

# Where There's a "Will," There Should Be a Way: Why *In re Salvino* Unjustifiably Restricts the Application of § 523(a)(6) to Exclude Willful and Malicious Breaches of Contract

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## I. INTRODUCTION

### A. THE SCENARIO

Imagine you are the president and CEO of a rapidly expanding medical group, opening new surgical centers across the country, and you have just defaulted on over \$4 million in bank loans. The bank is intending to accelerate your notes and has threatened to contact the FBI if you do not do one of three things: bring the loans current, liquidate the company, or find a buyer to acquire the debt. Not wanting to face a criminal investigation from the FBI or abandon the business you have spent the last thirteen years of your life building into a national corporation and come away with nothing, you manage to find a small group of investors willing to purchase a sizeable portion of your debt, covering all but \$1.5 million of your loan from the bank.

While evaluating the acquisition of your company, however, these investors make it abundantly clear to you that they do not intend to make such a significant investment unless you promise to remain with the company. As a matter of fact, in conjunction with the debt purchase, they require you to sign an employment contract that includes a five-year commitment to stay with the company. Little do these investors know that you have no intention of actually honoring this contract. While negotiating the debt purchase with the investors and acknowledging their repeated assertions that they could not be successful unless they retained your services, you have been simultaneously engaging in a secret job search, seeking alternative employment from your competitors, and even briefly entering into an employment agreement with a competitor before backing out. In the midst of this fiction you have created, you proceed to sign an amended employment contract with the investors that retains your five-year commitment to remain with the company but releases you from your \$1.5 million personal guaranty on the bank loan in exchange for the insertion of a liquidated damages provision. This liquidated damages provision fixes damages at \$1.5 million if you terminate the contract without breach by the company during the first year of the contract term and at a lesser amount for your breach during each subsequent year of the contract term.

Within one week of the asset purchase closing, you begin actively seeking alternative employment and are working full-time for a competitor in less than six months. What could possibly be the source of such audacity to willfully breach your employment contract knowing that you will be liable for \$1.5 million in liquidated damages? The sources are your memory of the story of Doctor Christopher Salvino and because you know that once you file for bankruptcy there will be no consequences for the injuries you have caused breaching contracts, since debts arising from any breach of contract—no matter how intentional or malicious the injury—are no longer subject to exception from discharge after the decision in *Wish Acquisition v. Salvino (In re Salvino)*.<sup>1</sup>

#### B. THE DECISION

In *In re Salvino*, the Bankruptcy Court for the Northern District of Illinois held, on these very facts, that the \$1.5 million debt arising from the breach of the liquidated damages provision of Christopher Salvino's employment contract was not subject to exception from discharge as a "willful

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1. See *Wish Acquisition, LLC v. Salvino (In re Salvino)*, 373 B.R. 578 (Bankr. N.D. Ill. 2007), *aff'd*, No. 07 C 4756, 2008 WL 182241, at \*1 (N.D. Ill. Jan. 18, 2008). The hypothetical presented in the introduction is essentially a condensed summary of the facts giving rise to *In re Salvino*.

and malicious injury”<sup>2</sup> under § 523(a)(6) of the Bankruptcy Code.<sup>3</sup> Rather than applying the standard for willful and malicious injury established by the Supreme Court in *Kawaauhau v. Geiger*<sup>4</sup> to the facts of the case, the *In re Salvino* court held, as a matter of law, that a debt arising from a breach of contract—not accompanied by any tortious conduct—can never constitute a willful and malicious injury as defined in § 523(a)(6).<sup>5</sup> The court came to this conclusion notwithstanding the fact that the Seventh Circuit had previously recognized that a debt resulting from a breach of contract could constitute a willful and malicious injury subject to exception from discharge under § 523(a)(6).<sup>6</sup> In addition, there exists a split of authority in the United States Circuit Courts of Appeals as to whether or not a breach of contract not accompanied by any tortious conduct may give rise to a willful and malicious injury subject to exception from discharge under § 523(a)(6).<sup>7</sup> The Ninth and Sixth Circuits require that a breach of contract must be accompanied by some form of tortious conduct that gives rise to a willful and malicious injury in order to qualify for exception to discharge under §

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2. *Id.* at 591.

3. 11 U.S.C. § 523(a)(6) (2006). “A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity.” *Id.* The phrase “subject to exception from discharge,” as used in this article, means that when a debtor files for bankruptcy and is discharged of the obligation to pay back the majority of its debts, those debts that are subject to exception from discharge are not discharged, and the obligation to repay the creditor for the nondischargeable debt remains.

4. *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (“[N]ondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to *injury*.”).

5. *See In re Salvino*, 373 B.R. at 591.

6. *N.I.S. Corp. v. Hallahan (In re Hallahan)*, 936 F.2d 1496 (7th Cir. 1991). The specific question of whether tortious conduct is an essential element of a willful and malicious injury under § 523(a)(6) was not directly addressed in *In re Hallahan*. Nevertheless, the Seventh Circuit affirmed the bankruptcy court’s finding, stating that “[b]ecause Hallahan concedes that he breached the contract willfully, the bankruptcy court’s finding that Hallahan’s debt to the plaintiffs is non-dischargeable under Section 523(a)(6) will not be disturbed.” *Id.* at 1501. “The bankruptcy court declined to discuss the claim for tortious interference with contract brought by plaintiffs, finding that Hallahan’s willful breach of his own contract with Ozark was enough to support a determination of non-dischargeability under Section 523(a)(6). Like the bankruptcy court, we will not address the tort claim.” *Id.* at 1501 n.4. *But see* *Wish Acquisition, LLC v. Salvino*, No. 07 C 4756, 2008 WL 182241, at \*4 (N.D. Ill. Jan. 18, 2008) (finding the weight of *Hallahan* to be “undermined” by the fact that a post-*Geiger*, unpublished decision of the Seventh Circuit, *Radivojevic v. Pickens (In re Pickens)*, No. 98-1985, 2000 WL 1071464, at \*1 (7th Cir. Aug. 1, 2000), states that § 523(a)(6) is intended to prevent the discharge of debts incurred as a result of intentional torts and finds it “doubtful” that § 523(a)(6) would provide a basis for excepting a debt incurred as a result of a breach of contract).

7. *See In re Salvino*, 373 B.R. at 588 (discussing the split of authority in the circuit courts); *see also infra* Part II.D.

523(a)(6),<sup>8</sup> while the Fifth and Tenth Circuits have ruled that a breach of contract, standing alone, may qualify for exception to discharge as a willful and malicious injury under § 523(a)(6) so long as the debt arose from an intentional or substantially certain injury.<sup>9</sup>

### C. THE ARGUMENT

This author takes the position that the *In re Salvino* court erred in concluding that a willful and malicious injury, as defined in § 523(a)(6), requires tortious conduct as an essential element and, thus, in categorically denying relief to victims of willful and malicious breaches of contract when those who have injured them file for bankruptcy. Rather, the court should have held that the debt arising from the liquidated damages provision of Christopher Salvino's employment contract was nondischargeable<sup>10</sup> since it was the result of Salvino's willful and malicious injury-causing conduct. At the very least, the court should have engaged in a meaningful inquiry into the culpability of Christopher Salvino's injury-causing conduct by analyzing whether his injury-causing conduct was willful and malicious. By categorically denying relief to victims of willful and malicious injuries that arise from a breach of contract, the *In re Salvino* court has immunized an entire class of wrongdoers who were not intended to benefit from the Bankruptcy Code's privilege<sup>11</sup> of granting honest debtors a discharge in bankruptcy.

Both the statutory language of § 523(a)(6) and the standard articulated by the Supreme Court in *Kawaauhau v. Geiger* support the argument that willful and malicious injuries arising from a breach of contract not accompanied by any tortious conduct should be subject to exception to discharge as a willful and malicious injury under § 523(a)(6). This is because both the statutory elements of § 523(a)(6)<sup>12</sup> and the standard articulated in *Geiger*<sup>13</sup>

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8. *Steier v. Best (In re Best)*, 109 F. App'x 1, 6 (6th Cir. 2004); *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202 (9th Cir. 2001).

9. *Williams v. Int'l Bhd. of Elec. Workers Local 520 (In re Williams)*, 337 F.3d 504 (5th Cir. 2003); *Sanders v. Vaughn (In re Sanders)*, No. 99-6396, 2000 WL 328136, at \*2 (10th Cir. Mar. 29, 2000).

10. "Nondischargeable debt" is defined as "[a] debt . . . that is not released through bankruptcy." BLACK'S LAW DICTIONARY 433 (8th ed. 2004).

11. *See Union Planters Bank, N.A. v. Connors*, 283 F.3d 896, 901 (7th Cir. 2002) ("Although the denial of discharge in bankruptcy should be construed strictly against the creditor and liberally in favor of the debtor, such discharge is not a right, but a privilege."); *see also Dubrowsky v. Estate of Perl binder (In re Dubrowsky)*, 244 B.R. 560, 572 (E.D.N.Y. 2000) ("A discharge under section 727 is a privilege, not a right, and may only be granted to the honest debtor.").

