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Consumer

You Be the Judge: A § 523(A)(6) Consumer Mock Trial

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"What Were You Thinking?"

A Question of the Debtor's Intent In Nondischargeability Actions

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I. Introduction

Bankruptcy is designed to give relief (i.e. a discharge of debt) to the *honest but unfortunate* debtor. That said, Bankruptcy Code § 523 represents congressional intent that nineteen (19) categories of debt are nondischargeable even for the honest but unfortunate debtor.

Most of the categories of debt in Bankruptcy Code § 523 are "automatically nondischargeable" and, while no complaint is required to be filed to determine nondischargeability of these "automatically nondischargeable" debts, either the debtor or any creditor *may* file a complaint for that purpose *at any time*. *See* Fed. R. Bankr. P. 4001(a) and (b). If the bankruptcy case has already been closed, it can be reopened without an additional filing fee for the purpose of filing a complaint to determine whether a debt falls within one of these "automatically nondischargeable" categories of debt. *See* Fed. R. Bankr. P. 4007(b).

However, Bankruptcy Code § 523(c) ***requires*** the filing of a complaint to determine nondischargeability under §§ 523(a) (2), (4) and/or (6). Either the debtor or the creditor can file the complaint, but it must be filed within 60 days after the first date set for the 341 meeting of creditors, unless the bankruptcy court extends that deadline for cause based on a motion filed before the deadline expires. *See* Fed. R. Bankr. P. 4007(a) and (c).

Why is that? What do §§ 523(a)(2), (4) and (6) have in common so that the Bankruptcy Code does *not* render those debts "automatically nondischargeable" but, instead, requires litigation to determine dischargeability? The answer is clear— §§ 523(a)(2), (4) and (6) each sound in tort (rather than in contract), and each involves the debtor's *intentional* wrongdoing. Consequently, the Bankruptcy Code requires proof of the debtor's intent before the debt will be determined nondischargeable. These materials explore how to prove the debtor's intent for purposes of §§ 523(a)(2), (4) and (6)

II. Standard of Proof; Different Types of Intent under §§ 523(a)(2), (4) and (6)

Although Fed. R. Bankr. P. 4007(a) permits the debtor or any creditor to file a complaint to determine dischargeability, generally it is the creditor who files a complaint under §§ 523(a)(2), (4) and/or (6) seeking to determine nondischargeability of the debt. The standard of proof for all of the dischargeability exceptions in 11 U.S.C. § 523(a) is the "preponderance of the evidence" standard. *Grogan v. Garner,* 498 U.S. 279, 111 S. Ct. 654, 661, 112 L. Ed. 755 (1991). In order to except a debt from discharge, a creditor must prove each element by a

preponderance of the evidence, and exceptions to discharge are strictly construed against the creditor. *In re Rembert,* 141 F. 3d 277, 281 (6th Cir. 1998).

Creditors should *not* take a "one-size-fits all" approach to proving the debtor's intent, because §§ 523(a)(2), (4) and (6) all look at different *types* of intent, or the debtor's intent to *do different things.* One of the statutes (e.g. § 523(a)(2)(B)) expressly spells out the type of intent; that statute says "with intent to deceive". Case law has evolved on how to prove intent for purposes of §§ 523(a)(2)(A), 523(a)(4) and 523(a)(6). These materials examine the different types of intent required under §§ 523(a)(2), (4) and (6), and how to prove the debtor's intent for each of them.

III. How to Prove the Debtor's Intent Under 523(a)(2)

Bankruptcy Code § 523(a)(2) makes a debt nondischargeable if it is:

(2) for money, property, services, or an extension, renewal, or refinancing of credit to the extent obtained by---

(A) false pretenses, a false representation or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive

Bankruptcy Code §§ 523(a)(2)(A) and (B) are mutually exclusive regarding the financial condition of the debtor or insiders of the debtor. In other words, if the false statement is "respecting" the financial condition of the debtor or an insider, it has to be in writing in order to be nondischargeable under § 523(a)(2)(B). *Lamar Archer & Cofrin, LLP v Appling,* ___U.S. ___, 138 S. Ct. 1752, 201 L. Ed. 2d 102 (2018). *See also Field V. Mans,* 516 U.S. 59, 66, 116 S. Ct. 437, 441, 133 L. Ed. 2d 351 (1995).

