

**SOAKING UP THE SUN: EMPLOYMENT LAW EXPOSURE IN FLORIDA**  
**FLORIDA NELA 2012 CONFERENCE**  
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Scott M. Behren, Esq.  
Behren Law Firm  
2893 Executive Park Drive  
Suite 110  
201  
Weston, FL33331  
(954) 636-3802  
scott@behrenlaw.com  
www.behrenlaw.com

Michael Hoffman, Esq.  
Hoffman, Larin & Agnetti, P.A.  
909 North Miami Beach Boulevard, #  
North Miami Beach, Florida 33162  
Telephone: 305.653.5555  
Fax: 305.940.0090  
www.hlalaw.com

**Bankruptcy/Employment Law Issues**

**Q:** What are my obligations upon getting Suggestion of bankruptcy or notice that bankruptcy has been filed by Employer?

**A:** The filing of a bankruptcy petition imposes an automatic stay on all collection activity. Thus, any litigation against the bankruptcy debtor must stop. The employee must then make a decision how to proceed in bankruptcy court.

**Q:** Should I go to 341 or Meeting of Creditors Meeting and what takes place there?

**A:** A 341 meeting is the forum where a trustee – a panel trustee in a Chapter 7 or Chapter 13 bankruptcy case and an attorney from the Office of the United States Trustee in a Chapter 11 case – conducts a brief deposition of the bankruptcy debtor. The meetings typically take no more than 3-5 minutes. I decide whether to attend a 341 meeting on a case by case basis. In a Chapter 7 case, the 341 meeting is often the first time the trustee is looking at the case file. If you want to alert the trustee to certain matters – i.e., undisclosed assets, potential litigation claims, etc..., the 341

meeting is often a helpful forum. If you want to conduct an extended inquiry of the Debtor's assets or financial affairs, you should probably schedule a formal deposition.

**Q:** Do I file a proof of claim and if so what, if any priority does employee claims against employer have in bankruptcy?

**A:** If there is going to be distribution from the estate, you need to file a proof of claim to share in such distribution. However, by filing a proof of claim, the claimant submits to jurisdiction of the bankruptcy court and forgoes its right to a jury trial. Langenkamp v. Culp, 498 U.S. 42 (1990). If there is any reason your client wants to stay out of bankruptcy court (i.e., he received preferential or fraudulent transfers), you should evaluate whether to file a proof of claim.

**Q:** What should I fill out on proof of claim form and what if any documents should I provide?

**A:** There is a standard proof of claim form. You should enter counsel's contact information to ensure that if there is any objection, that you will be notified. You should also indicate if the claim is asserting any priority (i.e., wages within 180 days of filing). Finally, you should attach documents supporting your claim (i.e., judgment, statement, etc...).

**Q:** Do options for repayment for my client vary depending upon whether its a Chapter 7, 11 or 13 and if so what are the different options available under these different types of filings?

**A:** Yes. A Chapter 7 is a liquidation. If the debtor has non-exempt assets, the Chapter 7 trustee will liquidate them and disburse proceeds to creditors. A Chapter 13 can best be described as an individual reorganization. The debtor makes a monthly payment to a Chapter 13 trustee who then distributes the proceeds to creditors. The amount of the payment in Chapter 13 is dependent on the value of the Debtor's non-exempt assets (creditors cannot receive less than they would in a Chapter 7) and the debtor's disposable income, which must be committed to the repayment of creditors.

**Q:** If Client comes to me with employment claim and is already in bankruptcy what are my obligations to disclose in Bankruptcy this new possible asset of client?

