUCTION

While bankruptcy is intended to relieve the honest debtor,[1] the Bankruptcy Code (the Code) prevents the discharge of debts in certain situations where the debtor's actions are less than ethical.[2] Section 523(a)(6) of the Code does not allow a debtor to discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity."[3] The case law concerning the interpretation of § 523(a)(6) is not clear and in 2007, the Federal Bankruptcy Court for the Northern District of Illinois noted a circuit split over the requirements for the dischargeability of intentional breaches of contract in bankruptcy proceedings. The bankruptcy court noted that there is disagreement between the circuits over whether § 523(a)(6) requires tortious conduct for a debt to be nondischargeable.[4] While the text of § 523(a)(6) clearly requires a willful and malicious injury,[5] the Ninth and Fifth Circuits are divided as to whether tortious conduct is required for an intentional breach of contract to be nondischargeable.[6] In the Ninth Circuit, for a breach of contract "to be excepted from discharge under § 523(a)(6) . . . [it] must be accompanied by some form of tortious conduct that gives rise to willful and malicious injury."[7] The Fifth Circuit, however, "holds that any breach of contract is nondischargeable as a willful and malicious injury if the debtor either intended to injure the other party to the contract by breaching it or if injury

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1. Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 555 (1915).

2. *See*, *e.g.*, 11 U.S.C. § 523 (2006).

3. § 523(a)(6).

4. Tortious conduct is "[a]n act or omission that subjects the actor to liability under the principles of tort law." BLACK'S LAW DICTIONARY 337 (9th ed. 2009).

5. § 523(a)(6).

6. Wish Acquisition, L.L.C. v. Salvino, 373 B.R. 578, 588 (Bankr. N.D. Ill. 2007), *aff'd*, No. 07-C-4756, 2008 U.S. Dist. LEXIS 3918 (N.D. Ill. Jan. 18, 2008). In addition to the split between the Ninth and Fifth Circuits, the Tenth and Sixth Circuits are also split through unreported decisions. *Compare In re* Best, 109 F. App'x 1 (6th Cir. 2004) (tortious conduct is necessary for a debt to be nondischargeable under § 523(6)(a)) *with* Sanders v. Vaughn (*In re* Sanders), No. 99-6396, 2000 U.S. App. LEXIS 5763 (10th Cir. Mar. 29, 2000) (tortious conduct is not necessary for a debt to be nondischargeable under § 523(6)(a)).

7. Petralia v. Jercich (*In re* Jercich), 238 F.3d 1202, 1206 (9th Cir. 2001) (internal quotation marks omitted).

to the other party was substantially certain to result from the breach; tortious conduct is not required."[8]

Part I of this note will begin with an overview of the circuit split and its origination out of the United States Supreme Court's decision in *Kawaauhau v. Geiger*.[9] This overview will commence with a discussion of *Geiger*, then analyze the competing interpretations developed by the Ninth Circuit's *In re Jercich* decision,[10] and the Fifth Circuit's *In re Williams* decision.[11] Part I will conclude with a brief explanation of *Wish Acquisition, L.L.C. v. Salvino*,[12] a bankruptcy case that noted the circuit split. Part II of this note discusses the role of state regulation in the application of federal bankruptcy law, specifically the § 523(a)(6) exception. Part III will conclude the note with an analysis of the relevant issues and a recommendation that the Ninth Circuit rule be adopted to resolve the circuit split. The Ninth Circuit rule should be adopted because it is more protective of debtors, more in line with the legislature's intent concerning the Bankruptcy Code, and is less susceptible to abuse by creditors or debtors.

I. CIRCUIT SPLIT

The Supreme Court's decision in *Geiger* gave rise to a circuit split because the case merely addressed the issue of whether reckless or negligent conduct could lead to a debt being nondischargeable.[13] The Court did not address the issue of what kind of intentional conduct was necessary to invoke the § 523(a)(6) exceptions.[14] Since the Court did not address what constitutes a "willful and malicious injury" under § 523(a)(6), the Ninth and Fifth Circuits developed competing interpretations.[15] In 2007, the Bankruptcy Court for the Northern District of Illinois addressed the circuit split and determined that the Ninth Circuit's rule requiring tortious conduct for a debt to be nondischargeable under § 523(a)(6) should be applied in the Seventh Circuit.[16]

A. *KAWAAUHAU V. GEIGER*

The circuit split recognized in *Salvino* arose out of competing interpretations of the *Geiger* decision that determined the scope of § 523(a)(6).[17] The Court held that "a debt arising from a medical

8. *Salvino*, 373 B.R. at 588 (citing Williams v. Int'l Bhd. of Elec. Workers Local 520 (*In re* Williams), 337 F.3d 504, 510 (5th Cir. 2003)) (internal quotation marks omitted).
9. 523 U.S. 57 (1998).
10. 238 F.3d 1202.
11. 337 F.3d 504.
12. 373 B.R. 578.
13. *See* Kawaauhau v. Geiger, 523 U.S. 57, 64 (1998).
14. *Id.*
15. *See In re Jercich*, 238 F.3d at 1206; *In re Williams*, 337 F.3d at 510.
16. *Salvino*, 373 B.R. at 581.
17. *See generally Geiger*, 523 U.S. 57.

malpractice judgment, attributable to negligent or reckless conduct," was dischargeable under § 523(a)(6) because the plaintiff was not the victim of a willful or malicious injury.[18] This suit arose when a plaintiff had her right leg amputated below the knee after receiving treatment from her doctor for a foot injury.[19] The jury found the defendant liable for malpractice, and he attempted to avoid the judgment by petitioning for bankruptcy.[20] In response to the defendant's bankruptcy petition, the plaintiff requested that the bankruptcy court hold the malpractice judgment nondischargeable because the judgment originated from a willful and malicious injury and was thus a debt excepted from discharge under § 523(a)(6).[21]

The bankruptcy court initially determined that the defendant's conduct was willful and malicious since his "treatment fell far below the appropriate standard of care."[22] The district court affirmed the bankruptcy court's determination that the debt was nondischargeable, but the appellate court reversed and determined that the malpractice debt was dischargeable.[23] The court of appeals reversed the district court's determination because the § 523(a)(6) exception from discharge "is confined to debts based on what the law has for generations called an intentional tort."[24]

Ultimately, the United States Supreme Court affirmed the judgment of the court of appeals and determined that willful, in the context of § 523(a)(6), modifies injury, "indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional act that leads to injury."[25] The Court justified a narrow reading of the statute by asserting that if Congress had intended to "exempt debts resulting from unintentionally inflicted injuries," explicit language to make that meaning clear would have been used.[26] Further, the structure of the statute mirrors that of intentional torts, in that "[i]ntentional torts generally require that the actor intend 'the consequences of an act,' not simply 'the act itself.'"[27] If the Court adopted a broad reading of § 523(a)(6), it would have expanded the scope of the statute to cover many situations where "an act is intentional, but injury is unintended," including a knowing breach of contract or a car accident.[28] This type of broad reading would be incompatible with the established notion that "exceptions to discharge

18. *Id.* at 59.
19. *Id.*
20. *Id.* at 59–60.
21. *Id.* at 60.
22. *Id.*
23. *Id.*
24. *Id.* (internal quotation marks omitted).
25. *Id.* at 61 (emphasis in original).
26. *Id.*
27. *Id.* at 61–62 (quoting RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (1964)).
28. *Id.* at 62.

should be confined to those plainly expressed."[29] Finally, if the Court adopted a broad understanding of willful and malicious it would have rendered § 523(a)(9), which exempts debts from injuries or deaths arising from drunk driving to be discharged, superfluous.[30] Based on these factors, the Court unanimously determined that § 523(a)(6) should be interpreted narrowly, so that the statute only applies to a deliberate or intentional injury.