Notice, § 523(a)(2)(B) expressly requires the debtor's *reasonable* reliance on the false written statement regarding the financial condition of the debtor or an insider of the debtor. However, cases interpreting § 523(a)(2)(A) hold that it only requires *justifiable* reliance by the creditor, which is a lower threshold. *Field v. Mans,* 516 U.S. 59, 70-77, 116 S. Ct. 437, 444-447, 133 L. Ed. 2d 351 (1995).

Sections 523(a)(2)(A) and (B) both require proof of the debtor's intent. In § 523(a)(2)(A), the proof of intent is embedded in the terms "false pretenses, a false representation, or actual fraud". Generally, in order to prove fraud justifying

nondischargeability in a 523(a)(2)(A) case, the creditor must prove that: (1) the debtor obtained money, property, services, or an extension, renewal or refinancing of credit through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth, (2) the debtor intended to deceive the creditor, (3) the creditor justifiably relied on the false representation, and (5) the creditor's reliance was the proximate consequence of the representation. *See, e.g.* In re Rembert, 141 F. 3d 277, 280-281 (6th Cir. 1998). Section 523(a)(2)(B) expressly requires proof of the debtor's intent to deceive.

Recently, the Supreme Court has given § 523(a)(2) a fair amount of attention. In *Husky Internat'l. Electronics, Inc. v Ritz*, 578 U.S. ___, 136 S. Ct. 1581, 194 L. Ed. 2d 655 (2016), the Supreme Court held that "actual fraud" in § 523(a)(2)(A) "encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation". The Supreme Court held that "actual fraud" denotes any fraud that involves moral turpitude or intentional wrong. The term "actual fraud" is in contrast to "implied fraud" (or "fraud in law") which describe acts of deception that may exist without imputation of bad faith or immorality. Thus, the Supreme Court reasoned that "anything that counts as "fraud" and is done with wrongful intent is "actual fraud". 136 S. Ct. at 1586. A scheme (such as a fraudulent transfer scheme) will suffice for purposes 523(a)(2)(A); there doesn't have to be a "false representation".

In *Lamar Archer & Cofrin, LLP v. Appling,* ___ U.S. ___, 138 S. Ct. 1752, 201 L. Ed. 102 (2018),the Supreme Court held that a debtor's statement about the value of a single asset (the debtor's tax refund) constituted an oral statement "respecting the debtor's financial condition" and, because the statement was not in writing, § 523(a)(2)(B) did not apply and, consequently, the debt was dischargeable.

►**§ 523(a)(2) requires proof of actual fraud; constructive or fraud implied in law is not sufficient.** Practitioners often wonder what *kind* of fraud does it take to render a debt nondischargeable under § 523(a)(2)—is constructive fraud sufficient, or does § 523(a)(2) require proof of actual fraud? Constructive fraud (or fraud implied in law) is *not* sufficient to prove nondischargeability under § 523(a)(2). In *Neal v. Clark,* 95 U.S. 704 (1877), the Supreme Court interpreted "fraud" to mean actual or positive fraud or fraud in fact involving moral turpitude or intentional wrong, rather than fraud implied by law.

Section 523(a)(2)(B) expressly requires "intent to deceive". With respect to § 523(a)(2)(A), circuit courts seem to agree that, in order for a debt to be nondischargeable under § 523(a)(2)(A), the false representation giving rise to the debt must have been knowingly made *or* made with recklessness as to its truth. In other words, reckless disregard for the truth satisfies the scienter requirement of §523(a)(2)(A). *See, e.g. In re Bocchino,* 794 F. 3d 376, 380 (3rd Cir. 2015); *In re*

Menna, 16. F. 3d 7, 10 (1st Cir. 1994); *In re McLaren,* 3 F. 3d 958, 961 (6th Cir. 1993). And, at least one circuit court has held that the proper inquiry to determine a debtor's fraudulent intent is whether the debtor subjectively intended to repay the debt. *See In re Rembert,* 141. F. 3d 277, 281 (6th Cir. 1998)

Generally, fraud cannot be based upon future statements, or promises to perform in the future, without proof of scienter. *See, e.g. In re Allison,* 960 F. 2d 481,484 (5th Cir. 1992)*; In re Schwartz,* 45 B.R. 354, 357 (Bankr. S.D. N.Y. 1985). If, however, a promise is made with intent not to perform, or if the promisor knew or should have known of his prospective inability to perform, the misrepresentation may be fraudulent. *See In re Allison, Id.*

Courts know that direct proof of fraudulent intent is rarely available. Therefore, intent to deceive may be inferred from the totality of circumstances. That said, there still must be evidence of the circumstances which present a picture of the deceptive conduct by the debtor, which indicates that he or she intended to deceive and cheat the creditor. *See, e.g. In re Leger,* 34 B.R. 873, 878 (Bankr. D. Mass. 1983).

