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Section 523(a)(6): Willful and Malicious Exception from Discharge: The Implied Malice Standard

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SECTION 523(a)(6): WILLFUL AND MALICIOUS EXCEPTION FROM DISCHARGE: THE "IMPLIED MALICE" STANDARD

I. INTRODUCTION

A major provision of modern bankruptcy law is discharge of debt. The purpose of this provision for discharge is generally recognized as giving a fresh start "to the honest but unfortunate debtor."[1] The key word in this phrase is "honest." Throughout the history of United States bankruptcy law, Congress intended that discharge only be available to the honest debtor.[2] As a result, Congress created several exceptions to the discharge provision.[3] Among the debts excepted from the discharge provision are those incurred as the result of a "willful and malicious injury by the debtor to another entity or to the property of another entity."[4] A number of courts have addressed the issue of what acts by the debtor and what types of debt fall within the meaning of the phrase "willful and malicious".[5]

Since the enactment of the Bankruptcy Reform Act of 1978,[6] the courts have taken a variety of approaches in construing the willful and malicious exception. This disparity of approaches has undermined the goals of the bankruptcy system, among which are uniformity in the

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1. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). The Court stated that "[o]ne 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.' " *Id.* (quoting Williams v. United States Fidelity & Guar. Co., 236 U.S. 549, 554-55 (1915)).

2. Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L. J. 1047, 1050 (1987).

3. 11 U.S.C. § 523(a)(1)-(10) (1988). Discharge is not available for certain taxes or customs duties, debt incurred by false oral or written representation, debt which was not listed or scheduled in a manner to permit the creditor to file a proof of claim, debt resulting from fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny, debts for alimony or child support under a separation agreement, divorce decree or court order, debt due to willful and malicious injury, debt which is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit, debt for educational loans made, insured or guaranteed by a governmental unit or funded in whole or part by a governmental unit or a nonprofit institution when the loan first became due within five years of the date of the filing of the petition, debt which arose as a result of the debtor's operation of a motor vehicle while legally intoxicated and debt that was not discharged in a prior bankruptcy case.

4. 11 U.S.C. § 523(a)(6) (1988).

5. *See e.g.*, Tinker v. Colwell, 193 U.S. 473 (1904); *In re* Long, 774 F.2d 875 (8th Cir. 1985); United Bank of Southgate v. Nelson, 35 Bankr. 766 (Bankr. N.D. Ill. 1983); *In re* Hodges, 4 Bankr. 513 (Bankr. W.D. Va. 1980); Doty v. Rogers, 213 S.C. 361 (1948).

6. 11 U.S.C. §§ 101-1501 (1988).

treatment of creditors and debtors,[7] provision of a "fresh start" to the honest debtor,[8] protection of the interests of creditors,[9] and achievement of economic efficiency in allocating the risk of loss between the parties.[10]

This comment discusses the separate approaches which courts have taken when interpreting the willful and malicious exception to discharge. First, this comment examines those cases which interpret the willful and malicious exception to discharge to require an "intent to harm." This approach is analyzed to determine if it effectuates the goals of bankruptcy and complies with congressional intent. Next, those cases applying a "heightened culpability" standard to the willful and malicious exception are considered. This approach is also evaluated in terms of the goals of bankruptcy and congressional intent. Finally, the "implied malice" approach to the willful and malicious exception to discharge is examined. This comment concludes that the "implied malice" approach best effectuates the goals of bankruptcy and complies with congressional intent.

II. BACKGROUND

Early bankruptcy laws made no provision for a discharge of debt.[11] These laws were based on the proposition that bankrupt debtors were wrongdoers.[12] The early English bankruptcy acts dealt with debtors as quasi-criminals.[13] Bankruptcy laws were thus viewed as quasi-punitive in nature,[14] often resulting in the debtor being sent to debtors' prison or having all of his property seized by creditors.[15] Discharge was first introduced in early English law as a means of inducing debtors to make a full disclosure and delivery of their assets.[16] These early discharge pro-

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7. Note, *Exceptions to Discharge: Section 523*, 3 BANKR. DEV. J. 295, 295 (1986).

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

9. Howard, *supra* note 2, at 1048.

10. *Id.*

11. H. REMINGTON, 1 A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 2 (5th ed. 1950); Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355, 367 (1986).

12. H. REMINGTON, *supra* note 11, § 2, at 6.

13. *See id.* ("In the first of the English acts the bankrupt was always referred to as 'the offender,' an odium of crime being thus cast upon the word 'bankrupt' which has clung to it this day.").

14. Ayer, *supra* note 11, at 367.

15. Comment, *Protection of Debtor's "Fresh Start" Under the New Bankruptcy Code*, 29 CATH. U.L REV. 843, 846 (1980).

16. J. MACLACHLAN, BANKRUPTCY 88 (1956); *see also* H. REMINGTON, *supra* note 11, § 5. "[A]nd be it further enacted that all and every person and persons so becoming bankrupt as aforesaid, who shall, within the time limited by this act, surrender him, her or themselves—and all things conform as in and by this act is directed—shall be discharged from all debts by him, her or them due and owing at the time that he, she or they did become

visions gave creditors the power to grant a discharge.[17] Qualifications to the discharge, such as requiring that the assets of the debtor equal a certain portion of his debts, and that a certain portion of the debtor's creditors assent to his discharge, were later included.[18] The first bankruptcy act in the United States, passed in 1800, provided for the right of discharge, subject to the unfettered discretion of the creditor.[19]

As the law of bankruptcy evolved, discharge became more readily available to the debtor. The second bankruptcy act, passed in 1841, contained a subtle, yet important, distinction from the previous laws allowing discharge at the discretion of the creditor.[20] The Act of 1841 required that, unless the creditor objected, the debtor be provided a discharge if the debtor complied with all aspects of the Act of 1841 and made a full delivery of assets.[21] Creditors could still vote against the discharge, but it was their responsibility to make the first objection.[22] This changing attitude toward discharge was fully reflected in the Bankruptcy Act of 1898.[23] As in previous acts, the Act of 1898 required the debtor to apply for the discharge.[24] The right to discharge was, however, considered absolute unless an appropriate party objected and the court made certain findings.[25]

These legislative changes reflect the evolving purpose behind discharge.[26] Although the original policy of promoting debtor cooperation was still present, providing a "fresh start" to the debtor became the prominent consideration.[27] This fresh start policy reflected the belief that the discharge benefitted not only the debtor by allowing him to escape burdensome debt, but also society in general by encouraging the debtor to again become a productive member of the community.[28] Such

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bankrupt."

H. REMINGTON, *supra* note 11, § 5 (quoting 4 Anne, ch. 17 (1705)).

17. Ayer, *supra* note 11, at 367.

18. H. REMINGTON, *supra* note 11, § 5.

19. Ayer, *supra* note 11, at 367; see Bankruptcy Act of 1800, § 36, 2 Stat. 19 (repealed 1803). The creditor was given discretion to grant a discharge and could do so for any reason or for no reason. A certificate of discharge was required to be signed by ⅔ of the creditors whose interest was greater than $50. *Id.*

20. Ayer, *supra* note 11, at 367.

21. Bankruptcy Act of 1841, ch. 9, § 4, 5 Stat. 440, 443 (repealed 1843).

22. *Id.* § 4, 5 stat. at 443; *see* Ayer, *supra* note 11, at 367.

23. Bankruptcy Act of 1898, ch. 541, §§ 14-17, 30 Stat. 544 (repealed 1978).

24. *Id.* § 15, 30 Stat. at 550.

25. A debtor was given the right of discharge unless he committed an offense punishable by imprisonment or destroyed financial records with the intent to conceal his financial condition or failed to keep records from which his financial condition could be ascertained. *Id.* § 15, 30 Stat. at 550. In addition, specific debts were also exempted from discharge. *Id.* § 17, 30 Stat. at 550.

26. J. MACLACHLAN, *supra* note 16, at 88.

27. *Id.*

28. *Id.*; *see also* H. REMINGTON, *supra* note 11, § 17. ("Looking at the over-all picture,

a policy also reflected the changing status of a debtor in society.[29] Moreover, the fresh start policy reflected the belief that many debtors were unsophisticated in dealings with credit and were subject to being taken advantage of by a sophisticated creditor.[30] As noted above, it was generally believed that a fresh start policy could be served if discharge was provided only to the "honest" debtor.[31] Consequently, several exceptions to the discharge were created in order to insure that those incurring debt as the result of some culpable behavior not be given the benefit of discharge.[32] Among the exceptions set out in the Act of 1898 was the exception for debts resulting from willful and malicious injuries.[33] The Act of 1898 stated "[a] discharge in bankruptcy shall release a bankrupt from all his provable debts, . . . except . . . for willful and malicious injuries to the person or property of another."[34] The courts have struggled to define this exception.

