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In re Cecchini: Willful and Malicious Injury—Nondischargeability in Bankruptcy

The Bankruptcy Code¹ operates to discharge or release a debtor from all debts,² subject to express exceptions provided within the Code.³ One exception to discharge is set forth in section 523(a)(6), which makes a debt due to “‘willful and malicious’ injury to another entity⁴ or to the property of another entity” nondischargeable.⁵ The bankruptcy, district, and circuit court decisions, however, have reached inconsistent results regarding the interpretation of the phrase “willful and malicious injury.”⁶ Recently, in *In re Cecchini*,⁷ the Ninth Circuit Court of Appeals ruled that section 523(a)(6) does not require proof of an intentional injury, but instead, only requires proof of an intentional act which necessarily leads to injury.⁸

Part I of this note sets forth the facts and rationale of *In re Cecchini*.⁹ Part II discusses the legal background surrounding the interpretation of the phrase “willful and malicious” under the Bank-

1. Pub. L. 95-598, 92 Stat. 2549-2657 (codified at 11 U.S.C. §§101-151326 (1978)).

2. See 11 U.S.C. §101(11) (debt means “liability on a claim”). “Claim” is defined as (A) “a right to payment, whether or not such a right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.” *Id.* at §101(4).

3. Porter, *Bankruptcy — Survival of Liability for Willful and Malicious Injury*, 35 REF. J. 53 (1961). See generally 11 U.S.C. §523.

4. 11 U.S.C. §523(a)(6) substitutes the word “entity” for “person.” 3 COLLIER ON BANKRUPTCY §523.16 at 523-127-28. “Person” includes an individual, partners, and corporation; “entity” includes a person, estate, trust and governmental unit. *Id.* at 523-128.

5. 11 U.S.C. §523(a)(6) Title 11 U.S.C. §523 states in relevant part:

(a) A discharge under section 727, 1141 or 1328(b) of this title does not discharge an individual debtor from any debt . . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

6. Compare *In re Adams*, 761 F.2d 1422, 1425 (9th Cir. 1985) (willful and malicious injury means the “intentional doing of a wrongful act with knowledge of its probable consequences”) with *In re Compos*, 768 F.2d 1155, 1159 (10th Cir. 1985) (willful and malicious injury requires proof of intent to injure).

7. 780 F.2d 1440 (9th Cir. 1986). The Ninth Circuit Court of Appeals withdrew the opinion filed October 4, 1985 (772 F.2d 1493) and substituted the present opinion. Compare *In re Cecchini*, 772 F.2d 1493 (1985) with *In re Cecchini*, 780 F.2d 1440.

8. *Cecchini*, 780 F.2d at 1443.

9. See *infra* notes 12-42 and accompanying text.

ruptcy Code.¹⁰ Finally, Part III analyzes the legal ramifications of the *Cecchini* opinion.¹¹

I. THE CASE

A. *The Facts*

Plaintiff, operator of a hotel in Baja, Mexico, entered into an agreement with C.V.R. Investments (CVR), a partnership consisting of the defendants, Robustelli and Cecchini, and one other partner.¹² The agreement provided that CVR would attempt to induce American tourists to travel to Mexico and stay in plaintiff's hotel.¹³ As part of the agreement, plaintiff was to reimburse CVR for promotional expenses incurred, and defendants were to collect and forward prepayment checks received from American tourists to plaintiff.¹⁴

During the course of the agreement, Cecchini and Robustelli came to believe that plaintiff was not reimbursing CVR for promotional expenses.¹⁵ Acting on this belief, Cecchini instructed a CVR employee to have the prepayment checks endorsed and deposited directly into the CVR partnership account, rather than being sent to the plaintiff.¹⁶ Plaintiff discovered that defendants had converted the prepayment monies and brought suit to recover the funds and damages.¹⁷ Defendants entered into a stipulated judgment in favor of plaintiff in 1977.¹⁸ In 1981, however, each defendant filed voluntary Chapter 7 bankruptcy petitions.¹⁹

Plaintiff filed an adversary proceeding seeking a determination that the debtors' personal liabilities on the judgment were nondischargeable under the willful and malicious injury exception.²⁰ The bankruptcy court held that debtors' liabilities to plaintiff were dischargeable, and the Bankruptcy Appellate Panel affirmed.²¹ The Ninth Circuit Court of Appeals reversed.²²

10. See *infra* notes 43-131 and accompanying text.

11. See *infra* notes 132-154 and accompanying text.

12. *Cecchini*, 780 F.2d at 1441-42.

13. *Id.*

14. *Id.*

15. *Id.* In reality, the other partner of CVR not involved in the present case, William Van der Meer, had intercepted plaintiff's timely payments and converted the money to his own use without the knowledge or consent of Cecchini or Robustelli. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. See *In re Cecchini*, 37 Bankr. 671 (Bankr. 9th Cir. 1984).

22. See *In re Cecchini*, 780 F.2d at 1441.

B. The Opinion

The Court of Appeals in *Cecchini* first looked to previous judicial interpretations of "willful and malicious injury."²³ To fall within the exception of section 523(a)(6), the injury to an entity must be both willful *and* malicious.²⁴ The word willful means "deliberate or intentional."²⁵ The word malicious means "wrongful and without cause or excuse, even in absence of personal hatred, spite, or ill-will."²⁶ Therefore, the *Cecchini* court found that a wrongful act done intentionally, which necessarily results in harm and is without just cause or excuse, constitutes a willful and malicious injury.²⁷

The court relied upon *In re Adams*²⁸ to support this interpretation of the statute.²⁹ In *Adams*, the Ninth Circuit held that a finding of

23. *Cecchini*, 780 F.2d at 1442-43. The court should ascertain legislative intent when interpreting statutes. *Id.*; *Pressley v. Capital Credit & Collection Service*, 760 F.2d 922, 924 (9th Cir. 1985). The intent may be ascertained from the plain language of the statute, or from looking to the legislative history. *Id.* See generally *SANDS*, 2A SUTHERLAND STAT. CONST. §49.11 (4th Ed. 1972).

24. *Cecchini*, 780 F.2d at 1442-43. Willful and malicious are in the conjunctive. *In re McGiboney*, 8 Bankr. 987, 989 (1981); *Hartman, The Dischargeability of Debts in Bankruptcy*, 15 VAND. L.R. 13, 26; *In re Carncross*, 114 F. Supp. 119 (1953) (something more than intention is necessary to constitute malice because the words malicious and intentional are not synonymous).

25. *Cecchini*, 780 F.2d at 1443; see also H.R. Rep. No. 595, 95th Cong., 1st Sess. 363 (1977); S. Rep. No. 989, 95th Cong. 2d Sess. 77-79 (1978). The Bankruptcy Appellate Panel (BAP) interpreted "willful and malicious" as modifying the word injury. *In re Cecchini*, 37 Bankr. at 675. But see Notes of the Committee on the Judiciary of both Senate and House, which follow the actual text of the statute: "Under this paragraph, 'willful' means deliberate or intentional." *Id.* By substituting "intentional" for "willful" in the statute, the result is "intentional and malicious injury," or simply "intentional injury." *Id.* "If Congress had intended the phrase to modify the debtor's act rather than the injury, the statute would read: a debt for a willful and malicious act by the debtor causing injury to another entity or property of another entity." *Id.*

26. *Id.*; *Tinker v. Colwell*, 193 U.S. 473, 486 (1902); *In re Kearney Chemicals, Inc.*, 468 F. Supp. 1107 (1979); *Vickers v. Home Indem. Co.*, 546 F.2d 1149, 1150 (5th Cir. 1977); see also *In re Grace*, 22 Bankr. 653, 656 (1982) (malicious means wrongful and without just cause or excuse, rather than the more rigid standard requiring actual and conscious intent to do harm); *Seven Elves, Inc. v. Eskenazi*, 704 F.2d 241, 245 (5th Cir. 1983) (malicious means absence of just cause or excuse); *In re Wooten*, 30 Bankr. 357, 358 (1983) (personal ill will towards injured party is not a requirement of willful and malicious injury); *In re La Casse*, 28 Bankr. 214, 217 (1983) (neither personal animosity nor specific intention to cause damage to a particular person or thing is a requirement of willful and malicious injury). A malignant spirit or specific intention to hurt a particular person is not an essential element. *Tinker*, 193 U.S. at 486. Malice means an injurious act which demonstrates a "depraved inclination" to disregard the rights of others. *Id.* at 486-87.