12. 11 U.S.C. § 523(a)(6) (2006) ("A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt for

relate to the deliberateness of the debtor's injury-causing conduct, rather than to whether the underlying debt arose from a tort or a breach of contract. In addition, precedent exists supporting the position that willful and malicious breaches of contract are subject to exception from discharge under § 523(a)(6).<sup>14</sup>

Accordingly, this article takes the position that the bankruptcy court in *In re Salvino* erred when it concluded that any breaches of contract not accompanied by tortious conduct could never qualify for exception to discharge as a willful and malicious injury.<sup>15</sup> Despite its seemingly persuasive reasoning,<sup>16</sup> the court misread and misapplied dicta from the Supreme Court's opinion in *Geiger*,<sup>17</sup> gave too much weight to what it refers to as the "common use" of the phrase "willful and malicious,"<sup>18</sup> and overstated its apprehension about the consequences of permitting some breaches of contract that are not accompanied by any tortious conduct being excepted from discharge as a willful and malicious injury<sup>19</sup> in coming to its conclusion that tortious conduct is an essential element of a willful and malicious injury under § 523(a)(6). Additionally, the decision in *In re Salvino* ignores Seventh Circuit precedent<sup>20</sup> and dismisses the precedential value of numerous cases holding that a breach of contract, standing alone, may give rise to a willful and malicious injury under § 523(a)(6)<sup>21</sup> because it is devoid of any meaningful inquiry into the willful and malicious nature of Christopher Salvino's injury-causing conduct and because it conflicts with the Bankruptcy Code's underlying policy of providing relief only to the "honest, but unfortunate debtor."<sup>22</sup> This article concludes with an analysis of the practi-

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willful and malicious injury by the debtor to another entity or to the property of another entity.").

13. See *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) ("[N]on-dischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.").

14. See sources and discussion *supra* notes 6, 9; see also *infra* notes 53-54, 69, 87, 116.

15. *Wish Acquisition, LLC v. Salvino (In re Salvino)*, 373 B.R. 578, 591 (Bankr. N.D. Ill. 2007), *aff'd*, No. 07 C 4756, 2008 WL 182241, at \*1 (N.D. Ill. Jan. 18, 2008).

16. See *Goodstein Realty Boca Raton, LLC v. Gelinis (In re Gelinis)*, No. 05-36668-BKC-PGH, 2007 WL 2965046, at \*9 n.7 (Bankr. S.D. Fla. Oct. 9, 2007) ("The *Salvino* analysis makes several cogent points . . .").

17. See *In re Salvino*, 373 B.R. at 589.

18. *Id.*

19. *Id.* at 590 ("[A]pplying the common law definition of 'willful and malicious' to contract claims [would render] § 523(a)(6) broadly destructive of the bankruptcy discharge.").

20. See sources and discussion *supra* note 6.

21. See sources and discussion *supra* notes 6, 9; see also *infra* notes 53-54, 69, 87, 116.

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

cal impact of the decision in *In re Salvino* and articulates a proposal that allows for only some particularly egregious breaches of contract to fall within the purview of the § 523(a)(6) exception to discharge but does not render § 523(a)(6) “broadly destructive of the bankruptcy discharge,”<sup>23</sup> as was assumed by the court.

## II. BACKGROUND

### A. DISCHARGE IN BANKRUPTCY

“The purpose of the [Bankruptcy] Code is to provide equitable distribution of the debtor’s assets to the creditors and ‘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.’”<sup>24</sup> Discharge in bankruptcy is recognized as “the foremost remedy to effectuate a fresh start,”<sup>25</sup> and it functions to release a debtor from liability for his prebankruptcy debts.<sup>26</sup> A decree of discharge operates to free a debtor’s future income from the burden of his nonexempt, pre-existing debts “in exchange for [the debtor] surrendering either his nonexempt assets, or, more recently, a portion of his future earnings.”<sup>27</sup> While achieving discharge through bankruptcy can be a salvation for many debtors, allowing them to begin a new economic life, it is recognized that “the right to discharge is not now, and has never been, absolute.”<sup>28</sup> The

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23. *Wish Acquisition, LLC v. Salvino (In re Salvino)*, 373 B.R. 578, 590 (Bankr. N.D. Ill. 2007), *aff’d*, No. 07 C 4756, 2008 WL 182241, at \*1 (N.D. Ill. Jan. 18, 2008).

24. *Vill. of San Jose v. McWilliams*, 284 F.3d 785, 790 (7th Cir. 2002).

25. 9 AM. JUR. 2D *Bankruptcy* § 5 (2006 & Supp. 2008) (citing *N. River Ins. Co. v. Baskowitz (In re Baskowitz)*, 194 B.R. 839 (Bankr. E.D. Mo. 1996); *First State Bank of Newport v. Beshears (In re Beshears)*, 196 B.R. 468 (Bankr. E.D. Ark. 1996)).

26. See BLACK’S LAW DICTIONARY 496 (8th ed. 2004).

27. Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985) (“[Discharge allows] an individual to keep human capital and its proceeds as well as certain other assets . . . [but] . . . require[s] him to surrender other forms of his wealth.”).

28. Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 57 n.6 (1990) (“[D]ischarge first became a feature of Anglo-American bankruptcy jurisprudence in 1705.”). The author further explains that as discharge became more freely available under the 1841 and 1867 Bankruptcy Acts, there “came more grounds for complete denial of the discharge,” and that “the 1898 Act specified numerous exceptions to discharge, including the exception for willful and malicious injuries.” *Id.* at 62-65; see also Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1395 n.5 (1985) (“[F]rom an historical perspective, discharge is a relatively recent addition to bankruptcy law. . . . [The 1705 English statute first permitting discharge] . . . was conceived more as a means to encourage merchant-debtors to disclose their assets to creditors (and thus to facilitate collection) than as a way to give individuals a ‘fresh start.’”).

Supreme Court has established that the purpose of the Bankruptcy Code and its discharge provisions is to relieve the “honest but unfortunate debtor” from “oppressive indebtedness” by granting him the opportunity to have a “fresh start.”<sup>29</sup> Since this “fresh start” policy is limited to the “honest but unfortunate debtor,”<sup>30</sup> the Code provides that certain types of debts shall be excepted from discharge as a matter of law, thus narrowing the range of debts subject to discharge in bankruptcy. The fact that each exception to discharge enumerated in § 523(a) deals with more or less reprehensible conduct leads to an inference that the statutorily created exceptions to discharge were set forth with the purpose of effectuating the underlying policy of the Bankruptcy Code by ensuring that only the “honest but unfortunate” debtors remain eligible for a “fresh start” through discharge in bankruptcy. The Supreme Court has seemingly confirmed this by stating that “[t]he various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress ‘that the creditors’ interest in recovering full payment of debts in these categories outweighs the debtors’ interest in a complete fresh start.’”<sup>31</sup>

#### B. EXCEPTION FOR “WILLFUL AND MALICIOUS INJURY”

Of the twenty-one categories of debts excepted from discharge under paragraphs one through nineteen of § 523(a), the specific exception provision addressed by this article is the exception for debts “for willful and malicious injury by the debtor to another entity or to the property of another entity.”<sup>32</sup> The legislative history accompanying § 523(a)(6) makes it clear that the term “willful” means “deliberate or intentional.”<sup>33</sup> Even so, the Supreme Court’s decision in *Geiger*—holding that “debts arising from reck-

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29. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (“One of the primary purposes of the Bankruptcy Act 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.’ . . . It gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.” (citation omitted)).

30. *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) (“[I]n the same breath that we have invoked this ‘fresh start’ policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the ‘honest but unfortunate debtor.’”); *see also* *E. Diversified Distrib., Inc. v. Matus (In re Matus)*, 303 B.R. 660, 670 (Bankr. N.D. Ga. 2004) (“[G]ood faith and candor are necessary prerequisites to obtaining a discharge.”).

31. *Cohen v. de la Cruz*, 523 U.S. 213, 222 (1998).

32. 11 U.S.C. § 523(a)(6) (2006).

33. *Farmers Ins. Group v. Compos (In re Compos)*, 768 F.2d 1155, 1157-58 (10th Cir. 1985) (“[I]t was the express intent of Congress to define ‘willful’ for purposes of § 523(a)(6) to mean ‘deliberate or intentional.’”).

lessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)<sup>34</sup>—settled a dispute that had arisen regarding the § 523(a)(6) exception’s applicability to intentional acts that “necessarily cause injury.”<sup>35</sup> In so doing, the *Geiger* opinion clarified the § 523(a)(6) exception’s definition of “willful” by declaring that “[t]he word ‘willful’ in (a)(6) modifies the word ‘injury,’”<sup>36</sup> meaning that the debtor must not merely intend to commit the *act* but must also intend to cause the *injury* or be substantially certain that the injury would occur in order to satisfy the “willful” prong of willful and malicious injury of § 523(a)(6).<sup>37</sup>

There is less of a consensus as to the showing necessary to establish the “malicious” prong of willful and malicious injury.<sup>38</sup> The Supreme Court has stated that “[m]alice . . . in its legal sense . . . means a wrongful act, done intentionally, without just cause or excuse,” and has indicated that the law will imply malice when the act is of a certain nature.<sup>39</sup> Nevertheless, some courts have required a showing of “specific malice”—that is, “proof of an intent to injure”<sup>40</sup>—while other courts have found a showing of implied or constructive malice to be sufficient.<sup>41</sup> Furthermore, there is disagreement among the courts as to whether the willful and malicious analysis is “single focused” or whether “§ 523(a)(6) requires a dual inquiry into

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34. *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998).

35. The petitioner in *Geiger* unsuccessfully sought to construe language from an earlier Supreme Court opinion, *Tinker v. Colwell*, to encompass debts arising from recklessly or negligently inflicted injuries. *Id.* at 63 (1998) (“[An act that] necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the [bankruptcy discharge] exception.” (citing *Tinker v. Colwell*, 193 U.S. 473, 487 (1904))).

36. *Id.* at 61.

37. *Id.*

38. Karen N. Fischer, *The Exception to Discharge for Willful and Malicious Injury: The Proper Standard for Malice*, 7 BANKR. DEV. J. 245, 246 (1990) (“The term ‘malice’ is not defined consistently. As a result, there are two conflicting lines of reasoning regarding the finding of malice. One requires a showing of specific intent, while the other uses implied or constructive malice.”). “The implied malice formulation seems to be the more equitable standard. Unlike specific intent, which is virtually impossible to prove, implied malice gives the creditor a greater chance of prevailing.” *Id.* at 259.