In deciding *Geiger*, the Supreme Court clearly established that § 523(a)(6) exempted only deliberate or intentional injuries, and does not cover intentional acts that result in injury.[31] However, the Court did not address the issue of whether the debtor's conduct must be tortious to be exempted under the statute. Both the Ninth and Fifth Circuits address this issue, but are split on whether the debtor's conduct must be tortious in addition to willful and malicious for a debt to be nondischargeable.

B. *PETRALIA V. JERCICH*

After the Supreme Court in *Geiger* addressed one aspect of the § 523(a)(6) exception, the Ninth Circuit addressed the issue of whether tortious conduct is required to invoke the exception. Its decision is the basis for the *Salvino* decision. The dispute in *Jercich* arose when Jercich, the owner of a real estate company, failed to pay one of his employees as required under an employment contract.[32] The employee sued Jercich seeking damages.[33] The state court found in favor of the employee and while the appellate decision was pending, Jercich filed for bankruptcy.[34] The employee initiated proceedings to except the judgment from discharge under § 523(a)(6).[35]

Ultimately, the bankruptcy court found for Jercich and determined that the debt was dischargeable.[36] The bankruptcy appellate panel affirmed the bankruptcy court's decision because "where a debtor's conduct constitutes both a breach of contract and a tort, the debt resulting from that conduct does not fit within § 523(a)(6) unless the liability for the tort is independent of the liability on the contract."[37] The appellate panel determined that since

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29. *Id.* (quoting Gleason v. Thaw, 236 U.S. 558, 562 (1915)) (internal quotation marks omitted).
30. *Id.*
31. *Id.*
32. Petralia v. Jercich (*In re* Jercich), 238 F.3d 1202, 1203–04 (9th Cir. 2001).
33. *Id.* at 1204.
34. *Id.*
35. *Id.*
36. *Id.*
37. Petralia v. Jercich (*In re* Jercich), 243 B.R. 747, 751 (B.A.P. 9th Cir. 2000), *rev'd*, 238 F.3d 1202 (9th Cir. 2001).

there was not a tort independent from the contract, the debt was not exempt from discharge under § 523(a)(6).[38]

The Ninth Circuit reversed the appellate panel and held "that to be excepted from discharge under § 523(a)(6), a breach of contract must be accompanied by some form of tortious conduct that gives rise to willful and malicious injury."[39] In order for a breach of contract to become tortious conduct it must "violate[] an independent duty arising from principles of tort law."[40] Jercich's nonpayment of wages to the employee when he had the ability to do so was tortious conduct because it violated California law.[41] The Ninth Circuit determined that the "deliberate or intentional injury" standard established by the Supreme Court in *Geiger* necessitates tortious conduct, in addition to a "willful and malicious injury," for a debt to be nondischargeable under § 523(a)(6).[42]

C. *WILLIAMS V. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 520*

While the Ninth Circuit determined that tortious conduct was required for a debt to be deemed nondischargeable under § 523(a)(6),[43] the Fifth Circuit rejected the tortious conduct requirement and instead limited its inquiry to a determination of whether the debtor's conduct was willful and malicious.[44] The Fifth Circuit held in *Williams* "that for a debt to be nondischargeable, a debtor must have acted with objective substantial certainty or subjective motive to inflict injury."[45]

The conflict in *Williams* arose out of a violation of a collective bargaining agreement and a subsequent agreement between an electrical contractor and a union for electricians. Williams, the electrical contractor, hired electricians for a commercial project who concealed their union affiliation and went on strike.[46] After being unable to hire non-union electricians, Williams entered into a collective bargaining agreement with the Union.[47] Finding trouble with the union electricians, Williams, in violation of the collective bargaining agreement, hired non-union electricians.[48] In response to the violation, the Union initiated a grievance

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38. *Id.*

39. *In re Jercich*, 238 F.3d at 1206 (internal quotation marks omitted).

40. *Id.* (quoting Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 460 (Cal. 1994)).

41. *Id.* at 1207.

42. *See id.* at 1205.

43. *Id.*

44. *See* Williams v. Int'l Bhd. of Elec. Workers Local 520 (*In re* Williams), 337 F.3d 504, 510 (5th Cir. 2003).

45. *Id.* at 508–09 (citing Miller v. J.D. Abrams, Inc. (*In re* Miller), 156 F.3d 598, 603 (5th Cir. 1998)) (internal quotation marks omitted).

46. *Id.* at 507.

47. *Id.*

48. *Id.*

against Williams.[49] The dispute was resolved when Williams agreed to use only union electricians for commercial projects.[50] The new agreement was subsequently violated and the Union sought damages from both Williams' original violation of the collective bargaining agreement and his later violation of the new agreement.[51] Williams then filed for bankruptcy, and the Union sought to have the debts under the collective bargaining agreement and the subsequent agreement excepted from the discharge under § 523(a)(6).[52]

The bankruptcy court determined that the debts under the collective bargaining agreement were nondischargeable because they "arose from willful and malicious injury."[53] After the judgment was affirmed by the district court,[54] the Fifth Circuit reaffirmed the bankruptcy court's determination that tortious conduct is not required for a debt to be nondischargeable.[55] In rejecting the requirement of tortious conduct, the circuit court condensed the test for a willful or malicious injury "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."[56] This test requires that "a debtor must commit an intentional or substantially certain injury in order to be deprived of a discharge."[57] Under this rule, "the dischargeability of contractual debts under [§] 523(a)(6) depends upon the knowledge and intent of the debtor at the time of the breach."[58]

Though the Fifth Circuit affirmed the bankruptcy court's determination that tortious conduct is not required for a debt to be nondischargeable under § 523(a)(6), it did not fully affirm the decision of the bankruptcy court.[59] The Fifth Circuit reversed the bankruptcy court's determination that the damages resulting from Williams' violation of the collective bargaining agreement were nondischargeable.[60] Williams may have acted intentionally in hiring non-union electricians, but he was not intending to harm the Union through this action; he was acting to finish the project and to save his business.[61] The Union did not introduce any evidence that when Williams breached the collective bargaining agreement he "was substantially certain

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49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 508.
53. *Id.*
54. *Id.*
55. *See id.* at 510 (citing Texas v. Walker, 142 F.3d 813, 823 (5th Cir. 1998)).
56. *Id.* at 509 (citing Miller v. J.D. Abrams, Inc. (*In re* Miller), 156 F.3d 598, 603 (5th Cir. 1998)) (internal quotation marks omitted).
57. *Id.*
58. *Id.* at 510.
59. *Id.* at 513.
60. *Id.*
61. *Id.* at 510.

the Union would sustain a blow to its prestige and its ability to uphold its contracts."[62] Since there was no showing that Williams intended or was substantially certain to cause injury to the Union through his violation of the collective bargaining agreement, the debt was dischargeable.[63]

The circuit court also affirmed the bankruptcy court's determination that Williams' violation of the agreement led to nondischargeable damages.[64] It is well established that "[f]ailure to obey a court order constitutes willful and malicious conduct, and a judgment against a defiant debtor is excepted from discharge."[65] Since Williams failed to follow the court order, his conduct was at least substantially certain to cause injury to the Union and therefore the damages resulting from his breach of the agreement were nondischargeable.[66] This ruling interprets *Geiger* to mean tortious conduct is not required to invoke the § 523(a)(6) exception to discharge, and instead only requires conduct that was intentionally undergone, or substantially certain, to cause injury.[67]

D. *WISH ACQUISITION, L.L.C. V. SALVINO*

The Ninth and Fifth Circuit's debate concerning the requirement of tortious conduct in the § 523(a)(6) exception has influenced other courts not within their jurisdiction. For example, in *Wish Acquisition L.L.C. v. Salvino*, the Bankruptcy Court for the Northern District of Illinois sided with the Ninth Circuit's determination that tortious conduct was required to invoke the § 523(a)(6) exception.[68] In this case, Salvino, the debtor, owed Wish Acquisition (Wish), his former employer, debts that were nondischargeable under § 523(a)(6) for the intentional breach of his employment contract.[69] The conflict arose after Wish acquired Salvino's medical practice and the practice subsequently defaulted on its loans.[70] When Wish acquired the practice, it entered into an employment contract with Salvino which provided that Wish would "forgive all but $1.5 million of Salvino's personal guaranty of the bank loan" in exchange for Salvino's medical services.[71] Salvino, before filing for bankruptcy, breached his employment contract by seeking other employment, making him liable to repay the $1.5