A. Tinker v. Colwell: Original Definition of "Willful and Malicious"

Initially, the United States Supreme Court settled the question of what constituted a willful and malicious injury in *Tinker v. Colwell*.[35] In *Tinker*, the Court set out a basic standard for the terms willful and malicious.[36] The case involved the dischargeability of a debt resulting from a judgment in a criminal conversation proceeding.[37] The defendant, Tinker, sought to discharge a $50,000 judgment he suffered in state court stemming from an adulterous affair he had carried on with Colwell's wife.[38] After the proceedings, Tinker filed for bankruptcy and Colwell opposed discharge of the judgment, claiming the debt was incurred as the result of a willful and malicious injury to his property.[39] The Supreme Court found that a husband had certain exclusive rights

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however, bankruptcy is not solely for the relief of debtors, but a social measure. Its aim is not merely release from the pressure of debt, but social and economic rehabilitation as well.").

29. Ayer, *supra* note 11, at 369. One reason for the growing acceptance of discharge in bankruptcy was "the conviction that debtors in a complicated world probably don't have much control over whether and to what extent they are able to meet their obligations." *Id.*

30. J. MACLACHLAN, *supra* note 16, at 88.

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

32. Bankruptcy Act of 1898, ch. 541, § 17(a)(1)-(4), 30 Stat 544, 550-51 (repealed 1978).

33. *Id.* § 17(a)(2), 30 Stat. at 550. Other exceptions included tax debts, debts created by fraud, embezzlement or misappropriation while acting in a fiduciary capacity and debts resulting from judgments for fraud or the obtaining of property by false pretenses or false representations. *Id.* § 17(a)(1)-(4), 30 Stat. at 550.

34. *Id.* § 17(a)(2), 30 Stat. at 550.

35. 193 U.S. 473 (1904).

36. *Id.*

37. *Id.* Criminal conversation was a cause of action for the act of adultery. The two terms are essentially interchangeable.

38. *Id.* at 474.

39. *Id.*

(both personal and property) with respect to his wife and that because a wife was incapable, under the law, of giving any consent to affect those rights, criminal conversation or adultery by another man could be described as an injury to the personal property of the husband.[40] The Court held that the debt did fall within the meaning of a "willful and malicious" injury and denied discharge.[41] In so doing, the Court set forth the standard for determining whether an act falls within the willful and malicious exception to discharge. The Court enunciated the standard as follows:

> 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 [to discharge in bankruptcy].[42]

To fall within the exception, the debtor's act must not only be willful but also malicious. The Court noted that a finding of "special malice," defined as some malevolent purpose or ill will toward another, is not required.[43] Rather, malice could be implied from the action, where one who performs a wrongful act knows of the harmful consequences or the surrounding circumstances indicate that such knowledge can be inferred.[44] The *Tinker* Court pointed out that the willful and malicious exception did not require that every willful act be malicious. The Court stated that:

> One who negligently drives through a crowded thoroughfare and negligently runs over an individual would not, as we suppose, be within the exception. True he drives negligently, and that is a wrongful act, but he does not intentionally drive over the individual. If he intentionally did drive over him, it would certainly be malicious.[45]

Thus, the court found that a wrongful, intentional act which necessarily causes harm comes within the meaning of willful and malicious, but

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40. *Id.* at 481.

41. *Id.*

42. *Id.* at 487. In coming up with its definition, the Court quoted from several lower courts who had also considered the issue. *Id.* at 486. One lower court held that:

> " 'Malice,' in law, simply means a depraved inclination on the part of a person to disregard the rights of others, which intent is manifested by his injurious acts. While it may be true that in his unlawful act [the wrongdoer] was not actuated by hatred or revenge or passion towards the plaintiff, nevertheless, if he acted wantonly against what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice."

Id. at 486-87 (quoting *In re* Freche, 109 F. 620, 621 (1901)).

43. *Id.* at 490.

44. *Id.*

45. *Id.* at 489.

that not every willful act is malicious. While the Court made no apparent determination as to whether reckless acts come within the willful and malicious exception to discharge, it is necessarily implied.

A majority of lower courts following *Tinker* have found that the standard set out by the Court included not only intentional and deliberate acts, but also acts rising only to the level of recklessness. These courts thus applied a standard of recklessness to both the willfulness and the maliciousness of the act.[46]

Other courts construing *Tinker* found that while, a reckless standard could be applied in finding malice or implied malice, a reckless standard could not be used to establish a willful act. Instead, these courts held that the act itself had to be intentional and deliberate in order to be willful, and that a showing of defendant's reckless disregard was not sufficient.[47] Both lines of interpretation were followed until the passage of the Bankruptcy Reform Act of 1978.[48]

The Supreme Court reexamined the issue of the willful and malicious exception in *Davis v. Aetna Acceptance Co.*[49] The debtor in *Davis* was a car dealer who had his vehicle floorplan financed by Aetna Acceptance Company (Aetna).[50] Although Aetna held a security interest in the vehicles, the dealer sold one of the cars without remitting the proceeds to Aetna.[51] The parties stipulated that the sale was made in the ordinary course of business and that nothing was concealed.[52] Notice of the sale was given to Aetna even though no express consent was obtained.[53] There was also evidence that a number of other cars were sold under similar circumstances.[54] The debtor promised to remit payment immediately but failed to keep that promise and subsequently

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46. *In re* Kubiniec, 2 F. Supp. 632 (W.D.N.Y. 1932) (a willful injury is one which has been done under such circumstances as to indicate reckless disregard for the safety of others); Fitzgerald v. Herzer, 78 Cal. App. 2d 127, 177 P.2d 364 (1947) (acts of defendant which were judged to be grossly careless, reckless and negligent and wanton found to come within exception of willful and malicious); Matthews v. Franklin, 74 So. 2d 309 (La. Ct. App. 1954) (wanton and reckless operation of a vehicle may come within the meaning of willful and malicious); Doty v. Rogers, 213 S.C. 361 (1948) (a wrongful act done in utter disregard of the rights of others evidencing a reckless disregard for the safety of others constitutes a willful and malicious injury within the act).

47. *In re* Rainey, 1 Bankr. 569 (Bankr. D. Or. 1979); Greenfield v. Tuccillo, 129 F.2d 854 (2d Cir. 1942); *In re* Vena 46 F.2d 81, 82 (W.D. Wash. 1930).

48. *See* cases cited *supra* notes 47-48; *see also* Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1501 (1988).

49. 293 U.S. 328 (1934).

50. *Id.* at 330.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

filed for bankruptcy.[55] The Court found that the debtor had committed no malicious act.[56] The Court held that, in order to determine whether an act of conversion is willful and malicious, reference must be made to the surrounding circumstances.[57] The Court determined that "[t]here may be a conversion which is innocent or technical, an unauthorized assumption of dominion without wilfulness or malice."[58] The Court further held that "[t]here may be an honest, but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a wilful and malicious one."[59] The Court found that Davis' conversion of the sale proceeds was not malicious under the exception, stating that the "discharge will prevail as against a showing of conversion without aggravated features."[60] A defendant who thus innocently or mistakenly harms the plaintiff's interests, as determined from the surrounding facts and circumstances, cannot be found to have acted maliciously.

B. The Bankruptcy Reform Act & New Interpretations

With the passage of the Bankruptcy Reform Act of 1978, Congress retained a number of exceptions to discharge. Specifically, Congress chose to adopt substantially the same language as in the Act of 1878 in providing for an exception for debts incurred as the result of willful and malicious injury.[61] Although the language was basically the same, the new section was accompanied by legislative history purporting to clarify this exception.[62] This legislative history has been the source of much debate in the courts. The legislative history accompanying the exception to discharge states:

> Paragraph (6) excepts debts for willful and malicious injury by the debtor to another person. Under this paragraph, "willful" means deliberate or intentional. To the extent that *Tinker v. Colwell*, 193 U.S. 473 (1902), held that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.[63]

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55. *Id.*
56. *Id.* at 332-33.
57. *Id.* at 332.
58. *Id.*
59. *Id.*
60. *Id.* at 333.
61. 11 U.S.C. § 523(a)(6) (1988). This section excepts from discharge debts incurred as the result of "willful and malicious injury by the debtor to another entity or to the property of another entity." *Id.*
62. *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 365 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6320-21; *see also* S. REP. NO. 989, 95th Cong., 2d Sess. 79, *reprinted in* 1978 U.S CODE CONG. & ADMIN. NEWS 5787, 5865.
63. H.R. REP. NO. 595, 95th Cong., 1st Sess. 365 (1977), *reprinted in* 1978 U.S. CODE CONG. &

Instead of clarifying the willful and malicious exception, the legislative history only created more ambiguity regarding the meaning of malicious.