39. See *Tinker v. Colwell*, 193 U.S. 473, 485-87 (1904) (“[T]he law implies that there must be malice in the very act [of criminal conversation with the plaintiff’s wife].”). The Court found this to be true even where there is no showing of “a malevolent purpose toward the injured person.” *Id.* at 489-90.

40. See, e.g., *Farmers Ins. Group v. Compos (In re Compos)*, 768 F.2d 1155, 1159 (10th Cir. 1985) (“We hold that § 523(a)(6) requires proof of an intent to injure before a debt can be held to be nondischargeable under that provision of the Code.”).

41. *Coolidge Bank & Tr. Co. v. Nance (In re Nance)*, 556 F.2d 602, 611 (1st Cir. 1977) (“There need be no showing of ‘special malice’ toward the injured party, only that the act ‘is done deliberately and intentionally in knowing disregard of the rights of another.’”).

whether a debtor acted both willfully and maliciously.”<sup>42</sup> While the majority of courts engage in a dual inquiry regarding whether the debtor acted both willfully and maliciously,<sup>43</sup> the Fifth Circuit has “condensed [the test for willful and malicious injury under § 523(a)(6)] 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.”<sup>44</sup>

### C. THE DECISION IN *GEIGER*

In *Kawaauhau v. Geiger*,<sup>45</sup> the Supreme Court addressed the scope of § 523(a)(6) when confronted with the issue of whether a judgment debt resulting from the negligent or reckless malpractice of a doctor could qualify as a willful and malicious injury as defined in § 523(a)(6).<sup>46</sup> Faced with the “pivotal question” of whether the § 523(a)(6) exception applied to “acts, done intentionally that cause injury . . . or only acts done with the actual intent to cause injury,” the Court determined that the willful and malicious injury exception requires the intent to cause injury and accordingly held that “debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6).”<sup>47</sup>

In support of this conclusion, the Court stated that “the (a)(6) formulation triggers in the lawyer’s mind the category of ‘intentional torts,’ as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend ‘the consequences of an act,’ not simply ‘the act itself.’”<sup>48</sup> The Court acknowledged that it was rejecting the petitioners’ “more encompassing interpretation [of § 523(a)(6), which] could place within the excepted category a wide range of situations in which an act is intentional, but injury is unintended,” and it listed as possible examples

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42. 2 HOWARD J. STEINBERG, *BANKRUPTCY LITIGATION* § 13:45, nn.16-17 (2d ed. 2008).

43. *E.g.*, *Barclays Am./Bus. Credit, Inc. v. Long (In re Long)*, 774 F.2d 875, 880-81 (8th Cir. 1985) (“Congress tells us in § 523(a)(6) that malice and willfulness are two different characteristics. They should not be lumped together to create an amorphous standard to prevent discharge for any conduct that may be judicially considered to be deplorable.”).

44. *See Williams v. Int’l Bhd. of Elec. Workers Local 520 (In re Williams)*, 337 F.3d 504, 509 (5th Cir. 2003) (“This definition of implied malice is identical to the [*Geiger*] Court’s explanation of a willful injury.”); *see also Girardi v. Shaffer (In re Shaffer)*, No. 94-33189-T, 2003 WL 23138445, at \*13 (Bankr. E.D. Va. Jan. 17, 2003) (“The Supreme Court’s *Geiger* decision did not discuss the malice element of § 523(a)(6). Instead, the court’s definition of willfulness changed the complexion of court decisions under the statute as it made willfulness the principle issue for resolution in these cases.”).

45. 523 U.S. 57 (1998).

46. *Id.* at 61.

47. *Id.* at 64.

48. *Id.* at 61-62.

both negligently caused car accidents and a knowing breach of contract.<sup>49</sup> This brief comment made by the Court simply acknowledged that the petitioners' overly broad definition of willful and malicious injury—which would include recklessly and negligently inflicted injuries—was overly broad because such an expansive definition would encompass nearly all injuries resulting from breaches of contract even though not all breaches of contract are committed with an intent to cause injury. Nevertheless, a number of courts, including the court in *In re Salvino*, have misconstrued this brief comment in *Geiger* as supporting the decision to categorically deny relief to victims of willful and malicious breaches of contract that are not accompanied by tortious conduct.<sup>50</sup> By holding that tortious conduct is an essential element of a willful and malicious injury under § 523(a)(6), these courts have effectively placed an unduly restrictive limitation on the types of injuries that are subject to exception from discharge under § 523(a)(6).

D. CIRCUIT SPLIT REGARDING WHETHER TORTIOUS CONDUCT IS AN ESSENTIAL ELEMENT OF § 523(A)(6)

The general consensus among bankruptcy law commentators is that “[s]ection 523(a)(6) generally relates to torts and not to contracts.”<sup>51</sup> Following the decision in *Geiger*, however, a split of authority developed in the circuit courts regarding whether tortious conduct is an essential element of a willful and malicious injury as defined in § 523(a)(6). Namely, the Sixth and Ninth Circuits have held that tortious conduct is an essential ele-

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49. *Id.* at 62.

50. *Wish Acquisition, LLC v. Salvino (In re Salvino)*, 373 B.R. 578, 589 (Bankr. N.D. Ill. 2007), *aff'd*, No. 07 C 4756, 2008 WL 182241, at \*1 (N.D. Ill. Jan. 18, 2008); *see also Steier v. Best (In re Best)*, 109 F. App'x 1, 3 (6th Cir. 2004); *Cotten v. Deasy (In re Deasy)*, 66 F. App'x 526 (5th Cir. 2003) (“[*Geiger*] explicitly rejects a construction of ‘willful’ under which a breach of contract could qualify.”); *Goodstein Realty Boca Raton, LLC v. Gelinias (In re Gelinias)*, No. 05-36668-BKC-PGH, 2007 WL 2965046, at \*8 (Bankr. S.D. Fla. Oct. 9, 2007) (agreeing with the conclusion in *Salvino* that § 523(a)(6) requires “tortious conduct as an essential element of a ‘willful and malicious injury’”).

51. 4 COLLIER ON BANKRUPTCY ¶523.12[1] (Lawrence P. King ed., 15th ed. rev. 2007). *But see* LAWRENCE PONOROFF & STEPHEN E. SNYDER, COMMERCIAL BANKRUPTCY LITIGATION § 9:17 (1989 & Supp. 2007) (“At its core, [Section 523(a)(6)] is concerned with claims against the debtor born out of the intentional commission of a physical tort. . . . This should not be taken to mean, however, that a debt originating in contract may never be held nondischargeable under section 523(a)(6). To the contrary, since the statutory elements of this exception relate to the deliberateness of the debtor’s conduct, and not to whether the affected creditor’s consequent claim sounds in tort or contract under prevailing nonbankruptcy law, it would be imprudent to presumptively conclude that section 523(a)(6) might never serve as a basis for avoiding discharge of a debt emanating from the breach of a contractual obligation.”).

ment of § 523(a)(6),<sup>52</sup> while the Fifth and Tenth Circuits have focused on the willfulness of the debtor's injury-causing conduct in deciding that a breach of contract not accompanied by any tortious conduct may qualify as a willful and malicious injury under § 523(a)(6).<sup>53</sup> The district courts remain similarly divided on this issue.<sup>54</sup>

### III. ANALYSIS

#### A. THE REPORT: *IN RE SALVINO*

Notwithstanding the existence of a split in authority among the circuit courts<sup>55</sup> and the fact that the Seventh Circuit had previously recognized that a breach of contract not accompanied by any tortious conduct may constitute a willful and malicious injury under § 523(a)(6),<sup>56</sup> the *In re Salvino* court decided that tortious conduct is an essential element of a willful and malicious injury as defined in § 523(a)(6) based on what it referred to as "considerations [of] language, history, policy and context."<sup>57</sup> In short, the *In*

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52. *Steier v. Best (In re Best)*, 109 F. App'x 1 (6th Cir. 2004); *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1206 (9th Cir. 2001) ("[T]o 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.'"). *But see Spring Works v. Sarff (In re Sarff)*, 242 B.R. 620, 626 (B.A.P. 6th Cir. 2000) ("Under *Geiger*, damages for a breach of contract can be nondischargeable under § 523(a)(6). The plaintiff must, however, show more than just a 'knowing breach of contract' and must prove that the defendant 'intended to cause harm by' breaching the contract." (citation omitted)).

53. *Williams v. Int'l Bhd. of Elec. Workers Local 520 (In re Williams)*, 337 F.3d 504 (5th Cir. 2003) ("[A] knowing breach of a clear contractual obligation that is certain to cause injury may prevent discharge under Section 523(a)(6), regardless of the existence of separate tortious conduct."); *Sanders v. Vaughn (In re Sanders)*, No. 99-6396, 2000 WL 328136, at \*2 (10th Cir. Mar. 29, 2000) ("Contrary to [debtor's] interpretation, nothing in *Geiger* indicates the Supreme Court's intention to immunize debtors under 11 U.S.C. § 523(a)(6) for 'willful and malicious' breaches of contract."). *But see Cotten v. Deasy (In re Deasy)*, No. 02-11200, 2003 WL 21018189, at \*1 (5th Cir. Apr. 18, 2003) ("*Kawaauhau* explicitly rejects a construction of 'willful' under which a breach of contract could qualify.").

54. *Compare Girardi v. Shaffer (In re Shaffer)*, No. 94-33189-T, 2003 WL 23138445, at \*11-\*14 (Bankr. E.D. Va. Jan. 17, 2003) (rejecting the debtor's argument that "after *Geiger*, breach of contract cannot be the basis for nondischargeability under § 523(a)(6)" in holding that the breach of a contract to purchase property can be a willful and malicious injury) with *In re Gelinas*, 2007 WL 2965046, at \*9 n.7 (agreeing with the conclusion in *In re Salvino* that § 523(a)(6) requires "tortious conduct as an essential element of a 'willful and malicious injury'").