62. *Id.* at 511.
63. *Id.*
64. *Id.* at 513.
65. *Id.* at 512 (citing PRP Wine Int'l v. Allison (*In re* Allison), 176 B.R. 60, 64 (Bankr. S.D. Fla. 1994)).
66. *Id.* at 513.
67. *See id.* at 509.
68. Wish Acquisition, L.L.C. v. Salvino, 373 B.R. 578, 581 (Bankr. N.D. Ill. 2007), *aff'd*, No. 07-C-4756, 2008 U.S. Dist. LEXIS 3918 (N.D. Ill. Jan. 18, 2008).
69. *Id.*
70. *Id.* at 582.
71. *Id.* at 583.

million under a liquidated damages provision in the employment contract.[72] The court determined that Salvino's debts were dischargeable because Wish was unable to show that Salvino's intentional breach of contract resulted in a willful and malicious injury.[73]

In deciding this case, the bankruptcy court adopted the Ninth Circuit's rule that "the willful and malicious injury exception [of § 523(a)(6)] applies only to claims arising from tortious conduct, not from simple breaches of contract."[74] The first reason the court gave in deciding to adopt the Ninth Circuit rule requiring tortious conduct was due to the use of the phrase "willful and malicious injury" in § 523(a)(6).[75] Using the terms "willful and malicious" implies that the exception is limited to tortious conduct.[76] Therefore, "only debts arising from the sort of conduct that the common law discourages by punitive damages" would be nondischargeable.[77] Second, the court stated that before § 523(a)(6) was enacted, there was a willful and malicious injury exception from the discharge of debts that applied only when tortious conduct was present.[78] Since Congress enacted § 523(a)(6) with the willful and malicious standard, the court presumed that Congress meant to continue the practice of limiting the application of the exception to tortious conduct.[79] Third, the court concluded that if a broad understanding of willful and malicious conduct was adopted under § 523(a)(6), it would include debts generally discharged in bankruptcy.[80] Finally, the court reasoned that if all intentional breaches of contract were nondischargeable under § 523(a)(6), then it would come into conflict with § 365 of the Code.[81] Section 365 encourages, in certain circumstances, intentional breaches that will generally harm the other party.[82] Therefore, if § 523(a)(6) did not require tortious conduct, the Code would punish conduct that it encourages elsewhere.[83]

In this case, Salvino's breach of his employment contract was not a willful and malicious injury under § 523(a)(6) since the breach itself was not tortious.[84] Salvino owed Wish $1.5 million,[85] but this money was

72. *See id.* at 582–84.
73. *Id.* at 581.
74. *Id.*
75. *Id.* at 589.
76. *Id.*
77. *Id.* (internal quotation marks omitted).
78. *Id.*; *see also In re* Barton, 465 F. Supp. 918, 924 (S.D.N.Y. 1979) (limiting willful and malicious injury "to cases sounding in tort, not in contract").
79. *Salvino*, 373 B.R. at 590.
80. *Id.*
81. *Id.* at 591.
82. *See* 11 U.S.C. § 365 (2006).
83. *Salvino*, 373 B.R. at 591.
84. *Id.*
85. *Id.* at 586–87.

contract debt and did not arise from an independent violation of tort law.[86] The breach was not tortious because the contract was a private agreement and an intentional breach of contract does not give rise to liability under tort law.[87] Additionally, since § 523(a)(6) is not based on contract principles and instead is grounded in tort law, "[i]t is designed to compensate the injured party for the injury suffered while not allowing the debtor to escape liability for a willful and malicious injury by resort to the bankruptcy laws."[88] Since the purpose of § 523(a)(6) is to compensate an injured creditor, "the appropriate measure for non-dischargeability under § 523(a)(6) is an amount equal to the injury caused by the debtor rather than any other sum owed by the debtor on a contractual basis."[89] Though Salvino's conduct was intentional, his breach of the contract was not tortious and therefore his debt was dischargeable under the Code.[90]

While the Supreme Court in *Geiger* managed to clarify one aspect of the § 523(a)(6) exception, the Court failed to answer the question of whether tortious conduct is a prerequisite for a debt to be nondischargeable under the section. This failure has led to competing interpretations by the Ninth and Fifth Circuits that have affected other areas of the law. The differing interpretations of § 523(a)(6) by the Ninth and Fifth Circuits of whether tortious conduct is required for a debt to be nondischargeable has resulted in state and federal common law having conflicting roles in understanding the exception.

II. BANKRUPTCY LAW WITHIN THE FEDERAL AND STATE STATUTORY LANDSCAPE

Since the Ninth and Fifth Circuit rules require differing reliance on state and federal common law, it is necessary to place § 523(a)(6) in the broader legal context and understand the competing authority of federal and state governments in establishing bankruptcy standards. The Code occupies a unique place in American jurisprudence in that it is federal law that allows the states to establish competing interpretations, especially concerning exemptions.[91] Though bankruptcy law does allow for some state regulation,[92] when there is a conflict between the federal and state laws,

86. *See id.* at 592.

87. *Id.*

88. Friendly Fin. Serv. Mid-City, Inc. v. Modicue (*In re* Modicue), 926 F.2d 452, 453 (5th Cir. 1991) (internal quotation marks omitted).

89. *Id.*

90. *See Salvino*, 373 B.R. at 592.

91. For examples of such exemptions, see New York's personal property exemption statute and Texas' personal property exemption statute. N.Y. C.P.L.R. 5205 (McKinney 2009); TEX. PROP. CODE ANN. § 42.001 (Vernon 2007).

92. *See*, *e.g.*, 11 U.S.C. § 522(b)(3)(A) (2006) (defining property as "any property that is exempt under federal law . . . or state or local law that is applicable on the date of the filing of the petition . . .").

federal law will govern.[93] The federal government has authority to regulate bankruptcy as outlined in the Bankruptcy Clause, which gives the federal government the authority to enact "uniform [l]aws on the subject of [b]ankruptcies throughout the United States."[94] Despite this clear provision, there has been some debate over the proper scope of federal authority in bankruptcy.

A. DEFINING THE TRADITIONAL ROLE OF STATE LAW IN BANKRUPTCY DETERMINATIONS

Despite the fact that the Constitution clearly establishes the federal government as having authority concerning the enactment of uniform bankruptcy laws, the individual states have always had a role to play in bankruptcy.[95] In *Butner v. United States*, the Supreme Court explicitly recognized the role of the states in bankruptcy determinations.[96] The Court advocated limited federal authority in bankruptcy cases by representing the legal truism that unless there is conflicting federal regulation, state law governs.[97] The Supreme Court espoused and established the notion that state bankruptcy laws are only preempted when there is actual conflict with the federal regulation provided by the Code.[98] The dispute in *Butner* centered on competing claims for rents collected between the filing of bankruptcy and foreclosure between a bankruptcy trustee and a second mortgagee.[99] When the Supreme Court granted certiorari, it did not intend to determine whether the state law was properly applied.[100] Instead, the Court was concerned with whether the federal statutes that govern the administration of bankrupt estates were correctly interpreted.[101] Since state law defines and creates property interests, unless there is "some federal interest [that] requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."[102] The Court sought to ensure the uniform treatment of property within a state, regardless of whether the suit was in federal or state courts, "to reduce uncertainty . . . discourage forum shopping, and . . . prevent a party from receiving 'a windfall merely by