The courts which have interpreted this new section and its legislative history have not disputed the meaning of the word willful. Willful is now generally accepted to mean a voluntary, deliberate or intentional act.[64] An injury which occurs as the result of reckless action is no longer considered sufficient grounds for denying discharge.[65] The injury instead must be the result of a deliberate, intentional act on the part of the debtor.[66]

Although courts are now generally in agreement as to the definition of the willful prong of the exception, there is a split in the courts as to what type of conduct can be viewed as malicious. There are three separate approaches. First, a majority of courts interpret the legislative history to overrule *Tinker* only to the extent that the decision applied a reckless standard to the willful prong.[67] These courts continue to use the *Tinker* standard of "implied malice" when determining exceptions to discharge.[68] Second, other courts interpret the legislative history to completely overrule *Tinker*.[69] These courts require a finding of a specific "intent to harm," special malice as defined by the *Tinker* court,[70]

ADMIN. NEWS 5963, 6320-21.

64. *See* St. Paul Fire & Marine Ins. Co. v. Vaughn, 779 F.2d 1003 (4th Cir. 1985); *In re* Compos, 768 F.2d 1155, 1157 (10th Cir. 1985); *In re* Horldt, 86 Bankr. 823, 825 (Bankr. E.D. Pa. 1988).

65. 3 COLLIER ON BANKRUPTCY ¶ 523.16, at 523-118 (15th ed. 1989).

66. *See In re* Long, 774 F.2d 875, 880 (8th Cir. 1985) (there exists a "virtual consensus" that willful means intentional or deliberate); *Compos*, 768 F.2d at 1157 (the express intent of Congress was that willful mean intentional and deliberate); *In re* Quezada, 718 F.2d 121, 121 (5th Cir. 1983) (defendant's negligence in allowing pit bulldog to escape does not come within exception which requires intentional, deliberate injury); *Horldt*, 86 Bankr. at 825 (controversy among courts does not include "willful" prong as courts agree that debtor's conduct must be found to be intentional to be willful); *see also* 3 COLLIER ON BANKRUPTCY, *supra* note 66, ¶ 523.16, at 523-118 ("word 'willful' means 'deliberate or intentional,' a deliberate or intentional act which necessarily leads to injury").

67. *E.g.*, United Bank of Southgate v. Nelson, 35 Bankr. 766, 774 (Bankr. N.D. Ill. 1983).

68. *See In re* Cecchini, 780 F.2d 1440, 1443 (9th Cir. 1986) (an intentional, wrongful act is sufficient to establish malice on the part of the defendant); *In re* Meyer, 100 Bankr. 301 (Bankr. D.S.C. 1989) (malice may be implied by showing that debtor intentionally committed an inherently wrongful act without just cause or excuse); *In re* Cobley, 89 Bankr. 446, 451 (Bankr. E.D. Pa. 1988) (malice implied from act of beating prison inmate, such act being intentional and without just cause or excuse); *In re* Dubian, 77 Bankr. 332, 337 (Bankr. D. Mass. 1987) (malice implied from intentional wrongful act of intentional interference with contractual relations); *Nelson*, 35 Bankr. at 776 (intentional act of converting insurance proceeds, without just cause or excuse, comes within definition of malicious); *In re* Ries, 22 Bankr. 343, 347 (Bankr. W.D. Wis. 1982) (intentional act of selling piano in which debtor knew bank held security interest was within the definition of malicious).

69. *E.g.*, *In re* Hodges, 4 Bankr. 513 (Bankr. W.D. Va. 1980).

70. Tinker v. Colwell, 193 U.S. 473, 487-88 (1904).

before excepting a debt from the discharge.[71] Third, some courts basically ignore the legislative history and opt for a standard falling somewhere between the implied malice standard and the intent to harm standard.[72] This approach, found mainly in recent decisions, attempts to create the most equitable solution based on the facts of the situation.[73]

C. *Implied Malice Standard*

The majority of courts still apply the implied malice standard set out in *Tinker*. These courts find that, while willful requires an intentional, deliberate act, the maliciousness of the act can be implied from the action itself; thus, there is no requirement of special malice or an intent to harm.[74] The rationale for this approach is explained in *United Bank of Southgate v. Nelson*.[75] The defendant in this case purchased a mobile home in which the bank held a security interest.[76] The mobile home was completely destroyed in an accident and the defendant was given a check by the insurance company to cover the loss.[77] The defendant, in knowing violation of the security agreement, failed to remit the insurance proceeds to the bank.[78] The bankruptcy court found that, because the defendant had no specific intent to harm the bank, the debt was dischargeable.[79] The district court reversed this holding finding that *Tinker* stood for two separate principles.[80] First, willfulness could be established by a reckless standard. Second, malice could be implied

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71. *See In re* Hartley, 869 F.2d 394 (8th Cir. 1989) (intentional act of throwing lighted firecracker into basement filled with gasoline fumes not within exception to discharge for willful and malicious injuries since actor did not intend to cause explosion and fire which injured plaintiff); *In re* Compos, 768 F.2d 1155 (10th Cir. 1985) (act of intentionally driving while intoxicated does not preclude discharge where defendant did not intend to injure plaintiff); *In re* Akridge, 89 Bankr. 66 (Bankr. App. P. 9th Cir. 1988) (act of crossing picket line in violation of union constitution not malicious where debtor's act was motivated by economic need rather than intent to cause harm); *In re* Hodges, 4 Bankr. 513 (Bankr. W.D. Va. 1980) (act of selling stereo in knowing violation of security agreement not within meaning of exception to discharge where defendant did not intend to harm plaintiff).

72. *E.g.*, Coffy v. Burdick, 65 Bankr. 105 (Bankr. N.D. Ind. 1986).

73. *See In re* Long, 774 F.2d 875, 880 (8th Cir. 1985) (some amount of "heightened culpability" required in order for debt to come within exception); *In re* Horldt, 86 Bankr. 823, 825 (Bankr. E.D. Pa. 1988) (act of intentionally selling secured collateral did not preclude discharge where evidence indicated that defendant acted to benefit creditors); *Burdick*, 65 Bankr. at 105 (court examined "totality of circumstances" in establishing malice).

74. *See, e.g.*, United Bank of Southgate v. Nelson, 35 Bankr. 766 (Bankr. N.D. Ill. 1983).

75. *Id.*

76. *Id.* at 767.

77. *Id.*

78. *Id.*

79. *Id.* at 768.

80. *Id.* at 769.

from the surrounding circumstances.[81] The court examined the legislative history concerning this section and determined that, because Congress spoke only to the willful prong of the exception, it meant to overrule *Tinker's* application of a reckless standard to the element of willfulness.[82] The court found that Congress did not intend to overrule *Tinker's* application of implied malice.[83] The court therefore held that a debtor who knows that her action will harm the creditor but nonetheless proceeds in the face of this knowledge can be said to have performed a malicious act.[84]

A majority of courts have followed this interpretation of the legislative history.[85] These courts have used the general standard that "[a] wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury."[86] The key phrase in this standard is "an act which *necessarily* produces harm."[87] This phrase indicates that the harm must be of the type which logically flows from the act, such that one who intentionally or deliberately performs the act either knows or should have known of the harm which will occur due to the very nature of the act.[88] If a wrongful, intentional act is committed, courts applying this approach will not hesitate to imply malice from the debtor's actions and the surrounding circumstances.[89]

D. "Intent to Harm" Standard

Although the majority of courts adhere to the *Tinker* standard of implied malice, a number of courts have required a much stricter standard to find a debt nondischargeable. These courts have interpreted the

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81. *Id.*

82. *Id.* at 774.

83. *Id.*

84. *Id.* at 776.

85. *See* Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257, 1263 (11th Cir. 1988); Perkins v. Scharffe, 817 F.2d 392, 394 (6th Cir. 1987); Wheeler v. Laudani, 783 F.2d 610, 615 (6th Cir. 1986); *In re* Cecchini, 780 F.2d 1440, 1443 (9th Cir. 1986); St. Paul Fire & Marine Ins. Co. v. Vaughn, 779 F.2d 1003, 1009 (4th Cir. 1985); *In re* Quezada, 718 F.2d 121, 123 (5th Cir. 1983); *In re* Dardar, 620 F.2d 39, 40 (5th Cir. 1980); *In re* Clark, 116 Bankr. 552, 554 (N.D. Ohio 1990); *In re* Cobley, 89 Bankr. 446, 451 (Bankr. E.D. Pa. 1988); *In re* Erickson, 89 Bankr. 850, 852 (Bankr. D. Idaho 1988); *In re* Jones, 88 Bankr. 899, 902 (Bankr. E.D. Wis. 1988); *In re* Condict, 71 Bankr. 485, 487 (N.D. Ill. 1987); *In re* Taylor, 58 Bankr. 849, 855 (Bankr. E.D. Va. 1986); *In re* Ries, 22 Bankr. 343, 347 (Bankr. W.D. Wis. 1982).