55. See cases cited *supra* notes 52-53.

56. *N.I.S. Corp. v. Hallahan (In re Hallahan)*, 936 F.2d 1496 (7th Cir. 1991); see also *supra* note 6.

57. *Wish Acquisition, LLC v. Salvino (In re Salvino)*, 373 B.R. 578, 591 (Bankr. N.D. Ill. 2007), *aff'd*, No. 07 C 4756, 2008 WL 182241, at \*1 (N.D. Ill. Jan. 18, 2008).

*re Salvino* court states the following reasons as justification for its conclusion: (1) the Supreme Court's statement in *Geiger* that "the phrase 'willful and malicious injury' is one that 'triggers in the lawyer's mind the category of intentional torts'";<sup>58</sup> (2) "the common use of 'willful and malicious' has been to describe conduct warranting punitive damages in tort cases" and that "the common law treats willfulness and malice as irrelevant in contract cases, where punitive damages are generally held to be unavailable";<sup>59</sup> (3) the § 523(a)(6) exception to discharge has historically been applied only in situations of tortious conduct, dating back to the Bankruptcy Act of 1898;<sup>60</sup> (4) "applying the common law definition of 'willful and malicious' to contract claims renders § 523(a)(6) broadly destructive of the bankruptcy discharge";<sup>61</sup> and (5) "making intentional breaches of contract nondischargeable under § 523(a)(6) would create substantial tension with § 365 of the Bankruptcy Code[ which] authorizes a debtor in possession to reject executory contracts and unexpired leases that do not produce a benefit for the debtor's estate."<sup>62</sup>

#### B. THE ANALYSIS

Despite the fact that some may view the *In re Salvino* analysis as "mak[ing] several cogent points,"<sup>63</sup> the reasoning proffered by the court in reaching its conclusion that tortious conduct is an essential element of a willful and malicious injury under § 523(a)(6) is incorrect for the following reasons. First, the *In re Salvino* court has taken from a different context and erroneously misconstrued two passages of dicta from the Supreme Court's opinion in *Geiger*<sup>64</sup> in order to rationalize its conclusion that the willful and malicious injury exception is limited to intentional torts. Second, the *In re Salvino* court has given too much weight to what it refers to as the "common use" of the phrase "willful and malicious" and to the fact that punitive damages are generally not recoverable in actions for breach of contract. Third, the *In re Salvino* court has overstated its apprehension of the consequences of permitting some breaches of contract, those that are not accompanied by any tortious conduct, to be excepted from discharge as a willful and malicious injury. Fourth, making willful and malicious breaches of contract nondischargeable under § 523(a)(6) would not "create substantial

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58. *Id.* at 589.

59. *Id.*

60. *Id.* at 589-90.

61. *Id.* at 590.

62. *Id.* at 591.

63. *E.g.*, Goodstein Realty Boca Raton, LLC v. Gelinas (*In re Gelinas*), No. 05-216705, 2007 WL 2965046, at \*9 (Bankr. S.D. Fla. Oct. 9, 2007).

64. *See infra* note 73.

tension with § 365 of the Bankruptcy Code” because even though § 365 may permit willful breaches of contract, the fact that all rejected<sup>65</sup> contracts must be court approved<sup>66</sup> and withstand the business judgment rule<sup>67</sup> of § 365 does not allow for the willful and malicious rejection or breach of executory contracts and unexpired leases.

In addition to not agreeing with the reasons proffered by the *In re Salvino* court as the justification for its ruling, this author takes issue with the outcome of the decision in *In re Salvino* for three additional reasons. First, the court ignored Seventh Circuit precedent<sup>68</sup> in addition to dismissing the precedential value of other prior cases holding that an injury arising from a breach of contract not accompanied by any tortious conduct could qualify as a willful and malicious injury under § 523(a)(6),<sup>69</sup> including opinions from two circuit courts.<sup>70</sup> Second, the *In re Salvino* court has disregarded the fact that the focus of the Supreme Court’s inquiry in *Geiger* was the deliberateness of the debtor’s injury-causing conduct, rather than whether the nature of the creditor’s cause of action arising from the injury had its basis in tort or contract.<sup>71</sup> Third, the lasting effect of the decision in *In re Salvino* will be to immunize from liability an entire class of wrongdoers who were never intended to be shielded<sup>72</sup> from the consequences of

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65. *In re Salvino*, 373 B.R. at 591.

Section 365(a) authorizes a debtor in possession to reject executory contracts and unexpired leases that do not produce a benefit for the debtor’s estate. *See In re Trans World Airlines, Inc.*, 261 B.R. 103, 117 (Bankr. D. Del. 2001) (“[T]he ability to reject an executory contract is rooted in the principle of maximizing the return to creditors by permitting a debtor in possession to renounce title to and abandon burdensome property if such action is in the best interests of the estate.”).

*Id.*

66. 11 U.S.C. § 365(a) (2006) (“Except as provided in [the following sections], the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.”).

67. *See infra* note 120 and accompanying text.

68. *N.I.S. Corp. v. Hallahan (In re Hallahan)*, 936 F.2d 1496 (7th Cir. 1991).

69. *E.g., Traditional Indus. v. Ketaner (In re Ketaner)*, 149 B.R. 395 (Bankr. E.D. Va. 1992) (finding the injury resulting from the debtor’s breach of a noncompetition clause to be excepted from discharge as a willful and malicious injury under § 523(a)(6)). “Intentional breach of a valid covenant not to compete in an employment agreement can constitute ‘willful and malicious’ injury under 11 U.S.C. § 523(a)(6).” *Id.* at 400. “The focus, for dischargeability purposes, is not on the wrongfulness of the intentional breach. Instead, the focus for § 523(a)(6) is on the debtor’s intent when he took the action.” *Id.* (citing *Dorr & Assocs. v. Pasek (In re Pasek)*, 129 B.R. 247, 251 (Bankr. D. Wyo. 1991)).

70. *See Steier v. Best (In re Best)*, 109 F. App’x 1, 3 (6th Cir. 2004); *Cotten v. Deasy (In re Deasy)*, No. 02-11200, 2003 WL 21018189, at \*1 (5th Cir. Apr. 18, 2003).

71. *See supra* text accompanying note 37; *see also supra* note 52.

72. *See E. Diversified Distribs., Inc. v. Matus (In re Matus)*, 303 B.R. 660, 670 (Bankr. N.D. Ga. 2004) (“Though the Bankruptcy Code provides most debtors with a fresh start, the Code prevents dishonest debtors from improperly using it as a shield.”).

their injury-causing conduct through the privilege of obtaining a discharge in bankruptcy of the debts arising from their intentionally and inexcusably harmful breaches of contract.

1. *Rebutting the Court's Reasoning in In re Salvino*

First, the *In re Salvino* court is guilty of extracting two passages of dicta from *Geiger*<sup>73</sup> and misconstruing them in such a way as to result in an excessive restriction on the applicability of § 523(a)(6) by categorically excluding all debts arising from a breach of contract if the breach is not accompanied by tortious conduct from qualifying for exception to discharge as a willful and malicious injury, regardless of how intentional and inexcusable the debtor's conduct may have been in breaching the contract. The court commits this error because it fails to take into account the context in which the statements in *Geiger* were made.

The question at issue in *Geiger* was whether recklessly or negligently inflicted injuries may qualify for exception to discharge as a willful and malicious injury under § 523(a)(6).<sup>74</sup> The Court unequivocally held that debts resulting from recklessly or negligently caused injuries do not qualify for exception to discharge under § 523(a)(6).<sup>75</sup> In explaining its holding, the Court simply stated that “the (a)(6) formulation triggers in the lawyer's mind the category ‘intentional torts,’ as distinguished from negligent or reckless torts,”<sup>76</sup> in order to illustrate the fact that recklessly and negligently caused injuries do not qualify for exception to discharge under § 523(a)(6). There is no evidence that the Court intended to decree that only intentional torts could qualify as willful and malicious injuries under § 523(a)(6). Rather, a more reasonable interpretation of this statement<sup>77</sup> is that the Court was merely stating that the statutory elements of § 523(a)(6) “trigger in one's mind” the kind of intentional conduct that intentionally causes injury, rather than the kind of intentional conduct which proximately—but unintentionally—causes injury. Therefore, this statement does not necessarily exclude from the § 523(a)(6) definition of “willful and malicious injury” the kind of conduct that intentionally causes injury by way of breaching a con-

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73. See *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998). “[A]s the Eighth Circuit observed, the (a)(6) formulation triggers in the lawyer's mind the category ‘intentional torts,’ as distinguished from negligent or reckless torts.” *Id.* at 61. “The *Kawaauhau* more encompassing interpretation could place within the excepted category a wide range of situations in which an act is intentional, but injury is unintended, *i.e.*, neither desired nor in fact anticipated by the debtor. . . . A ‘knowing breach of contract’ could also qualify.” *Id.* at 62 (citation omitted).

74. See *id.* at 61.

75. *Id.* at 64.

76. *Id.* at 61.

77. See *Geiger*, 523 U.S. at 61-62.

tractual obligation rather than a tort duty. Rather, this statement merely illustrates the principle that unintentionally caused injuries do not fall within the purview of § 523(a)(6). The attempt by the *In re Salvino* court to give this passage from *Geiger*<sup>78</sup> a far greater effect than could possibly have been contemplated by the Supreme Court when it was issued epitomizes the level of the court's error in concluding that tortious conduct is an essential element of willful and malicious injury under § 523(a)(6) and in categorically excluding from exception to discharge those willful and malicious injuries arising from the breach of a contractual obligation not accompanied by tortious conduct.

