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I. INTRODUCTION

United States Bankruptcy law is premised on the idea of providing debtors with a fresh start. As the Supreme Court stated in \textit{Local Loan Co. v. Hunt}, one of the central policies of our bankruptcy law is to give “the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.” Despite the strong adherence to policy supporting a fresh start, the general rule of dischargeability has long been limited by a number of exceptions prohibiting the discharge of certain types of debt, including debts arising from a willful and malicious injury. The discharge exception for willful and malicious injuries first appeared in the Bankruptcy Act of 1898. Through-
out its history, the scope of the willful and malicious injury discharge exception has been the source of confusion. In *Kawaauhau v. Geiger*, the Supreme Court addressed a circuit split regarding the proper interpretation of the term "willful" under the discharge exception.

In *Kawaauhau*, Justice Ginsburg authored the unanimous opinion of the Court, holding that the term "willful" in the discharge exception for willful and malicious injury is satisfied only by a deliberate or intentional injury. This holding correctly resolved the circuit split regarding the proper meaning to be given to the term "willful" by limiting the exception to debts arising from intentional injuries.

Although *Kawaauhau* correctly resolved the circuit split regarding the proper interpretation of willfulness under the exception, the decision did not clearly define the scope of the term "intent" as used by the Court to describe willful conduct. The Court's failure to clearly define "intent" under the definition of willful creates a risk that *Kawaauhau* will narrow the willful and malicious discharge exception to a point where the exception will no longer be able to separate the honest and unfortunate debtor from the culpable debtor whose debt should be rendered nondischargeable under the exception. To prevent this result, it is necessary to interpret the term "intent" under 11 U.S.C. § 523(a)(6) as including both intent to injure and subjective knowledge that injury is substantially certain to result. Under this interpretation of intent, the discharge exception will serve its function in rendering the debts of culpable debtors nondischargeable while at the same time allowing honest debtors an opportunity for a fresh start.

This Note will examine the Supreme Court's holding in *Kawaauhau* and the proper scope to be given to the term "intent" as used by the Court. First, this Note will present a history of the willful and malicious injury discharge exception in United States bankruptcy law including a summary of the *Kawaauhau* holding. Second, this Note will examine the Supreme Court's holding in *Kawaauhau*, which correctly interpreted willfulness under 11 U.S.C. § 523(a)(6) to require intent to injure. Finally, this Note will examine the proper interpretation to be given to the term "intent" as used by the Court in *Kawaauhau* to enable the discharge exception to serve its function of excepting the discharge of debts arising from willful and malicious injuries.

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6. See id. at 977.
II. BACKGROUND


The Bankruptcy Code excepts from discharge debts arising from a “willful and malicious injury by the debtor to another entity or to the property of another entity.” The willful and malicious injury discharge exception first appeared as section 17a(2) of the Bankruptcy Act of 1898. Soon after its enactment, the exception was interpreted by the Supreme Court in Tinker v. Colwell. Nearly a century after the decision, an understanding of Tinker remains essential to the proper interpretation of the willful and malicious injury discharge exception as codified in 11 U.S.C. § 523(a)(6).

In Tinker, the debtor, Charles Tinker, filed bankruptcy following a $50,000 judgment rendered against him for criminal conversation (adultery) with Frederick Colwell’s wife. Mr. Colwell raised objection to discharge of the judgment, arguing that Mr. Tinker’s actions constituted a willful and malicious injury rendering the judgment nondischargeable under § 17a(2). The Tinker Court held the judgment nondischargeable after finding that the judgment for criminal conversation was based upon a willful and malicious injury as defined in § 17a(2) of the Bankruptcy Act of 1898.

In its examination of the discharge exception, the Tinker Court addressed willfulness and malice as separate statutory requirements. Under § 17a(2), the Court defined “willfulness” to mean “intentional and voluntary.” The Court defined “malice” in its legal sense as “a wrongful act, done intentionally, without just cause or excuse.” In addition, the Court clearly indicated that malice could be implied from the circumstances of the case. The Court stated that “the act itself necessarily implies that degree of malice which is sufficient to bring the case within the exception stated in the statute” and “it is not necessary that the cause of action be based upon special malice.”

After separately defining willfulness and malice under the discharge exception, the Tinker Court announced a test incorporating both the willful and malicious elements of the exception:

[We think 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

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10. See Tabb, supra note 3, at 66.
14. Id. at 485-86.
15. See id. at 485.
16. Id.
causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception.\textsuperscript{17}

This language led to decades of confusion regarding the proper interpretation of the willful and malicious injury discharge exception.\textsuperscript{18} In the early 20\textsuperscript{th} Century, many courts incorrectly interpreted this language as allowing a "reckless disregard" standard under which reckless conduct by the debtor could satisfy the requirements of the willful and malicious discharge exception.\textsuperscript{19}

The Supreme Court next encountered the willful and malicious discharge exception in \textit{McIntyre v. Kavanaugh}.\textsuperscript{20} In \textit{McIntyre}, the discharge exception was raised after the creditor brought a successful suit for conversion against the debtor. Quoting the combined test for willful and malicious injury announced in \textit{Tinker}, the \textit{McIntyre} Court found circumstances sufficient to show that the conversion was both willful and malicious and consequently denied discharge of the conversion debt.\textsuperscript{21}