27. *Cecchini*, 780 F.2d at 1443; *Tinker*, 193 U.S. at 487.

28. 761 F.2d 1422 (9th Cir. 1985).

29. *Cecchini*, 780 F.2d at 1443. Regarding statutory construction, the court in *Adams* found that when a former statute is amended, or a doubtful meaning clarified by subsequent legislation, such amendment or legislation is strong evidence of legislative intent of the first statute. *Adams*, 761 F.2d at 1427; *Sands*, *supra* note 23, at §49.11; *Clements v. T.R. Bechtel Co.*, 43 Cal. 2d 227 (1954). Whether a subsequent statute or amendment sheds light on the meaning of a former statute depends upon the circumstances under which the additional legislation takes

specific intent to injure was not required to support a finding that the act falls within the scope of section 523(a)(6).³⁰ Moreover, proof that the defendant had knowledge of the probable consequences of an act was not necessary to show willfulness and maliciousness.³¹ Instead, the *Adams* court ruled that nondischargeability is measured by the nature of the *act*, rather than by the nature of the *liability*.³² Thus, according to the *Adams* court, all liabilities resulting from intentional tortious acts are nondischargeable.³³

place. 2A Sands, *supra* note 23 at 49.11. The court in *Adams* viewed the existing conflict among the bankruptcy and circuit courts as an indication that a subsequent amendment is intended to clarify, rather than change, existing law. *Adams*, 761 F.2d at 1427; *see also* 2A Sands, *supra* note 23 at §49.11.; *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984); *Brown v. Marquette Savings and Loan Assoc.*, 686 F.2d 608, 615 (7th Cir. 1982) ("one method of interpreting the significance of subsequent amendments to a statute takes dispute or ambiguity, such as a split in the circuits, to be an indication that a subsequent amendment is intended to clarify, rather than change, the existing law."); *United States v. Tapert*, 625 F.2d 111, 121 (6th Cir. 1980), *cert. denied* 449 U.S. 952 ("an amendment to an existing statute is not an acknowledgement by Congress that the original statute is invalid"). A common and customary legislative procedure is to enact amendments to strengthen and clarify existing law. *Id.* Accordingly, the court in *Adams* found that Congress enacted §523(a)(9) to clarify the ambiguity of §523(a)(6). *Adams*, 761 F.2d at 1427. Section 523(a)(9) provides that debts arising out of judgments for injuries resulting from drunk driving are nondischargeable. 11 U.S.C. §523(a)(9). Injuries resulting from drunk driving have generally not been determined to constitute intentional injuries, but rather, merely intentional acts resulting in injury. *See e.g.*, *Matter of Wooten*, 8 Collier Bankr. Cas. 994 (1983); *In re Compos*, 768 F.2d 1155 (1985). Therefore, an intentional act resulting in injury is sufficient to support a finding of willfulness and malice as contemplated by §523(a)(6). *Adams*, 761 F.2d at 1427-28.

But see 2A Sands, *supra* note 23 at §49.11 (many cases hold that a statute is amended or changed, thus resolving doubtful meaning, to evidence that the previous statute meant the contrary). This theory is based on the fact that the legislature is not presumed to perform a useless act. *Id.*

30. *Adams*, 761 F.2d at 1427; *In re Coen*, 458 F.2d 326, 329 (9th Cir. 1972).

31. *Cecchini*, 780 F.2d at 1443.

32. *Coen*, 458 F.2d at 329. Both compensatory and punitive damages may be awarded by the jury for willful and malicious injuries, and when the record clearly indicates that compensatory damages were awarded for willful and malicious acts, that award is not dischargeable in bankruptcy, and neither is the award for punitive damages. *Id.* In other words, courts generally look behind judgments to the nature of the action in which the judgments were rendered. Bankr. L. Ed. §7:122 at 130; 9A Am Jur 2d *Bankruptcy* §805 at 555. *See e.g.*, *Greenfield v. Tuccillo*, 129 F.2d 854, 856 (2d Cir. 1972) (form of judgment itself does not control the issue of dischargeability of liability arising out of willful and malicious injury, and the entire record may be referred to in determining the dischargeability); *Jaco v. Baker*, 148 P.2d 938, 942 (1944) (when the action was predicated on a willful and intentional act, namely, the keeping of a vicious dog with knowledge of the dog's viciousness, the fact that the judge instructed the jury that punitive damages could not be awarded did not establish that the judgment in the action was necessarily dischargeable in bankruptcy); *In re Wernecke*, 1 F. Supp 127, 128 (1932) (failure of the jury to award exemplary damages did not render a judgment meeting other requirements for §523(a)(6) exemption dischargeable).

33. *Cecchini*, 780 F.2d at 1443; *Adams*, 761 F.2d at 1428; *see also* *Coen*, 458 F.2d at 329 (nondischargeability of liability is measured by the nature of the act); *In re Franklin*, 726 F.2d 606, 610 (10th Cir. 1984) ("willful and malicious" requires the intentional doing of an act which necessarily leads to injury"); *Matter of Quezada*, 718 F.2d 121, 123 (5th Cir. 1983) (willful means a deliberate and intentional act which necessarily leads to injury); *In re DeRosa*, 20 Bankr. 307, 313 (1982) (intent to do the wrongful act is sufficient to constitute willful and malicious).

The court in *Cecchini* next attacked the issue of whether the debt arising out of the specific act of conversion was nondischargeable.³⁴ The court held that conversion, if committed intentionally and without justification or excuse, constitutes willful and malicious injury.³⁵ Further, proof of malice toward the individual is not required to render the debt nondischargeable.³⁶ Accordingly, intentional conversion necessarily produces harm and is without just cause or excuse, and therefore, is willful and malicious, even absent proof of a specific intent to injure.³⁷ The court determined that Cecchini clearly intended to convert the plaintiff's funds to CVR, and Cecchini succeeded.³⁸ Consequently, Cecchini's debt to plaintiff was held nondischargeable.³⁹

Addressing the applicability of section 523(a)(6) to the dischargeability of Cecchini's partner, Robustelli, the court found that the record revealed no evidence that Robustelli was directly involved in converting the funds. Robustelli and Cecchini, however, were partners in CVR.⁴⁰ Furthermore, Cecchini was acting on behalf of the partnership and in the ordinary course of business of the partnership when he converted the funds.⁴¹ Thus, applying basic principles of partnership law, the court imputed Cecchini's knowledge and intent to Robustelli in finding that Robustelli's debt was also nondischargeable.⁴²

34. *Cecchini*, 780 F.2d at 1443.