86. 3 COLLIER ON BANKRUPTCY, *supra* note 66, ¶ 523.16, at 523-117.

87. *Id.* (emphasis added).

88. *Id.; see Nelson*, 35 Bankr. at 776 (malice may be inferred from the nature and conduct of the act itself).

89. It is apparent that the debtor's knowledge of the probable consequences can be inferred from his actions and/or his experience in business. *In re* Ries, 22 Bankr. 343 (Bankr. W.D. Wis. 1982).

legislative history to require an intent to harm on the part of the debtor.[90]

An early case establishing this line of interpretation was *In re Hodges*.[91] In *Hodges*, the debtor sold a stereo in which the plaintiff held a security interest.[92] Although the debtor stated that he did not know the plaintiff held a security interest, the debtor was aware that the plaintiff held some rights to the stereo.[93] The bankruptcy court, in examining the legislative history, found that Congress intended to completely overrule the *Tinker* standard for both the willful and malicious prongs.[94] The court stated that the "reckless" or "utter disregard" standard had been overruled, apparently construing the two prongs of willful and malicious together, and held that "[w]ithout the *Tinker* standard, that leaves but one choice 'intent to do harm.' "[95] The court found that although Hodges was aware that the plaintiff had rights in the stereo and that Hodges sold the stereo willfully, Hodges did not sell it maliciously, because he sold it to acquire money for a house payment and food.[96] He did not, therefore, sell the stereo with the intent to harm the plaintiff.[97] These courts require that some ill will or intent to harm be proven before a debt will be excepted from the discharge.[98]

Some cases from the Eighth and Tenth Circuit Courts of Appeals have also required an intent to harm,[99] but their presentation of the standard varies slightly from the foregoing courts. These courts have examined the language of the exception itself and held that the word willful modifies the word injury.[100] These courts have determined that Congress intended to except only those debts resulting from intentional

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90. *See In re* Hartley, 869 F.2d 394 (8th Cir. 1989); Cassidy v. Minihan, 794 F.2d 340 (8th Cir. 1986); *In re* Compos, 768 F.2d 1155 (10th Cir. 1985); *In re* Lane, 76 Bankr. 1016 (Bankr. E.D. Pa. 1987); *In re* Kinney, 54 Bankr 36 (Bankr. M.D. Fla. 1985); *In re* Lewis, 17 Bankr. 46 (Bankr. W.D. Ark. 1981); *In re* Nelson, 10 Bankr. 691 (Bankr. N.D. Ill. 1981); *In re* Hodges, 4 Bankr. 513 (Bankr. W.D. Va. 1980).

91. 4 Bankr. 513 (Bankr. W.D. Va. 1980).

92. *Id.* at 514.

93. *Id.*

94. *Id.* at 516.

95. *Id.*

96. *Id.* at 517.

97. *Id.* The court also relied on *Davis*, 293 U.S. at 328, to find the debt dischargeable. The reliance on *Davis* is misplaced. *Davis* concerned an innocent and unintentional conversion of the sale proceeds of an automobile. *Id.* at 332. In *Hodges*, however, the debtor was aware of the creditor's rights and deliberately sold the collateral in the face of those rights. *Hodges*, 4 Bankr. at 514.

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

99. *See In re* Hartley, 869 F.2d 394 (8th Cir. 1989); Cassidy v. Minihan, 794 F.2d 340 (8th Cir. 1986); *In re* Compos, 768 F.2d 1155 (10th Cir. 1985).

100. *E.g.*, *Hartley*, 869 F.2d at 395.

or deliberate injuries.[101] Thus, these courts effectively read the malicious requirement out of the statute. Regardless of the way the standard is articulated, both approaches basically center on the subjective intent to harm the creditor.

E. Heightened Culpability

The third approach has attempted to apply a middle ground to the "willful and malicious" standard. This standard falls somewhere between the "implied malice" standard of *Tinker* and the "intent to injure" standard as spelled out in *Hodges*. Courts applying the heightened culpability standard have attempted to require a little more culpability on the part of the debtor before finding a debt nondischargeable.[102] Although this approach does not require a specific intent to harm, it does mandate something more than a showing that the debtor acted without just cause or excuse.[103] These courts, like those following the intent to harm standard, take a subjective approach as to what the debtor knew when the debt was incurred.[104] For example, in *In re Long*,[105] the Eighth Circuit Court of Appeals found that "if malice, as it is used in section 523(a)(6), is to have any meaning independent of willful it must apply only to conduct more culpable than that which is in reckless disregard of creditors' economic interests and expectancies, as distinguished from mere legal rights."[106] The court added that "knowledge that legal rights are being violated is insufficient to establish malice, absent some additional 'aggravated circumstances.' "[107] The *Long* court, therefore, seemed to require a greater burden than was demanded under the *Tinker* standard of implied malice.[108] The court found that the issue of nondischargeability turned on the establishment of two elements: first, whether the conduct was "headstrong and knowing"; and second, whether the conduct was "targeted at the creditor . . . in the sense that the conduct is certain or almost certain to cause financial harm."[109] The court found the defendant's conduct willful because he knew the diversion of funds to a corpo-

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101. *Id.*; *Cassidy*, 794 F.2d 344; *Compos*, 768 F.2d at 1158-59.

102. *See In re* Long, 774 F.2d 875 (8th Cir. 1985); *In re* Horldt, 86 Bankr. 823 (Bankr. E.D. Pa. 1988); *In re* Burdick, 65 Bankr. 105 (Bankr. N.D. Ind. 1986).

103. *Long*, 774 F.2d at 875.

104. *In re* Mclaughlin, 109 Bankr. 14 (Bankr. D.N.H. 1989) (court looked to whether debtor acted in "good faith" and whether debtor had "realistic hopes" that his actions would result in benefit to the creditor).

105. 774 F.2d 875 (8th Cir. 1985).

106. *Id.* at 881.

107. *Id.*

108. *Id.*

109. *Id.*

rate account rather than a collateral account was in derogation of a contractual agreement with the plaintiff.[110] The defendant testified, however, that he was only using the diverted money for the purpose of benefitting the plaintiff and other creditors and not for his own personal gain.[111] The court held that the defendant could not be found to have known that his action would harm the plaintiff even though the defendant was aware of the inherent wrongfulness of the act.[112] The court found that this did not rise to the level of culpability required to except the debt from discharge.[113]

A similar approach was taken by the bankruptcy court of the Northern District of Indiana in the case of *In re Burdick*.[114] In this case, the defendant purchased thirty-nine milk cows.[115] The plaintiff held a security interest in the cows, with a right to repossess.[116] When a number of the cows failed to produce adequate amounts of milk, the defendant sold a portion of the herd, receiving approximately $9000.[117] The court, in examining the debtor's actions, refused to apply either the intent to harm or implied malice standards.[118] The court found that these two approaches were inherently unfair and instead chose "to make the determination of malice by looking at the totality of the circumstances."[119]

The *Burdick* court made a distinction between a commercial setting and a noncommercial setting.[120] In a commercial setting, the court found it relevant to consider such documents as security agreements, leases and/or licenses.[121] This type of evidence would help determine whether the defendant had been given adequate notice of the permitted uses of the collateral.[122] The court also found that the commercial so-

110. *Id.*

111. *Id.* at 882

112. *Id.*

113. *Id.*

114. 65 Bankr. 105 (Bankr. N.D. Ind. 1986).

115. *Id.* at 106.

116. *Id.*

117. *Id.* at 106-07.

118. *Id.* at 110. The court found that a specific intent to harm standard puts a nearly insurmountable burden on the creditor. *Id.* at 109. The court also found that requiring only a showing of implied malice gives the creditor the opportunity to produce evidence of the nature of the conversion or evidence of the personal feelings of the debtor toward the creditor with the hope that a strong inference of an evil mind may be created. *Id.* at 110.