In \textit{Davis v. Aetna Acceptance Co.},\textsuperscript{22} the Supreme Court again examined the willful and malicious injury exception arising from an action for conversion of a security interest. R.H. Davis, an automobile dealer, obtained a loan from Aetna Acceptance Company to purchase an automobile. Davis secured payment of the loan with a chattel mortgage covering the automobile. In violation of the agreement, Davis sold the automobile without Aetna's consent and only later gave notice of the transaction to an Aetna representative.\textsuperscript{23} Evidence suggests that on many other occasions, cars held by Davis on similar terms had been sold without Aetna's express consent and the proceeds accounted for thereafter. On this occasion, Davis did not remit the proceeds of the sale to Aetna and subsequently petitioned for bankruptcy. Aetna brought action against Davis for conversion.\textsuperscript{24}

In holding the debt dischargeable in bankruptcy, the \textit{Davis} Court stated that every act of conversion does not necessarily constitute a willful and malicious injury.\textsuperscript{25} The Court held that "[t]here may be a conversion which is innocent or technical, an unauthorized assumption of dominion without willfulness or malice."\textsuperscript{26} The \textit{Davis} Court

\textsuperscript{17} \textit{Id.} at 487.
\textsuperscript{18} \textit{See Tabb, supra note 3, at 67.}
\textsuperscript{20} 242 U.S. 138 (1916).
\textsuperscript{21} \textit{See id.} at 141-42.
\textsuperscript{22} 293 U.S. 328 (1934).
\textsuperscript{23} \textit{See id.} at 330.
\textsuperscript{24} \textit{See id.} at 331.
\textsuperscript{25} \textit{See id.} at 332.
\textsuperscript{26} \textit{Id.} (citations omitted).
believed "[t]here may be an honest but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed" and under such circumstances "what is done is a tort, but not a willful and malicious one."27 Under the facts before it, the Court did not find the requisite willfulness or malice and discharged the debt "as against a showing of conversion without aggravating features."28

Lower courts following Tinker, McIntyre and Davis often misinterpreted these holdings to allow reckless conduct to satisfy the willful and malicious injury discharge exception.29 Many of these cases involved injury resulting from the reckless operation of an automobile.30 Cases allowing reckless conduct to satisfy § 523(a)(6) were directly overruled in the Judiciary Committee Reports accompanying the Bankruptcy Reform Act of 1978.

When the Bankruptcy Code was revised under the Bankruptcy Reform Act of 1978, the words of the willful and malicious discharge exception remained unchanged as codified in 11 U.S.C. § 523(a)(6).31 However, in enacting the modern exception, reports of the Senate and the House of Representatives Judiciary Committees accompanying the Bankruptcy Reform Act of 1978 expressly addressed Tinker and expressed their intent regarding the proper meaning to be given to the word "willful" as used in the exception. The Committee Reports from both the Senate and the House of Representatives, in nearly identical language, indicated that the word willful was to mean "deliberate or intentional" and that to the extent that Tinker v. Colwell... 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."32 The Committee Reports were largely successful in abrogating the 'reckless disregard' standard for willfulness.33

27. Id.
28. Id. at 333.
29. See Tabb, supra note 3, at 70-71.
30. See id.
32. S. REP. No. 989, 95th Cong., 2d Sess. 79 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5865. The language of the House of Representatives report was nearly identical to that of the Senate, stating "to the extent that Tinker v. Colwell... held that a 'looser' standard is intended, and to the extent that other cases have relied on Tinker to apply a 'reckless disreg and standard' standard, they are overruled." H.R. REP. No. 595, 95th Cong., 2d Sess. 365 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6320-21 (emphasis added).
33. A number of courts continued to hold reckless conduct sufficient to satisfy 11 U.S.C. § 523(a)(6), mainly in the context of drunk-driving liability. See, e.g., Moraes v. Adams (In re Adams), 761 F.2d 1422, 1426-27 (9th Cir. 1985) (holding drunk-driving debts nondischargeable under § 523(a)(6)); Hartford Ins. Group v. Galvan (In re Galvan), 39 B.R. 663, 665 (D. Colo. 1984) (holding that the report of the Judiciary Committee is insufficient to overrule the Tinker interpretation of "willful and malicious injury," where Congress did not change the language of the
Although the Committee Reports clarified the issue of whether reckless conduct satisfied § 523(a)(6)'s willfulness requirement, courts continued to apply the willful and malicious discharge exception inconsistently.

Following the Bankruptcy Reform Act of 1978, courts spent considerable time wrestling with the willful and malicious injury discharge exception. Although most of this time was spent trying to derive a proper definition of "malice" under the exception, a split in circuits developed concerning the proper application of § 523(a)(6)'s willfulness requirement. Courts were relatively consistent in defining "willful" as deliberate or intentional pursuant to the instructions of the Committee Reports accompanying the Bankruptcy Reform Act of 1978, but they were split on whether this language required a deliberate and intentional act causing injury or a deliberate and intentional injury. This was the question framed and answered by the Supreme Court in Kawaauhau v. Geiger, which held that willfulness under § 523(a)(6) requires an intentional injury.