35. *Id.*; 3 Collier *supra* note 4 §523, at 523-130; see e.g., *In re McCloud*, 7 Bankr. 819 (1980) (debtor's disposition of livestock securing loans constituted a conversion of bank's property; debt was therefore nondischargeable); *In re Auvenshine*, 9 Bankr. 772 (1981). A technical conversion, however, may not be deemed willful or malicious. *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934).

36. *McIntyre v. Kavanaugh*, 242 U.S. 138, 142 (1916); *In re DeRosa*, 20 Bankr. at 313; *In re McGibboney*, 8 Bankr. 987, 989 (1981); see e.g., *In re Jordan*, 12 Bankr. Ct. Dec. 1135 (debtor's intentional sale of stock certificates which debtor knew were mistakenly credited to her account, though not motivated by any animosity toward the brokerage house, demonstrates the type of malice addressed in §523(a)(6)).

37. *Cecchini*, 780 F.2d at 1443.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* The Uniform Partnership Act provides that a partnership is liable for the debts incurred when one partner, acting within the scope of his apparent authority, commits an act of conversion. 60 Am Jur 2d *Partnership* §167 (1964). Individual partners are also liable when the partnership in the course of business receives money or property which is misapplied by any partner while the money or property is in the custody of the partnership. *Id.* Note, however, that neither the firm nor other innocent partners are liable for conversion which is not effected in the course of the firm's business. *Id.*

42. *Cecchini*, 780 F.2d at 1444; see *McIntyre v. Kavanaugh*, 242 U.S. 138, 139 (1916). Partners are individually responsible for torts committed by members of their firm while acting within the general scope of business, regardless of whether the particular partner personally participated in the tortious act. *Id.* at 139. If the defendant is the alter ego of a corporation, malicious and willful injuries caused by employees of a corporation, even though the defendant did not personally commit the acts, will be imputed to the defendant, and thus, liabilities arising

II. LEGAL BACKGROUND

Since 1898, an exception to the bankruptcy discharge has been provided for liabilities arising from "willful and malicious" injuries to the person or property of another.⁴³ *Tinker v. Colwell*⁴⁴ was the first case in which the United States Supreme Court addressed the legal issues surrounding this exception.

As a result of Mr. Tinker having an extramarital affair with Mrs. Colwell, judgment for criminal conversation⁴⁵ was rendered in favor of Mr. Colwell.⁴⁶ Tinker filed a voluntary bankruptcy petition, *inter alia*, to avoid the debt.⁴⁷ The Supreme Court, however, refused to discharge the obligation represented by Mr. Colwell's judgment, holding that the judgment was one for willful and malicious injury to the *property* of Mr. Colwell, namely, Mrs. Colwell.⁴⁸

The Court further ruled that particular malevolence toward the husband was not necessary.⁴⁹ "Malice" was interpreted as a disregard for the rights of others; the intent was manifested by the injurious acts.⁵⁰ A specific intent to hurt a particular person was not considered an essential element.⁵¹ The Court concluded that "a willful disregard of what one knows to be his duty, an act which is against good morals

therefrom are nondischargeable. *In re Kasler*, 611 F.2d 308, 309-10 n.3 (1979) (attempt to hold alter ego of corporation liable for libelous statements made by employees of corporation). Fraudulent representations by one partner within the scope of the partnership business will be imputed to the remaining partners, and the debts as to the latter will not be dischargeable. 3 Collier *supra* note 4 §523.08 at 523-52 (15th Ed. 1983). Liability is imputed regardless of whether the defendant had knowledge of the agent's acts. *Federal Deposit Ins. Corp. v. Braemoor Associates*, 686 F.2d 550, 558 (1982). *But see In re Cornell*, 11 Collier Bankr. Cas. 2d 744 (1984) (the statute, legislative history, and current case law reject imputing the intent of the child to the parent-debtor for purposes of §523(a)(6)).

Compare *In re Cecchini*, 772 F.2d 1493 with *In re Cecchini*, 780 F.2d at 1444. The original opinion held that Cecchini's willful and malicious acts were not imputed to Robustelli; the substituted opinion holds to the contrary. *Id.*

43. 11 U.S.C. §523(a)(6) (originally enacted as Bankruptcy Act of 1898 section 17(a)(2)). In 1898, the exception was confined to "judgments" for injuries. Countryman, *The New Dischargeability Law*, 45 REF. J. 1, 12 (1955). The 1898 Act was amended in 1903 by changing the word "judgment" to "liability." *Id.* Thus, a liability for willful and malicious injury is not affected by the fact that the liability was not reduced to judgment prior to the discharge in bankruptcy. *Id.*; 78 A.L.R. 2d 1227.

44. 193 U.S. 473 (1902).

45. Criminal conversation means "defilement of the marriage bed, sexual intercourse of an outsider with husband or wife, or breaking down of the covenant of fidelity." BLACKS LAW DICTIONARY 336 (5th ed. 1979).

46. *Tinker*, 193 U.S. at 474.

47. *Id.*

48. *Id.* at 485.

49. *Id.* at 486.

50. *Id.* at 487.

51. *Id.*

and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously. . . .”⁵²

Debts found nondischargeable under section 523(a)(6) typically fall within one of two categories: (1) claims for conversion by a creditor when the debtor has sold collateral subject to a security agreement, thereby depriving the creditor of a secured interest; or (2) attempts by a creditor to have previously-entered tort judgments against the debtor found nondischargeable.⁵³ *Tinker* has been cited for support in cases involving both conversion and tort judgments against the debtor.⁵⁴

A. Conversion

In 1916, the Supreme Court applied the *Tinker* interpretation of “willful and malicious” to an intentional conversion of collateral by the defendant.⁵⁵ In *McIntyre v. Kavanaugh*, a stockbroker sold securities pledged to him by a customer and converted the funds to his own use.⁵⁶ The court concluded that the stockbroker’s conversion, which began almost immediately after the pledge and was largely consummated within nine days, was a case within the purview of *Tinker*.⁵⁷ According to the *Tinker* reasoning, malice toward the particular customer was not required.⁵⁸ This was an immoral act, wrongful in itself, and done with intentional disregard of a known duty to refrain from selling the pledged securities.⁵⁹ Consequently, the debt was not discharged.⁶⁰

In a later decision, *Davis v. Aetna Acceptance Co.*,⁶¹ the Supreme Court averted the inference that every intentional act of conversion was willful and malicious. In *Davis*, an auto dealer held his inventory under trust receipts forbidding sale without the consent of the finance institution. One of Davis’ salesmen sold an auto without the

52. *Id.*

53. *In re Kinsey*, Bankr. L. Rep. ¶70520.

54. See e.g., *Cecchini*, 780 F.2d at 1440 (conversion); *McCloud*, 7 Bankr. at 824-25; *DeRosa*, 20 Bankr. at 313; *In re Fussell*, 15 Bankr. at 1022; *In re Finnie*, 10 Bankr. at 263. See also *Adams*, 761 F.2d at 1426 (previously-entered judgment); *Wooten*, 8 Collier Bankr. Cas. at 996; *Compos*, 768 F.2d at 1157; *Quezada*, 718 F.2d at 122.

55. *McIntyre v. Kavanaugh*, 242 U.S. 138 (1916). See Countryman, *supra* note 43 at 12 (discussion of the *McIntyre* case).

56. *McIntyre*, 242 U.S. at 140.

57. *Id.* at 141.

58. *Id.* at 142.

59. *Id.* at 141.

60. *Id.* at 142.

