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“WILLFUL AND MALICIOUS” INJURY EXCEPTION TO DISCHARGE OF DEBT— NINTH CIRCUIT ADOPTS A SUBJECTIVE TEST FOR WHAT CONSTITUTES “WILLFUL AND MALICIOUS” CONDUCT—*IN RE SU*

Katharine Battaia Richter*

HISTORICALLY, American bankruptcy law has frowned on relieving debtor obligations resulting from “willful and malicious” conduct.¹ The Supreme Court’s opinion in *Kawaauhau v. Geiger* purported to give some guidance on how to classify debt arising from a “willful and malicious” action.² However, there has since been a split among the circuits.³ The Ninth Circuit added to the split in its recent decision in *In re Su*⁴ when it adopted a narrow, subjective test to determine what conduct is willful and malicious and, therefore, non-dischargeable. The Ninth Circuit’s opinion was not a significant addition to the subjective side of the debate because it was based on an incomplete reading of relevant tort law, an incorrect interpretation of Congressional intent, and an avoidance of important policy concerns. A better-reasoned approach includes an objective component.

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1. See Michael D. DeFrank, *An Ineffective Escape Hatch: The Textualist Mistake in Geiger*, 16 *BANKR. DEV. J.* 467, 475-76 (2000). The 1898 Bankruptcy Act sought to give debtors relief and creditors a way to act in recognition of the theory that society benefits when debtor responsibilities are relieved. *Id.* at 475. The “willful and malicious” exception to discharge was adopted in the 1898 Act because discharging debt from tort claims did not further the social benefit theory. *Id.*

2. See *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998). In a unanimous decision, the *Geiger* Court commented that “willful and malicious” conduct calls to mind “intentional torts” as opposed to negligent or reckless torts. See *id.* at 61.

3. See Gary Young, *Who’s for Forgiving Tort Judgments?*, *NAT’L L.J.*, July 10, 2002, at B5 col.3. The Fifth Circuit has adopted a test for “willful and malicious” conduct that has a subjective and an objective component, while the Sixth and Ninth Circuits have adopted strictly subjective tests. *Id.* It is important to note that besides the subjective versus the subjective/objective test division in the circuits, there is another point of conflict among the circuits on the issue of what conduct is “malicious.” See Howard B. Kleinberg, *When Does the “Willful and Malicious Injury” Exception to Discharge Apply to a Debt Stemming from a Conversion of Collateral?*, 119 *BANKING L.J.* 87, 89 (2002) (noting that courts vary as to whether “willful and malicious” is one standard or two).

4. *In re Su*, 290 F.3d 1140, 1142 (9th Cir. 2002).

On her way to work on August 21, 1997, Dora Carrillo was seriously injured when she crossed a major intersection in downtown San Francisco.⁵ That morning, Louis Su ran a red light while driving a 14-passenger van at a speed of thirty-seven miles per hour in a 25-mile-an-hour zone.⁶ He smashed his van into a car and then struck Carrillo, causing her serious and permanent injury.⁷

Carrillo sued Su in state court alleging Su's actions were "wanton, willful and malicious," and that his intentional conduct resulted in permanent injury to Carrillo.⁸ The jury found that Su's negligence resulted in Carrillo's injuries and found Su "guilty of malice."⁹ The jury awarded Carrillo economic and non-economic damages, but no punitive damages.¹⁰

Su filed a Chapter 7 bankruptcy petition with the bankruptcy court after the state court entered the judgment against him.¹¹ Carrillo argued at the adversary proceeding¹² that her judgment against Su was not dischargeable under 11 U.S.C. § 523(a)(6)¹³ based on the Fifth Circuit's decision in *In re Miller*.¹⁴ The bankruptcy court agreed with Carrillo's reasoning and found that Su's debt to Carrillo was nondischargeable because, by an objective standard, there was a substantial certainty of harm when Su ran the red light at an intersection known for its congestion.¹⁵

The Bankruptcy Appellate Panel (BAP) reversed the bankruptcy court's finding.¹⁶ The BAP held that the bankruptcy court's application of an objective test to the facts of the case was inconsistent with the jurisprudence of the Ninth Circuit.¹⁷

The Ninth Circuit reviewed the findings of the bankruptcy court de novo and independently reviewed the bankruptcy court's ruling on appeal from the BAP.¹⁸ Thus, the issue before the Ninth Circuit was what type of standard—an objective or a subjective one—must be applied to

5. *Id.* at 1141.