B. Kawaauhau v. Geiger

In Kawaauhau v. Geiger, the Supreme Court addressed the circuit split regarding the proper interpretation of "willful" under 11 U.S.C. § 523(a)(6). The issue, as framed by the Court, was whether the compass of § 523(a)(6)'s discharge exception "cover[s] acts, done intentionally, that cause injury . . . or only acts done with the actual intent to cause injury." The Supreme Court affirmed the decision of the Eighth Circuit Court of Appeals that interpreted the willful element of exception). This position was largely resolved by a 1984 Amendment to the Bankruptcy Code creating 11 U.S.C. § 523(a)(9), a specific discharge exception for debts arising from injury caused by the debtor's operation of a motor vehicle while intoxicated.

34. See Cassidy v. Minihan, 794 F.2d 340, 343-44 (8th Cir. 1986) (discussing various interpretations of § 523(a)(6) in the context of drunk-driving debts following the Bankruptcy Reform Act of 1978).

35. The proper definition of "malice" under § 523(a)(6) has been the source of considerable controversy between circuits. At least four separate tests for "malice" under § 523(a)(6) have been advanced including the "implied" malice test, the "special" malice test, the "targeted at the creditor" test and the "totality of the circumstances" test. See ITT Consumer Discount Co. v. Horldt (In re Horldt), 86 B.R. 823, 824-25 (Bankr. E.D. Pa. 1988) (discussing the four approaches to malice under § 523(a)(6)).

36. See Perkins v. Scharffe, 817 F.2d 392, 393 (6th Cir. 1987) (recognizing that "bankruptcy courts have been divided as to whether the statute requires an intentional act that results in injury or an act with intent to cause injury").

37. See Farmers Ins. Group v. Compos (In re Compos), 768 F.2d 1155, 1157 (10th Cir. 1985).

38. See Perkins, 817 F.2d at 393.


40. Id.
§ 523(a)(6) to require a deliberate or intentional injury.\textsuperscript{41} Because the Court was unable to find evidence that the debtor, Dr. Geiger, intended to injure the creditor, Mrs. Margaret Kawaauhau, the debt was held dischargeable.\textsuperscript{42}

In \textit{Kawaauhau}, Mrs. Kawaauhau sought medical treatment from Dr. Paul Geiger after dropping a box on her right foot.\textsuperscript{43} During her visit with Dr. Geiger, Mrs. Kawaauhau complained of chills, dizziness, fever, and pain in her right calf. After diagnosing her condition as thrombophlebitis of the right leg, Dr. Geiger admitted Mrs. Kawaauhau to the hospital for treatment and prescribed oral doses of tetracycline. After conducting tests, Dr. Geiger determined that continued administration of the oral tetracycline would be an effective treatment of her condition. Dr. Geiger eventually prescribed oral penicillin in place of the tetracycline.\textsuperscript{44} Dr. Geiger then departed on a business trip leaving Mrs. Kawaauhau in the care of other physicians who began to administer intramuscular penicillin and decided to transfer her to an infectious disease specialist.\textsuperscript{45} Upon returning, Dr. Geiger discontinued all antibiotics, believing that the infection had run its course. A few days later, Mrs. Kawaauhau's condition deteriorated and her right leg had to be amputated below the knee.\textsuperscript{46}

Mr. and Mrs. Kawaauhau (the "Kawaauhaus") succeeded in an action for malpractice against Dr. Geiger who subsequently petitioned for protection under Chapter 7 of the Bankruptcy Code.\textsuperscript{47} The Kawaauhaus filed a complaint requesting that the bankruptcy court deny discharge of the malpractice judgment on the ground that it constituted a debt for willful and malicious injury excepted from discharge by 11 U.S.C. § 523(a)(6). The Bankruptcy Court held the debt nondischargeable under § 523(a)(6), concluding that Dr. Geiger's treatment of Mrs. Kawaauhau "was so far below the standard level of care that it can be categorized as willful and malicious conduct for dischargeability purposes."\textsuperscript{48} In an unpublished order, the district court affirmed.\textsuperscript{49}

\textsuperscript{41.} See id.
\textsuperscript{42.} See id. at 978.
\textsuperscript{44.} See id.
\textsuperscript{45.} See id.
\textsuperscript{46.} See id. at 917-918.
\textsuperscript{47.} See id. at 919.
\textsuperscript{48.} Id. at 923.
A three-judge panel of the Eighth Circuit Court of Appeals reversed, and in a subsequent rehearing en banc, the Eighth Circuit adhered to the panel's position. The Eighth Circuit Court of Appeals recognized that under the statute, "the word 'willful' . . . modifies the word 'injury,' so that what is required for nondischargeability is a deliberate or intentional injury, not merely a deliberate or intentional act." The court of appeals recognized that the word "intentional" causes a lawyer's mind to think of the category of intentional torts, which are based upon "the consequences of an act rather than the act itself." The court of appeals held that "for a judgment debt to be nondischargeable under the relevant statutory provision, it is necessary that it be based on the commission of an intentional tort." Because there was no indication that Dr. Geiger intended injury or that he believed injury was substantially certain to result from his conduct, the Eighth Circuit Court of Appeals reversed the judgment of the district court and permitted discharge of the debt.

In a lengthy dissenting opinion, Judge Murphy criticized the majority opinion for requiring intent to injure to satisfy the discharge exception. Judge Murphy argued that neither the legislative history nor the language of the statute suggested that willfulness under § 523(a)(6) requires intent to injure or that application of the exception should be limited to intentional torts. In addition, Judge Murphy recognized that no other circuit required an intentional injury to satisfy the discharge exception and such a requirement would undermine the purpose of § 523(a)(6) by placing a nearly impossible burden on a creditor to show that the debtor intended to do him harm.