Some courts have adopted a nonexclusive list of twelve circumstantial factors to consider when determining a debtor's intent. The following list of factors was distilled in a case where the issue was whether the debtor intended to repay the credit card debt including: (1) the length of time between the charges made and the filing of bankruptcy, (2) whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made, (3) the number of charges made; (4) the amount of the charges, (5) the financial condition of the debtor at the time the charges are made, (6) whether the charges were above the credit limit of the account, (7) whether the debtor made multiple charges on the same day, (8) whether or not the debtor was employed, (9) the debtor's prospects for employment, (10) financial sophistication of the debtor, (11) whether there was a sudden change in the debtor's buying habits, and (12) whether the purchases were made for luxuries or necessities. *See, e.g. In re Ellingsworth,* 212 B.R. 326, 335 (Bankr. W.D. Mo. 1997). These factors are an aid in determining whether the debtor knew he/she would be unable to repay the debt; if so, the debtor incurred the debt with the intent not to repay it. *Id.* at 335.

Other courts, however, have held that "factor-counting" is inappropriate and, instead, hold that courts should consider all the facts and circumstances to determine whether it is more probable than not that the debtor had the requisite fraudulent intent. *See, e.g., In re Murphy,* 190 B.R. 327, 333-334 (Bankr. N.D. Ill. 1995) in which the court noted that the determination of the debtor's intent requires a review of the circumstances of the case at hand, but not a comparison with circumstances (a/k/a "factors") of other cases. In *In re Rembert,* 141. F. 3d 277, 281, 282 (6th Cir. 1998) the Sixth Circuit held that "factor-counting" is inappropriate when applying a

subjective standard, but these factors could help the court to determine the debtor's state of mind when he or she represented an intention to repay. *Rembert, Id.* at 282.

"When the creditor introduces circumstantial evidence proving the debtor's intent to deceive, the debtor 'cannot overcome [that] inference with an unsupported assertion of honest intent.'… The focus is, then, on whether the debtor's actions appear so inconsistent with [his] self-serving statement of intent that the proof leads the court to disbelieve the debtor." *In re Van Horne,* 823 F. 2d 1285, 1287-1288 (8th Cir. 1987).

Courts "may consider both direct evidence of the debtor's subjective state of mind and evidence of the surrounding circumstances, and then may make appropriate inferences as to whether the debtor harbored the proscribed intent." *See In re Davenport*, 491 B.R. 911 (Bankr. W.D. Mo. 2013). In order to get a court to infer the requisite intent, the creditor should provide evidence of a misrepresentation *coupled with* deceptive conduct. *See, e.g. In re Schlickmann,* 6 B.R. 281, 282 (Bankr. D. Mass. 1989); *In re Leger,* 34 B.R. 873, 878 (Bankr. D. Mass. 1983). In *In re Lyon,* 8 B.R. 152, 154 (Bankr. D. Me. 1981), the court held that exceeding the "credit line", without more, was insufficient for the court to infer intent not to pay; there needs to be evidence of deceptive conduct.

►**Will fraud by a debtor's agent render the debtor's debt nondischargeable under 523(a)(2)?** Generally, a principal is responsible for the actions of his/her agents within the scope of the agent's authority. In *Strang v. Bradner,* 114 U.S. 555. 561, 5 S. Ct. 1038, 1041, 29 L. Ed. 248 (1885) the Supreme Court held that for purposes of determining dischargeabilty of debt, one partner's fraud may be imputed to the other partners who had no knowledge of it. The fraud in *Strang* was perpetrated within the scope of the partnership's business and innocent partners received the fruits of the fraudulent conduct. Since the Supreme Court's opinion in *Strang v. Bradner,* circuit courts of appeal have developed various interpretations of the concept.