61. 293 U.S. 328 (1934).

consent of the finance company. Testimony was presented which tended to show that cars held on like terms had been sold without express consent on many other occasions, and the proceeds accounted for thereafter.⁶² On this occasion, however, the dealer promised to make prompt remittance by check, but failed to do so and filed a bankruptcy petition shortly thereafter.⁶³

The Supreme Court reiterated the rule of *McIntyre* that a wrong which is unexcused and wanton results in a nondischargeable debt.⁶⁴ The Court concluded, however, that every act of conversion does not amount to a willful and malicious act.⁶⁵ Rather, "an honest but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed," is an *innocent or technical* conversion which may lack any element of willfulness or maliciousness necessary to except the liability from discharge.⁶⁶ Based on the foregoing, one commentator concluded that a conversion which is (1) unintentional or (2) intentional, but committed under an honest but mistaken belief that the act was not wrongful, is not excepted from discharge as a willful and malicious injury.⁶⁷

Section 17(a)(2) of the prior Bankruptcy Act⁶⁸ contained a provision similar to the current section 523(a)(6). The old section 17(a)(2), however, specifically precluded discharge of liabilities for willful and malicious conversion.⁶⁹ The legislative history of the Bankruptcy Reform Act of 1978 indicates that a substantive change was not intended by the deletion of the express reference to willful and malicious conversion.⁷⁰ Rather, legislative history states that the change was designed to include in the category of nondischargeable debts a conversion under which the debtor willfully and maliciously intended to borrow property for a short period of time with no intent to inflict injury, but when injury was in fact inflicted.⁷¹ Thus, under the current Bankruptcy Code, "willful and malicious" injury includes a willful and malicious conversion.⁷²

62. *Id.* at 330.

63. *Davis*, 293 U.S. at 330.

64. *Id.* at 332.

65. *Id.*

66. *Id.*

67. Countryman, *supra* note 43 at 14.

68. 11 U.S.C. §523(a)(6) (originally enacted as Bankruptcy Act of 1898 section 17(a)(2)).

69. 2 Bankr. L. Ed. §7:122 at 128.

70. *Id.* at 128-29; 9A Am Jur 2d Bankruptcy §804; H.R. Rep. No. 95-595, p. 364.

71. 124 Cong. Rec. H11096 (daily ed. Sept. 18, 1978).

72. *Id.*

Though the United States Supreme Court has not addressed the issue since deciding *Davis*, courts have utilized greatly conflicting interpretations of "willful and malicious injury." In *In re Hodges*,⁷³ for instance, a debtor sold stereo equipment which was subject to a security interest.⁷⁴ Defendant became financially burdened because of illness and used the proceeds from the sale of the equipment to make house payments, purchase food and support his family. Moreover, the defendant testified that he did not realize that the plaintiff held a security interest.⁷⁵ The bankruptcy court held that the debtor did not sell the equipment maliciously, and accordingly, the debt was discharged.⁷⁶

Case law prior to the enactment of the Bankruptcy Reform Act of 1978 had demonstrated that the applicable standard in construing section 17(a)(2) was the *Tinker* standard of "reckless disregard."⁷⁷ Thus, the intentional conversion of property without consent of the secured lender or other excuse was considered a willful and malicious injury.⁷⁸

Hodges held that, with the change in bankruptcy law in 1978, Congress expressly overruled *Tinker v. Colwell* to the extent that *Tinker* held that:

[t]he requirement of willfulness and maliciousness should not be given a narrow construction, and that a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously so as to come within the exception from discharge.⁷⁹

Without the *Tinker* standard of intent, only one choice exists: to be willful and malicious, the debtor must have a conscious "intent to cause harm to the creditor or the creditor's property."⁸⁰ Maliciousness could no longer be implied.⁸¹ Therefore, unless the debtor's purpose

73. *In re Hodges*, 4 Bankr. 513 (1980).

74. *Id.* at 514.

75. *Id.* The terms were in small print on the back page of the security agreement, thus, not conspicuous to defendant. *Id.* at 514.

76. *Id.* at 517.

77. *Id.* at 515.

78. *Tinker*, 193 U.S. at 487.

79. *Hodges*, 4 Bankr. at 514-15 (quoting *Tinker*, 193 U.S. at 487). See also 3 Collier *supra* note 4 §523.16(3) (15th Ed. 1979); 3 Bankr. L. Ed. §22:35.

80. *Hodges*, 4 Bankr. at 516. See e.g., *In re Compos*, 768 F.2d at 1158; *In re Egan*, 52 Bankr. 501, 508 (1985); *In re Behr*, 42 Bankr. 922, 925 (1984); *In re McLaughlin*, 14 Bankr. 773, 775 (1981).

81. *Hodges*, 4 Bankr. at 516. But see *United Bank of Southgate v. Nelson*, 9 Collier Bankr. Cas. 745, 748-49 (1983) (a finding of malice should be premised upon an implied or constructive malicious intent).

in selling the secured property was to harm the creditor, the debt is dischargeable.⁸² When the debtor has other purposes,⁸³ remits a portion of the proceeds to the secured creditor,⁸⁴ or continues to make loan payments,⁸⁵ the debt is dischargeable.

The court in *Hodges* further buttressed this position by noting that in *Davis*, the Supreme Court held that a technical or innocent conversion lacks the elements of maliciousness, and that malice must encompass "an intent to harm" the creditor.⁸⁶ Applying this standard to the facts of *Hodges*, the court held that though the defendant's act of conversion was willful, the defendant did not appear to have acted maliciously.⁸⁷

On the other hand, many courts interpret both the ruling in *Tinker* and the legislative history quite differently.⁸⁸ In *In re McCloud*,⁸⁹ for example, the court held that the debtor's disposition of livestock securing loans was both a malicious and a willful conversion because the collateral was sold intentionally and in knowing disregard of the rights of the bank.⁹⁰ Referring to the same language in the legislative history which overrules *Tinker*, quoted by the court in *Hodges*, the court in *McCloud* made similar findings that the legislative history demonstrated that the injury caused by the debtor must be shown to have been "intentional" and not merely resulting from "reckless disregard of the creditor's rights."⁹¹ Nothing in the legislative history of section 523(a)(6), however, suggests that Congress intended to overrule the *Tinker* interpretation of the term "malicious."⁹²

82. See *Hodges*, 4 Bankr. at 517; *In re Gentis*, 10 Bankr. 209, 213 (1981); *In re Nelson*, 4 Collier Bankr. Cas. 2d 548, 549 (1981).

83. See e.g., *Hodges*, 4 Bankr. at 517 (raising money for living expenses); *McLaughlin*, 14 Bankr. at 775 (sold secured property in attempt to meet bills).

84. See *In re Langer*, 12 Bankr. 957, 960 (1981); *In re Hawkins*, 6 Bankr. 97 (1980).

85. See *In re Harris*, 8 Bankr. 88 (1980).

86. *Hodges*, 4 Bankr. at 516.

87. *Id.* at 517.

88. See e.g., *In re Fry*, 14 Bankr. 864, 866 (1981) (section 523(a)(6) does not require an "intent to do harm"); *In re McGiboney*, 8 Bankr. 987, 989 (1981); *In re DeRosa*, 20 Bankr. at 313; *In re Ayres*, 25 Bankr. 762, 775 (1982); *In re Clark*, 30 Bankr. 685, 687 (1983).

89. 7 Bankr. 819 (1980).

90. *Id.* at 826.

91. *Id.* at 825; see H.R. Rep. No. 595, 95th Cong. 1st Sess. 363 (1977); S. Rep. No. 989, 95th Cong., 1st Sess. 77-79, reprinted in U.S. Code Cong. & Ad. News 1978, p. 5787, 6320 (1978).