In a unanimous opinion penned by Justice Ginsburg, the Supreme Court affirmed the judgment of the Eighth Circuit Court of Appeals, holding that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." The Court concurred with the Eighth Circuit's interpretation of the plain language of the statute and the similarity of the exception to the category of

52. Id. at 852.
53. Id. (quoting RESTATEMENT (SECOND) TORTS § 8A cmt. a, at 15 (1965)).
54. Id. at 853.
55. See id. at 854. The court held that at worst Dr. Geiger's conduct could be described as reckless. See id. at 853.
56. See id. at 857 (Murphy, J., dissenting).
57. See id.
58. See id. at 860 (citing Conte v. Gautam (In re Conte), 33 F.3d 303, 308 (3d Cir. 1994)).
intentional torts. Affirming the decision of the Eighth Circuit, the Supreme Court held that nondischargeability under § 523(a)(6) requires a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.

The Court reasoned that had Congress intended § 523(a)(6) to prevent the discharge of debts resulting from reckless conduct it might have described "willful acts that cause injury" or it might have used additional words such as "reckless" or "negligent," to modify "injury." The Court also recognized that a broad definition of intent would cause a wide range of situations to come within the exception to discharge, including traffic accidents where the act causing the accident was intentional but the resulting injury was not. In addition, the Court expressed reluctance to adopt an interpretation of the exception that would render another portion of the same law superfluous. For these reasons the Supreme Court held that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)."

III. ANALYSIS

Section 523(a)(6) of the Bankruptcy Code excepts from discharge, debts arising from a "willful and malicious injury by the debtor to another entity or to the property of another entity." "Willful" and "malicious" are distinct elements in the § 523(a)(6) analysis. To have a debt excepted from discharge, the creditor must show by a preponderance of the evidence that the injury caused by the debtor was both willful and malicious. In Kawaauhau v. Geiger, the Supreme Court held that "debts arising from recklessly or negligently inflicted injury

60. See id. at 977.
61. See id.
62. See id.
63. See id.
64. See id. Under the interpretation of the discharge exception advanced by the Kawaauhaus, permitting reckless conduct to satisfy the exception, there would be no need for § 523(a)(9), which excepts from discharge, debts for death or personal injury caused by the debtor's unlawful operation of a motor vehicle while intoxicated. See 11 U.S.C. § 523(a)(9) (1996).
67. See Barclays Am./Bus. Credit, Inc. v. Long (In re Long), 774 F.2d 875, 880-81 (8th Cir. 1985).
69. See In re Long, 774 F.2d at 880-81; Allstate Ins. v. Dzuik (In re Dzuik), 218 B.R. 485, 487 (Bankr. D. Minn. 1998); American Bank v. McCune (In re McCune), 85 B.R. 834, 837 (Bankr. W.D. Mo. 1988) (holding that willfulness and maliciousness are analyzed separately and both must be found to justify exception from discharge).
do not fall with the compass of § 523(a)(6)." The *Kawaauhau* Court came to this conclusion following an examination of the proper meaning of the term "willful" as contained in the willful and malicious injury discharge exception. By limiting willfulness to situations where the debtor intends injury, *Kawaauhau* correctly resolved the circuit split concerning the proper interpretation of willfulness under the exception.

Although the *Kawaauhau* Court correctly resolved the circuit split concerning the proper interpretation of willfulness, the Supreme Court did not clearly define the scope of "intent" as used under the exception. However, a careful examination of the *Kawaauhau* opinion suggests that either subjective intent to injure or subjective knowledge that injury is substantially certain to result may satisfy intent. This interpretation of the scope of intent provides the correct balance between policy favoring a fresh start for honest debtors and the policy of the discharge exception to protect creditors from the discharge of certain types of debt.


The House and Senate Judiciary Committee Reports accompanying the Bankruptcy Reform Act of 1978 unambiguously define the word "willful" as used in § 523(a)(6) as "deliberate or intentional." Although courts have consistently defined "willful" as deliberate or intentional pursuant to congressional intent, prior to *Kawaauhau*, circuits were split on whether a showing of willfulness under § 523(a)(6) required a deliberate or intentional act resulting in injury or a deliberate or intentional injury. The question, as posed by the Supreme Court in *Kawaauhau*, was whether the compass of § 523(a)(6)'s discharge exception "cover[s] acts done intentionally, that cause injury . . . or only acts done with the actual intent to cause injury." In *Kawaauhau*, the Supreme Court held that the willful element of § 523(a)(6) requires an intentional injury. This interpretation of willfulness is consistent with the plain language of the statute, the legislative history of the statute, and the general policy of the bank-

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73. *See* Perkins v. Scharffe, 817 F.2d 392, 393 (6th Cir. 1987).
75. *See* id.
ruptcy code to narrowly construe discharge exceptions to provide honest debtors with a fresh start.