119. *Id.*

120. *Id.* The court found that in a noncommercial setting, the standard is "whether a reasonable and prudent person would have known that the act complained of was unauthorized, or whether the debtor actually knew it was unauthorized." *Id.*

121. *Id.*

122. *Id.*

phistication of the debtor was relevant.[123] In addition, the court noted that there might be some custom or usage which could cause the debtor to believe that the act was not a conversion.[124] One final factor the court considered was whether the debtor had acted in subjective good faith, "that is to say, with a full heart and empty head."[125] The court found that the defendant, although aware of the security agreement, did not know that he was prohibited from selling the cattle.[126] Evidence suggested, in fact, that it was customary in the industry for creditors to permit selling the herd without turning over the proceeds.[127] The court thus held that the debt was dischargeable.[128] Although the defendant had been aware of the rights of the plaintiff when the defendant sold the cattle, he did so with the good faith belief that it was permitted.[129] This third approach examines the debtor from a subjective point of view. The courts examine the defendant's state of mind and attempt to determine whether the defendant acts with any level of culpability[130] or is acting in "good faith."[131]

These three approaches to the willful and malicious exception have created confusion in the actual standard that should be applied.[132] This divergence has caused a wide disparity in the outcome of several cases with similar facts.[133] As a result, a clear, consistent standard needs to be adopted to provide uniformity in the current bankruptcy code.

III. ANALYSIS

A uniform standard for the willful and malicious exception to discharge needs to be established.[134] A uniform standard would provide

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123. *Id.*
124. *Id.*
125. *Id.* at 111.
126. *Id.*
127. *Id.* at 112, n.11.
128. *Id.* at 112.
129. *Id.*
130. *Long*, 774 F.2d at 882.
131. *Burdick*, 65 Bankr. at 111.
132. *See* Comment, *Exceptions to Discharge: Section 523*, 3 BANKR. DEV. J. 295, 305-06 (1986).
133. For example, in *In re* Cecchini, 37 Bankr. 671, 675-76 (Bankr. 9th Cir. 1984), *rev'd*, 780 F.2d 1440 (9th Cir. 1986), the Bankruptcy Appellate Panel for the Ninth Circuit applied the "intent to injure" standard and found the debt to be discharged. On appeal, the Ninth Circuit Court of Appeals applied the "implied malice" standard and found that the debt was the result of a willful and malicious act and reversed the lower court. *Id.* at 1443.
134. Perkins v. Scharffe, 817 F.2d 392, 395 (6th Cir. 1987) (Engel, J., concurring). "Uniformity on this question is desireable because bankruptcy is an area in which 'it is more important that the applicable law be settled than that it be settled right.' " *Id.* (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). One author has suggested that what is needed is a further clarification by Congress of their intent in promulgating section 523(a)(6). Comment, *supra* note 132, at 306.

stability and predictability in a bankruptcy law of national scope.[135] Such a standard, however, needs to reflect the overall purposes to be achieved by discharge in bankruptcy.[136]

As previously noted, these three divergent approaches have caused substantially different results among cases with similar facts. One reason for this divergence may be the result of what one commentator has labled an "outcome determinative" trend in the courts.[137] Such an approach "favors the party whom the court perceives as more deserving of relief."[138] Courts using this approach employ a standard of malice that favors the outcome they seek based upon what they consider to be a fair or equitable result.[139] Such an approach obviously creates confusion as to what the proper standard for malice is. What is needed is a standard approach for determining malice which takes into account these equitable considerations while at the same time providing a measure of uniformity.

The standard for determining whether a debt comes within the willful and malicious exception for discharge should achieve three objectives. First, it should be uniform in application and result.[140] Second, it should give effect to the intent of Congress.[141] Third, it should establish clear and objective criteria with which to determine whether a debt comes within the willful and malicious exception.[142]

A. "Intent to Harm" Standard

In examining the cases which have determined that an "intent to harm" standard is required in order to except a debt from discharge, a number of factors are present which militate against its use as a standard for the willful and malicious exception. Instead of providing rational, equitable results, this approach has resulted in a number of unsound decisions.[143]

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135. J. MACLACHLAN, *supra* note 16, at 18. The author stated that "bankruptcy law in this country has a federal character and a degree of uniformity which distinguishes it from most of the other subjects in the field of commercial law." *Id.*; *see also In re* Mclaughlin, 109 Bankr. 14, 16-17 (Bankr. D.N.H. 1989) (suggesting that guidance for future cases is an important consideration when determining which standard to use for the willful and malicious exception to discharge).

136. *See* Howard, *supra* note 2, at 1050.

137. Comment, *The Exception to Discharge For Willful and Malicious Injury: The Proper Standard For Malice*, 7 Bankr. Devs. J. 245, 255 (1990).

138. *Id.*

139. *Id.* at 256-57.

140. *Perkins*, 817 F.2d at 395.

141. *See supra* text accompanying note 63.

142. United Bank of Southgate v. Nelson, 35 Bankr. 766, 776 (Bankr. N.D. Ill. 1986) (suggesting that a flexible standard is needed to take all relevant factors into consideration).

143. *See In re* Hartley, 869 F.2d 394 (8th Cir. 1989) (debtor's act of throwing a lighted firecracker into confined area where gasoline fumes were known to be present, with the express

To determine whether the intent to harm standard is the approach which should be adopted, it is necessary to examine the results obtained in a number of different actions. For example, in *In re Hartley*,[144] the defendant sought to discharge a $1,000,000 judgment incurred as the result of personal injury to the plaintiff.[145] The plaintiff, an employee of the defendant,[146] was cleaning tires with a gasoline mixture in an enclosed basement.[147] The defendant, as a joke, threw a lighted firecracker into the fume-filled basement, allegedly intending only to startle the plaintiff.[148] The firecracker created an explosion, severely injuring the plaintiff.[149] The Eighth Circuit Court of Appeals, applying the intent to injure standard, found the debt dischargeable.[150] The court found that there was "simply no proof that Hartley threw the firecracker into the basement intending to cause the explosion and fire that injured Jones."[151] Although the defendant threw the firecracker into the basement intending to "startle" the plaintiff, the fact that more extreme damage occurred did not matter.[152] The defendant was well aware that fumes had collected in the basement.[153] The fact that he did not intend to cause the harm which actually occurred kept the act, from which the debt resulted, from becoming one which was willful and malicious.[154]

More commonly, disputes arise as to the standard to be applied in cases involving conversion of property.[155] Such cases generally involve debtors who sell or dispose of a piece of collateral in which the creditor has a security interest.[156] The question then becomes whether the debt

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intent of scaring employee, did not come within willful and malicious exception); First Nat'l Bank of Atlanta v. Mclaughlin, 14 Bankr. 773 (Bankr. N.D. Ga. 1981) (debtor's act of selling secured collateral without creditors' consent as expressly required in security agreement not malicious within section 523(a)(6)).

144. 869 F.2d 394 (8th Cir. 1989).

145. *Id.* at 395.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. The dissent pointed out that the defendant was fully aware of the potential danger. The first employee that had been sent to the basement to clean the tires refused to finish the job because of the strong fumes. It is also evident that the plaintiff had been in the basement upwards of 1-2 hours. *Id.* at 396. (Bowman, J., dissenting).

154. *Id.*

155. *See* St. Paul Fire & Marine Ins. v. Vaughn, 779 F.2d 1003 (4th Cir. 1985) (conversion of contractor funds); *In re* Tester, 62 Bankr. 486 (Bankr. W.D. Va. 1986) (conversion of proceeds from sale of motor vehicle); *In re* Gatte, 31 Bankr. 46 (Bankr. W.D. La. 1983) (conversion of tractor and trailer).

156. *See, e.g., In re* Hodges, 4 Bankr. 513 (Bankr. W.D. Va. 1980) (debtor sold stereo in

has been incurred maliciously. Generally, the answer is 'no' when the intent to harm standard is applied because most debtors sell collateral due to personal financial crises not intending to harm the creditor.[157]

For example, in *In re Cecchini*,[158] the defendants knowingly detained checks which were to go to the plaintiff in the erroneous belief that the plaintiff was not reimbursing them for their commissions.[159] The Bankruptcy Appellate Panel for the Ninth Circuit applied an intent to harm standard and found the debts dischargeable.[160] The court held that, because the defendants believed the plaintiff owed them money, they did not intend to injure the plaintiff, although they were fully aware that they were at least contractually required to pay the money to the plaintiff.[161]

The results in this case and others employing the intent to harm standard indicate that such an approach, while arguably uniform in application and effect, creates inequitable consequences for innocent creditors who are injured by intentional acts of debtors.[162] Any judgment may be discharged if the harm which occurred was not that which the defendant specifically intended.[163] Moreover, in secured interest transactions, requiring an "intent to injure" effectively shackles a creditor from ever establishing a willful and malicious injury.[164] Normally, the most common reason for selling a piece of collateral and breaching a security agreement is the need to escape dire financial straits and not the desire to harm the creditor.[165] The intent to harm standard has been described as placing a "nearly insurmountable burden" on the creditor who must show some amount of ill will or intent to injure in order to get the debt excepted from discharge.[166]

The intent to harm standard also purports to effectuate Congress' intent as evidenced by the legislative history in section 523(a)(6).[167] Courts interpret the legislative history as completely overruling *Tinker v. Colwell*[168] and disallowing any use of recklessness to establish an exception to discharge.[169] These courts find that the word willful,

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which creditor held security interest).