93. U.S. CONST. art. VI, cl. 2.
94. U.S. CONST. art. I, § 8, cl. 4.
95. *See*, *e.g.*, Tower Grove Bank & Trust Co. v. Weinstein (*In re* Hallenberg-Wagner Motor Co.), 119 F.2d 120, 122 (8th Cir. 1941) ("In this circuit the law is settled that the construction of mortgages is governed by local state law.").
96. *See generally* Butner v. United States, 440 U.S. 48 (1979).
97. *See id.* at 54.
98. *Id.*
99. *Id.* at 49.
100. *Id.* at 51.
101. *Id.*
102. *Id.* at 55.

reason of the happenstance of bankruptcy.'"[103] The Court in *Butner* held that "the federal bankruptcy court should take whatever steps are necessary to ensure that the mortgagee is afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensued."[104]

Since *Butner* was decided,[105] there has been movement in the federal bankruptcy courts to rely on federal common law for definitional purposes to ensure uniformity among the states.[106] The basic premise of *Butner* holds true, but its scope has been limited to a definitional role, with the federal courts increasingly relying on federal common law, rather than state law, to settle any ambiguities in the Code.[107]

B. THE SHIFT TO USING FEDERAL COMMON LAW TO DEFINE TERMS THAT ARE AT ISSUE

While not directly contradicting the truism found in *Butner*, the Court in *United States v. Craft* shifted away from the dominance of state definitions in the application of federal bankruptcy law, and instead focused on using federal common law to define relevant terms.[108] In *Craft,* the Court was concerned with "whether a tenant by the entirety possesses 'property' or 'rights to property' to which a federal tax lien may attach."[109] The Court determined that the tenant by the entirety possessed "property" or "rights to property" for the purposes of federal law, and while the state may make a different choice concerning state creditors, that choice is not binding on federal courts.[110] Instead, federal courts should "look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, [and] then to federal law to determine whether the taxpayer's state-delineated rights qualify as property or rights to property within the compass of the federal tax lien legislation."[111] *Craft* did not completely reject the truism found in *Butner*, but instead, merely

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103. *Id.* (quoting Lewis v. Mfrs. Nat'l Bank, 364 U.S. 603, 609 (1961)).

104. *Id.* at 56.

105. The decision in *Butner* has been superceded by the new bankruptcy code, however "*Butner's* core principles remain 'good law,' as it has been re-articulated by the High Court since the advent of the Bankruptcy Code." *See In re* Pruitt, 401 B.R. 546, 564 (2009).

106. *See* United States v. Craft, 535 U.S. 274, 278–79 (2002) ("State law determines only which sticks are in a person's bundle. Whether those sticks qualify as 'property' for purposes of the federal tax lien statute is a question of federal law.").

107. *See id.* at 288 (state law definition of property rejected in favor of a definition from federal common law); *see also* Rousey v. Jacoway, 544 U.S. 320, 330 (2005) (state law is not even mentioned in the analysis when the Court is filling in blanks in the Bankruptcy Code).

108. *See Craft*, 535 U.S. at 288.

109. *Id.* at 276.

110. *Id.* at 288.

111. *Id.* at 278 (quoting Drye v. United States, 528 U.S. 49, 58 (1999)) (internal quotation marks omitted).

represented a movement toward the establishment of a federal common law defining the scope of the Code.[112]

C. THE EXPANSION OF FEDERAL COMMON LAW IN DETERMINING THE APPLICABILITY OF BANKRUPTCY LAW

Expanding on the conception of a federal common law for definitional purposes as envisaged by *Craft*, the Supreme Court later firmly established that the question of whether a debt is dischargeable is a separate federal inquiry that should take place in bankruptcy court, not earlier in state court when the nondischargeability of debts is not at issue.[113] In *Archer v. Warner*, the Warners agreed to pay the Archers in order to settle a fraud claim.[114] However, after the Warners missed their first payment, they filed for bankruptcy.[115] The Archers claimed that the Warners' debt was nondischargeable because it was for money obtained by fraud.[116] The bankruptcy court, district court, and the court of appeals denied the Archers' claim and determined that the debt was dischargeable.[117] The Supreme Court reversed stating that "the mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry into the true nature of the debt."[118] *Archer* definitively settled the issue that the bankruptcy court can weigh all evidence by looking beyond the record of state court proceedings when determining whether a debt is nondischargeable.[119] Yet, in *Rousey v. Jacoway*, the Court did not expand on the notion of a federal common law existing for definitional purposes as *Archer* did. Instead, *Rousey* is merely a recent example of federal common law being applied to a bankruptcy exemption.[120] The Court in *Rousey* asked "whether debtors can exempt assets in their Individual Retirement Accounts ("IRAs") from the bankruptcy estate pursuant to § 522(d)(10)(E)."[121] The § 522(d)(10)(E) exemption allows a debtor to remove his right to receive "a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor" from the bankruptcy estate.[122] The bankruptcy court, the bankruptcy appellate panel, and the court of appeals determined

112. *See id.* at 288.
113. Archer v. Warner, 538 U.S. 314, 321 (2003) (citing Brown v. Felsen, 442 U.S. 127, 134 (1979)).
114. *Id.* at 317.
115. *Id.* at 317–18.
116. *Id.* at 318.
117. *Id.*
118. *Id.* at 320–21 (quoting *Brown*, 442 U.S. at 138) (internal quotation marks omitted).
119. *See id.* at 321 (citing *Brown*, 442 U.S. at 138–39).
120. *See generally* Rousey v. Jacoway, 544 U.S. 320 (2005).
121. *Id.* at 322.
122. 11 U.S.C. § 522(d)(10)(E) (2006).

that the debtors' right to payment did not meet all of the statutory factors. Therefore, the IRAs were not exempt from the bankruptcy proceedings.[123] The Supreme Court reversed and determined that IRAs could be exempted from the bankruptcy estate under § 522(d)(10)(E).[124]

In the context of this note, *Rousey* is not important for the decision itself, but rather for how it was reached. When the Court determined that the exemption applied, the Court did not consider state law, relying on an analysis grounded in federal common law.[125] Specifically the Court noted that the Code did not define the relevant terms, and looked "to the ordinary meaning of [those] terms" within the federal common law instead of state law.[126] *Rousey* illustrates the scope of the *Archer* expansion by demonstrating that the application of federal common law extended beyond the applicability of bankruptcy law in general and instead is applicable in defining exemption terms.

III. APPLICATION OF PRINCIPLES IN DECIDING THE CIRCUIT SPLIT

Though the Ninth and Fifth Circuits' interpretations necessitate different roles concerning the incorporation of federal and state common law into § 523(a)(6), the differing reliance on either federal or state common law does not make either interpretation fundamentally unsound. However, the Ninth Circuit rule is superior because it is more protective of debtors, is supported by the legislature's drafting intent, and is not subject to abuse by creditors or debtors.

A. NINTH CIRCUIT RULE AND THE ROLE OF STATE AND FEDERAL COMMON LAW

The Ninth Circuit rule concerning the nondischargeability of debts under § 523(a)(6) is a fundamentally sound statutory interpretation, but, since tortious conduct is not defined within the Code, there is conflict over whether state or federal common law should define the term.[127] Depending on which standard is adopted, different conduct will be excepted from discharge under the Ninth Circuit rule. If courts apply the truism from *Butner*, state law will define what constitutes tortious conduct.[128] However,

123. *Rousey*, 544 U.S. at 324–25.

124. *Id.* at 326.

125. *See id.* at 327–32 (analyzing whether the debtor's right to payment meets the requirements of the § 522(d)(10)(E) exception without invoking, or even mentioning state law, and instead relying on a purely federal analysis).

126. *Id.* at 330.

127. *See* 11 U.S.C. § 523(a)(6) (2006).