Any attempt at statutory construction should begin with an examination of the statutory language itself and then proceed to the legislative history if the statutory language is unclear.\(^{76}\) As recognized by the Supreme Court, an examination of the plain language of the willful and malicious injury discharge exception reveals that the word “willful” modifies the word “injury.”\(^{77}\) This construction strongly suggests that the willful element of the discharge exception requires a deliberate or intentional injury, not merely a deliberate or intentional act resulting in injury.\(^{78}\)

In addition, as the \textit{Kawaauhau} Court noted, the statute contains no language suggesting a broader interpretation of willfulness under the exception.\(^{79}\) Generally exceptions to discharge should be confined to those plainly expressed.\(^{80}\) Had Congress intended a broader interpretation of the discharge exception, it might have instead described “willful acts that cause injury” or included additional words such as “reckless” or “negligent” to modify the word “injury.”\(^{81}\) Likewise, the statute makes no mention of acts causing injury. Because the word “willful” clearly modifies “injury” under the exception and Congress included no language to suggest a broader meaning, the plain language of the statute strongly suggests that an intentional injury is required.

The Supreme Court in \textit{Kawaauhau} also recognized that the § 523(a)(6) formulation triggers in the lawyer’s mind the category of “intentional torts” which generally require that the actor intend the injury, not merely the act causing the injury.\(^{82}\) The Court, quoting from comment a of section 8A of the Restatement (Second) of Torts,

\begin{itemize}
  \item \textit{Taibb v. Radloff}, 501 U.S. 157, 162 (1991) (“Where . . . the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.”) (quoting Blum v. Stenson, 465 U.S. 886, 896 (1984)); see also Pennsylvania Dept. of Pub. Welfare v. Davenport, 495 U.S. 552, 557 (1990) (recognizing that construction of a term in a statute must be guided by the fundamental canon that statutory interpretations begin with the language of the statute itself); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982) (holding that the plain meaning of legislation is conclusive except where the result of a literal application of the statute is at odds with intention of the drafters).
  \item See \textit{Kawaauhau}, 118 S. Ct. at 977; see also Farmers Ins. Group v. Compos (In re Compos), 768 F.2d 1155, 1158 (10th Cir. 1985) (holding that the adjective “willful” modifies “injury” requiring a willful injury).
  \item See \textit{In re Compos}, 768 F.2d at 1158.
  \item See \textit{id}.
  \item \textit{Id}. (quoting Gleason v. Thaw, 236 U.S. 558, 562 (1915)).
  \item See \textit{id}.
  \item See \textit{id}.
\end{itemize}
noted that intentional torts generally require that the actor intend "the consequences of an act," not simply "the act itself."\(^8\)

The legislative history of the Bankruptcy Act of 1978 also supports the holding of *Kawaauhau* that requires intent to injure to satisfy willfulness under the discharge exception. Prior to enactment of the Bankruptcy Reform Act of 1978, the law regarding the willful and malicious injury discharge exception was largely governed by *Tinker v. Colwell*.\(^8\) In *Tinker*, the Court held 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."\(^8\) This language from *Tinker* was interpreted by a line of cases to mean that a willful injury could be established by a showing of the debtor's reckless disregard of duty.\(^6\) However, this interpretation of the *Tinker* language was clearly rejected by the Judiciary Committee Reports of both the Senate and House of Representatives accompanying the Bankruptcy Reform Act of 1978.\(^8\)

In the Judiciary Committee Report accompanying the Bankruptcy Reform Act, the Senate defined willful as "deliberate or intentional" and stated that "[t]o the extent that *Tinker v. Colwell*... held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a 'reckless disregard' standard, they are overruled."\(^8\) Because the Judiciary Committee Report defined "willful" to mean deliberate or intentional, and they clearly required a degree of culpability greater than recklessness to satisfy the willful requirement, it is clear that Congress intended to restrict nondis-

\(^8\) Id. (citing RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (1965)) (emphasis omitted).

\(^8\) See Barclays Am./Bus. Credit, Inc. v. Long (*In re Long*), 774 F.2d 875, 879 (8th Cir. 1985).


\(^8\) See, e.g., *Den Haerynck v. Thompson*, 228 F.2d 72 (10th Cir. 1955) (holding an injury from reckless operation of an automobile nondischargeable); *Harrison v. Donnelly*, 153 F.2d 588 (8th Cir. 1946) (holding that the law may imply that a negligent act evincing reckless indifference to rights of others is done intentionally).

\(^8\) It is of significance that these statements were rejected by the reports of the Senate and House Judiciary Committees accompanying the Bankruptcy Reform Act of 1978. As recognized in *Garcia v. United States*, "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" 469 U.S. 70, 76 (1984) (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969)).

chargeability under § 523(a)(6) to situations involving an intended injury.\textsuperscript{89}

Although the Committee Reports do not specify the exact standard to be adopted in lieu of the reckless disregard standard that was expressly rejected, the Reports have been correctly interpreted to require intent to injure to satisfy willfulness. The Committee Reports do not specifically indicate whether willfulness may be satisfied by intent to do an act resulting in injury or whether subjective intent to injure is required.\textsuperscript{90} Although not expressly requiring intent to injure, the fact that the Reports directly overruled cases adopting a reckless disregard standard indicates that a mere showing of an act resulting in injury is insufficient to establish willfulness under the discharge exception.

If the Committee Reports were read to allow an intentional act resulting in injury to satisfy willfulness, reckless or even negligent conduct might still be sufficient to satisfy willfulness under the exception. As the Eighth Circuit recognized "[e]very act that is not literally compelled by the physical act of another . . . or the result of an involuntary muscle spasm, is a 'deliberate or intentional' one, and if it leads to injury, a judgment debt predicated on it would be immune from discharge."\textsuperscript{91} However, Congress made clear that it intended to overrule the reckless disregard standard.\textsuperscript{92} Therefore, to give effect to congressional intent to make reckless conduct insufficient to satisfy willfulness, it is necessary to require a deliberate or intentional injury.