In addition to relying on the "intentional torts" reference in *Geiger*,<sup>79</sup> the *In re Salvino* court also gave heavy credence<sup>80</sup> to the reference in *Geiger* of "a knowing breach of contract"<sup>81</sup> as an example of the type of injury that could be included under the petitioners' erroneously overbroad interpretation of willful and malicious injury.<sup>82</sup> However, the *In re Salvino* court disregarded the fact that the question of whether a breach of contract may qualify as a willful and malicious injury under § 523(a)(6) was not at issue in *Geiger*. Rather, the court extracts this dicta from the divergent context of *Geiger*<sup>83</sup> and misconstrues it in order to support its conclusion that tortious conduct is an essential element of willful and malicious injury under § 523(a)(6).<sup>84</sup> Contrary to the *In re Salvino* court's conclusion,<sup>85</sup> it is more plausible that the Supreme Court included this reference to a knowing breach of contract only to illustrate the fact that the petitioners' "more en-

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78. *Id.*

79. *Id.*

80. See *Wish Acquisition, LLC v. Salvino (In re Salvino)*, 373 B.R. 578, 590 (Bankr. N.D. Ill. 2007), *aff'd*, No. 07 C 4756, 2008 WL 182241, at \*1 (N.D. Ill. Jan. 18, 2008) ("Treating breaches of contracts as willful and malicious injuries would thus dramatically expand the number of nondischargeable debts and diminish the scope of the bankruptcy discharge. The Supreme Court recognized the implausibility of this result when it included 'knowing breach of contract' among the items that could be encompassed by an erroneously overbroad interpretation of 'willful and malicious.'"); see also *Cotten v. Deasy (In re Deasy)*, No. 02-11200, 2003 WL 21018189, at \*1 (5th Cir. Apr. 18, 2003) ("[*Geiger*] explicitly rejects a construction of 'willful' under which a breach of contract could qualify.").

81. *Geiger*, 523 U.S. at 62 ("The Kawaauhaus' more encompassing interpretation could place within the excepted category a wide range of situations in which an act is intentional, but injury is unintended, *i.e.*, neither desired nor in fact anticipated by the debtor. Every traffic accident stemming from an initial intentional act—for example, intentionally rotating the steering wheel of an automobile to make a left-hand turn without first checking oncoming traffic—could fit the description. A 'knowing breach of contract' could also qualify." (citation omitted)).

82. *Id.*

83. See *supra* text accompanying note 46.

84. See *In re Salvino*, 373 B.R. at 591; see also *supra* note 80.

85. See *In re Salvino*, 373 B.R. at 591.

compassing interpretation”<sup>86</sup> of § 523(a)(6) was erroneous because such an expansive interpretation of § 523(a)(6) would result in nearly all breaches of contract being subject to exception from discharge as a willful and malicious injury, regardless of the debtor’s state of mind when committing the act that causes the injury. A more correct reading of *Geiger* recognizes that the decision stands for the principle that a willful and malicious injury under § 523(a)(6) must be “‘desired [ ] or in fact anticipated by the debtor.’”<sup>87</sup> Such a definition allows for some particularly egregious breaches of contract, but not all breaches of contract, to be excepted from discharge under § 523(a)(6), as would be the case if the petitioners’ more-expansive interpretation<sup>88</sup> had been accepted by the Court.

It is evident that the *In re Salvino* court’s reliance on these two passages from *Geiger*<sup>89</sup> clearly contributed to its reading into § 523(a)(6) an excessively restrictive interpretation of the type of conduct that may constitute a willful and malicious injury,<sup>90</sup> despite the fact that these statements were issued in a separate context in order to illustrate the fact that negligently caused injuries do not fall within the purview of § 523(a)(6). Rather than focusing on the debtor’s subjective state of mind in causing the injury, the *In re Salvino* court chose to omit the analysis set forth by the Supreme Court in *Geiger*,<sup>91</sup> namely, analyzing the willfulness and maliciousness of the debtor’s injury-causing conduct. Instead, the court chose to categorically deny relief to all creditors who have been harmed by a debtor’s breach of contract, no matter how willful or malicious the conduct, so long as the creditor is not able to prove the debtor’s conduct was “tortious” under applicable nonbankruptcy law.<sup>92</sup>

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86. See *Geiger*, 523 U.S. at 62.

87. See *Sanders v. Vaughn (In re Sanders)*, No. 99-6396, 2000 WL 328136, at \*2 (10th Cir. Mar. 29, 2000) (quoting *Geiger*, 523 U.S. at 62) (“[N]othing in *Geiger* indicates the Supreme Court’s intention to immunize debtors under 11 U.S.C. § 523(a)(6) for ‘willful and malicious’ breaches of contract.”); see also *Girardi v. Shaffer (In re Shaffer)*, No. 94-33189-T, 2003 WL 23138445, at \*14 (Bankr. E.D. Va. Jan. 17, 2003) (disagreeing with the debtor’s argument that “after the Supreme Court’s *Geiger* decision, breach of contract cannot be the basis for nondischargeability under § 523(a)(6)”).

While there would seem little doubt that under the right circumstances, breach of contract can qualify as willful and malicious injury, the court has been unable to find a reported decision involving a breach of contract to purchase property. The absence of a precedent is not important because this type of case, revolving around a debtor’s motivation, must be decided on its own facts.

*Shaffer*, 2003 WL 23138445, at \*14.

88. See *Geiger*, 523 U.S. at 62.

89. See *supra* note 73.

90. See *In re Salvino*, 373 B.R. at 591.

91. See *Geiger*, 523 U.S. at 61-62.

92. See *In re Salvino*, 373 B.R. at 591.

The *In re Salvino* court's second error was in according too much weight to what it referred to as the "common use"<sup>93</sup> of the phrase "willful and malicious" and to the fact that punitive damages are generally not available for breaches of contract in justifying its decision to categorically deny relief to all creditors who are the victims of intentional and inexcusable breaches of contract. First, the court's reliance on the common use<sup>94</sup> of the phrase "willful and malicious" is erroneous because the common use of willful and malicious should not be deemed to be controlling in bankruptcy cases. This is because "[m]alice does not mean the same thing for nondischargeability purposes under § 523(a)(6) as it does in contexts outside of bankruptcy."<sup>95</sup> Case law illustrates the fact that less of a showing is required to establish malice in bankruptcy cases than is required to establish malice in nonbankruptcy cases,<sup>96</sup> since many bankruptcy courts will find implied or constructive malice under certain conditions.<sup>97</sup> Second, even though punitive damages may generally be unavailable in actions for breach of contract, it does not follow that "willfulness and malice [are] irrelevant in contract cases."<sup>98</sup> This is illustrated by the fact that courts have allowed punitive damages to be awarded for certain types of breaches of contract,<sup>99</sup> such as for the breach of a covenant not to compete<sup>100</sup> and where a general contractor's breach of its contract to make payments to a subcontractor was

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93. *Id.* at 589.

94. *Id.*

95. *Girardi v. Shaffer (In re Shaffer)*, No. 94-33189-T, 2003 WL 23138445, at \*13 (Bankr. E.D. Va. Jan. 17, 2003). "In bankruptcy, a debtor may act with malice without bearing any subjective ill will toward a plaintiff creditor or any specific intent to injure." *Id.*

96. *See id.*

97. *See id.*; *see also Tinker v. Colwell*, 193 U.S. 473, 485-87, 489-90 (1904); *Coolidge Bank & Tr. Co. v. Nance (In re Nance)*, 556 F.2d 602, 611 (1st Cir. 1977).

98. *See Wish Acquisition, LLC v. Salvino (In re Salvino)*, 373 B.R. 578, 589 (Bankr. N.D. Ill. 2007), *aff'd*, No. 07 C 4756, 2008 WL 182241, at \*1 (N.D. Ill. Jan. 18, 2008).

99. *See generally* Mark Pennington, *Punitive Damages for Breach of Contract: A Core Sample From the Decisions of the Last Ten Years*, 42 ARK. L. REV. 31 (1989).

100. *See Davis v. Gage*, 682 P.2d 1282, 1285-86 (Idaho 1984) (awarding punitive damages to purchasers of a restaurant and tavern for the vendors' breach of their covenant not to compete with the purchasers' business for a period of fifteen years). "[N]umerous situations arise where the breaking of a promise may be an extreme deviation from standards of reasonable conduct, and when done with knowledge of its likely effects, may be grounds for an award of punitive damages." *Id.* at 1286 (quoting *Linscott v. Rainier Nat'l Life Ins. Co.*, 606 P.2d 958, 964 (Idaho 1980)); *see also Budget Rent-A-Car of Miss., Inc. v. B & G Rent-A-Car, Inc.*, 619 S.W.2d 832, 838 (Mo. Ct. App. 1981) (supporting an award of punitive damages where evidence showed that a former franchisees' breach of a noncompetition covenant in the franchise agreement was "willful and without just cause or excuse, and the same was sought to be concealed").

“injurious to the public interest.”<sup>101</sup> Additionally, some legislatures have statutorily allowed for noncompensatory damages to be awarded for certain kinds of breaches of contract.<sup>102</sup>

Furthermore, even though the *In re Salvino* court reasons that willfulness and malice are irrelevant in contract cases,<sup>103</sup> it ignores the fact that many of the rules of contract law involve moral considerations.<sup>104</sup> The fact that the morality of a contracting party’s conduct and the demands of justice play a significant role in a number of long-established principles of contract law, including promissory estoppel and the implied covenant of good faith and fair dealing,<sup>105</sup> supports the argument that willfulness and malice are important considerations in contract law and that it would be erroneous to categorically exclude debts arising from willful and malicious breaches of contract from the § 523(a)(6) exception.