6. *Id.*

7. *Id.*

8. *See id.* at 1141.

9. *Id.* The state court defined "malice" as conduct that is intended to cause injury to the plaintiff or that is despicable and carried on with a "willful and conscious disregard for safety and rights of others." *Id.*

10. *Id.* at 1141-42.

11. *Id.* at 1142.

12. *Id.*

13. 11 U.S.C. § 523(a)(6) (2002) ("A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity.").

14. *In re Miller*, 156 F.3d 598 (5th Cir. 1998). The Fifth Circuit held that "an injury is 'willful and malicious' where there is either an objective substantial certainty of harm or a subjective motive to cause harm." *Id.* at 606.

15. *In re Su*, 290 F.3d at 1142.

16. *Id.*

17. *Id.* The BAP based its holding on the ruling in *In re Jercich*, 238 F.2d 1202 (9th Cir. 2001), another Ninth Circuit case that came down while *Su* was pending before the BAP. *Id.* In *Jercich*, the Ninth Circuit adopted a subjective test, which the court purported was in line with the Fifth Circuit's decision in *Miller*. *See In re Jercich*, 238 F.2d at 1208.

18. *In re Su*, 290 F.3d at 1142.

establish a debtor's conduct toward a creditor as willful and malicious and, therefore, nondischargeable under the Bankruptcy Code.¹⁹

The Ninth Circuit rejected an objective test in favor of a subjective test under which a debt is nondischargeable when the debtor either subjectively intends to cause injury or subjectively believes harm is substantially certain to occur from his actions.²⁰ The *Geiger* Court's opinion pointed the Ninth Circuit to the Restatement (Second) of Torts for the formulation of its subjective standard.²¹ After examining the *Geiger* Court's opinion and the Restatement, the Ninth Circuit reasoned that adding an objective component, as the Fifth Circuit had done,²² would go beyond the intent of Congress.²³ The Ninth Circuit agreed with the BAP that the bankruptcy court—in focusing solely on the “objective substantial certainty of harm” stemming from Su's driving—applied the wrong legal standard.²⁴ The Ninth Circuit remanded the case to the bankruptcy court for application of the purely subjective test.²⁵

The Ninth Circuit's reasoning behind the adoption of a subjective test for § 523(a)(6)'s “willful injury” component described above is flawed in its interpretation of applicable legal theory and legislative history and is devoid of a discussion of public policy issues. The remainder of this case-note brings out these problems with the Ninth Circuit's opinion and lays out a better approach to assessing dischargeability of debt. First, the Ninth Circuit ignored the comments to the Restatement provision it followed so closely in adopting a subjective test. Second, a test that includes an objective component would better satisfy the ideas found in a more complete review of the history of the willful and malicious injury exception. Finally, public policy calls for an objective component since a strictly subjective test presents proof problems for creditors.

The Ninth Circuit should have adopted an objective component in recognition of relative tort law principles that the *Geiger* Court embraced in its holding. In *Geiger*, the Supreme Court textually defined § 523(a)(6) to

19. *See id.*

20. *See id.* at 1142-46. The Ninth Circuit simultaneously rejected the adoption of an objective test. *Id.*

21. *See id.* at 1143-44. The Ninth Circuit recognized that while the *Geiger* Court mentions that § 523(a)(6) brings intentional torts to the lawyer's mind, the *Geiger* Court “did not expressly adopt [the] subjective Restatement formulation” of the test for an intentional tort as the test for “willful and malicious injury.” *Id.* The Restatement (Second) defines an action as intentional if the actor subjectively “desires to cause consequences of his act . . . or believes that the consequences are substantially certain to result from [his act].” RESTATEMENT (SECOND) OF TORTS § 8A (1965).