157. United Bank of Southgate v. Nelson, 35 Bankr. 765, 776 (Bankr. N.D. Ill. 1986).
158. 37 Bankr. 671 (Bankr. 9th Cir. 1984), *rev'd*, 780 F.2d 1440 (9th Cir. 1986).
159. *Id.* at 671-72.
160. *Id.* at 672.
161. *Id.*
162. *See, e.g., Hartley*, 869 F.2d at 394.
163. *See, e.g., In re* Hodges, 4 Bankr. 513, 515 (Bankr. W.D. Va. 1980).
164. *Cecchini*, 37 Bankr. at 671.
165. United Bank of Southgate v. Nelson, 35 Bankr. 765, 776 (Bankr. N.D. Ill. 1986).
166. *In re* Burdick, 65 Bankr. 105, 109 (Bankr. N.D. Ind. 1986).
167. *See supra* text accompanying notes 63 & 64.
168. 193 U.S. 473 (1904).
169. *See In re* Compos, 768 F.2d 1155, 1158 (10th Cir. 1985).

meaning deliberate and intentional, modifies the word injury and therefore the legislature intended that section 523(a)(6) "not except from discharge intentional acts which cause injury; [the section] requires instead an intentional or deliberate injury."[170] This reasoning is not justified upon examining the language of the legislative history.[171]

The legislative history only addresses the term willful.[172] The legislature prefaces its remarks with the definition of willful; "[u]nder this paragraph, 'willful' means deliberate or intentional."[173] The statement continues, "[t]o 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."[174] A careful reading of this history should produce but one conclusion. Because Congress spoke only of the term willful, it intended merely to overrule *Tinker's* definition of willfulness and left the standard of implied malice alone.[175] Further, by construing the exception to require a "willful injury," the courts reduce the element of malice to unneeded surplusage. Every willful injury will most likely come within the definition of malicious.[176] If this were a correct interpretation, there would be no need for Congress to retain malice as a separate element. The requirement of both a willful (intentional) injury and a malicious injury seems to create an unneeded redundancy. According to one accepted canon of statutory interpretation, a statute should be interpreted to give meaning to all words contained in the statute.[177] As such, the intent to harm standard cannot be a correct interpretation.

It is evident upon close examination that the intent to harm standard for interpreting the willful and malicious exception to discharge is not a practicable approach. Although the standard may provide for uniformity, it does so at the cost of making the exception for willful

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170. *Id.*

171. *See supra* text accompanying note 64.

172. *Id.*

173. H.R. REP. NO. 595, 95th Cong., 1st Sess. 365, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 5963, 6320-21.

174. *Id.* (citation omitted).

175. United Bank of Southgate v. Nelson, 35 Bankr. 766, 774 (Bankr. N.D. Ill. 1983).

176. Malice has been defined as "[t]he intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent." BLACKS LAW DICTIONARY 862 (5th ed. 1989). Malice, therefore is implicit in the term willful (deliberate or intentional) injury.

177. 2A N. SINGER, STATUTES & STATUTORY CONSTRUCTION § 46.06 (1984) (" 'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed so that effect is given to all its provisions, so that none will be inoperative or superfluous." (footnote omitted) (quoting State v. Bartley, 39 Neb. 353, 356, 58 N.W. 172, 174 (1894)).

and malicious injury ineffective.[178] Because the creditor is charged with the almost insurmountable burden of proving specific intent to harm, he is effectively precluded from ever preventing a discharge of debt.[179] Such a standard creates unfair and absurd results where a debtor acts with knowledge of the probable results although he may not have specifically intended the actual results.[180] Finally, although the courts employing this standard purport to be effectuating Congress' intent, a closer reading of the legislative history indicates that Congress sought only to overrule the *Tinker* standard of recklessness as it applied to the willful element.[181] It is evident that the legislature intended to retain the implied malice standard.[182]

B. Heightened Culpability

The courts applying a level of culpability greater than the implied malice standard but less than the intent to harm standard have tried to provide a more equitable standard when interpreting the willful and malicious exception to discharge. These courts have tried to distinguish between worthy debtors and those less worthy because of some level of bad faith, ill will, or other culpable conduct.[183] These courts have subjectively examined the debtor's state of mind, looking at the debtor's immediate situation with respect to the debt.[184]

These courts seem to have failed in their attempted distinction. Their effort to establish a new standard appears to be nothing more than an elaboration of the implied malice standard. As previously indicated, the *Tinker* Court held that the willful and malicious exception only required *legal* malice as distinguished from *special* malice.[185] Special malice or actual malice may be defined as a design or intent to do harm to a person or the interests of another.[186] Legal malice, on the

178. Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257, 1263 (11th Cir. 1988).

179. *Id.*

180. *Hartley*, 869 F.2d at 395.

181. *See* United Bank of Southgate v. Nelson, 35 Bankr. 766, 774 (Bankr. N.D. Ill. 1983).

182. *Id.* at 775; *see supra* text accompanying note 63.

183. *See In re* Mclaughlin, 109 Bankr. 14, 17 (Bankr. D.N.H. 1989) (even though debtor was aware of security agreement and was a sophisticated businessman, the fact that he tried to use converted funds to aid his business kept his actions from being malicious); *In re* Burdick, 65 Bankr. 105, 111 (Bankr. N.D. Ind. 1986) (the court should be concerned with the subjective good faith of the debtor); *see also In re* Long, 774 F.2d 875 (8th Cir. 1985).

184. *See Mclaughlin*, 109 Bankr. at 14 (debtor's circumstances are considered and debt is discharged if debtor has substantial belief that he could pay the debt in the foreseeable future); *In re* Robinson, 86 Bankr. 182, 185 (Bankr. W.D. Mo. 1988) (court determines whether debtor knew or should have known that harm would have occured); *Burdick*, 65 Bankr. at 111 (court is to inquire as to the debtor's good faith and make its determination based on the debtor's demeanor and credibility).

185. *Tinker*, 193 U.S. at 490.

186. *Id.* at 487.

other hand, refers to knowledge or substantial certainty that the action taken will result in harm or injury to another.[187] The actor's motives for performing the act are irrelevant; action in the face of such knowledge is defined as legal malice.[188] Because it is apparent that Congress did not completely overrule the *Tinker* standard when it passed the Act of 1978, the *Tinker* requirement of implied malice is still the controlling standard. Moreover, it is clear that the Supreme Court in *Davis v. Aetna Acceptance Co.*[189] required the determination of malice to be made from the surrounding circumstances.[190] The *Davis* Court also held that innocent conversions or other actions consistent with a course of dealing do not come within the exception.[191]

The bankruptcy court of the Northern District of Indiana in *In re Burdick*[192] expressly rejected the intent to harm and implied malice standards and purported to create a new standard it termed the "totality of circumstances" standard.[193] The court considered such a standard inherently more equitable because the standard takes into account all surrounding circumstances as well as the debtor's subjective state of mind. Factors the court would consider included the subjective good faith of the debtor, the debtor's experience in business, and documents such as security agreements and leases or licenses.[194]

It is evident that the standard used by the court in *Burdick* is contained within the implied malice standard. As indicated by the Court in *Davis,* when determining whether a debt falls within the willful and malicious exception to discharge, the implied malice standard requires a court to consider all surrounding facts and circumstances.[195] It thus appears that the *Burdick* "totality of the circumstances" standard is really nothing more than an element of the implied malice standard.

One court which has attempted to set out a standard under this

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187. *Id.*

188. *Id.* at 485-86.

189. 293 U.S. 328 (1934).

190. *Id.* at 332 ("But a willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances").

191. *Id.*

192. 65 Bankr. 105 (Bankr. N.D. Ind. 1986).

193. *Id.* at 110.

194. *Id.* at 111. The court stated that:

> by considering the factors of whether the debtor knew or should have known that his use of property was unauthorized and whether the debtor engaged in the act . . . with a reason other than to harm the creditor, the court feels that it is in a better position to discover what was most likely the intent of the debtor at the time of the conversion than under the two existing views.

Id.

195. *Davis,* 293 U.S. at 332.