In addition to the aforementioned examples where malice and willfulness may play a role in contract law,<sup>106</sup> numerous legal commentators challenge the justifications that have been traditionally advanced for excluding punitive damages in contract cases and argue that punitive damages should be more readily available for breaches of contract.<sup>107</sup> While it is well recog-

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101. See *S. Sch. Bldgs., Inc. v. Loew Elec., Inc.*, 407 N.E.2d 240, 253 (Ind. Ct. App. 1980) (stating that allegations that a contractor had “intentionally and maliciously” withheld payments to a subcontractor in order “to force an unwarranted and unfounded compromise by the Plaintiff and to destroy Plaintiff’s business and business reputation” were “sufficient to state a claim for punitive damages [and that] [a] malicious and intentional withholding of money due for the purpose of injuring the financial stability of a business enterprise would, if proven, constitute conduct injurious to the public interest for which punitive damages would be justified”).

102. See, e.g., 215 ILL. COMP. STAT. 5/155 (2006) (allowing for noncompensatory damages where an insurance company has breached a contract with its insured by engaging in conduct constituting an “unreasonable and vexatious delay” in settling claims); 42 PA. CONS. STAT. ANN. § 8371 (West 2007) (allowing for punitive damages to be awarded against insurers who have “acted in bad faith toward the insured”).

103. See *In re Salvino*, 373 B.R. at 589.

104. Henry Mather, *Searching For the Moral Foundations of Contract Law*, 47 AM. J. JURIS. 71, 71 (2002) (“[M]any of the rules in the positive law of contracts force judges and lawyers to make moral judgments. These rules expressly require the application of some rather vague moral norms. Uniform Commercial Code section 1-203, for example, provides that each party to a contract governed by the UCC is obligated to exercise good faith in performing or enforcing that contract.”). “Restatement (Second) of Contracts section 90(1) provides another example [because it] permits enforcement of a promise lacking consideration, but only if justice necessitates enforcement . . .” *Id.*

105. See *id.*

106. See *supra* notes 99-102, 104-105.

107. See, e.g., Tad Armstrong, *Punitive Damages and Breach of Contract: Mr. Corbin, Say It Isn’t So*, 85 ILL. B.J. 74, 74-75 (1997) (“If the breach is intentional; if the conduct is outrageous; if the anticipated consequences of the breach are known, or should be known, to be devastating; and, worse yet, if the motivation for the breach is not justifiable, then why do our courts permit such conduct to go unpunished simply because the facts cannot be

nized that “the most plausible ground” for excluding punitive damages from contract liability is the “efficient breach theory,”<sup>108</sup> it is equally recognized that this “mainstream”<sup>109</sup> justification for excluding punitive damages in contract cases is significantly flawed.<sup>110</sup> Not only does the theory disregard the reality that “not all breaches of contract are efficient, even if the breaching party compensates the victim in full,”<sup>111</sup> it also fails to take into account the nonbreaching party’s “consequential” losses that the breaching party may not have been aware of before deciding to breach the contract.<sup>112</sup>

The third error made by the *In re Salvino* court was to overstate its apprehension of the consequences of permitting some breach of contract debts, those that are not accompanied by any tortious conduct, to be excepted from discharge as a willful and malicious injury under § 523(a)(6). The court in *In re Salvino* contemplates a future where § 523(a)(6) is “broadly destructive of the bankruptcy discharge” if it is to allow debts arising from breach of contract to be subject to discharge under § 523(a)(6).<sup>113</sup>

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forced to fit into a recognized tort pigeonhole? Punitive damages should be permitted against that breed of promise breaker that we will call the ‘contractfeasor.’”). “Why should our law require constrained and nearly always impossible allegations of ‘independent tort’ for victims of broken promises to recover punitive damages, when the outrageous act of the ‘contractfeasor’ is breach of contract, pure and simple?” *Id.* at 78. *See generally* William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 636 (1999) (arguing that “punitive damages should be available for any willful breach”).

108. Andrew M. Tettenborn, *Punitive Damages for Breach of Contract: What’s so Special About Contract Claims?* 9-10 (Working Paper, 2006), <http://ssrn.com/abstract=938700> (stating that it is reasoned that the “efficient breach theory” justifies the general exclusion of punitive damages for breach of contract because allowing punitive damages for breach of contract would “deter efficient . . . breaches, by making the cost of the breach to the contract breaker greater than the cost of the breach to the victim”).

109. *Id.*

110. *See generally* Dodge, *supra* note 107, at 632 (“There are two basic problems with the efficient breach argument against punitive damages. First, the efficient breach argument provides no excuse for shielding opportunistic breaches of contract . . . from punitive damages . . . . Second, and more fundamentally, allowing a promisor to breach and pay only expectation damages is not the most efficient way to avoid inefficient performance.”).

111. *See* Tettenborn, *supra* note 108.

112. *See* Mather, *supra* note 104, at 80 (“[T]he theory [of efficient breach] is unsound. . . . The party contemplating breach will not know whether his breach would be ‘efficient’ unless he knows what his victim’s loss from the breach would be. . . . In most such cases, he will not be able to make a fairly accurate estimate of his victim’s loss, especially when those losses include ‘consequential’ losses involving the victim’s other business affairs. . . . Furthermore, the theory measures efficiency only in terms of the outcome for the two parties. It ignores the very significant social cost that is incurred every time an intentional breach of contract is discovered and diminishes the social trust that is the vital lifeblood of our social practice of contracting.”).

113. *See* *Wish Acquisition, LLC v. Salvino (In re Salvino)*, 373 B.R. 578, 590 (Bankr. N.D. Ill. 2007), *aff’d*, No. 07 C 4756, 2008 WL 182241, at \*1 (N.D. Ill. Jan. 18, 2008).

However, this apprehension is misplaced for two reasons. First, such an apprehension disregards the existence and function of the “malicious” prong of the § 523(a)(6) exception.<sup>114</sup> Second, case law has illustrated that the *In re Salvino* court’s assumption<sup>115</sup> is erroneous since a number of courts that do not require tortious conduct as an essential element of a willful and malicious injury have struck down creditors’ challenges that a debt arising from a breach of contract should be excepted from discharge under § 523(a)(6) where the breach lacked the requisite element of malice.<sup>116</sup> Thus, the courts that apply both the “willful” and “malicious” prongs of the § 523(a)(6) analysis to debts arising from a breach of contract have proven in practice that allowing some particularly egregious breaches of contract to come within the purview of § 523(a)(6) does not render the exception “broadly destructive of discharge” since the majority of debts arising from a breach of contract will not satisfy the “malicious” prong of the § 523(a)(6) analysis, evidently disproving the expressed apprehension of the *In re Salvino* court.<sup>117</sup>

Fourth, making willful and malicious breaches of contract nondischargeable under § 523(a)(6) would not “create substantial tension with § 365 of the Bankruptcy Code” because even though § 365 may permit will-

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114. See discussion *supra* Part II.B.

115. See *In re Salvino*, 373 B.R. at 590.

116. See *Williams v. Int’l Bhd. of Elec. Workers Local 520 (In re Williams)*, 337 F.3d 504, 513 (5th Cir. 2003) (“[T]he initial debt arising from the breach of the CBA does not qualify as a willful and malicious injury under Section 523(a)(6) . . . [b]ecause there is no indication that Williams intended or was substantially certain to injure the Union when he violated the CBA.”); *Petro v. Holland (In re Holland)*, No. 05-62762-LEK, 2007 WL 161001, at \*16 (Bankr. W.D. Tex. Jan. 12, 2007). The *Williams* court came to this conclusion despite recognizing that § 523(a)(6) “excepts contractual debts . . . when those debts result from an intentional or substantially certain injury.” *Williams*, 337 F.3d at 510. The *Holland* court recognized that “a breach of contract may involve an intentional or substantially certain injury giving rise to a § 523(a)(6) claim,” but held that the debtor’s act in breaching the agreement was not a willful and malicious injury because it was “an example of an intentional act resulting in unintended or unanticipated injury,” since “uncontested evidence show[ed] that [the debtor’s] motive in breaching the agreement was not to intentionally injure [sic] [the creditor] but to save equipment awarded to [the debtor] in the divorce that had been awarded along with its debt.” *Holland*, 2007 WL 161001, at \*16; see also *Salem Bend Condo. Ass’n v. Bullock-Williams (In re Bullock-Williams)*, 220 B.R. 345, 347 (B.A.P. 6th Cir. 1998) (finding the debtor’s failure to pay her condominium association dues not to be a willful and malicious injury, since the creditor “failed to demonstrate that the [d]ebtor acted with intent to cause it harm in not making the payments”); *Dorr & Assocs. v. Pasek (In re Pasek)*, 129 B.R. 247, 252-53 (Bankr. Wyo. 1991) (recognizing that an intentional breach of contract may qualify as a willful and malicious injury, but holding that the debtor’s breach of a covenant not to compete was not malicious, since he had a “just cause or excuse” for breaching the contract).