92. *McCloud*, 7 Bankr. at 825. Careful reading of the troublesome passage of the Committee Report indicates, arguably, that Congress, in overruling *Tinker*, was referring only to the *Tinker* definition of "willful":

Paragraph (6) excepts debts for willful and malicious injury by the debtor to another person or to the property of another person. Under this paragraph, willful means deliberate or intentional. To the extent that *Tinker v. Colwell* [citations omitted] 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. [italics added]

The holding in *Tinker* did not turn on whether the debtor's conduct had been "willful". The United States Supreme Court stated that the act had been intentional and voluntary, and thus clearly had been willful for purposes of section 17(a)(2).⁹³ The emphasis of the case was whether the conduct of the debtor had been malicious for the purposes of section 17(a)(2).⁹⁴ The Court stated that malicious destruction of property did not require proof of special malice toward the injured party, but only an "act which was unlawful, wrongful and tortious, and, being willfully done. . . ."⁹⁵ In other words, the law will *imply* a degree of malice from a particular act.⁹⁶ The *Tinker* Court further qualified the holding by finding that not every willful act which is wrong implies malice.⁹⁷ Based on this reasoning, the *McCloud* court held that an *intent to do the wrongful act* was sufficient to preclude discharge of McCloud's debt.⁹⁸

Furthermore, the implied malice standard is in harmony with the policy underlying the preferred position of secured creditors in bankruptcy proceedings.⁹⁹ Adherence to the strict "intent to injure" standard effectively denies the secured creditor the property relied upon as security by placing an almost insurmountable burden on the creditor to prove the *subjective* intent of the debtor to harm the creditor or the creditor's property.¹⁰⁰ In accordance with these policy concerns

S. Rep. No. 95-989, 95th Cong., 2d Sess. 77-79, U.S. Code & Ad. News 2978, 5787, 5865 (1978). However, no clear indication exists that Congress intended to overrule those cases interpreting the *malice* definition set forth in *Tinker*.

93. *McCloud*, 7 Bankr. at 824; *Tinker*, 193 U.S. at 485. Bankruptcy courts have consistently defined "willful" as intentional or deliberate. *United Bank of Southgate v. Nelson*, 9 Collier Bankr. Cas. 2d 745, 747 (1983).

94. *McCloud*, 7 Bankr. at 825.

95. *Tinker*, 193 U.S. at 486.

96. *See id.*; *United Bank of Southgate*, 9 Collier Bankr. Cas. 2d at 749.

97. *Tinker*, 193 U.S. at 489.

98. *McCloud*, 7 Bankr. at 826.

99. *United Bank of Southgate*, 9 Collier Bankr. Cas. 2d at 758. This looser standard of "intent to act," from which malice will be implied, protects the integrity of secured property and does not render the security agreement a meaningless instrument. In the Matter of Nelson, 10 Bankr. 691, 692 (1981).

100. *United Bank of Southgate*, 9 Collier Bankr. Cas. 2d at 752. How the "intent to injure" standard could ever be applied in the typical commercial situation when a debtor wrongfully sells or disposes of secured property is difficult to imagine. *Id.* at 753.

But cf. 11 U.S.C. §523(a)(2)(B) (provides that a debtor will not be discharged from a debt if he has caused to be made or published a materially false written statement with "intent to deceive"). "Intent" for §523(a)(2)(B) purposes is actual intent—not an objective, reasonable person standard but essentially a subjective standard requiring evaluation of the present debtor at time of the representation on a case-by-case basis. *In re Hunt*, 30 Bankr. 425 (1983). Furthermore, intent to deceive may logically be *inferred* when a person knowingly or recklessly makes a false representation which he knows or should know will induce another to make a loan. *Carini v. Matera*, 592 F.2d 378, 380 (1979). Ostensibly, policy considerations have not prevented Congress from applying a subjective intent standard to the false representation exception to dischargeability of debts.

and expounding the *McCloud* rationale, the Ninth Circuit Court in *In re Cecchini* articulated the rule that a wrongful act such as conversion, done intentionally, which necessarily produces harm and is without just cause or excuse, is willful and malicious, even without proof of a specific intent to injure.¹⁰¹

B. Tort Judgments

A great deal of confusion exists as to how to treat cases that lie between the areas where the injury is produced by ordinary negligence and where the injury is the result of a deliberate and intentional wrongdoing.¹⁰² Under the Bankruptcy Code, courts generally look behind the judgment to the nature of the action in which the judgment was rendered.¹⁰³ If mere negligence was the essence of the action, the debt would ordinarily be considered dischargeable.¹⁰⁴

1. Majority: Negligence Alone is Insufficient

A majority of cases have decided that no degree of negligence can produce a willful and malicious injury; rather, intent to injure is necessary to except a debt from discharge.¹⁰⁵ This view is buttressed by the theory that exceptions to discharge impair the fresh start policy of bankruptcy, and that since the statute is highly remedial, these exceptions should be narrowly construed.¹⁰⁶

Moreover, the underlying purpose of the fresh start policy of the Bankruptcy Code is to relieve the *honest* debtor from the weight of

See also former 11 U.S.C. §14c(4) (denies discharge if the bankrupt has "... filed a petition in bankruptcy, transferred, removed, destroyed, or concealed any of his property with *intent to hinder, delay, or defraud his creditors*."). The requirement of specific, actual intent is the core of section 14c(4). *Bankruptcy — Discharge — Analysis of "Actual Intent" Test as Applied to Section 14c(4) of the Bankruptcy Act*, 22 VILL. L. REV. 1042, 1044 (1977). Upon the enactment of the Bankruptcy Act of 1978, section 14c was replaced by 11 U.S.C. §727(a)(2).

101. *Cecchini*, 780 F.2d at 1496. Moreover, the legislative record, arguably, explicitly indicates that a specific "intent to harm" is contrary to Congressional intent. "The intent is to include in the category of nondischargeable debts a conversion under which the debtor willfully and maliciously intends to borrow property for a short period of time with no intent to inflict injury but in which injury is in fact inflicted." *In re Scotella*, 18 Bankr. 975, 977 (1982) (citing H.R. No. 95-595, 95th Cong., 1st Sess., reprinted in 364 U.S. Cong. & Ad. News, 1978, 6320 (1977)).

102. Porter, *supra* note 3, at 53.

103. *Id.* See e.g., *Coen*, 458 F.2d at 329; *Adams*, 761 F.2d at 1427; *In re Hamanaka*, 53 Bankr. 320, 323 (1985); *In re Behr*, 42 Bankr. 922, 925 (1984).

104. Porter, *supra* note 3, at 53.

105. See 9A Am Jur 2d *Bankruptcy* §805.

106. See Porter, *supra* note 3, at 53.

oppressive indebtedness with leave to start afresh.¹⁰⁷ Courts following this view find support in the legislative history of section 523(a)(6), again, focusing on Congress' overruling of the "reckless disregard" standard of *Tinker*.¹⁰⁸ The dicta in *Tinker* stated that "[o]ne who negligently runs over an individual would not . . . be within the exception. True he drives negligently, and that is a wrongful act, but he does not intentionally drive over the individual. If he intentionally did drive over him, it would certainly be malicious."¹⁰⁹ Therefore, under this construction, the legislative history indicates that only deliberate and intentional acts should be considered "willful," and that mere reckless disregard will not qualify.¹¹⁰

2. *Minority: Significance of Negligence versus Reckless Conduct*

The contrary view favors the interpretation that willful and malicious injuries do not necessarily connote ill-will or special malice.¹¹¹ Under this view, section 523(a)(6) describes a "wrongful act done in utter disregard of the legal rights of others and without just or lawful support, evidencing a reckless disregard and indifference to the safety of human life, resulting in injury."¹¹² This view is based, in part, on the theory that bankruptcy should not be allowed to function as

107. See Kennedy, *Reflections on the Bankruptcy Laws of the United States: The Debtor's Fresh Start*, 76 W. VA. L. REV. 427 (1974). Daniel Webster delivered a compassionate speech in favor of debtor relief:

There are probably one or two hundred thousand debtors, honest, sober, and industrious, who drag out lives useless to their country, for no reason but that they cannot be legally discharged from debts in which misfortunes have involved them, and which there is no possibility of their ever paying. . . . It is true they are not imprisoned; but there may be, and there are, restraint and bondage outside the walls of the jail, as well as in. Their power of earning is, in truth, taken away; their faculty of useful employment is paralyzed, and hope itself becomes extinguished. . . . Many of these insolvent persons are young men with young families. Like other men, they have capacities both for action and enjoyment. Are we to stifle all these forever? Are we to suffer all these persons, many of them meritorious and respectable, to be pressed to the earth forever, by load of hopeless debt? . . .