The Fifth Circuit has taken an "absolute approach" and barred a debtor from discharging debts generated by the partner's fraud, even though the debtor did not know of the agent's fraudulent conduct and did not benefit monetarily from the fraud *See In re M.M. Winkler & Assocs.*, 239 F. 3d 746, 751 (5th Cir. 2001). The Sixth Circuit has held that the partner's sharing in the monetary benefits of the fraud was sufficient to impute knowledge and the actions of the fraudster to the allegedly "innocent partners", so as to make the debt nondischargeable. *See, e.g. In re Ledford,* 970 F. 2d 1556 (6th Cir. 1992).

Other circuits have required proof that the debtor "knew or should have known" of the agent's fraud, or was "recklessly indifferent" to the fraudulent acts of the agent, or "failed to investigate" in order for an agent's fraud to be imputed to the principal/debtor so as to render the debt nondischargeable. *See In re Reuter,* 686 F. 3d 511, 517-519 (8th Cir. 2012); *In re Walker,* 726 F. 2d 452, 454 (8th Cir. 1984); *David v. Annapolis Banking & Trust Co.,* 209 F. 2d 343 (4th Cir. 1953); *In re Lovich*, 117 F. 2d 612, 614-615 (2nd. Cir. 1941) ("we believe that when a false statement is made by an agent, some additional facts must exist justifying an inference that the bankrupt [principal] knew of the statement and in some way acquiesced in it or failed to investigate its accuracy". *Id.* at 615). *See also In re Savarese,* 209 F. 830, 832 (2d Cir. 1913) ("He had been 40 years in the business, and was entirely familiar with the amount and value of goods on hand. He could hardly have overlooked the fact that his First Place premises were included in the statement as firm assets, and were grossly overvalued. At the least, he was recklessly negligent. If such accounts as his are to be adopted, it will be made very easy for embarrassed merchants to close their eyes to fraudulent acts of their servants by which they profit, and then, if bankruptcy ensues, obtain the discharge which is intended to enable the merely unfortunate debtors to start life anew.")

IV. How to Prove Intent Under 11 U.S.C. § 523(a)(4)

523(a)(4) makes a debt nondischargeable if it is "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny."

The "fraud or defalcation" portion of 523(a)(4) only applies to acting in a fiduciary capacity. "Fraud" typically requires a false statement or omission, and "defalcation" can encompass a *non-fraudulent* breach of fiduciary duty.

Embezzlement and larceny each include a particular type of "intent" as an element. Embezzlement and larceny apply *outside* the fiduciary context. *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 275, 133 S. Ct. 1754, 185 L. Ed. 2d. 922 (2013).

"Fraud" in the context of § 523(a)(4) means "positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality. *Neal v. Clark,* 95 U.S. 704 (1877).

►**What is defalcation?** In *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 269, 133 S. Ct. 1754, 185 L. Ed. 2d. 922 (2013), the Supreme Court held that the term "defalcation" as used in 523(a)(4) should be treated similarly to fraud, and should require an act of bad faith, moral turpitude, immoral conduct, or intentional wrong. *Id.* at 273-274. In *Bullock,* the Supreme Court stated "…we include as intentional

not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent." *Id.* at 274. Where actual knowledge of wrongdoing is lacking, conduct is considered as equivalent if, as set forth in the Model Penal Code, the fiduciary "consciously disregards" or is willfully blind to, "a substantial and unjustifiable risk" that his conduct will turn out to violate a fiduciary duty. *Id.* at 274. The risk must be of such a nature and degree that, considering the nature and purpose of the debtor's conduct and the circumstances known to him, its disregard involves a *gross deviation* from the standard of conduct that a law-abiding person would observe in same situation. *Id.* at 274.

Thus, *Bullock* requires the plaintiff to prove the debtor's culpable state of mind involving knowledge of, or gross recklessness with respect to, the improper nature of the fiduciary behavior.

In *Bullock* the debt was based on a state court judgment that the debtor had breached his fiduciary duty by borrowing money from his father's trust while he was trustee. Even though the debtor repaid (with interest) all amounts that he borrowed from the trust while serving as its trustee, the debtor's siblings sued him in state court. The state court entered a judgment for breach of fiduciary duty but also found that the debtor did not appear to have had a malicious motive in borrowing the funds from the trust, even though the act of doing so was clearly self-dealing.