128. Butner v. United States, 440 U.S. 48, 54 n.9 (1979) ("[S]tate laws are thus suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress.").

if the courts apply the reasoning found in *Craft* or *Archer*, the courts will look to federal common law to define tortious conduct.[129]

While the Supremacy Clause of the United States Constitution would generally govern this conflict of competing interpretations, a determination of what constitutes tortious conduct is an activity generally left to the states.[130] Traditionally, states have been granted the authority to establish tort law because the determination of what constitutes tortious conduct is representative of a public policy decision to regulate.[131] In addition to tradition, defining what conduct is tortious should be left to the states so as to ensure the uniform application of bankruptcy law by both state and federal courts within a state. This will reduce uncertainty over what conduct is exempted, discourage forum shopping by debtors and creditors, and prevent a party from being benefited because the action is a bankruptcy proceeding.[132]

Furthermore, the federal definition of "tortious conduct" is inappropriate in the application of § 523(a)(6) because unlike *Craft*, there is no predefined common law since the Code does not define the term tortious conduct.[133] And while *Archer* may expand on the federal definitional power found in *Craft*, it does so by requiring a federal inquiry in bankruptcy court when the dischargeability of debts in bankruptcy is at issue.[134] This inquiry does not require the application of state or federal common law to define a term, but merely ensures that bankruptcy courts weigh all of the evidence when determining if a debt is nondischargeable.[135] Defining what constitutes tortious conduct must be done on the state level in order to ensure that local interests are represented in a uniform manner within the state.[136] In turn, this will necessitate reliance on the *Butner* Court's decision to incorporate state tort law into the Code.

Following the *Butner* Court's rationale may be disconcerting because it could lead to a different application and analysis of claims grounded in bankruptcy on a state-by-state basis. For example, in the hypothetical state

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129. *See* Archer v. Warner, 538 U.S. 314, 321 (2003); United States v. Craft, 535 U.S. 274, 278 (2002).

130. HENRY COHEN & VANESSA K. BURROWS, FEDERAL TORT REFORM LEGISLATION: CONSTITUTIONALITY AND SUMMARIES OF SELECTED STATUTES, CRS REPORT FOR CONGRESS (July 7, 2008), *available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/95797_07072008.pdf ("Tort law at present is almost exclusively state law rather than federal law.").

131. *See* Retherford v. AT&T Commc'n, 844 P.2d 949, 974 (Utah 1992) ("The common law of tort expresses public policy . . . .").

132. *Butner*, 440 U.S. at 55.

133. 11 U.S.C. § 523(a)(6) (2006); *see Craft*, 535 U.S. at 283 (explaining that the language of 26 U.S.C. § 6321 is broad and shows congressional intent to reach all the property a taxpayer may have).

134. *See Archer*, 538 U.S. at 321.

135. *See id.*

136. *See Butner*, 440 U.S. at 55.

of Guntopia, suppose there is a law exempting all responsibility for harm caused by firing a gun on one's own property. The Ninth Circuit rule, under the *Butner* standard, would allow someone who damaged another's property, with a gun used on their own property, to avoid the debt.[137] While this is an extreme example, it illustrates that reliance on the *Butner* standard could result in disparate treatment among the states for determining whether debts can be discharged in bankruptcy. Ultimately, this concern does not amount to much when one looks at how the Ninth Circuit rule has been applied. For example, in the *Jercich* decision, the court looked to California law to determine whether the nonpayment of wages by an employer was tortious conduct.[138] Though adoption of the Ninth Circuit rule could lead to confusion over whether state law or federal common law defines tortious conduct, the traditional exertion of power by the state, coupled with the general adoption of state standards by the bankruptcy courts, means that the state law definition of tortious conduct would be adopted.

While the requirement of tortious conduct being read into § 523(a)(6) could lead to conflict between state and federal law, the *Butner* truism effectively limits that conflict even when viewed in light of the expansive federal common law established by *Craft* and *Archer*.

B. FIFTH CIRCUIT RULE AND THE ROLE OF STATE AND FEDERAL COMMON LAW

Unlike the Ninth Circuit rule, the Fifth Circuit rule found in *Williams* invites the adoption of federal common law to define the terms. The Fifth Circuit rule requires that the "debtor must have acted with objective substantial certainty or subjective motive to inflict injury."[139] This test relies on definitional terms that can be uniformly adopted among the states, and therefore, there are no negative consequences with the adoption of a federal standard. The requirements of "objective substantial certainty" and "subjective motive" can be easily defined by federal common law so as to ensure uniformity in the application of bankruptcy law.[140] Similar to the

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137. The injury to property that would occur from an individual firing a gun on their own property would be dischargeable under § 523(a)(6) even if the individual acted in a willful and malicious manner because the state has determined that the individual's conduct is not blameworthy. *See* 11 U.S.C. § 523(a)(6) (2006).

138. *See* Petralia v. Jercich (*In re* Jercich), 238 F.3d 1202, 1207 (9th Cir. 2001); *see also* Jett v. Sicroff (*In re* Sicroff), 401 F.3d 1101, 1105 (9th Cir. 2005) (looking to California state law to determine that the libelous statements made by the debtor were tortious conduct making the damages nondischargeable under § 523(a)(6)), *amended by*, No. 03-15610, 2005 U.S. App. LEXIS 5919 (9th Cir. Apr. 11, 2005).

139. Williams v. Int'l Bhd. of Elec. Workers Local 520 (*In re* Williams), 337 F.3d 504, 509 (5th Cir. 2003) (citing Miller v. J.D. Abrams, Inc. (*In re* Miller), 156 F.3d 598, 603 (5th Cir. 1998)) (internal quotations omitted).

140. The reason these terms can be adopted easily on a federal level is because they are terms of art that are used in a consistent manner among the states. The term "objective substantial certainty" is applied in the same manner by the Fifth Circuit and in a bankruptcy court in Ohio.

rationale by the Court in *Rousey*, the terms found in the Fifth Circuit test can be easily defined by looking to the ordinary meaning of those terms.[141] In addition to *Rousey*, the Court in *Archer* established that federal common law could be used to define terms in bankruptcy.[142] The adoption of federal common law to define the terms found in the Fifth Circuit test is appropriate because of the uniform nature of the terms and the interest in establishing uniform application of the law among the states.

While the Fifth Circuit rule embraces the modern trend of using federal common law in interpreting the Code, there is concern that the test is not fundamentally sound since it conflates the willful and malicious requirement. The Fifth Circuit, relying primarily on the Supreme Court's reasoning in *Geiger*, determined that § 523(a)(6) creates an implied malice standard, and that "[a] debtor acts with implied malice when he acts with the actual intent to cause injury."[143] While it is possible that the Fifth Circuit could rely on the vagueness of the statute to justify its implied malice standard, since the fact that the statute reads "willful and malicious" could be interpreted as meaning that the injury be both willful and malicious, the statute could also be disjunctive and refer to a "willful injury" or a "malicious injury" as being adequate for an exception from discharge. However, the conflation misconstrues both the nature and the plain language of the *Geiger* decision, which did not address whether the doctor's conduct was malicious and merely focused on whether the doctor caused a willful injury to the patient.[144] Furthermore, as the Ninth Circuit has noted, conflating the willful and malicious standards of § 523(a)(6) contravenes established precedent.[145] Since the Supreme Court did not address the malicious requirement in *Geiger*, the Fifth Circuit has

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See, *e.g.*, Berry v. Vollbracht (*In re* Vollbracht), 276 F. App'x. 360, 361 (5th Cir. 2007) (defining "objective substantial certainty" as an objective test where the court looks at whether the debtor's actions were at least substantially certain to result in injury); J. Bowers Constr. Co. v. Williams (*In re* Williams), 233 B.R. 398, (Bankr. N.D. Ohio 1999) (the "objective substantial certainty" test was applied in an objective manner where the court looked at whether the debtor's actions in withdrawing funds from a joint savings account were intended to cause injury to the plaintiff). In addition to the consistent treatment of "objective substantial certainty," the term "subjective motive" is also treated in a consistent manner amongst the various states. *See*, *e.g.*, *Berry*, 276 F. App'x at 362 ("subjective motive" is used to determine whether the debtor's intentional actions were intended to cause harm to the plaintiff); Branch Banking & Trust Co. v. Powers (*In re* Powers), 227 B.R. 73, 76 (Bankr. E.D. Va. 1998) (the "subjective motive" test "requires [courts] to focus on the subjective intent of the debtor to determine whether the injury was intended or unintended"). This is in contrast to "tortious conduct," a term that the individual states have vested interests in defining. *See Butner*, 440 U.S. at 55.