The Kawaauhaus relied heavily on \textit{Tinker v. Colwell} which held a judgment for criminal conversation nondischargeable.\textsuperscript{93} In \textit{Tinker}, the Supreme Court held that specific intent to injure is not required under the willful and malicious injury discharge exception.\textsuperscript{94} Under the normal rule of statutory construction, if Congress intends for legislation to change the interpretation of a judicially created concept, it must make that intent specific.\textsuperscript{95} However, as discussed above, the legislative history of the Bankruptcy Reform Act of 1978 clearly evinces congressional intent to change the \textit{Tinker} Court's interpreta-

\textsuperscript{89} See Cassidy v. Minihan, 794 F.2d 340, 343-44 (8th Cir. 1986); see also Farmers Ins. Group v. Compos (\textit{In re Compos}), 768 F.2d 1155, 1158 (10th Cir. 1985) (holding that § 523(a)(6) requires an intentional or deliberate injury).

\textsuperscript{90} See Conte v. Gautam (\textit{In re Conte}), 33 F.3d 303, 306 (3d Cir. 1994).

\textsuperscript{91} Geiger v. Kawaauhau (\textit{In re Geiger}), 113 F.3d 848, 852 (8th Cir. 1997), cert. granted, 521 U.S. 1153 (1997), and affd, 118 S. Ct. 974 (1998).


\textsuperscript{94} See \textit{Tinker v. Colwell}, 193 U.S. 473, 485 (1904).

\textsuperscript{95} See Kelly v. Robinson, 479 U.S. 36, 37 (1986).
tion of the willfulness requirement contained in the discharge exception as codified in § 523(a)(6).

Not only is the Kawaauhau Court's interpretation of willfulness under § 523(a)(6) consistent with the plain language and legislative history of the statute, the interpretation is consistent with the general policy of bankruptcy law that exceptions from discharge are to be narrowly construed to give debtors an opportunity for a fresh start. The United States Bankruptcy law is based on the long-standing policy of affording the honest, but unfortunate debtor a discharge from debts and an opportunity to rehabilitate their financial affairs. The restriction of the willful and malicious discharge exception to cases involving an intentional injury furthers the fresh start policy of the bankruptcy code by protecting honest debtors while at the same time protecting the victims of intentional conduct from the discharge of claims based on willful and malicious injuries.

B. The Scope of Intentional Injury Under Kawaauhau v. Geiger

Although the Kawaauhau Court correctly defined "willfulness" under § 523(a)(6) to require a deliberate or intentional injury, the Court did not clearly define the term "intent" under the exception. Specifically, the Court did not indicate whether willfulness must be established by a showing that the debtor had a subjective intent to injure the creditor or whether willfulness may be established by showing that the debtor had subjective knowledge that injury was substantially certain to result from his acts. The resulting ambiguity concerning the scope of intent creates the possibility that the willful and malicious injury discharge exception will no longer be able to separate the honest and unfortunate debtor from the culpable debtor whose debt should be rendered nondischargeable under the exception. A careful examination of Kawaauhau suggests that a showing of either subjective intent to injure or subjective knowledge that injury is substantially certain to result may satisfy the intent requirement. This interpretation of "intent" under Kawaauhau will insure that creditors will be able to render the debts of culpable debtors nondischargeable while still allowing the honest debtor an opportunity for a fresh start.

96. See Tabb, supra note 3, at 56-57; see also Molitor v. Eidson (In re Molitor), 76 F.3d 218, 220 (8th Cir. 1996) (stating that the "purpose of the bankruptcy code is to afford the honest but unfortunate debtor a fresh start, not to shield those who abuse the bankruptcy process in order to avoid paying debts"); Johnson v. Miera (In re Miera), 926 F.2d 741, 745 (8th Cir. 1991) (stating that the underlying policy of the Bankruptcy Code is to give debtors a fresh start).

Justice Ginsburg’s definition of “intent” clearly encompasses subjective intent by the debtor to cause injury to the creditor. However, the *Kawaauhau* opinion fails to address whether intent also encompasses acts done intentionally which are known by the actor to be substantially certain to cause injury. A number of circuits have held that subjective substantial certainty of injury is insufficient to satisfy § 523(a)(6) willfulness under *Kawaauhau*. However, the Supreme Court’s reliance on the *Restatement (Second) of Torts*’ definition of “intent” suggests that intent would include circumstances where the debtor has subjective knowledge that injury is substantially certain to result. This reading of intent provides the logical balancing point allowing creditors the ability to protect debt while at the same time granting a fresh start to honest debtors.

Although the Court in *Kawaauhau* never expressly considered the “substantially certain” alternative of intent, it is an integral component of section of the *Restatement* embraced by the Court. In *Kawaauhau*, to support its reading of the plain language of § 523(a)(6), the Court quoted a portion of comment a to Section 8A of the *Restatement (Second)* of *Torts* which limits the use of intent to circumstances where the actor intends the consequences of his act and not simply the act itself. A complete reading of the *Restatement* section advanced by the *Kawaauhau* Court indicates that intent is satisfied where the actor believes that his acts are substantially certain to cause injury. Section 8A of the *Restatement (Second)* of *Torts* defines the word “intent” as used in the *Restatement* to mean “that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it.” The substantial certainty test for intent is explained in Comment b to Section 8A of the *Restatement (Second)* of *Torts*:

> Intent is not... limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.