Kennedy, *Reflections on the Bankruptcy Laws of the United States: The Debtor's Fresh Start*, 76 W. VA. L. REV. 427, 438-39 (1974) (citing Speech of May 18, 1840, reprinted in *Speeches and Orations of Daniel Webster* 471 *et seq.* (Whipple ed. 1879), and under the title *The Fault Is Not in the Constitution*, in *THE GOLDEN AGE OF AMERICAN LAW* 373, 377-79 (Haar ed. 1965)).

108. See *Compos*, 768 F.2d at 1157 (interprets legislative record to entirely overrule *Tinker*); *Hodges*, 4 Bankr. at 515; *In the Matter of Ricketts*, 16 Bankr. 833, 834 (1982); *In re Aldrich*, 16 Bankr. 825, 829-30 (1982); *In the Matter of Gentis*, 10 Bankr. 209, 213 (1981); *In re Graham*, 7 Bankr. 5, 7 (1980); *In re Nelson*, 4 Collier Bankr. Cas. 2d 548, 549 (1981).

109. *Tinker*, 193 U.S. at 489.

110. See *Compos*, 768 F.2d at 1157; *Matter of Quezada*, 718 F.2d at 122.

111. Porter, *supra* note 3, at 53. See also *In re Scotella*, 18 Bankr. at 977; *In re DeRosa*, 20 Bankr. 307, 313 (1982); *In the Matter of Klix*, 23 Bankr. 187, 190 (1982); *In the Matter of Chambers*, 23 Bankr. 206, 210 (1982); *In re Fussell*, 15 Bankr. at 1022 (1981); *In re Ries*, 22 Bankr. 343, 346-47 (1982).

112. See Porter, *supra* note 3, at 53.

a refuge for reckless tortfeasors, and that to rule otherwise would debilitate state laws which attempt to control reckless conduct, such as reckless driving.¹¹³

In *In re Franklin*,¹¹⁴ for instance, defendant prescribed an anesthetic without a patient history, over induced the patient with anesthesia, and covered up the records relating to the surgery and subsequent cardiac arrest.¹¹⁵ The court found that the actions of the defendant amounted to a willful breach of duty and a complete and total disregard of acceptable medical practice.¹¹⁶ The court did not find that the defendant performed the surgery in an attempt to bring about the cardiac arrest. The defendant, however, clearly did intend to perform the particular acts in question. Unfortunately, when these acts were performed in the manner and under the conditions present in this situation, they resulted in injury.¹¹⁷ This finding was sufficient to support a finding of willful and malicious conduct, and the debt was not discharged.¹¹⁸

In *re Adams*,¹¹⁹ a recent Ninth Circuit Court of Appeals opinion, decided several months prior to *Cecchini*, provided a clear statement of the reasoning utilized by that court. In *Adams*, judgment was entered against the defendant for voluntarily drinking and subsequently driving while intoxicated, thus causing an accident and severely injuring the plaintiff.¹²⁰ The court gleaned from a review of legislative history the same congressional intent found by courts in cases holding that "intent to injure" is required.¹²¹ That is, Congress intended that an act done in reckless disregard of possible consequences is not sufficient to classify the act as willful and malicious under section 523(a)(6).¹²² In other words, an intentional act is required. The similarity in interpreting the legislative history, however, ends here. Personal ill-will, concluded the *Adams* court, was not required for a finding of willful and malicious injury.¹²³

113. See Poff, *Dischargeability of Bankrupt's Liability For Personal Injuries Caused By Reckless Driving*, 29 REF. J. 70, 71 (1955).

114. 726 F.2d 606 (10th Cir. 1984).

115. *Id.* at 610.

116. *Id.*

117. *Id.*

118. *Id.*

119. 761 F.2d 1422 (9th Cir. 1985).

120. *Id.* at 1423.

121. See H.R. Rep. No. 595, 95 Cong., 1st Sess. 365, reprinted in 1978 U.S. Code & Ad. News 5787, 5963, 6320-21. See also *Compos*, 768 F.2d at 1159 (citing *In re Kuepper*, 36 Bankr. 680 (1983); *In re Hoppa*, 31 Bankr. 753 (1983); *In re Davis*, 26 Bankr. 580 (1983); *In re Silas*, 24 Bankr. 771 (1982)).

122. *Adams*, 761 F.2d at 1426.

123. See *Matter of Wooten*, 8 Collier Bankr. Cas. at 995.

In 1984, Congress enacted 11 USC 523(a)(9), which, in the view of the *Adams* court, prescribed the manner in which the court should construe section 523(a)(6).¹²⁴ Section 523(a)(9) provides explicitly that debts arising from liabilities incurred as a result of drunk driving are nondischargeable.¹²⁵ The legislative history underlying the 1984 amendment makes clear that Congress intended to clarify section 523.¹²⁶

The position of the *Adams* court was based on two premises: (1) an injury resulting from drunk driving lacks the specific intent to injure, and (2) Congress enacted section 523(a)(9) which expressly makes debts incurred as a result of drunk driving nondischargeable. The *Adams* court thus concluded that the nondischargeability of debts does not rest on a determination that the debtor possessed the specific intent to injure.¹²⁷ The conclusion therefore follows that the *intentional doing of an act* which necessarily leads to injury is determinative of whether a debt resulting therefrom will be nondischargeable.¹²⁸

The bankruptcy opinions are split in construing the meaning of section 523(a)(6). All cases agree that Congress rejected the *Tinker* "reckless disregard" definition of "willfull." Instead, courts define "willful" to be intentional or deliberate.¹²⁹ Courts, however, come to different results in interpreting "malicious." One line of cases reads the legislative history to entirely obviate *Tinker*.¹³⁰ Consequently, these courts translate malicious to require an "intent to cause harm." The second line of cases, represented by the Ninth Circuit in *Cecchini* and

124. *Adams*, 761 F.2d at 1426. 11 U.S.C. §523(a)(9) provides:

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual from any debt . . . (9) to any entity, to the extent that such debt arises from a judgment or consent decree entered in a court of record against the debtor wherein liability was incurred by such debtor as a result of the debtor's operation of a motor vehicle while legally intoxicated under the laws or regulations of any jurisdiction within the United States or its territories wherein such motor vehicle was operated and within which such liability was incurred.

125. 11 U.S.C. §523(a)(9).