141. *See* Rousey v. Jacoway, 544 U.S. 320, 330 (2005).

142. *See* Archer v. Warner, 538 U.S. 314, 321 (2003).

143. *In re Williams*, 337 F.3d at 509 (quoting *In re Miller*, 156 F.3d at 606) (internal quotations omitted).

144. *See* Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998).

145. Jett v. Sicroff (*In re* Sicroff), 401 F.3d 1101, 1107 (9th Cir. 2005), *amended by*, No. 03-15610, 2005 U.S. App. LEXIS 5919 (9th Cir. April 11, 2005).

misconstrued that case's interpretation of § 523(a)(6) by conflating the willful and malicious standard into a single test.[146]

The fact that the Ninth Circuit rule relies on state common law to define tortious conduct, and the Fifth Circuit rule relies on federal common law to define its terms does not affect the soundness of the rules. Though there could be some concern that the Ninth Circuit rule is an example of judicial rule making, this concern is unfounded because its interpretation can be reconciled with the statute's legislative history and the rules of statutory construction.[147] On the other hand, there is serious concern that the Fifth Circuit's conflation of the willful and malicious injury requirement into a single test comes into conflict with the Supreme Court's decision in *Geiger* and established precedent. Though this conflict does not make the Fifth Circuit rule fundamentally unsound, it does make the Ninth Circuit rule more attractive.

C. PROTECTIVE OF DEBTORS

In addition to the Ninth Circuit rule being a more attractive rule for constructionary reasons, the Ninth Circuit rule is also more protective of debtors. It is well established in the United States that the purpose of bankruptcy is "to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."[148] The fresh start afforded to the honest debtor gives the debtor "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[149] However, the policy for relief in bankruptcy being accorded to the honest debtor is not absolute and "the fresh start [policy of the Code] does not extend to an *in rem* claim against property but is limited to a discharge of personal liability."[150]

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146. It is possible, however, that the Supreme Court has implicitly approved of the Fifth Circuit's condensing of the malice and willful requirements, since the Court denied certiorari to *Miller v. J.D. Abrams, Inc.* (*In re Miller*), 156 F.3d 598 (5th Cir. 1998), the case that established the implied malice standard. *See* Miller v. J.D. Abrams, Inc. (*In re* Miller), 526 U.S. 1016 (1999). Nevertheless, this result is a stretch and is reading too much into the Court's decision to deny certiorari. United States v. Carver, 260 U.S. 482, 490 (1922) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case . . . ."). Even though the Fifth Circuit rule misreads the Court's decision in *Geiger* by conflating the willful and malicious requirements, it is not clear that the rule is not fundamentally sound since *Geiger* merely focused on what constituted an intentional injury and did not address what constituted a malicious injury. *See Geiger*, 523 U.S. at 61.

147. See *infra* the subsequent discussion concerning the role of legislative history and the rules of statutory construction in Part III.D.

148. Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915).

149. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

150. Dewsnup v. Timm, 502 U.S. 410, 416 (1992).

While it was clear as early as 1915 that the purpose of the Code was to give the honest debtor a fresh start,[151] before the enactment of the Code reform in 1978 secured creditors were able to abuse the system at the debtors' expense.[152] The Bankruptcy Reform Act of 1978 took steps to prevent abuse by creditors and the wide-sweeping changes resulted in the Code having a pro-debtor bias.[153] Yet, many of the amendments to the Code after 1978 have been passed to level the playing field, and even in some instances, favor creditors in bankruptcy.[154] Despite "the policy winds hav[ing] turned angrily from the dew-dropping pro[-]debtor south to the frozen bosom of the pro[-]creditor north,"[155] the fundamental purpose of the Code remains the same: to give the honest debtor a fresh start.[156]

The Ninth Circuit rule is more protective of debtors and is more lenient in allowing them to discharge their debts in bankruptcy proceedings. As shown in *Jercich* and *Salvino*, the Ninth Circuit rule only prevents debts from being dischargeable when the debtor has intentionally and maliciously caused injury to the creditor through tortious conduct.[157] By requiring tortious conduct in addition to a malicious and willful injury, the Ninth Circuit rule makes it harder for debtors to have their debts declared nondischargeable.[158] In addition to being protective of debtors, the requirement of tortious conduct involves a determination of the debtor's "honesty," or his blameworthiness, thus making the rule congruent with the purpose of bankruptcy.[159] For example, in *Jercich*, the debtor was "dishonest" because he breached California public policy in failing to pay the wages of one of his employees and therefore his debt was nondischargeable,[160] while the debtor in *Salvino* was "honest" because an intentional breach of an employment contract was not a violation of Illinois public policy.[161] The Ninth Circuit rule serves the fundamental purpose of

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151. *See id.*; *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. at 555.

152. *See* David Gray Carlson, *The Rotten Foundations of Securitization*, 39 WM. & MARY L. REV. 1055, 1065–66 (1998) ("Prior to the enactment of the Bankruptcy Code in 1978, secured creditors ruled the sea like so many pirates, boarding distressed debtor vessels to expropriate cargo, forcing these debtors to scuttle themselves.").

153. *See id.* at 1064.

154. *Id.* (for example, see 11 U.S.C. § 522(f)(3) (2006), which was originally added in 1994, and strongly favors creditors at the expense of debtors).

155. *Id.*

156. *See*, *e.g.*, Martin v. Bajgar (*In re* Bajgar), 104 F.3d 495, 501 (1st Cir. 1997).

157. Petralia v. Jercich (*In re* Jercich), 238 F.3d 1202, 1205 (9th Cir. 2001); Wish Acquisition, L.L.C. v. Salvino, 373 B.R. 578, 581 (Bankr. N.D. Ill. 2007), *aff'd*, No. 07-C-4756, 2008 U.S. Dist. LEXIS 3918 (N.D. Ill. Jan. 18, 2008).

158. *See*, *e.g.*, *Salvino*, 373 B.R. at 592 (although Salvino falsely represented the fact that he intended to work for Wish, his breach of contract was not tortious).

159. *See* Retherford v. AT&T Commc'n, 844 P.2d 949, 974 (Utah 1992) (tort law is an expression of public policy).

160. *In re Jercich*, 238 F.3d at 1206–07.

161. *Salvino*, 373 B.R. at 592.

bankruptcy by protecting honest debtors and preventing dishonest debtors from discharging their debts.[162]

On the other hand, the Fifth Circuit rule that combines the willful and malicious injury requirement into a single determination of whether the debtor "acted with objective substantial certainty or subjective motive to inflict injury" is not protective of debtors.[163] By conflating the willful and malicious requirements, the Fifth Circuit rule requires a single determination of whether a debtor's conduct can be nondischargeable. In addition to the rule being easily satisfied, the Fifth Circuit rule does not make any attempt to distinguish between an honest and dishonest debtor.[164] By failing to incorporate any degree of blameworthiness into the determination, the Fifth Circuit rule is as likely to allow a dishonest debtor to discharge her debts as to prevent an honest debtor from doing so.

While the Fifth Circuit rule provides debtors some protection by requiring intentional action on the part of the debtor, the Ninth Circuit rule is more protective by having multiple elements and a determination of blameworthiness through the requirement of tortious conduct. The Ninth Circuit rule is better because it is more protective of debtors in general, and more importantly, it makes an effort to protect honest debtors in accordance with the purpose of the Code.