The debtor filed bankruptcy because he could not liquidate sufficient assets to pay the state court judgment against him. A creditor filed a nondischargeability action under § 523(a)(4).

The bankruptcy court and the district court used an "objective recklessness" standard and ruled that the debt was nondischargeable under § 523(a)(4). The Supreme Court granted the debtor's petition for *certiorari* to decide whether the term "defalcation" in § 523(a)(4) applies in the absence of any specific finding of ill intent.

In *Bullock,* the Supreme Court held that the term "defalcation" as used in 523(a)(4) requires the plaintiff to prove the debtor's culpable state of mind involving knowledge of, or gross recklessness in respect to, the improper nature of the fiduciary behavior. After the Supreme Court's ruling in *Bullock,* the case was remanded so that the trial court could apply the heightened standard in *Bullock,* as opposed to the "objective recklessness" standard that the lower courts applied to determine the debt nondischargeable under § 523(a)(4).

Cases applying *Bullock* include *In re Jahrling,* 816 F. 3d. 921, 925-928 (7th Cir. 2016), and *Ke v. Wang*, 628 Fed. App'x. 10, *12 (2d Cir. 2015) in which the Second Circuit noted that "defalcation under 11 U.S.C. § 523(a)(4) requires a showing that

the faithless fiduciary committed an "intentional wrong," which incorporates a standard of conscious misbehavior or extreme recklessness". *Id.* at *12.

Even before *Bullock,* cases within the Second Circuit were decided using the heightened *Bullock* standard to determine nondischargeability cases involving fraud or defalcation while acting in a fiduciary capacity. In *In re Hyman,* 502 F. 3d 61, 68-69 (2d Cir. 2007) the Second Circuit noted that "…requiring the courts to make appropriate findings of conscious misbehavior or recklessness in the course of dischargeability litigation, the standard we adopt today insures that the harsh sanction of nondischargeability is reserved for those who exhibit "some portion of misconduct." [Citation omitted.] The standard does not reach fiduciaries who may have failed…only as a consequence of negligence, inadvertence or similar conduct not shown to be sufficiently culpable." *Id.* at 69. And, in *In re Yoshida,* 435 B.R. 102, 110 (Bankr. E.D. N.Y. 2010) the bankruptcy court noted that courts in the Second Circuit require a level of fault greater than mere negligence, and require a showing of conscious misbehavior or extreme recklessness—akin to the showing required for scienter in the securities law context." *Id.* at 110.

►**Embezzlement:** Debts arising from embezzlement are also nondischargeable under § 523(a)(4). Federal law defines "embezzlement" under § 523(a)(4) as the "fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come". *See, e.g., In re Brady,* 101 F. 3d 1165, 1172-1173 (6th Cir. 1996). "A creditor establishes his embezzlement claim "by showing that he entrusted his property to the debtor, the debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud." *In re Sullivan,* 305 B.R. 809, 825 (Bankr. W.D. Mich. 2004) (quoting *In re Brady, supra,* at 1172-1173). Thus, the "intent" required to prove embezzlement would be the debtor's fraudulent intent to use the property other than the use for which the property was entrusted.

►**Larceny:** Debts arising from larceny are also nondischargeable under §523(a)(4). For purposes of § 523(a)(4), larceny "is defined as the fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's own use *without the consent of the owner*." *In re Sullivan,* 305 B.R. 809, 825, fn. 13 (Bankr. W.D. Mich. 2004). *See also In re Ormsby,* 591 F. 3d 1199 (9th Cir. 2010). Thus, the "intent" required to prove larceny is intent to convert property to the taker's own use.

Although the particular intent required under § 523(a)(4) for fraud or defalcation in a fiduciary capacity, larceny and embezzlement are slightly different, they *all* include a culpable state of mind. *See, e.g. Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 269, 133 S. Ct. 1754, 185 L. Ed. 2d. 922 (2013). Intent may be inferred

from the totality of circumstances and the conduct of the debtor. *See, e.g. In re Ormsby,* 591 F. 3d 1199, 1206 (9th Cir. 2010).

V. How to Prove Intent under 523(a)(6)

Section 523(a)(6) renders a debt nondischargeable if it is for willful and malicious injury by the debtor to another entity or to the property of another entity.