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98. See, e.g., Hartley v. Jones (*Matter of Hartley*), 869 F.2d 394, 395 (8th Cir. 1989) (holding that the Bankruptcy Code requires that the defendant intended to cause injury); Berger v. Buck (*In re Buck*), 220 B.R. 999, 1004 (B.A.P. 10th Cir. 1998) (holding that the willful standard requires evidence that the debtor had “motive to harm” the creditor); Florida Outdoor Equip., Inc. v. Tomlinson (*In re Tomlinson*), 220 B.R. 134, 137-38 (Bankr. M.D. Fla. 1998) (stating that the Eleventh Circuit’s “substantially certain” standard is inconsistent with *Kawaauhau v. Geiger* and applying a strict “intent to cause injury” standard).


101. See *Kawaauhau*, 118 S. Ct. at 977.

102. See *Restatement (Second)* of *Torts* § 8A (1965).

103. *Id.*

104. *Id.* at cmt. b.
The Restatement makes clear that subjective knowledge that injury is substantially certain to result is sufficient to satisfy the intent requirement for intentional torts. Because the Kawaauhau Court compares § 523(a)(6) to an intentional tort and quotes language from the Restatement, the scope of intent as used in Kawaauhau is correctly read to include subjective knowledge of the debtor that the injury was substantially certain to result. A significant number of courts considering Kawaauhau permit intent to include circumstances where the debtor performs actions that are known by the actor to be "substantially certain to cause injury."\footnote{See In re Slosberg, 225 B.R. at 18; see, e.g., Texas v. Walker, 142 F.3d 813, 823-24 (5th Cir. 1998) (holding that injury might be intentional under Kawaauhau v. Geiger if the professor/debtor kept fees knowing that it would deprive the university of money to which it had legal rights); AVCO Fin. Servs. of Billings v. Kidd (In re Kidd), 219 B.R. 278, 285 (Bankr. D. Mont. 1998) (holding that the "subjective test" of the Kawaauhau v. Geiger willfulness inquiry includes either that the act was done with specific intent to injure the creditor or the act was done knowing with substantial certainty, that the creditor would be harmed). But see Berger v. Buck (In re Buck), 220 B.R. 999, 1004 (B.A.P. 10th Cir. 1998) (holding that the willful standard requires evidence that the debtor had "motive to harm" the creditor); Florida Outdoor Equip., Inc. v. Tomlinson (In re Tomlinson), 220 B.R. 134, 137-38 (Bankr. M.D. Fla. 1998) (stating that the Eleventh Circuit "substantially certain" standard is inconsistent with Kawaauhau v. Geiger and applying a strict "intent to cause injury" standard).}

In Geiger v. Kawaauhau (In re Geiger),\footnote{113 F.3d 848 (8th Cir. 1997), cert. granted, 521 U.S. 1153 (1997), and aff'd, 118 S. Ct. 974 (1998).} the Eighth Circuit Court of Appeals suggests that the debtor's subjective knowledge that his actions are substantially certain to result in injury would be sufficient to satisfy the willfulness requirement.\footnote{See id. at 853.} The court stated that "the real question is whether Dr. Geiger believed that these consequences were substantially certain to occur at the time that he attempted his treatment . . . . This is an important distinction, one in fact that defines the boundary between intentional and unintentional torts."\footnote{Id.} The court went on to say that "[e]ven if Dr. Geiger should have believed that his treatment was substantially certain to produce serious harmful consequences, he would be guilty only of professional malpractice, not of an intentional tort."\footnote{Id.} The Eighth Circuit's reading of intent suggests that intent under § 523(a)(6) is properly interpreted to include subjective knowledge that injury is substantially certain to occur.

Because of the Kawaauhau Court's reliance on intentional tort law in determining the proper definition of "intent" under § 523(a)(6) and because the Kawaauhau Court affirmed the lower court, which held that subjective knowledge that injury is substantially certain to occur
was sufficient, a careful reading of *Kawaauhau* would permit intent to be satisfied by showing either subjective intent to injure or subjective knowledge that injury is substantially certain to result. In addition, this position strikes an appropriate balance between the policy which seeks to provide honest debtors with a fresh start and the right of a creditor to secure payment of debts which appropriately fall under the discharge exception.

Despite the *Kawaauhau* Court's reliance on the *Restatement* and its strong allusion to the intentional torts in general, a number of circuits have interpreted *Kawaauhau* as requiring a subjective intent to injure to satisfy willfulness under § 523(a)(6).\(^{110}\) In *Berger v. Buck* (*In re Buck*),\(^ {111}\) the Bankruptcy Appeals Panel of the Tenth Circuit, without considering the possibility that the debtor had subjective knowledge that injury was substantially certain to result, suggested that because no evidence supported a finding that the debtor had a motive to harm the creditor, the debt would be dischargeable under *Kawaauhau*.\(^ {112}\)

In *Florida Outdoor Equipment, Inc. v. Tomlinson* (*In re Tomlinson*),\(^ {113}\) the court strictly construed the language of *Kawaauhau* to require a showing of intentional and deliberate injury to satisfy § 523(a)(6) and held that the debtor's conduct must have been done with actual intent to cause injury to come within the discharge exception.\(^ {114}\) In reaching this conclusion, the *Tomlinson* Court expressly rejected the prior position of the Eleventh Circuit that had included acts substantially certain to cause injury in the willful and malicious framework.\(^ {115}\)

These courts, however, fail to give proper attention to the reliance that the *Kawaauhau* Court places on the *Restatement* definition of intent. In addition, such a narrow interpretation of intent would render the § 523(a)(6) discharge exception largely unavailable to creditors in many circumstances in which debts should properly be excepted from discharge.\(^ {116}\) An examination of the debts related to the conversion of secured property exemplifies this potential problem.