**A:** It depends on two factors, when the claim arose and what Chapter the debtor filed.

	<b>Claim arose before bankruptcy filing</b>	<b>Claim arose after bankruptcy filing</b>
<b>Chapter 7</b>	The claim belongs to the bankruptcy estate unless and until the Chapter 7 trustee abandons the claim. Do not pursue this claim without consulting with the trustee.	The claim belongs to the debtor and can be pursued in the ordinary course.
<b>Chapter 13</b>	The claim belongs to the bankruptcy estate. However, the client can pursue such claim without prior court authorization. Any settlement of the claim will need to be approved by the bankruptcy court. Unless exempt wages, litigation proceeds may need to go to the Chapter 13 trustee for distribution to creditors. Payment of counsel's fees may also need to be approved by the Court.	Claim belongs to the bankruptcy estate.
<b>Chapter 11</b>	Same as Chapter 13, except that counsel's employment as the debtor's attorney must	Claim belongs to the bankruptcy estate.

	be approved by the Court. Payment of counsel's fees must also be approved by the Court.	
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**Q:** If trustee calls me to pursue claim for employee in bankruptcy how does that work, who signs the retainer, who pays, what do I do with proceeds once I collect?

**A:** The trustee will seek court approval to retain you as counsel to the bankruptcy estate. You will have to sign an affidavit of disinterestedness. Your fees will need to be approved by the Court. Litigation proceeds need to be disbursed to the Chapter 7 trustee.

**Q:** What are my obligations if trustee decides to abandon pending employee claim?

**A:** The claim re-vests in your client. You can pursue it on his or her behalf irrespective of the bankruptcy case.

**Q:** What should I do if have taken retainer for case from employee and they file bankruptcy, can trustee seek to get monies back from me? What can I do to protect myself from that situation?

**A:** The trustee can avoid and recover preferential transfers – payments to creditors made within 90 days of the bankruptcy filing. There are a number of defenses to preferences which can be asserted. If you received the retainer prior to the 90 day window, then you may have a security interest in the funds being held. This will often serve as a defense to a preference. Similarly, if you provided new value within the 90 day window after being paid, you can offset this new value against your preference exposure.

**Q:** What is an adversary proceeding and how can that be used to benefit my client?

**A:** An adversary proceeding is a lawsuit filed within the bankruptcy case. An adversary can be filed to object to a debtor's general discharge or to object to the dischargeability of a particular debt.

**Q:** What is a 2004 Examination, how can I use it and can it help me pursue my clients claims?

**A:** A 2004 Examination is a deposition with almost unlimited scope. The trustee and the debtors can utilize 2004 examinations to, among other things, search for assets.

**Q:** Client files bankruptcy under chapter 7.  
Client is sued by former employer for non-compete.  
Employer becomes aware of stay and files motion for leave from stay.  
Bankruptcy is discharged.  
Bankruptcy court does not rule on motion.  
Employer is now trying to ramp up non-compete case.

Can they do this?

**A:** The stay is lifted once the discharge is entered. Doesn't matter whether the court ruled on the motion. The majority of case law holds that the claim for monetary damages arising from the covenant not to compete is dischargeable. However, the right to obtain injunctive relief arising from the covenant is not discharged.

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**238 F.3d 1202 (9th Cir. 2001)**  
**In re: GEORGE JERICICH, Debtor.**  
**JAMES A. PETRALIA, Appellant,**  
**v.**  
**GEORGE JERICICH, Appellee.**  
**No. 00-15300**  
**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**  
**Argued and Submitted December 13, 2000**  
**Filed January 23, 2001**

**Page 1203**  
**Thomas R. Duffy and Ralph P. Guenther, Duffy & Guenther, Monterey, California, for the**  
**appellant.**

Thomas D. Patrick, Redding, California, for the appellee.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel Perris, Ryan and Meyers, Judges, Presiding. BAP No. NC-98-01724-PRyMe

Before: Pamela Ann Rymer, Thomas G. Nelson and Kim McLane Wardlaw, Circuit Judges.

T.G. NELSON, Circuit Judge:

James A. Petralia appeals the Bankruptcy Appellate Panel ("BAP") affirmance of the Bankruptcy Court's order granting judgment in favor of debtor George Jercich in Petralia's action seeking to have a debt excepted from discharge under 11 U.S.C. 523(a)(6). We have jurisdiction under 28 U.S.C. 158(d). We reverse.

I.