In *Kawaauhau v. Geiger* (*In re Geiger),* 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d. 90 (1998), the Supreme Court explained the term "willful" for purposes of § 523(a)(6). In *Geiger,* the issue was whether a debt arising from a medical malpractice judgment, attributable to negligent or reckless conduct, is nondischargeable under § 523(a)(6). The Supreme Court held that it was not. The Court observed that the word "willful" in § 523(a)(6) modifies the word "injury" in the statute and, consequently, the Court held that § 523(a)(6) requires a deliberate or intentional *injury,* not merely a deliberate or intention *act* that *leads* to injury.

It is clear from the Supreme Court's opinion that the Court was concerned about "opening the floodgates" and creating nondischargeable debt for a wide range of situations in which the act is intentional, but the injury is unintended—meaning that the injury is *neither desired nor in fact anticipated by the debtor.*

However, as the Ninth Circuit observed in *In re Su,* 290 F. 3d 1140, 1143 (9th Cir. 2002), the Supreme Court's ruling in *Geiger* is less clear on the state of mind that is required to satisfy § 523(a)(6)'s willful injury requirement and lower courts have differed on this issue.

> According to the Restatement, an action is intentional if an actor subjectively "desires to cause consequences of his act, or ….believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) OF TORTS, § 8A (1964). The *Geiger* Court, however, did not expressly adopt this subjective Restatement formulation, and the lower courts have differed over whether to adopt a strict subjective test when applying § 523(a)(6)."

Id at 1143.

Some circuits have adopted a "subjective approach" so that debt is nondischargeable under § 523(a)(6) only if the debtor intended/desired to cause harm or was substantially certain that his conduct would result in injury. *See, e.g. In re Markowitz,* 190 F. 3d 455, 464 (6th Cir. 1999); *In re Patch,* 526 F. 3d 1176, 1180-1181 (8th Cir. 2008); *In re Ormsby,* 591 F. 3d 1199, 1206 (9th Cir. 2010); *In re Moore,* 357 F. 3d. 1125, 1129 (10th Cir. 2004).

In *In re Englehart,* 2000 WL 1275614, at *3 (10th Cir. 2000) the Tenth Circuit Court of Appeals explained this subjective approach to willfulness for purposes of § 523(a)(6):

> Although the district court opined that "expert testimony" established that [the debtor's] conduct was "certain or substantially certain to cause [injury]," that is not enough. There is nothing in the record…that would support a finding that [the debtor] believed that it was substantially certain that [the creditor] would suffer harm. Indeed, [the debtor] testified that he believed [to the contrary]
>
> This is an important distinction, one in fact that defines the boundary between intentional and unintentional torts: Even if [the debtor] should have believed that his [conduct] was substantially certain to produce serious harmful consequences, he would be guilty only of [negligence or recklessness] not of an intentional tort.

Id. at *2.

Other circuits have adopted a different, so-called "objective standard" and have held that willfulness under § 523(a)(6) is proven "when the debtor possesses either an objective substantial certainty of harm or a subjective motive to cause harm", *See, e.g. In re Miller*, 156 F. 3d 598, 6063(5th Cir. 1998); *In re Williams,* 337 F. 3d 504, 508-509 (5th Cir. 2003); *In re Cantu,* 389 Fed. Appx. 342, 345 (5th Cir. 2010);

Evidence of the debtor's state of mind may be inferred from surrounding circumstances, *In re Gordon,* 303 B.R. 645, 656 fn.2 (Bankr. D. Colo. 2003).

Section 523(a)(6) *also* requires proof of maliciousness. An act is malicious if it is wrongful and without just cause or excuse; it does not require ill-will or specific intent to do harm, even in the absence of personal hatred, spite or ill-will. *See, e.g. In re Horsfall,* 738 F. 3d 767, 774 (7th Cir. 2014); *In re Stelluti,* 94 F. 3d 84, 87 (2d Cir. 1996). "A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *In re Ormsby,* 591 F. 3d. 1199, 1207 (9th Cir. 2010). An injury is malicious when the debtor intended to harm the creditor at least in the sense that the debtor's tortious conduct was certain or almost certain to cause harm. *See, e.g. In re Wendt*, 355 B.R. 769, 776 (Bankr. W.D. Mo. 2006). "Malicious for purposes of § 523(a)(6) means that the debtor targeted the creditor to suffer the harm resulting from the debtor's intentional, tortious act. [Citation omitted.] A wrongful act is malicious if…there is a 'knowing wrongfulness or knowing disregard of the rights of another' [Citation omitted.]" *In re Wendt,* 355 B.R. at 776.