"heightened culpability" approach is the Eighth Circuit Court of Appeals in *In re Long*.[196] The defendant in this case was the president of A & C Johnson Company (A & C).[197] A & C borrowed a substantial amount of money from the plaintiff corporation.[198] Pursuant to the agreement, these loans were to be secured by A & C's accounts receivable and any proceeds from these accounts were to be deposited in a collateral account.[199] The defendant, in violation of this agreement, diverted some of these proceeds to a new corporate account.[200] In examining the defendant's conduct, the court set out a standard by which to determine whether a debtor's conduct was willful and malicious.[201] The court created a two part test with which to determine the issue of dischargeability.[202] The court found that the issue turned on the establishment of two elements: first, whether the conduct was "headstrong and knowing;"[203] and second, whether the conduct was "targeted at the creditor . . . in the sense that the conduct is certain or almost certain to cause financial harm."[204] The court found that, although the defendant's conduct was clearly willful, it was not malicious because he used the diverted money in an attempt to save the business and prevent losses to his creditors.[205] The first element in the *Long* court's standard, "headstrong and knowing,"[206] corresponds with the willful prong of the willful and malicious exception.[207] The standard for willfulness, at least in the context of section 523(a)(6), has not been in dispute. The congressionally mandated definition is that willful means intentional or deliberate.[208] Thus, there is no apparent reason why the *Long* court felt compelled to redefine that prong of the exception. The terms "headstrong and knowing" cannot mean anything other than intentional and deliberate. If the court in *Long* meant something else, such a definition contradicts the intent of Congress which expressly requires willful to

196. 774 F.2d 875 (8th Cir. 1989).

197. *Id.* at 876.

198. *Id.* The plaintiff in *Long* was Barclays American/Business Credit, Inc. *Id.*

199. *Id.*

200. *Id.* at 881.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 881-82. The court indicated that there was evidence that Long used some of the diverted funds for his own personal benefit. *Id.* at 882. However, the court dismissed this use as de minimus in light of the size of the entire claim. *Id.*

206. *Id.* at 881.

207. *Id.*

208. H.R. REP. NO. 595, 95th Cong. 1st Sess. 365 (1977), *reprinted in*, 1988 U.S. CODE CONG. & ADMIN. NEWS 5963, 6320-21; S. REP. NO. 989, 95th Cong., 2d Sess. 79, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5865.

mean intentional or deliberate.[209] Moreover, the second element requiring that the action be targeted at the creditor[210] is really nothing more than an implied malice standard.[211] The court states that the action should be targeted at the creditor, "at least in the sense that the conduct is certain to cause financial harm."[212] In other words, the court was essentially defining the same standard as the *Tinker* formula, that is, conduct which would necessarily result in harm.[213] This approach purports to apply a higher standard than is found in the implied malice standard.[214] In effect, it is simply a further elaboration of the *Tinker* implied malice standard coupled with the *Davis* requirement of examining all circumstances with respect to the debt.

In addition, this approach does not consider the intent of Congress when establishing the standard. It ignores the legislative history which accompanies the exception to discharge.[215] The court in *Long* has created its own definition for the term willful, a term already defined by Congress.[216]

This approach which purports to follow a higher culpability standard cannot be sustained. It essentially restates the implied malice standard as set out in *Tinker* and further deliniated in *Davis*. A standard requiring an examination of the "totality of the circumstances"[217] or "aggravated circumstances"[218] provides no different criteria with which to measure a debtor's conduct.[219] In addition, these approaches ignore the legislative history that accompanies this exception.[220] As a result, these approaches do not establish a basis upon which all debtors may be evaluated.

C. *Implied Malice Standard*

A majority of courts apply the "implied malice" standard when construing the malicious prong of the exception to discharge.[221] This

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209. *See supra* text accompanying note 64.

210. *Long*, 774 F.2d at 881.

211. *Id.*

212. *Id.*

213. 3 COLLIER ON BANKRUPTCY, *supra* note 66, ¶ 523.16, at 523-117; *see Long*, 774 U.S. at 881. To establish its malicious element, the court in *Long* did rely on the *Tinker* language allowing malice where conduct "necessarily" causes harm.

214. *Long*, 774 F.2d at 881.

215. *See id.* at 875; *Burdick*, 65 Bankr. at 105.

216. *Long*, 774 F.2d at 881.

217. *Burdick*, 65 Bankr. at 110.

218. *Long*, 774 F.2d at 881.

219. *See id.*

220. *Id.*; *In re Mclaughlin*, 109 Bankr. 14 (Bankr. D.N.H. 1989); *Burdick*, 65 Bankr. at 105.

221. *See In re* Ikner, 883 F.2d 986, 991 (11th Cir. 1989); Chrysler Credit Corp. v. Rebhan,

standard provides that malice exists in any "wrongful act which necessarily causes injury and is without just cause or excuse."[222]

When the implied malice standard is correctly applied, it is the proper standard for the willful and malicious exception. The implied malice standard is the correct approach because it effectuates the goals of the bankruptcy law and the intent of Congress while providing a measure of uniformity among the jurisdictions.

This approach provides an objective analysis with which to determine the maliciousness of the debtor's action. Instead of having to determine the subjective intent of the debtor at the time of his act, this standard allows a court to imply malice from the debtor's action when the harm necessarily results from the action.[223] Courts can imply malice from the debtor's actions, his sophistication in business, his express or implied knowledge of the probable consequences, and other relevant facts surrounding the creation of the debt.[224] Such objective analysis provides uniformity in cases with similiar facts while at the same time ensuring that the honest or innocent debtor is provided a discharge.

The implied malice standard works regardless of the type of debt incurred or the type of action being sued upon. For example, in the case of *Wheeler v. Laudani*,[225] the question of a willful and malicious injury was considered in the context of a libel action.[226] The defendant published a document accusing the plaintiff of exploiting his public office for personal benefit.[227] The Sixth Circuit Court of Appeals found that the tort of defamation met the willful requirement of section 523(a)(6).[228] The court found that, when the debtor knows that the published documents are false, such knowledge meets the willful prong of the exception.[229] The court found that the intentional act of publishing false statements, with knowledge of the falsity of the statements, comes within the meaning of malice under the exception.[230] The court held that mere reckless disregard as to the falsity of the statements is not sufficient to establish the willful element.[231] If the defendant know-

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842 F.2d 1257 (11th Cir. 1988); *In re* Laudini, 783 F.2d 610, 615 (6th Cir. 1986); *Cecchini*, 780 F.2d at 1443; St. Paul Fire & Marine Ins. Co. v. Vaughn, 779 F.2d 1003, 1009-10 (4th Cir. 1985); *In re* Ries, 22 Bankr. 343, 347 (Bankr. W.D. Wis. 1982).

222. *See* 3 COLLIER ON BANKRUPTCY, *supra* note 66, ¶ 523.16, at 523-118.

223. *See In re* Ikner, 883 F.2d 986, 991 (11th Cir. 1989).

224. United Bank of Southgate v. Nelson, 35 Bankr. 766, 776 (Bankr. N.D. Ill. 1983).

225. 783 F.2d 610 (6th Cir. 1986).

226. *Id.*

227. *Id.* at 611.

228. *Id.*

229. *Id.* at 615.

230. *Id.*

231. *Id.*

ingly and intentionally published false statements about the plaintiff, malice could be implied.[232]

In the case of *In re Tinkham*,[233] the debtor had been convicted and fined for illegally dumping toxic chemical wastes in violation of several local ordinances.[234] A civil judgment was also entered against the debtor in the amount of $11,357,000 for damages caused by the waste.[235] The facts demonstrated that the debtor was 30 years old at the time of the dumping, that he had a ninth grade education and that he had started out in the gravel business and had subsequently expanded into the waste hauling business.[236] Using the implied malice standard, the court found that the act of dumping the wastes was not malicious within the meaning of § 523(a)(6).[237] The court based its determination on the debtor's testimony and the surrounding circumstances. The court found that the debtor's actions indicated that he knew something was not right about the dumping and that he knew the liquid waste he was receiving did contain contaminants.[238] However, the court believed the debtor's testimony that he was unaware of the danger, noting that at the time of the dumping there was limited public knowledge of the effects of toxic waste on the environment.[239] Moreover, the court found that the debtor's act of calling in state officials to inspect his tankers and the liquid waste corroborated his lack of knowledge of the potential danger from the waste.[240] Thus, the court found that, due to these surrounding circumstances, the debtor was not certain, or substantially certain, that harm from the dumping would occur, and as a result, the debt was discharged.[241]

The implied malice approach has also been used to determine the willful and malicious character of the action of a person intentionally driving while intoxicated. In *Moraes v. Adams*,[242] the Ninth Circuit Court of Appeals affirmed the district court's holding that the defendant, Adams, had intentionally driven while drunk with knowledge that probable harm would result.[243] The court found that malice could be

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232. *Id.* The court, however, remanded the case for a determination of whether the jury based its verdict on a reckless disregard standard or an actual knowledge standard. *Id.* at 615-16.

233. 59 Bankr. 209 (Bankr. D.N.H. 1986).

234. *Id.* at 210.

235. *Id.*

236. *Id.* at 212.

237. *Id.* at 217.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. 761 F.2d 1422 (9th Cir. 1985).