The underlying facts of this case are undisputed. From June 1981 to January 1983, Petralia was employed by George Jercich, Inc., a real estate company wholly owned and operated by debtor Jercich. The company performed mortgage broker

services, and Petralia's primary duty was to obtain investors to fund loans arranged by Jercich. Pursuant to an employment agreement between Petralia and Jercich, Petralia was to be paid a salary plus a commission for loans which were funded through his efforts. The commissions were to be paid on a monthly basis.

Jercich failed to pay Petralia his commissions as required under the employment agreement. Petralia quit his employment with Jercich in January 1983 and in February 1983 filed an action against Jercich in California state court. In this action, Petralia sought to recover, among other things, unpaid wages, "waiting time penalties" (penalties imposed on employers under California law for failure to timely pay employees), and punitive damages.

After a bench trial, the state court granted judgment in favor of Petralia. The court found that Jercich had not paid Petralia commissions and vacation pay as required under the employment contract; that "Jercich had the clear ability to make these payments to Petralia, but chose not to"; that instead of paying Petralia and other employees the money owed to them, "Jercich utilized the funds from his company to pay for a wide variety of personal investments, including a horse ranch"; and that Jercich's behavior was willful and amounted to oppression within the meaning of California Civil Code 3294<sup>(1)</sup>. The state court held, in relevant part, (1) that Petralia was entitled to his

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unpaid wages; (2) that Jercich owed Petralia waiting time penalties; and (3) that because Jercich's failure to pay was willful and deliberate and "constituted substantial oppression," punitive damages would be assessed against Jercich in the amount of \$20,000.00. The state trial court's judgment against Jercich was affirmed by the California Court of Appeal in an opinion filed in May 1986.

While the appeal of the state trial court judgment was pending, Jercich filed a Chapter 7 bankruptcy petition. In November 1986, after the state trial court judgment had been affirmed on appeal, Petralia initiated the present adversary proceeding seeking to have the state court judgment excepted from discharge under 11 U.S.C. 523(a)(6).<sup>2</sup>

The bankruptcy court resolved the adversary proceeding in favor of Jercich. The court found that under the U.S. Supreme Court's decision in *Kawaauhau v. Geiger*,<sup>3</sup> "the state court . . . would have had to find that Mr. Jercich . . . did what he did with a specific intent, to use a criminal law term, of harming [Petralia]. But no such finding was made, nor can that conclusion be inferred from the findings that were made by the state court." The bankruptcy court therefore held that the debt was dischargeable.

BAP affirmed in a published opinion, but for different reasons than stated by the bankruptcy court. BAP held that "where a debtor's conduct constitutes both a breach of contract and a tort, the debt resulting from that conduct does not fit within 523(a)(6) unless the liability for the tort is independent of the liability on the contract."<sup>4</sup> Defining a tort as "independent" only "if the conduct at issue would be tortious even if a contract between the parties did not exist," BAP concluded that there was not a tort independent of the contract and that the debt was not, therefore, excepted from discharge under 523(a)(6).<sup>5</sup>

II.

"We review independently the decision of the bankruptcy court, showing

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no deference to the decision of the BAP. We review de novo the bankruptcy court's conclusions of law, and we review for clear error the bankruptcy court's findings of fact."<sup>6</sup>

III.

Section 523(a)(6) excepts from discharge debts resulting from "willful and malicious injury by the debtor to another entity or to the property of another entity."<sup>7</sup> In *In re Riso*, we recognized that "a simple breach of contract is not the type of injury addressed by 523(a)(6)"<sup>8</sup> and held that "[a]n intentional breach of contract is excepted from discharge under 523(a)(6) only when it is accompanied by malicious and willful tortious conduct."<sup>9</sup>

By holding, in the present case, that the debt was not excepted from discharge under 523(a)(6), BAP imposed an additional requirement: not only must there be tortious conduct, but according to BAP, this conduct must be "tortious even if a contract between the parties did not exist."<sup>10</sup> We disagree with the imposition of this additional requirement.