A court may consider both direct evidence of the debtor's subjective state of mind *and* evidence of the surrounding objective circumstances, and then may make appropriate inferences as to whether the debtor harbored the proscribed intent. *See, e.g., In re Wendt*, 355 B.R. 769, 776 (Bankr. W.D. Mo. 2006)

Although § 523(a)(6) nondischargeability quickly comes to mind when dealing with personal injury cases, it can arise in many different contexts. For example, in *In re Monson,* 661 Fed. Appx. 675 (11th Cir. 2016) the Eleventh Circuit affirmed the Bankruptcy Court's decision which held that a debtor's unauthorized removal of collateral (i.e. computer equipment) constituted a willful and malicious injury to a creditor within the meaning of § 523(a)(6), because the debtor injured the creditor's right to recover its loan, the injury was intended, and the debtor was conscious of his wrongdoing. And, in *In re Williams,* 337 F. 3d 504, 510 (5th Cir. 2003), the Fifth Circuit noted that a "knowing breach of a clear contractual obligation that is certain to cause injury may prevent discharge under Section 523(a)(6), regardless of the existence of separate tortious conduct." *Id.* at 510.

Consider the following hypothetical:

The Debtor filed his Chapter 7 petition in the Bankruptcy Court in Phoenix, Arizona on June 1, 2018.

MJ Auto Credit filed a secured claim in the Debtor's Chapter 7 case in the amount of $30,000 plus 15% interest per year. This claim is secured by a security interest in a 2017 red Chevrolet Corvette convertible (the "Corvette").

On July 1, 2018, MJ Auto Credit obtained an Order Granting Relief from the Automatic Stay and Abandonment concerning the Corvette, however MJ Auto Credit did not immediately repossess the vehicle.

The Debtor lives in Buckeye, Arizona, the western-most suburb of Phoenix. Temperatures in Buckeye, Arizona during July and August typically reach 115° F. Arizona weather in July and August is well known for extreme "monsoon" rainstorms and "haboob" dust storms. Consequently, the Debtor (like many Arizonans) decided to the leave the Phoenix area during the summer of 2018.

The Debtor reads the local newspaper every day, and was well aware of predictions of extreme heat beginning on August 2, 2018. Consequently, the Debtor made plans to travel to San Diego on August 1, 2018 where he could stay with his parents for 6 weeks (rent free).

Although the Debtor had been in frequent contact with MJ Auto Credit regarding its repossession of the Corvette before his August 1st departure for San Diego, MJ

Auto Credit told the Debtor that it would take several weeks to arrange for retrieval of the Corvette.

In fact, MJ Auto Credit failed to pick up the Corvette before the Debtor's August 1, 2018 departure for San Diego. This infuriated the Debtor. Consequently, the Debtor decided to "teach them a lesson" and he left the Corvette in his driveway with the convertible top down. He also left the keys in the glove box, so that MJ Auto Credit could easily drive it away.

The Debtor didn't want to leave the Corvette in his garage because he didn't want anyone to have access to the valuable tools that he kept inside his garage.

Unfortunately, while the Corvette was in Debtor's driveway awaiting repossession by MJ Auto Credit, the Corvette was exposed to extreme heat – over 120° F – as well as severe monsoon rains and haboob dust. Vandals also stole the Corvette's wheels and rims. This rendered the Corvette undriveable and essentially a total loss when MJ Auto Credit finally came to pick up the Corvette after Labor Day.

MJ Auto Credit timely filed an adversary proceeding in the Debtor's bankruptcy case seeking a determination that its claim against the Debtor is nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

Questions Presented:

1. Does the Debtor's conduct warrant a determination that the claim of MJ Auto Credit is nondischargeable under 11 U.S.C. § 523(a)(6)?

2. Would it make a difference if the Debtor moved the Corvette to his sister's house down the block (without telling MJ Auto Credit about the move) because his own driveway was going to be repaired while he was in San Diego, but the Corvette was in plain sight?

3. Even if the Debtor left the Corvette in his driveway, would it make a difference if the Debtor had put up the convertible top and had wheel locks installed so that nobody could steal the Corvette's wheels and rims?