243. *Id.* at 1425. The district court specifically relied on section 523(a)(9), a recent amendment to the Bankruptcy Act of 1978, passed after the cause of action arose. 11 U.S.C. §

implied from the debtor's act because the harm, an auto accident, was the type which necessarily results when one intentionally drives while intoxicated.[244]

The implied malice approach finds its most effective use in its application to cases involving breaches of security agreements or other willful conversion actions. In utilizing the implied malice approach, courts must consider all facts and circumstances to determine whether legal malice is present. The majority of these courts have followed the holding in the case of *In re Ries*.[245] The defendant in *Ries* sold collateral in which the plaintiff held a security interest.[246] The bankruptcy court for the Western District of Wisconsin found that, although the defendant was not motivated by ill will or intent to harm the plaintiff, it was sufficient that the defendant knew that harm would be caused and proceeded in the face of this knowledge.[247] The court ruled that the defendant's knowledge of the probable harm could be inferred "from his experience in business, his concealment of the sale or his admission that he read the security agreement which forbade the sale of the collateral."[248] The court was not concerned with the subjective intent or culpable state of mind of the defendant.[249] Such a state of mind could be inferred from the objective facts and circumstances.[250]

Moreover, under this approach, a court cannot simply say that, because a security interest existed and the defendant sold or eliminated the property in the face of the secured interest, the debt was incurred as the result of malicious conduct. The actual inquiry is whether the debtor acted with knowledge or with substantial certainty that his action would harm the interests of the creditor.

The court in the case of *In re Long*[251] described how the implied malice standard should be applied in the context of willful conversion cases and breaches of security agreements.[252] Attempting to demonstrate a specific intent to harm in the context of conversion is nearly impossible.[253] The majority of debtors who sell assets in disregard of

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523(a)(9) (1988). This amendment specifically excepts debts incurred as the result of drunken driving. *Id.* The court relied on legislative history of the amendment which indicated that it was passed to clarify the existing exceptions. *Moreas*, 761 F.2d at 1426.

244. *Moreas*, 761 F.2d at 1426.
245. 22 Bankr. 343 (Bankr. W.D. Wis. 1982).
246. *Id.* at 344.
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 347.
251. 774 F.2d 875 (8th Cir. 1989).
252. *Id.*
253. *See In re* Burdick, 65 Bankr. 105, 109 (Bankr. N.D. Ind. 1986).

security interests or who convert assets to their own use, do so, not because of any desire to harm the interests of the other party, but rather, because the debtor is in need of immediate financial relief. The *Long* court, recognizing the difficulty of establishing actual malice, stated: "[w]hile intentional harm may be very difficult to establish, the likelihood of harm in an objective sense may be considered in evaluating intent. Use of objective information to ascertain intent to cause harm is by no means unfamiliar."[254] It is this knowledge of the likelihood of harm that the Supreme Court in *Tinker v. Colwell*[255] was describing when it announced its implied malice standard as "conduct which *necessarily* causes injury."[256] The court must examine the surrounding facts and circumstances to determine exactly what the debtor knew at the time of the transaction.

The situation in *Long* involved a defendant who was a sophisticated businessman and well versed in the use of credit and secured financing.[257] Long knew the diversion of funds from the collateral account was a breach of the contract and even admitted he knew that the creditor would probably not have consented.[258] The court allowed discharge of the debt on the basis of Long's testimony that he was attemping to save the business.[259] The court indicated that it disapproved of Long's conduct but could not find that the conduct rose to the level of maliciousness. The court found that Long believed, in good faith, that he could save the business and that his actions, based on the surrounding circumstances, were such that harm would not be substantially certain to occur.

The situation in which a debtor willfully breaches a security agreement tests the boundaries of the right to a fresh start.[260] As a result, courts utilizing the implied malice approach in willful conversion cases have been forced to examine each case very carefully. A court should be able to base its findings on the objective facts surrounding the conversion. Relying on a debtor's unsupported statement that she was attempting to save or rejuvenate her dying business would defeat the goal of establishing an objective, uniform standard. Ideally, a court should inquire into and measure the subjective good faith of the debtor by examining such objective factors as the debtor's use of the converted funds, the likelihood that the business could be saved, the fact that the

254. *Long*, 774 F.2d at 881.
255. 193 U.S. 473 (1904).
256. *Tinker*, 193 U.S. at 487 (emphasis added).
257. *Long*, 774 F.2d at 881.
258. *Id.* at 881-82.
259. *Id.*
260. *Id.* at 882.

debtor had read and understood the security agreement, and the debtor's overall expertise in business.[261] The basic question the court seeks to answer is whether harm was certain or substantially certain to occur to the creditor's interests by the debtor's conversion of funds or collateral. If, after examining such factors, the court finds that the debtor must have been certain, or substantially certain, that harm would occur to the creditor, then the court will imply malice and except the debt from discharge. The standard for implied malice provides clear and objective criteria to consider when determining whether a debt falls within the willful and malicious exception.[262]

While this standard has been criticized as being too pro-creditor,[263] such criticism is without merit. This standard still protects innocent debtors who mistakenly convert or dispose of encumbered property. For example, as stated by the *Davis* Court, "[t]here may be a conversion which is innocent or technical, an unauthorized assumption of dominion without willfulness or malice."[264] The debtor may convert the collateral with the erroneous belief that such conversion is within his rights or with the good faith belief, as evidenced by the surrounding circumstances, that such conversion will not harm the creditor's interests. A defendant who innocently or mistakenly harms the plaintiff's interests cannot be found to have acted maliciously.[265] As a result, not every debt created by a wrongful, intentional act comes within the exception to discharge.

This approach also effectuates the intent of the Congress. As previously indicated, a careful reading of the legislative history indicates that Congress merely intended to overrule *Tinker's* application of a reckless standard to the term willful.[266] The court in *United Bank of Southgate v. Nelson*[267] found that Congress intended to overrule

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261. *See, e.g., Ries,* 22 Bankr. at 344 (implying malice from such factors as experience in business, concealment of the sale or the debtor's admission that he read the security agreement which forbade the sale).

262. *Id.* at 347; *See In re* Tinkham, 59 Bankr. 209, 217 (Bankr. D.N.H. 1986) (act of dumping toxic wastes not malicious where facts indicated debtor was unaware of potential danger; lack of knowlege inferred from such factors as level of public awareness concerning hazardous waste and fact that debtor could request state inspection of the liquid waste).

263. *In re Horldt,* 86 Bankr. 823, 827 (Bankr. E.D. Pa. 1988). The court found that:

> to allow a creditor to have a debt owed him found nondischargeable merely upon a showing that the debtor acted intentionally, without just cause or excuse, and without further inquiring into the debtor's intent or knowledge of the wrongful nature of his conduct, at least circumstantially, can cause severe harm to an innocent debtor.

Id. at 827-28.

264. 293 U.S. at 332.

265. *Id.*

266. United Bank of Southgate v. Nelson, 35 Bankr. 766, 774 (Bankr. N.D. Ill. 1983).

267. 35 Bankr. at 766.

Tinker to the extent that it "has been interpreted to stand for a looser standard of willful."[268] The *Nelson* court found that Congress intended the *Tinker* standard for implied malice to continue.[269] Because this interpretation is based on a very careful reading of the legislative history, it effectuates the legislative intent.

IV. CONCLUSION

Of the three approaches used in construing the willful and malicious exception to discharge, the majority approach, applying an implied malice standard, offers the best interpretation of the meaning of willful and malicious. The implied malice standard provides clear and definite criteria with which to determine whether a debt falls within the willful and malicious exception. Moreover, the standard is consistent with the underlying purpose of discharge in bankruptcy: that the debts of an honest debtor, not a wrongdoer, be discharged.[270] Only in those instances where the debtor was certain, or substantially certain, that harm would occur (such certainty being implied from the surrounding facts and circumstances), will the debt be excepted from discharge. The purpose of equitable treatment of creditors is also advanced because the trier of fact is not required to delve into the subjective state of mind of the debtor, thus, relieving the creditor of an insurmountable burden of proof. The court instead can rely on the objective evidence of the surrounding facts and circumstances.

Finally, it is clear that applying a standard of implied malice effectuates the intent of Congress as evidenced by the legislative history. A close reading of that history indicates that Congress intended that only the term willful means intentional and deliberate and cannot be established by reckless conduct.[271]

The intent to harm and heightened culpability standards do not achieve the objectives of bankruptcy law as efficaciously as the implied malice standard. In addition, it is clear that the first two approaches do not effectuate Congress' intent. The implied malice approach accomplishes the objectives of bankruptcy law while providing uniformity in application and result. The majority of courts follow this standard for its clarity and objective fairness to both creditors and debtors.

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268. *Id.* at 774-75.
269. *Id.* at 775.
270. *Id.* at 776.
271. *Id.*