22. In *In re Miller*, the Fifth Circuit held that “either objective substantial certainty or subjective motive meets the Supreme Court's definition of ‘willful . . . injury’ in § 523(a)(6).” *In re Miller*, 156 F.3d at 603.

23. *In re Su*, 290 F.3d at 1145-46. The Ninth Circuit commented that an objective component based on a reasonable person standard is too similar to the “reckless disregard” standard, a standard the Senate Committee report says is not strict enough to term conduct “willful.” *See id.* at 1145 nn.4-5.

24. *See id.* at 1145 n.4.

25. *Id.* at 1145.

say that “willful,” as used in the statute, modifies the word “injury.”²⁶ The *Geiger* Court held that “debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6).”²⁷ The *Geiger* Court distinguished between actions that are negligent or reckless and those that are intentional when it noted that an intentional act is one in which the actor “intend[s] ‘the consequences of an act,’ not simply ‘the act itself.’”²⁸ While the *Geiger* Court mentioned intentional torts as an indicator of when a debtor has “willfully” injured someone, it did not conclude that only the subjective component should be adopted in a test for “willful” injury.²⁹

It makes sense, then, that the Ninth Circuit should have looked to the Restatement to determine what injuries are “willful,” but it does not follow that the Ninth Circuit should have done so incompletely. The *Geiger* Court affirmed an Eighth Circuit opinion in which “intent” was defined in terms of the two-pronged Restatement definition that includes an objective component.³⁰ Comment b of the Restatement describes an objective approach to evaluating intent that “is not . . . limited to consequences which are desired. If the actor knows that the consequences are . . . substantially certain to result from his act, and still goes ahead, he is treated by the law *as if he had in fact desired* to produce the result.”³¹ The Ninth Circuit made no mention of the objective component to finding an actor’s intent that Comment b presents. Only by leaving a discussion of Comment b out of its opinion did the Ninth Circuit make a logical argument to adopt a solely subjective test.

The Ninth Circuit’s opinion is also flawed due to its incorrect interpretation of the legislative history of the Bankruptcy Code³² and the advent of the “willful and malicious” exception to discharge. A review of the history of the Bankruptcy Code shows the over-arching policy goal of bankruptcy is two-fold: (1) to give the debtor a “fresh start” that allows him or her to regain his or her economic productivity, and (2) to allow creditors to collect payment.³³ The “willful and malicious” exception came into being because such conduct was not thought to be a part of

26. *Geiger*, 523 U.S. at 61.

27. *Id.* at 64.

28. *Id.* at 61-62 (citing RESTATEMENT (SECOND) OF TORTS § 8A cmt. a).

29. *Id.*; see also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 1 cmt. a, para. 10 (Tentative Draft No. 1, 2001). While the Restatement notes that the *Geiger* Court refers to intentional torts as a way to evaluate willful and malicious injury, it comments that both a subjective and objective component can be interpreted from the same opinion. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 1 cmt. a, para. 10 (Tentative Draft No. 1, 2001).

30. See *Geiger*, 523 U.S. at 64; see also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 1 cmt. a, para. 10.

31. RESTATEMENT (SECOND) OF TORTS § 8A (emphasis added). The objective portion of comment b is in addition to the subjective component clearly noted within the main text of the section. *Id.*; see also *In re Miller*, 156 F.3d at 604 (noting that an intentional tort requires “either objective substantial certainty or subjective motive to do harm”).

32. 11 U.S.C. §§ 101-1330 (2002).

33. See Charles G. Hallinan, *The “Fresh Start” Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 63-64 (1986).

socially useful risk-taking.³⁴ One could also conclude that the rule as it exists today³⁵ has a moral component, given the “existence of widely held standards regarding the ethical status of [willful and malicious] conduct.”³⁶ The provision was carried over into modern bankruptcy law by its adoption into the 1978 Bankruptcy Code (still in effect today) with the comment that “‘willful’ means deliberate or intentional” and a “reckless disregard” standard is not strict enough to test for willful conduct.³⁷ Thus, a test for willful and malicious conduct that includes an objective prong is in accordance with the legislative history for two reasons. First, the history prohibits a recklessness standard, not an objective component.³⁸ Second, adoption of an objective component helps ensure that debts that stem from morally wrong conduct—rather than poor economic conduct—do not get discharged, as the drafters originally intended.³⁹