117. *In re Salvino*, 373 B.R. at 590-91.

ful breaches of contract, the fact that all § 365 rejections<sup>118</sup> of contracts must be court approved<sup>119</sup> and withstand the business judgment rule<sup>120</sup> of § 365 does not leave any room for the willful and malicious rejection of contracts under § 365. Because the rejection of any executory contract or unexpired lease requires court approval,<sup>121</sup> the court-approved rejection of an executory contract or unexpired lease is inherently lacking the requisite element of malice because “what is ‘just’ or ‘unjust’ conduct as between the parties has been defined by the court.”<sup>122</sup> Therefore, any court-approved rejection of an executory contract or unexpired lease is necessarily lacking malice because the court, in authorizing the rejection, has defined the breach of contract as being just. In addition, before approving the rejection of any executory contract or unexpired lease, a bankruptcy court engages the business judgment test of § 365, guided by standards and criteria that “may involve a balancing of interests . . . and ultimately, the court must exercise [its] discretion fairly in the interest of all who have had the misfor-

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118. “Section 365(a) authorizes a debtor in possession to reject executory contracts and unexpired leases that do not produce a benefit for the debtor’s estate.” *Id.* at 591. “[T]he ability to reject an executory contract is rooted in the principle of maximizing the return to creditors by permitting a debtor in possession to renounce title to and abandon burdensome property if such action is in the best interests of the estate.” *Id.* (quoting *In re Trans World Airlines, Inc.*, 261 B.R. 103, 117 (Bankr. D. Del. 2001)).

119. 11 U.S.C. § 365(a) (2006) (“Except as provided in [the following sections], the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.”).

120. 5A FED. PROC., L. ED. *Business Judgment Rule as Standard for Rejection* § 9:1287 (2004) (“Under the business judgment rule or standard, the rejection of an executory contract or unexpired lease is appropriate if the trustee or debtor in possession demonstrates that the rejection will benefit the estate . . . . The primary focus of this standard has been viewed as the extent to which rejection of the contract or lease will benefit the general unsecured creditors of the estate.”).

Some courts have recognized that the determination of whether the rejection will benefit unsecured creditors may involve a balancing of interests. Thus, the harm resulting to a creditor as a result of the rejection of an agreement may be weighed against the benefit or harm to other creditors, as well as the potential harm to the debtor.

. . . Court approval may be withheld if a decision to reject is viewed as so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, whim, or caprice.”

*Id.*

121. *See* 11 U.S.C. § 365(a) (2006).

122. *See Williams v. Int’l Bhd. of Elec. Workers Local 520 (In re Williams)*, 337 F.3d 504, 511-12 (5th Cir. 2003). The court held that the debtor’s intentional violation of a court order was “necessarily without ‘just cause or excuse’” and that “[t]he fact that this promise had been made by Williams to the district court and was sanctioned by the Agreed Judgment and Decree elevated the injury to a willful and malicious level.” *Id.*

tune of dealing with the debtor.”<sup>123</sup> Thus, when a bankruptcy court approves the rejection of a contract after finding that the rejection of the contract passes the business judgment test,<sup>124</sup> it follows that the court has found that the “party whose contract is to be rejected [will not] be damaged disproportionately to any benefit to be derived from the general creditors of the estate,” from which it can be inferred that such a breach of contract could not be deemed to be malicious.<sup>125</sup> Accordingly, the court’s reasoning that “making intentional breaches of contract nondischargeable under § 523(a)(6) would create substantial tension with § 365”<sup>126</sup> is lacking merit since the court-approved rejection of an executory contract or unexpired lease lacks the requisite element of malice.

The *In re Salvino* court argues that “if § 523(a)(6) applied to contracts, the Code would punish under that provision the very conduct it encourages under § 365(a),” and that “[s]uch a reading would violate the principle that statutes should be construed to make their various sections cohere with one another in advancing a legislative purpose.”<sup>127</sup> This statement begs the question, however, what legislative purpose is being advanced by denying relief to victims of willful and malicious breaches of contract? The underlying legislative purpose of the Bankruptcy Code’s discharge provisions is “to provide relief to the honest but unfortunate debtor,”<sup>128</sup> and this legislative purpose is not being advanced by the *In re Salvino* court’s decision to categorically exclude from the § 523(a)(6) exception to discharge those debts arising from willful and malicious breaches of contract. Moreover, this statement<sup>129</sup> is erroneous because § 365(a) does not encourage the willful and malicious rejection of executory contracts and unexpired leases. Rather, § 365(b) merely permits the rejection of these contractual obligations only

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123. Chi-Feng Huang v. Pierce (*In re Chi-Feng Huang*), 23 B.R. 798, 801 (B.A.P. 9th Cir. 1982) (“The primary issue is whether rejection would benefit the general unsecured creditors. This may involve a balancing of interests . . . [T]he Second Circuit noted the need for a flexible test, stating that, ‘the trustee and ultimately the court, must exercise their discretion fairly in the interest of all who have had the misfortune of dealing with the debtor.’ This statement illustrates that it is proper for the court to refuse to authorize the rejection of a lease or executory contract where the party whose contract is to be rejected would be damaged disproportionately to any benefit to be derived by the general creditors of the estate.”).

124. *Id.*

125. *Id.*

126. Wish Acquisition, LLC v. Salvino (*In re Salvino*), 373 B.R. 578, 591 (Bankr. N.D. Ill. 2007), *aff’d*, No. 07 C 4756, 2008 WL 182241, at \*1 (N.D. Ill. Jan. 18, 2008).

127. *Id.* (citation omitted) (“[I]f § 523(a)(6) applied to contracts, the Code would punish under that provision the very conduct that it encourages under § 365(a)—intentional breaches of contract that maximize the value of the debtor’s property. Such a reading would violate the principle that statutes should be construed to make their various sections cohere with one another in advancing a legislative purpose.” (citation omitted)).

128. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

129. See *supra* note 127.

after a bankruptcy court has approved the rejection and it has passed the business judgment rule.<sup>130</sup>

2. *The Outcome and Future Consequences of the Decision in In re Salvino*

Besides the weaknesses in the reasons proffered by the *In re Salvino* court as justification for its decision to require tortious conduct as an essential element of willful and malicious injury under § 523(a)(6), the future consequences of the court's decision are problematic for three additional reasons. First, the fact that the *In re Salvino* court disregards Seventh Circuit precedent<sup>131</sup> and the precedential value of other cases holding that an injury arising from a breach of contract not accompanied by any tortious conduct could constitute a willful and malicious injury under § 523(a)(6)<sup>132</sup> jeopardizes the future precedential value of these decisions, which have been effectively discarded by the court. Second, the *In re Salvino* court's categorical exclusion of injuries arising from breaches of contract from qualifying for exception to discharge under § 523(a)(6) robs the decision of a meaningful inquiry because it disregards the fact that the focus of the Supreme Court's inquiry in *Geiger* was on the deliberateness of the debtor's injury-causing conduct,<sup>133</sup> rather than whether the nature of the creditor's cause of action arising from the injury has its basis in tort or contract. Third, the decision of the court in *In re Salvino*<sup>134</sup> offends the Bankruptcy Code's underlying policy of providing relief to the "honest, but unfortunate debtor,"<sup>135</sup> in that its lasting effect is to immunize from liability for their debts an entire class of wrongdoers who were never intended to be shielded from the consequences of their injury-causing conduct through the privilege of obtaining a discharge in bankruptcy of their debts arising from their intentionally and inexcusably harmful breaches of contract.<sup>136</sup>

First, the *In re Salvino* court's decision<sup>137</sup> to categorically exclude willful and malicious breaches of contract from exception to discharge under § 523(a)(6) is overreaching because numerous courts have recognized

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130. See *supra* note 120.

131. N.I.S. Corp. v. Hallahan (*In re Hallahan*), 936 F.2d 1496 (7th Cir. 1991); see also *supra* text accompanying note 6.

132. See *supra* notes 9, 53-54, 69, 87, 116.

133. See *supra* text accompanying note 37.

134. Wish Acquisition, LLC v. Salvino (*In re Salvino*), 373 B.R. 578, 591 (Bankr. N.D. Ill. 2007), *aff'd*, No. 07 C 4756, 2008 WL 182241, at \*1 (N.D. Ill. Jan. 18, 2008).

135. See *supra* note 30.

136. See E. Diversified Distributions, Inc. v. Matus (*In re Matus*), 303 B.R. 660, 670 (Bankr. N.D. Ga. 2004) ("Though the Bankruptcy Code provides most debtors with a fresh start, the Code prevents dishonest debtors from improperly using it as a shield.").

137. See *In re Salvino*, 373 B.R. at 591.

that a breach of contract not accompanied by tortious conduct may constitute a willful and malicious injury under § 523(a)(6).<sup>138</sup> Not only does the court dismiss the fact that the Seventh Circuit has previously affirmed a decision to except from discharge under § 523(a)(6) a debt arising from a breach of contract merely because the issue of whether tortious conduct is required was not presented on appeal in that decision,<sup>139</sup> it also disregards the precedential and persuasive value of post-*Geiger*<sup>140</sup> decisions of the Fifth Circuit<sup>141</sup> and Tenth Circuit<sup>142</sup> holding that willful and malicious breaches of contract may be excepted from discharge under § 523(a)(6). The court's utter dismissal of the value of these decisions has led subsequent bankruptcy courts to follow suit in categorically excluding willful and malicious breaches of contract from exception to discharge under § 523(a)(6).<sup>143</sup> This is true despite the fact that the Fifth Circuit in *Williams*<sup>144</sup> and the Tenth Circuit in *Sanders*<sup>145</sup> properly recognized the critical inquiry of the Supreme Court's analysis in *Geiger* as turning on the deliberateness of the debtor's injury-causing conduct,<sup>146</sup> rather than on whether the creditor's remedy arising from that injury has its basis in tort or contract. If bankruptcy courts continue to accept *In re Salvino* as controlling precedent,<sup>147</sup> debtors will have free rein to inflict willful and malicious injuries by breaching contracts since they will be comforted by the knowledge that their debts arising from these injuries will be wiped out through discharge in bankruptcy.

Second, the *In re Salvino* court's decision to categorically exclude willful and malicious breaches of contract from § 523(a)(6) effectively robs the case of a meaningful inquiry into the culpability of Christopher Salvino's injury-causing conduct. This is because the *In re Salvino* court disregarded the fact that the focus of the Supreme Court's inquiry in *Geiger* was on the deliberateness of the debtor's injury-causing conduct, rather than on whether the debtor's liability arose in tort or breach of contract.<sup>148</sup> The Supreme Court in *Geiger* clearly held that when a debtor intentionally injures or is substantially certain to injure a creditor, the resulting debt is

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138. See *supra* notes 9, 53-54, 69, 87, 116.