126. *Adams*, 761 F.2d at 1426. In describing the various Bankruptcy Code amendments that were being adopted, the Chairman of the House Committee of the Judiciary stated that "[section 523(a)(9)] clarifies present law relating to the nondischargeability of debts incurred by drunk drivers. Debts incurred by persons driving while intoxicated are presumed to be willfully and maliciously incurred under this provision." *Id.*; 130 Cong. Rec. H7489 (daily ed. June 29, 1984) (statement of Rep. Rodino), reprinted in 6 1984 U.S. Code Cong. & Ad. News 576, 577.

127. *Adams*, 761 F.2d at 1426.

128. *Id.* at 1427. Furthermore, the author of the amendment, Senator DeConcini, stated on the floor of the Senate, "[B]ankruptcy was never meant to be a shield behind which drunk drivers and others who have acted in a reckless manner, can absolve themselves of liability. The concept of fresh start for a debtor must defer to the possibility of a fresh start of the innocent victim. . . ." *Wooten*, 8 Collier Bankr. Cas. at 996.

129. See e.g., *Cecchini*, 780 F.2d at 1495; *Langer*, 12 Bankr. at 959; *Compos*, 768 F.2d at 1157.

130. See *McLaughlin*, 14 Bankr. at 773; *Aldrich*, 16 Bankr. at 825; *Finnie*, 10 Bankr. at 262; *Nelson*, 4 Collier Bankr. Cas. 2d at 548.

Adams, reason that Congress did not intend to strike down the *Tinker* definition of "malicious," and interpret "malicious" as implied or constructive malice, similar to the construction of that term in *Tinker*.¹³¹ Thus, the Ninth Circuit, and other circuits following the *Cecchini* view, hold that section 523(a)(6) requires merely an intent to act which necessarily results in harm to make a debt non-dischargeable. While interpretation of section 523(a)(6) presents a problem in determining which debts are nondischargeable under Chapter 7 bankruptcy proceedings, this quandary does not arise under Chapter 13 proceedings because debts resulting from willful and malicious injuries are nevertheless dischargeable under Chapter 13.

III. LEGAL RAMIFICATIONS

Up to this point, this note has discussed nondischargeability of debts under Chapter 7 of the Bankruptcy Code. Section 523 delineates several exceptions to the dischargeability of debts under Chapter 7 bankruptcy proceedings. The court in *Cecchini* applied the "willful and malicious injury" exception to deny the petitioner's request to discharge the liability resulting from conversion of property. The court would have arrived at a contrary result, however, if Mr. *Cecchini* had filed bankruptcy under Chapter 13, rather than Chapter 7.

With only two exceptions, *all* debts are dischargeable under a Chapter 13 plan.¹³² The Code clearly states that the only debts which are not dischargeable in a Chapter 13 case are family support obligations¹³³ and long-term payments which extend beyond the pay-

131. See *DeRosa*, 20 Bankr. at 307; *McCloud*, 7 Bankr. at 819; *Ries*, 22 Bankr. at 343; *Auvenshine*, 9 Bankr. at 772.

132. 11 U.S.C. §1328(a). Section 1328(a) states:

As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1322(b)(5) of this title; or
(2) of the kind specified in section 523(a)(5) of this title.

See *Id.* §606(7). "Plan" means "a plan for a composition or extension, or both, proposed in a proceeding under this chapter." *Id.* A plan must deal with unsecured debts generally, and may deal severally with debts secured other than by an estate in real property or a chattel real. 10 Collier on Bankruptcy ¶22.08 at 45. The debtor must submit the plan at the initial meeting of creditors, and proposals are not accepted from creditors. *Id.* A plan is not binding on any parties unless confirmed by the bankruptcy court. *Id.* at 45-46.

133. *Id.* §523(a)(5). Section 523(a)(5) states:

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt—
(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance

ment period of the Chapter 13 plan.¹³⁴ No other exceptions exist. Therefore, a debt for willful and malicious injury is dischargeable upon the completion of a Chapter 13 plan by the debtor.¹³⁵

Under Chapter 13 bankruptcy proceedings, the debtor submits a plan under which the debtor will pay some proportion of all obligations.¹³⁶ Thus, creditors generally receive more under a Chapter 13 repayment plan than under the straight liquidation of debts under Chapter 7.¹³⁷ The Bankruptcy Code requires confirmation of the plan by the bankruptcy court.¹³⁸ Section 1324 of the Bankruptcy Code provides, however, that any party in interest may object to the confirmation of the Chapter 13 plan.¹³⁹ An objection to the confirmation is predicated on the failure of the plan or the procedures employed prior to confirmation to conform with the requirements set forth in section 1325.¹⁴⁰

for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement. . . .

Id.

134. 11 U.S.C. §1322(b)(5). Section 1322(b)(5) pertains to curing defaults where the last payment will occur after the date on which the final payment under the plan is due. *Id.*

135. See *In re Tackaberry*, BLD ¶68302 (1981) (debt for willful and malicious injury is dischargeable under Chapter 13 plan); *In re Keckler*, 3 Bankr. 155 (1980); *In re Lewis*, 5 Bankr. 575 (1980); *In re Seely*, 6 Bankr. 309 (1980). That a debt for willful and malicious injury is not dischargeable under Chapter 7 but is dischargeable under Chapter 13 seems incongruous. *Tackaberry*, BLD ¶68302 at 79611. Yet, the legislative history clearly manifests this intent. *Id.* Between the introduction of H.R. 6 in January 1977 and the introduction of the revised H.R. 8200 in July of the same year, the discharge exception for alimony and child support was simply "added" to the bankruptcy reform legislation before the House. This was done despite repeated testimony at House Hearings that *all* the discharge exceptions enumerated in Chapter 7 should be explicitly excepted from Chapter 13. See Bankruptcy Act Revision: Hearings on H.R. 31 and 32. Before Sub Comm. on Civ. and Const. Rights of the House Comm. on the Judiciary, 94th Cong. 1st Sess. 1430, 2128 (1975-76). The Senate version of the bill never contained the alimony exception but rather excepted debts arising from "willful and malicious conduct." This discrepancy between the bills was subsequently glossed over in a renumbering of the Senate bill, and the House version was hastily enacted in the final days of the 95th Congress. Matter of Brown, 7 Bankr. 529, 530 n.1 (1980). A recently proposed Code revision, S. 658, 96th Cong., 1st Sess. (1979), 9 Bankr. L. Ed. §81:6,59, which was passed by the Senate in October 1979, would have eliminated the discharge discrepancy between Chapters 7 and 13. According to House Judiciary Committee Counsel, however, this change has been dropped from the House version of the bill because the discrepancy provides a practical *incentive* to the use of Chapter 13 proceedings, which were seldom used prior to the adoption of the new Code. *Id.* at 530 n.2.

136. See 11 U.S.C. §§1321 (filing of plan), 1322 (contents of plan). See 10 Collier on Bankr. ¶¶29.01-29.12.

137. See e.g., *In re Hudson*, 9 Bankr. 363, 367 (1981).

138. 11 U.S.C. §1325(a).

139. *Id.* §1324. The bankruptcy judge is required to provide notice and an opportunity for hearing any objections to confirmation. S. Rep. No. 95-989 to accompany S. 2266, 95th Cong., 2d Sess. (1978) p. 142.