First, there is nothing in the language of 523(a)(6) to indicate that a debt arising from a breach of contract is excepted from discharge only if the debtor's conduct would be tortious even if no contract existed.<sup>11</sup> To the contrary, although 523(a)(6) generally applies to torts rather than to contracts,<sup>12</sup> and an intentional breach of contract generally will not give rise to a nondischargeable debt, where an intentional breach of contract is accompanied by tortious conduct which results in willful and malicious injury, the resulting debt is excepted from discharge under 523(a)(6).<sup>13</sup>

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Moreover, one of the fundamental policies of bankruptcy law is to give a fresh start only to the "honest but unfortunate debtor."<sup>14</sup> In fact, Congress's decision to make the debts listed under 523(a) nondischargeable "reflect[s] a decision by Congress that the fresh start policy is not always paramount. For example, some of the exceptions to discharge in S 523(a) are based on a corollary of the policy of giving honest debtors a fresh start, which would be to deny dishonest debtors a fresh start. See e.g., 11 U.S.C. 523(a)(1), (2), (4), (6), and (12)."<sup>15</sup> Allowing discharge of debts simply because the tortious conduct at issue would not be tortious in the absence of a contract would negate this fundamental policy.

We therefore hold that to be excepted from discharge under 523(a)(6), a breach of contract must be accompanied by some form of "tortious conduct" that gives rise to "willful and malicious injury." In so holding, we reject BAP's imposition of a requirement that the conduct at issue be tortious even if a contract between the parties did not exist.

#### IV.

##### A. Tortious Conduct

To determine whether Jercich's conduct was tortious, we look to California state law.<sup>16</sup> Under California law, "[c]onduct amounting to a breach of contract becomes tortious only when it also violates an independent duty arising from principles of tort law."<sup>17</sup>

Outside the area of insurance contracts, tort recovery for the bad faith breach of a contract is permitted only when, "in addition to the breach of the covenant [of good faith and fair dealing] a defendant's conduct violates a fundamental public policy of the state."<sup>18</sup> The California Court of Appeal has held that "the prompt payment of wages due an employee is a fundamental public policy" in California.<sup>19</sup> As that court explained:

Public policy has long favored the full and prompt payment of wages due an employee. Wages are not ordinary debts. Because of the economic position of the average worker and, in particular, his family, it is essential to the public welfare that he receive his pay promptly. Thus, the prompt payment of wages serves society's interest through a more stable job market, in which its most important policies are safe guarded.

Labor Code section 216, subdivision (a) provides any employer who, having the ability to pay, willfully refuses to pay wages due and payable after demand has been made is guilty of a misdemeanor. The Legislature's decision to criminalize violations of the prompt payment policy also supports [the conclusion that the policy for full and prompt payment of wages] involves a broad public interest, not merely the interest of the employee.<sup>20</sup>

In the present case, the state trial court found that Jercich had the "clear ability" to pay Petralia his wages when they were due, but willfully "chose not to" in violation of California law.<sup>21</sup> The court also found that Jercich's acts amounted to oppression under California Civil Code 3294, which by definition must involve "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights."<sup>22</sup> As the court explained: "Few, if any, areas of the law are more important than an employer's obligation to pay his employee's wages. California courts agree, and have time and again underscored the significance of an employer's failure to pay wages."

Based on these state court findings, we hold that Jercich's nonpayment of wages under the particular circumstances of this case constituted tortious conduct.

##### B. Willful and Malicious Injury

###### 1. Willfulness

Citing *Kawaauhau v. Geiger*,<sup>23</sup> Jercich argues, and the district court held, that to meet

the willfulness prong of 523(a)(6), Jercich had to have withheld the wages with the "specific intent" of harming Petralia. We disagree.