139. See *supra* text accompanying note 6.

140. See discussion *supra* Part II.C.

141. See sources cited *supra* note 53.

142. See sources cited *supra* note 53.

143. See, e.g., *Goodstein Realty Boca Raton, LLC v. Gelinas (In re Gelinas)*, No. 05-36668-BKC-PGH, 2007 WL 2965046, at \*9 n.7 (Bankr. S.D. Fla. Oct. 9, 2007) ("The *Salvino* analysis makes several cogent points.").

144. See *supra* note 53.

145. See *supra* note 53.

146. See *supra* text accompanying note 37.

147. See, e.g., *Neiman v. Irmen (In re Irmen)*, 379 B.R. 299 (Bankr. N.D. Ill. 2007).

148. See *supra* text accompanying note 37.

excepted from discharge under § 523(a)(6) as a willful and malicious injury without limiting this standard to tortious conduct.<sup>149</sup> Therefore, it was erroneous for the court to neglect to apply the *Geiger* Court's analysis to the facts of the *In re Salvino* case solely because Christopher Salvino's judgment debt arose under contract, rather than tort law.

Third, the *In re Salvino* court's decision to categorically exclude willful and malicious breaches of contract from exception to discharge under § 523(a)(6) is offensive to the policy rationale underlying the Bankruptcy Code's discharge provisions.<sup>150</sup> Specifically, the decision immunizes from liability for their debts an entire class of wrongdoers who were never intended to be shielded<sup>151</sup> from the consequences of their willful and malicious breaches of contract. Under *In re Salvino*, debtors who intentionally breach a contract without just cause while cognizant of the injury they are substantially certain they will inflict are shielded from the § 523(a)(6) exception to discharge for willful and malicious injury-causing conduct solely because their method of inflicting injury was by way of breaching a contract, rather than committing a separate tort. How is this an equitable result when the underlying purpose of the Bankruptcy Code is to provide relief only to honest but unfortunate debtors?<sup>152</sup> Many wrongdoers commit dishonest or fraudulent conduct in the course of inflicting injury by willfully and maliciously breaching a contract, yet a victim may be unable to meet the demanding burden required to establish common law fraud.<sup>153</sup> Should the victim of a dishonest debtor's willful and malicious breach of contract be denied redress for their injury solely because they could not establish that their injury resulted from the violation of a tort duty? Nothing in the policy underlying the Bankruptcy Code's discharge provisions supports the argument that debtors guilty of inflicting willful and malicious injuries should be relieved of liability for debts arising from such conduct. Rather, the Code's overarching policy<sup>154</sup> supports the conclusion that debtors guilty of willful and malicious breaches of contract should not be accorded relief for their dishonest, injury-causing behavior. Therefore, such debts should be excepted from discharge under § 523(a)(6).

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149. See *supra* text accompanying note 37.

150. See *supra* note 30.

151. See *E. Diversified Distribs., Inc. v. Matus (In re Matus)*, 303 B.R. 660, 670 (Bankr. N.D. Ga. 2004) ("Though the Bankruptcy Code provides most debtors with a fresh start, the Code prevents dishonest debtors from improperly using it as a shield.").

152. See *supra* note 30.

153. See *Wish Acquisition, LLC v. Salvino (In re Salvino)*, 373 B.R. 578, 588 (Bankr. N.D. Ill. 2007), *aff'd*, No. 07 C 4756, 2008 WL 182241, at \*1 (N.D. Ill. Jan. 18, 2008) ("[E]ven though Salvino's misrepresentations about his intent to work for Acquisition may have led Acquisition to enter into the employment contract . . . , his later breach of the contract was not a fraud or misrepresentation.").

154. See *supra* note 30.

## C. PROPOSAL FOR THE FUTURE

Having already established that the *In re Salvino* court's decision to shield from exception to discharge under § 523(a)(6) debts arising from willful and malicious breaches of contract is erroneous because it dismisses conflicting precedent,<sup>155</sup> because its reasoning is flawed,<sup>156</sup> and because its consequences are overreaching<sup>157</sup> and in conflict with the underlying policy of the Bankruptcy Code's discharge provisions,<sup>158</sup> the focus of this article now turns to formulating a proposal for the future.

Despite its flawed reasoning, the *In re Salvino* court raises reasonable concerns. If § 523(a)(6) is applied too broadly to debts arising from breach of contract, it may hinder the Bankruptcy Code's policy of providing a fresh start to honest but unfortunate debtors.<sup>159</sup> However, categorically denying relief to victims of willful and malicious breaches of contract is not the best method for effectuating the Bankruptcy Code's underlying policy. Therefore, bankruptcy courts should be allowed to except from discharge under § 523(a)(6) those debts arising from willful and malicious breaches of contract, but only after the court has engaged in a meaningful inquiry into the deliberateness of the debtor's injury-causing conduct. Accordingly, this author proposes that bankruptcy courts should analyze the "willful" prong of § 523(a)(6) for a debt that arises from a breach of contract by considering the debtor's intent in committing the injury-causing conduct and by asking whether the debtor committed the breach of contract with an intent to inflict injury or whether the debtor was subjectively aware that the injury was "substantially certain" to result from such a breach of contract.<sup>160</sup> Even though *Geiger* "made willfulness the principle issue for resolution in these cases,"<sup>161</sup> in conjunction with the aforementioned analysis under the "willful" prong, bankruptcy courts should separately analyze the "malicious" prong of § 523(a)(6) by asking whether the debtor had any just cause or excuse for breaching the contract. If the debtor had some just reason for

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155. See discussion *supra* Part II.D.

156. See discussion *supra* Part III.B.1.

157. See discussion *supra* Part III.B.2.

158. See discussion *supra* Part III.B.2.

159. See *supra* note 30.

160. See *Girardi v. Shaffer* (*In re Shaffer*), No. 94-33189-T, 2003 WL 23138445, at \*15 (Bankr. E.D. Va. Jan. 17, 2003) ("[T]he applicable standard is that the debtor's judgment debt [to the creditor] will be excepted from discharge if she desired 'to cause consequences of [her] act or . . . [believed] that the consequences [were] substantially certain to result from it.'" (quoting *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 464 (6th Cir. 1999))). "[T]he debtor must have had 'either a subjective intent to harm, or a subjective belief that harm is substantially certain.'" *Id.* (quoting *Carrillo v. Su* (*In re Su*), 290 F.3d 1140, 1140 (9th Cir. 2002)).

161. *Id.* at \*13.

breaching the contract, the resulting injury shall not be excepted from discharge under § 523(a)(6) because it will lack the requisite element of malice. Furthermore, it should be appropriate for a bankruptcy court analyzing whether a breach of contract constitutes a willful and malicious injury under § 523(a)(6) to consider the totality of the circumstances surrounding the contract, including the level of trust and confidence involved in the contractual relationship.<sup>162</sup> Contracts such as those involving fiduciary relationships, insurance agreements, noncompetition agreements, confidentiality agreements, and employment contracts containing liquidated damages provisions are just a few examples of the kind of contracts where a breaching party is more likely than not to be subjectively aware of the extent of the injury that is "substantially certain" to result from a breach.

#### IV. CONCLUSION

In conclusion, the Bankruptcy Court for the Northern District of Illinois was wrong when it concluded that tortious conduct is an essential element of a willful and malicious injury under § 523(a)(6).<sup>163</sup> In doing so, the *In re Salvino* court has erroneously dismissed conflicting precedent, has relied on questionable reasoning in justifying its conclusion, and has issued a ruling with overreaching consequences that are in conflict with the purpose underlying the Bankruptcy Code. The court's categorical exclusion of willful and malicious breaches of contract from § 523(a)(6) robbed the case of a meaningful inquiry into the culpability of Christopher Salvino's conduct and relieved him of liability for his debt without engaging in an analysis of the willfulness and maliciousness of his injury-causing conduct. As a result, the *In re Salvino* decision threatens to immunize those individuals who willfully and maliciously breach contracts from exception to discharge under § 523(a)(6), despite the fact that Congress sought to deter such conduct by creating the exception to discharge for willful and malicious injury. The ability of victims of willful and malicious breaches of contract to receive redress for their injuries after the offender files for bankruptcy now lies in the hands of the Seventh Circuit. The next time the Seventh Circuit is confronted with this issue, it has two choices: it may either affirm the decision in *In re Salvino* thus acquiescing to this mockery of Bankruptcy Code policy or it may overturn that decision and unapologetically hold debtors accountable for their willful and malicious breaches of contract.

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162. See Armstrong, *supra* note 107, at 77 ("[S]pecial contracts of trust and confidence [are different from] your garden variety commercial transaction.").

163. See Wish Acquisition, LLC v. Salvino (*In re Salvino*), 373 B.R. 578, 591 (Bankr. N.D. Ill. 2007), *aff'd*, No. 07 C 4756, 2008 WL 182241, at \*1 (N.D. Ill. Jan. 18, 2008).

MICHAEL D. MARTINEZ\*

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\* J.D. Candidate, May 2009, Northern Illinois University College of Law; B.A., University of Illinois, 2006. I would like to thank my friends and family for always believing in me and for teaching me the most important lesson in life—believing that anything is possible. Specifically, I would like to thank my Mom and Dad for teaching me the value of hard work and for inspiring me to never give up; my brilliant sister, Sara, for never ceasing to challenge me to strive for even greater heights; and my beautiful girlfriend, Sue—it is your love that has made this all worthwhile.