140. S. Rep. No. 95-989 to accompany S. 2266, 95th Cong., 2d Sess. (1978) p. 142.

Under section 1325, the court is required to confirm the plan if certain requirements are met.¹⁴¹ Most importantly, the plan must be proposed in good faith,¹⁴² must be in the best interest of creditors,¹⁴³

141. 11 U.S.C. §1325(a). Section 1325 states:

- (a) The court shall confirm a plan if—
 - (1) the plan complies with the provisions of this chapter and with other applicable provisions of this title;
 - (2) any fee, charge, or amount required under chapter 123 of title 28, or by plan, to be paid before confirmation, has been paid;
 - (3) the plan has been proposed in good faith and not by any means forbidden by law;
 - (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;
 - (5) with respect to each allowed secured claim provided for by the plan—
 - (A) the holder of such claim has accepted the plan;
 - (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
 - (C) the debtor surrenders the property securing such claim to such holder; and
 - (6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

142. *Id.* §1325(a)(3). Good faith is not defined by the Bankruptcy Code. *In re Powell*, 2 Bankr. 314, 315 (1980); *In re Sadler*, 3 Bankr. 536, 536 (1980); *In re Ward*, 6 Bankr. 93, 96 (1980). The general inquiry is directed to whether there has been an abuse of the provisions, purpose, or spirit of Chapter 13 in the proposal or plan. 10 Collier at ¶29.06(6). Consequently, the fact that good faith has not been defined has been held to "repose great discretion in the court." *Powell*, 2-Bankr. at 315. The amount of payments under the debtors' plans has been an area of controversy. *See In re Iacovoni*, 2 Bankr. 256 (1980) (good faith requires debtor to make at least some payments; rejects "zero payment plans"); *but see In re Cloutier*, 3 Bankr. 584 (1980) (plan offering no payments is a strong factor against approving the plan, but not determinative); *see generally In Good Faith, Zero Plans and the Purposes of Bankruptcy Code Chapter 13: A Legislative Solution to the Controversy*, 61 B.U. L. REV. 773 (1981) (critique on the judicial acceptance of zero plans for unsecured creditors under Chapter 13); Neustadter, *Consumer Insolvency Counseling for Californians in the 1980's*, 19 SANTA CLARA L. REV. 817 (1979) (proposing and implementing a plan where nothing or only a trivial sum is paid to unsecured creditors is possible under Chapter 13); *Bankruptcy: Good Faith and the Zero Payment Plan in Chapter 13*, 69 KENTUCKY L.J. 327 (1980-81) (quantitative statement of trends in reported cases).

One commentator concluded that the requirement that the plan be "proposed in good faith" has resulted in more litigation than any other issue. Cyr, "Good Faith" Tempest: An Analysis and Proposal for Change, 55 BANKR. L.J. 271 (1981). Moreover, the application of the good faith requirement is the only barrier to the use by dishonest debtors of §1328(a) as a device for abuse. *In re Marlow*, 3 Bankr. 305, 307 (1980).

143. 11 U.S.C. §1325(a)(4). The "best interest of the creditor test" requires that the value of property to be distributed under the plan on account of each unsecured claim must not be less than the amount that would have been paid on the claim if the estate and debtor were liquidated under Chapter 7. Bankr. L. Ed. §46.50. If the best interest test is satisfied regarding unsecured claims, failure of unsecured creditors to accept the plan will not bar confirmation. *Id.* The plan will be confirmed if secured creditors have accepted the plan, or the secured creditor will retain the lien securing the claim and the value of the property to be distributed

and must be feasible.¹⁴⁴ If the plan meets the confirmation standards, the court must confirm the plan; the court has no discretion.¹⁴⁵

The discharge under section 1328(a) of Chapter 13 is more comprehensive than the discharge under section 523 of Chapter 7.¹⁴⁶ An important advantage available under Chapter 13 is that the debtor can obtain a release from nondischargeable, unsecured debts, other than claims entitled to priority or for alimony or child maintenance, by partial payment of claims under a composition plan.¹⁴⁷ A debt nondischargeable under Chapter 7, such as a debt for embezzlement, for money obtained by fraud, for willful and malicious injury to the person or property of another, for a fine or for an educational loan, can be compromised, under Chapter 13, in the same manner as other debts.¹⁴⁸ On payment of the amount provided in a composition plan dealing with any such claim, the debtor is entitled to receive a discharge of the balance of the claim.¹³⁹

The practical effect of section 1328 is to give debtors an "incentive" to use Chapter 13 proceedings.¹⁵⁰ Theoretically, this "incentive" benefit can be justified on the ground that the Chapter 13 debtor is at least attempting to "make good" on the debts, whereas the Chapter 7 debtor, who does not get the benefit, is not.¹⁵¹ Yet in cases involving debts arising out of willful and malicious injuries, debtors often get the benefit of Chapter 13 without paying a fair proportion of the debtor's obligations when the bankruptcy court confirms a plan proposing nominal payments.¹⁵²

One of the primary purposes of the Bankruptcy Act is to relieve the honest debtor from the weight of oppressive indebtedness, and allow a fresh start free from the obligations of business misfortunes.¹⁵³

under the plan on account of the claim not less than the allowed amount of the claim. *Id.* at §46.51. Normally, the court has little difficulty in finding that the plan is in the best interests of creditors because the debtor usually does not own any realizable assets which could provide any kind of dividend in straight bankruptcy, thus the Chapter 13 plan offers a greater gain to those creditors. 10 Collier at ¶29.06(3).

144. 11 U.S.C. §1325(a)(6). This requires the court to determine that the debtor will be able to make all payments under the plan. H.R. Rep. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) p. 430. "Most importantly, the facts relating to the debtor's earning power, i.e., his income from which payments under the plan are to be made, and to his general prospects should be considered." 10 Collier at ¶29.06(4).

145. See *In re Scott*, 3 Collier Bankr. Cas. 2d at 420; 5 Collier at ¶1325.01 (15 Ed. 1979).

146. See *Keckler*, 3 Bankr. at 158.

147. See *Lee*, Chapter 13 *nee* Chapter XIII, 53 AM. BANK. L.J. 303, 307 (1979).

148. *Id.*

149. *Id.*

150. See *Matter of Brown*, 7 Bankr. at 530 (1980).

151. *Id.*

152. *Id.*

153. *Williams v. U.S. Fidelity & G. Co.*, 236 U.S. 549, 554-55 (1915).

The *Cecchini* standard for section 523(a)(6) appears to hinder that objective by defining "willful and malicious injury" broadly, causing a wider range of debts to be held nondischargeable. Keeping in mind that under section 523 the debtor has committed an intentional, wrongful act, Chapter 13, nevertheless, provides relief for the debtor who does not wish to shirk all financial obligations, but who instead is willing to accept a feasible repayment plan which satisfies a portion of the debtor's liabilities.¹⁵⁴

CONCLUSION

One of the primary purposes of the Bankruptcy Code is to provide the honest debtor a fresh start free from burdensome financial obligations. Accordingly, exceptions to discharge under bankruptcy are to be narrowly construed in favor of the debtor. The purpose of section 523(a)(6) is to preserve the discharge feature from abuse and to deny the benefits to those who have been shown to be unworthy of the benefits in the ways specified by the section. Courts reading section 523(a)(6) to require the debtor to have intended to injure the creditor may be using the subjective intent of the debtor as a means of distinguishing the honest debtor from the dishonest debtor; only the honest debtor will receive the full benefit of a fresh start under the Bankruptcy Code. On the other hand, courts following the *Cecchini* reasoning find that an implied intent to injure sufficiently separates the honest from the dishonest debtor. The *Cecchini* decision does not foreclose discharge to debtors who have intentionally or inadvertently become unable to meet financial obligations, but rather, only debtors who have intentionally acted in such a manner as to necessarily cause harm to the creditor will be forced to pay the creditor despite filing bankruptcy. Thus, for debtors who have not acted wrongly, the fresh start policy is still promoted by the holding in *Cecchini*.

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154. See 11 U.S.C. §1328.