D. INTENT OF THE LEGISLATURE

Besides being more protective of debtors, the Ninth Circuit rule is more in line with the intent of the legislature and the rules of statutory construction. Concerning the passage of amendments to the Code, "[w]hen Congress amends the bankruptcy laws, it does not write on a clean slate."[165] This means that modifications to the Code do not replace established case law; instead, amendments are understood in light of previous interpretations except where the common law is explicitly overruled.[166] Further, when there is a dearth of discussion concerning a modification to existing case law in the legislative history, the Supreme Court has been reluctant to interpret an amendment to the Code that contradicts a pre-Code practice.[167] In practice, when a provision of the Code "is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the

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162. *See In re Jercich*, 238 F.3d at 1206.

163. Williams v. Int'l Bhd. of Elec. Workers Local 520 (*In re* Williams), 337 F.3d 504, 509 (5th Cir. 2003) (citing Miller v. J.D. Abrams, Inc. (*In re* Miller), 156 F.3d 598, 603 (5th Cir. 1998)) (internal quotation marks omitted).

164. *See*, *e.g.*, Red v. Baum (*In re* Red), 96 F. App'x 229, 231 (5th Cir. 2004). Despite the fact that the debtor's act of running a car into a crowded bar constituted tortious conduct, the court did not address the debtor's blameworthiness in holding his debt nondischargeable and instead focused on whether the debtor's actions were objectively certain to cause harm. *Id.*

165. Dewsnup v. Timm, 502 U.S. 410, 419 (1992) (internal quotation marks omitted).

166. Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991).

167. *Dewsnup*, 502 U.S. at 419.

statute."[168] But, when interpreting a provision of the Code that is open to some interpretation, the court may look to legislative history and the pre-Code practice.[169]

Section 523(a)(6) may not be facially ambiguous, but given the divergent treatment among the circuits, it is necessary to look at earlier practice and the legislative history to determine whether tortious conduct is required.[170] Looking at the practice of the judiciary before § 523(a)(6) was added to the Code, the Ninth Circuit rule is more in line with past practice. Before § 523(a)(6) was codified in 1978, § 17(a)(8) of the Bankruptcy Act of 1898 had a willful and malicious injury exception from discharge that applied only where there was tortious conduct.[171] By voluntarily reenacting the willful and malicious injury requirement for nondischargeability from the old § 17(a)(8) into § 523(a)(6), it is safe to assume that Congress intended to continue limiting the application of this exception to tortious conduct.[172] This assumption comes from the fact that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."[173] Since the language of the old bankruptcy exception found in § 17(a)(8) is the same as the current language found in § 523(a)(6),[174] unless there is contrary language in the legislative history the requirement of tortious conduct will continue unabated.[175] Additionally, when a common law principle is firmly established, like the requirement of tortious conduct to invoke the willful and malicious injury exception, "the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident."[176]

Looking to the legislative history, the Ninth Circuit rule is congruent with established rules of statutory construction. The legislative history of § 523(a)(6) merely discusses that the Supreme Court's ruling in a prior case had been overruled.[177] Therefore, "willful" means intentional or

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168. United States v. Ron Pair Enter., 489 U.S. 235, 240–41 (1989).

169. *See id.* at 246.

170. *See id.*

171. Wish Acquisition, L.L.C. v. Salvino, 373 B.R. 578, 589 (Bankr. N.D. Ill. 2007), *aff'd*, No. 07-C-4756, 2008 U.S. Dist. LEXIS 3918 (N.D. Ill. Jan. 18, 2008).

172. *See id.* at 590.

173. Lorillard v. Pons, 434 U.S. 575, 580 (1978).

174. *Salvino*, 373 B.R. at 589 ("[B]efore the enactment of § 523(a)(6) in the 1978 Bankruptcy Code, a 'willful and malicious injury' exception from discharge was set out in § 17(a)(8) of the Bankruptcy Act of 1898, and was applied only in situations of tortious conduct.").

175. *See* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991).

176. *Id.* (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)) (internal quotation marks omitted).

177. In the legislative changes concerning § 523(a)(6), the only change mentioned is that the Supreme Court case *Tinker v. Colwell*, 193 U.S. 473 (1902), was overruled. *See* S. REP. NO. 95-989, at 79 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865.

deliberate.[178] However, there is nothing in the legislative history suggesting that the scope of the § 523(a)(6) exception has been expanded to cover claims of malicious and willful injury that do not involve an independent tort action.[179] Further, when discussing the modifications to § 523 generally, the legislative discussion makes no mention of § 523(a)(6),[180] and where there is no discussion it is likely that the pre-Code practice is still applicable.[181] Since there is no discussion in the legislative history of modifying § 523(a)(6) to cover claims of malicious and willful injury that do not involve an independent tort action, the Ninth Circuit rule should be adopted.

It is necessary to look at the pervasiveness of past practice and legislative history to determine whether the prior practice is still the current rule under the Code, because the modification of the Code does not occur on a clean slate.[182] Past practice will govern unless there is clear intent either in the statute or in the legislative history to overrule the past practice.[183] When Congress adopted the language of § 17(a)(8) without modifying it or discussing changes, the case law requiring tortious conduct for a debt to be nondischargeable still governed. Since the Fifth Circuit rule does not require tortious conduct and the Ninth Circuit rule does, the Ninth Circuit rule is more harmonious with the rules of legislative history and statutory construction.

E. ABUSE BY THE DEBTOR AND THE CREDITOR

Beyond being more protective of debtors and more in line with legislative intent, the Ninth Circuit rule cannot be as easily manipulated by either party for an unfair advantage while the Fifth Circuit rule can be easily abused by a creditor. While the underlying purpose of the Code, in allowing the honest debtor to start afresh, is pro-debtor,[184] bankruptcy does not unduly favor debtors at the expense of creditors.[185] Given this dichotomy, it becomes necessary to interpret the Code in such a manner that creditors do not lose their rights but debtors are protected in accordance with the purpose of the Code.[186] Although it is true that the balancing of debtors and

178. S. REP. NO. 95-989, at 79.

179. *See id.* (does not mention modifying the statute to no longer require tortious conduct).

180. *See* Crime Control Act of 1990, Pub. L. No. 101-647, sec. 2522, 104 Stat. 4789, 4865–66 (1990) (codified as amended at 11 U.S.C. 523 (2006)).

181. *See* Dewsnup v. Timm, 502 U.S. 410, 419 (1992) (Without discussion in the legislative history, the Court has been reluctant to adopt an interpretation of the Bankruptcy Code that would "effect a major change in pre-Code practice . . . .").

182. *See* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991).

183. *See Dewsnup*, 502 U.S. at 419.

184. *See* Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 555 (1915).

185. *See*, *e.g.*, 11 U.S.C. § 523(a) (2006) (exceptions to discharge).

186. *See* Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 834 (1987) (stating bankruptcy policy is vague and mysterious where "bankruptcy judges have a general mandate to do equity, but not too much equity").

creditors rights in an equitable manner can result in abuse of the system, the fact that bankruptcy is an alternative avenue for the vindication of legal rights exacerbates the possibility of forum shopping.[187]

Since "[t]here is no virtue in giving parties an incentive to engage in forum shopping for its own sake," it becomes necessary to establish exception rules that do not encourage pursuing an action in bankruptcy over other legitimate legal avenues.[188] One method of limiting forum shopping in bankruptcy is to ensure that debtor/creditor rights outside of bankruptcy match those rights within bankruptcy.[189] By keeping the rights in bankruptcy and alternative legal avenues congruent, the ability of parties to misbehave is severely limited.[190] This method is superior to granting judges discretion to police the conduct of parties since judges are human, and therefore, prone to error.[191] By establishing congruent policies in and out of bankruptcy, courts can limit forum shopping and other abuses by parties.