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110. *See, e.g.*, *Hartley v. Jones* (*Matter of Hartley*), 869 F.2d 394, 395 (8th Cir. 1989) (holding that it is the injury to the creditor, not the act to the debtor, which must be intentional); *In re Buck*, 220 B.R. at 1004 (holding that the willful standard requires evidence that the debtor has "motive to harm" the creditor); *In re Tomlinson*, 220 B.R. at 137-38 (holding the *Kawaauhau v. Geiger* requires a showing of intentional and deliberate injury).

111. 220 B.R. 999 (B.A.P. 10th Cir. 1998).

112. *See id.* at 1004.


114. *See id.* at 138.

115. *See id.*

Under a definition of "intent" requiring subjective intent to injure, a debt arising from a conversion case where a debtor converts a security to his own use without consent of the creditor holding a security interest will almost never be found nondischargeable under the willful and malicious injury discharge exception. In the normal conversion case, the debtor will most likely not intend to injure the creditor. Usually the debtor intends to benefit himself by taking the security interest and does not intend to injure the creditor at all. At the time of conversion, the debtor may fully intend to repay the debt to the creditor. Even if the debtor actually intends to harm the creditor, the subjective intent of the debtor will be nearly impossible to prove because a debtor in bankruptcy will always be able to argue that the conversion was related to financial difficulties and not intent to injure the creditor.

Therefore, a narrow scope of intent satisfied only by a showing of subjective intent to injure permits a debtor's financial difficulties to serve as a justification for the conversion of collateral and a rebuttal to the discharge exception's requirement of intent to harm the creditor. Under this standard of intent, a creditor is essentially denied his security interest in the secured property because of the nearly impossible burden placed upon him to prove that the debtor subjectively intended to injure him. This effect is shown by courts that have adopted a definition of "malice" requiring subjective intent to injure. These courts almost always decided in favor of the debtor and grant discharge.

The result is much different if intent may be satisfied where the debtor has subjective knowledge that his actions are substantially certain to result in injury to the creditor. Utilizing this broader scope of intent, a debtor's actions will be found willful under § 523(a)(6) where the debtor has subjective knowledge that his conversion is substantially certain to harm the creditor. Under this interpretation, effect is given to the security interest held by the creditor in circumstances where a debtor knowingly violates the security agreement and the debtor will be denied discharge of this debt contingent on a finding of malice.

In addition, an honest debtor inadvertently converting secured property will still be able to discharge the debt in bankruptcy consistent with the fundamental goal of the bankruptcy code to provide the honest debtor with a fresh start. Debtors who are unaware that their

117. See id.
118. See id.
119. See id.
121. See id. at 772.
122. See Tabb, supra note 3, at 83.
actions will harm the creditor or who are unaware of the existence of a security agreement may discharge their debts in bankruptcy because they possess neither subjective intent to injure the creditor nor subjective knowledge that their actions are substantially certain to injure the creditor. Therefore, defining intent to include subjective substantial certainty that injury will result protects the security interest of creditors under circumstances where the debtor acts with knowledge of the agreement while at the same time still permits an honest debtor without knowledge of the security interest to discharge the debts in bankruptcy.

IV. CONCLUSION

The discharge exception for willful and malicious injury is an area of United States bankruptcy law where the competing policy considerations of the bankruptcy code collide. Bankruptcy law is premised on the idea of granting the honest debtor a fresh start to allow that person to once again become a productive member of society. However, the policy behind the bankruptcy discharge exceptions seeks to prevent the discharge of certain debts arising from culpable conduct. The careful interpretation of bankruptcy discharge exceptions is essential to preventing an imbalance between these competing policy considerations.

In Kawaauhau v. Geiger, the Supreme Court held that willfulness under § 523(a)(6) requires a deliberate or intentional injury as opposed to a deliberate or intentional act resulting in injury. This holding correctly limits the discharge exception to cases involving intentional conduct by the debtor and insures that honest debtors will receive the fresh start to which they are entitled under the bankruptcy code. However, the Court’s failure to clearly define the scope of “intent” creates the risk that this exception will be interpreted too narrowly and permit the discharge of debts arising from culpable conduct, the discharge of which a creditor should be protected from under the exception.

To insure that the willful and malicious injury discharge exception is correctly interpreted to provide honest debtors a fresh start while at the same time protecting creditors from the discharge of debts resulting from culpable conduct, it is necessary to clarify the scope of “intent” under Kawaauhau. Defining the scope of intent to include subjective intent to cause injury and subjective knowledge of the debtor that injury is substantially certain to result achieves the proper balance between the competing policy considerations of the Bankruptcy Code. This interpretation allows the honest debtor a fresh start and at the same time protects creditors from the discharge

123. See Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
of debts arising from conduct that was intended to injure the creditor or from which the debtor was substantially certain the creditor would be injured.

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