The Ninth Circuit also ignored policy arguments that favor adoption of an objective prong when it adopted a solely subjective test for “willful and malicious” injury.⁴⁰ If a creditor can only subjectively test a debtor’s intent, then he has a virtually insurmountable burden of proof to show that a debtor acted “willfully.”⁴¹ Essentially, if there is no objective standard, a creditor can only hope the debtor is “honest” on the stand and admits that he willfully caused the creditor injury.⁴² Such an admission is hard to obtain. For instance, in *Geiger*, the creditor was a patient who lost a limb as a result of her doctor’s carelessness.⁴³ Though there was compelling evidence that the doctor’s actions were “deliberate” and “intentional,”⁴⁴ the injury the doctor’s actions caused was not classified as “willfully” wrought since the doctor only admitted to giving “substandard care.”⁴⁵ Such reliance on the debtor’s testimony puts the debtor in control of the case and leaves the creditor with only a narrow avenue to pursue.

Though the Ninth Circuit claimed consideration of circumstantial evidence to prove willful injury is “fundamentally subjective,”⁴⁶ the court

34. *See id.*

35. *See* DeFrank, *supra* note 1, at 475-76, 481 (noting that the language of the rule today has not changed much since its adoption in 1898).

36. Hallinan, *supra* note 33, at 138.

37. *See* S. REP. NO. 95-989, at 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865.

38. *But see* Young, *supra* note 3. Young notes that the Ninth Circuit felt an objective standard was too much like a recklessness standard, which the drafters had completely rejected. *Id.*

39. *See* DeFrank, *supra* note 1, at 486-87. DeFrank argues that the *Geiger* Court inappropriately used a textualist argument to defend its position favoring a subjective test. *Id.*

40. *See generally id.*

41. *See id.* at 487. DeFrank finds it problematic that the *Geiger* Court did not discuss how a creditor could prove willful injury where the creditor denies having acted willfully even if the facts suggest otherwise. *See id.*

42. *See id.*

43. *Geiger*, 523 U.S. at 59.

44. *Id.*; *see also* De Frank, *supra* note 1, at 484-86.

45. DeFrank, *supra* note 1, at 487.

46. *In re Su*, 290 F.3d at 1146 n.6. The court commented that allowing a review of circumstantial evidence remains “fundamentally subjective” since the focus is still on what was going through the debtor’s mind. *Id.*

failed to support its argument. The purpose of an objective test is to analyze the situation from a reasonable person's viewpoint in order to infer the mindset of the actor. Thus, looking at circumstantial evidence to infer a debtor's mindset at the time of his injurious actions remains objective no matter what brush the artist uses to paint the picture. A fact finder is allowed and, in cases where circumstantial evidence makes up the bulk of the argument, expected to make reasonable inferences based on an objective approach to the problem. The bankruptcy court judge in *In re Su* did just that; he looked at the facts, made a reasonable inference that willful and malicious injury had occurred, and declared the debt nondischargeable.⁴⁷ Explaining away the need for an objective test by calling it "subjective" is not only bad logic, but also not convincing. The public policy concerns arising from allowing courts to take away avenues of proof by building walls to keep out important lines of evidence and by redefining well-settled concepts are avoided with the adoption of an integrated test.

While accepting the public policy need for an objective component in the willful and malicious injury test does result in a lighter burden on creditors, it does not overburden the courts that hear the cases.⁴⁸ Instead, it equips judges with a test—the reasonable person standard—they can use to draw a discretionary line.

The Ninth Circuit should have adopted an objective component to test for willful injury. The inclusion of an objective component is a better-reasoned option since it complies with relevant tort law as referenced in *Geiger*, the legislative history of bankruptcy law, and public policy.

47. See *In re Su*, 290 F.3d at 1142. The jury in the state court found Su guilty of "malice," meaning conduct intended to cause injury and carried on with a "willful and conscious disregard for safety and rights of others." *Id.* at 1141.

48. *But see id.* at 1145.