The Ninth Circuit rule limits opportunities to forum shop by ensuring that legal rights that are protected outside of bankruptcy are protected during bankruptcy proceedings. By exempting tortious conduct from discharge, the Ninth Circuit rule establishes a bankruptcy policy grounded in legal rights. This congruent policy in the context of § 523(a)(6) ensures that violators of public policy are held responsible for the harm they cause.[192] By ensuring that violators of public policy are responsible for the harm they cause no matter what the legal proceeding, the Ninth Circuit rule does not provide an incentive for the debtor to enter into bankruptcy and gives the creditor no reason to force the debtor into bankruptcy.[193] Since the Ninth Circuit rule ensures congruence between rights in and out of bankruptcy, the rule is appropriately classified as a neutral rule into and out of bankruptcy.[194]

Though the Ninth Circuit rule ensures congruent analysis of conduct, there is concern that in practice a dishonest debtor might be able to abuse the rule to avoid his obligations to his creditor. For example, allowing the doctor in *Salvino* to avoid the debts arising out of his intentional breach of contract seems to be an abuse of the Code, since it allows a dishonest debtor

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187. *See id.* at 824–27.

188. *Id.* at 827.

189. *See id.* at 822.

190. *See id.* at 821 (when a party has an incentive to misbehave controlling their conduct is inherently difficult, but eliminating that incentive makes that party easier to police).

191. *Id.* ("Allowing someone to gamble with someone else's money is always a bad idea, even when a conscientious judge is looking over the gambler's shoulder.").

192. *See*, *e.g.*, Petralia v. Jercich (*In re* Jercich), 238 F.3d 1202, 1207 (9th Cir. 2001) (Jercich was unable to avoid damages owed through non-payment of wages to his employee even though he filed for bankruptcy).

193. *See* Baird, *supra* note 186, at 827 ("There is no virtue in giving parties an incentive to engage in forum shopping for its own sake.").

194. The Ninth Circuit rule is appropriately classified as a neutral rule into and out of bankruptcy since it does not encourage forum shopping by either the debtor or the creditor.

to swindle his creditor and escape his obligations.[195] Despite the doctor's dishonesty, his conduct is more correctly classified as an intentional breach of contract done to offset further economic loss.[196] The doctor's conduct may have been underhanded, but it was merely a breach of an agreement between private parties and did not implicate the public policy concerns underlying tort law.[197] Since Salvino did not violate any public policy in breaching his contract,[198] he is not blameworthy, and therefore is an honest debtor who is entitled to protection under the Code.[199]

By requiring tortious conduct for a debt to be nondischargeable under § 523(a)(6), the Ninth Circuit rule is firmly grounding willful and malicious injury in tort law. By doing so, the Ninth Circuit is ensuring that each challenge to the dischargeability of debts under § 523(a)(6) will be decided on a case-by-case basis after a careful weighing of objective standards that does not allow either the debtor or the creditor to use bankruptcy to their own advantage at the expense of the other party.[200]

In contrast, the Fifth Circuit rule is not neutral concerning forum shopping and has the effect of encouraging creditors to force debtors into bankruptcy. This incentive results from the lack of a requirement of tortious conduct in the determination of whether a debt is nondischargeable because of a willful and malicious injury.[201] Without the tortious conduct exception, creditors who lack a valid tort claim, or whose judgment would be limited in normal proceedings, have an incentive to push debtors into bankruptcy to ensure payment. This incentive results because the Fifth Circuit rule is easily satisfied and is sufficiently broad to cover a wide range of misconduct, including intentional breaches of contract.[202] For example, under the Fifth Circuit rule, Salvino would have been unable to discharge the debts resulting from the breach of his employment contract since he intended, or was substantially certain, to injure the creditor.[203] A creditor under the Fifth Circuit rule would have the incentive to force a debtor like Salvino into bankruptcy, so as to limit his remedies and ensure a prompt judgment for payment.

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195. *See* Wish Acquisition, L.L.C. v. Salvino, 373 B.R. 578, 592 (Bankr. N.D. Ill. 2007), *aff'd*, No. 07-C-4756, 2008 U.S. Dist. LEXIS 3918 (N.D. Ill. Jan. 18, 2008).

196. *See id.*

197. *See* Retherford v. AT&T Commc'n, 844 P.2d 949, 974 (Utah 1992) ("The common law of tort expresses public policy, the scope of which is not generally determined by reference to privately contracted obligations.").

198. *Salvino*, 373 B.R. at 592.

199. *See* Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 555 (1915).

200. *See*, *e.g.*, *Salvino*, 373 B.R. at 588–92; Petralia v. Jercich (*In re* Jercich), 238 F.3d 1202, 1206–09 (9th Cir. 2001) (examples of analysis under the Ninth Circuit rule on a case by case basis), *cert. denied*, 533 U.S. 930 (2001).

201. *See* Williams v. Int'l Bhd. of Elec. Workers Local 520 (*In re* Williams), 337 F.3d 504, 510 (5th Cir. 2003).

202. *See Salvino*, 373 B.R. at 590.

203. *See id.* at 578.

The Ninth Circuit rule is neutral as to the issue of forum shopping because it ensures equal treatment of parties in and out of bankruptcy proceedings, thus ensuring that neither party will seek the bankruptcy arena in search of a windfall.[204] In contrast, the Fifth Circuit rule does not mandate similar application of the law within bankruptcy and other legal proceedings resulting in an incentive for creditors to engage in forum shopping.[205] The Ninth Circuit's rule is superior to the Fifth Circuit's approach because, instead of merely giving judges additional authority to police abuses, it eliminates incentives to engage in forum shopping.[206]

CONCLUSION

The Ninth Circuit rule requiring tortious conduct for a debt to be nondischargeable should be universally adopted since it is more protective of debtors, more consistent with the legislative history of the statute, can be reconciled with the rules of statutory construction, and is less likely to result in forum shopping by both the debtor and the creditor. As Bankruptcy Judge Wedoff notes in *Salvino*, the use of the phrase "willful and malicious injury" suggests that the exception is limited to tortious conduct, that the legislative history seems to necessitate a finding of a tortious conduct requirement, that without a tortious conduct requirement the exception would become too broad and contravene the purpose of the Code, and that there would be conflicts between clauses of the Code if tortious conduct was not required.[207] Interpreting § 523(a)(6) to require tortious conduct is more protective of debtors because it is more difficult to satisfy and is harmonious with the overarching purpose of the Code.[208] This interpretation is also more consistent with the intent of the legislature because past practice and the rules of statutory construction necessitate a finding that tortious conduct is required to invoke the willful and malicious injury exception.[209] The Ninth Circuit rule will result in less forum shopping by either party as it ensures the equal application of law whether the action is a bankruptcy proceeding or not.[210] Since the fundamental purpose of the Code is to allow the honest debtor to start afresh[211] and the Ninth Circuit clearly fulfills that function, it should be universally adopted throughout the United States.

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204. *See* Baird, *supra* note 186, at 825.

205. *See id.* at 818 ("In a world in which workers enjoy a special priority only in bankruptcy, creditors will strive to resolve their differences outside of bankruptcy.").

206. *Id.* at 821.

207. *See Salvino*, 373 B.R. at 589–91.

208. *See* Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915) (the purpose of bankruptcy is to allow an "honest debtor" to "start afresh").

209. *See* Dewsnup v. Timm, 502 U.S. 410, 419 (1992).

210. *See* Baird, *supra* note 186, at 822.

211. *See Williams*, 236 U.S. at 555.

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* B.A., Kalamazoo College, 2007; J.D. candidate, Brooklyn Law School, 2010. I would like to thank my family for their love and support, as well as the entire staff of the Brooklyn Journal of Corporate, Financial & Commercial Law for their hard work and editing. Further, I am indebted to Professor Edward J. Janger, for his guidance and advice.