In *Geiger*, the U.S. Supreme Court held that debts arising out of a medical malpractice judgment, i.e., "debts arising from reckless or negligently inflicted injuries," do not fall within 523(a)(6)'s exception to discharge.<sup>24</sup> In so holding, the Court clarified that it is insufficient under 523(a)(6) to show that the debtor acted willfully and that the injury was negligently or recklessly inflicted; instead, it must be shown not only that the debtor acted willfully, but also that the debtor inflicted the injury willfully and maliciously rather than recklessly or negligently.<sup>25</sup>

In *Geiger*, the Court did not answer the question before us today--the precise state of mind required to satisfy 523(a)(6)'s "willful" standard. The *Geiger* Court did, however, cite with approval its prior decision of *McIntyre v. Kavanaugh*<sup>26</sup> and the Restatement (Second) of

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Torts 8A, cmt. A, p. 15 (1964).

In *McIntyre*, the debt arose from the debtor's conversion of the creditor's property. Holding that this debt was excepted from discharge under 523(a)(6), the Court indicated that a wrongful act that is voluntarily committed with knowledge that the act is wrongful and will necessarily cause injury meets the "willful and malicious" standard of 523(a)(6).<sup>27</sup> Similarly, the Restatement definition of intent cited by the *Geiger* Court requires the actor either to desire the consequences of an act or to know the consequences are substantially certain to result. Under this definition, the actor's deliberate act with knowledge that the act is substantially certain to cause injury is sufficient to establish willful intent.<sup>28</sup>

This definition is consistent with the approach this court took in the post-*Geiger* case of *In re Bailey*,<sup>29</sup> where we stated that "[t]he

conversion of another's property without his knowledge or consent, done intentionally and without justification and excuse, to the other's injury, constitutes a willful and malicious injury within the meaning of 523(a)(6).<sup>30</sup> Similarly, the Fifth Circuit has held *Geiger* to be satisfied where "the debtor intentionally took action that necessarily caused, or was substantially certain to cause, the injury."<sup>31</sup> In other words, under the Fifth Circuit's approach, an injury is "willful" under 523(a)(6) if the debtor's motive was to inflict the injury or the debtor's act was substantially certain to result in injury.<sup>32</sup>

The Sixth Circuit has also held, post-*Geiger*, that a debtor must will or desire the harm, or believe that injury is substantially certain to occur as a result of his behavior before a resulting debt will be excepted from discharge under 523(a)(6).<sup>33</sup> Finally, at least one Ninth Circuit BAP panel has held that either substantial certainty that injury will result or subjective motive to inflict injury meets the post-*Geiger* requirement of "willful injury" under 523(a)(6).<sup>34</sup>

We hold, consistent with the approaches taken by the Fifth and Sixth Circuits, that under *Geiger*, the willful injury requirement of 523(a)(6) is met when it is shown either that the debtor had a subjective motive to inflict the injury or that the debtor believed that injury was substantially certain to occur as a result of his conduct. We believe that this holding comports with the purpose bankruptcy law's fundamental policy of granting discharges only to the honest but unfortunate debtor.<sup>35</sup>

Application of this standard to the state court's factual findings demonstrates that the injury to Petralia was willful. As the state court found, Jercich knew he owed the wages to Petralia and that injury to Petralia was substantially certain to occur

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if the wages were not paid; and Jercich had the clear ability to pay Petralia his wages, yet chose not to pay and instead used the money for his own personal benefit. He therefore inflicted willful injury on Petralia.

## 2. Maliciousness

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."<sup>26</sup> In the present case, the state court found Jercich knew he owed Petralia the wages and that injury to Petralia was substantially certain to occur if the wages were not paid; that Jercich had the clear ability to pay Petralia the wages; and that despite his knowledge, Jercich chose not to pay and instead used the money for his own personal benefit. Jercich has pointed to no "just cause or excuse" for his behavior. Moreover, Jercich's deliberate and willful failure to pay was found by the state trial court to constitute substantial oppression under California Civil Code 3294, which by definition is "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights."<sup>27</sup> We hold that these state court findings are sufficient to show that the injury inflicted by Jercich was malicious under 523(a)(6).

## V.

The debt in this case arose from willful and malicious injury caused by the debtor's tortious conduct. It is therefore excepted from discharge under 11 U.S.C. 523(a)(6).

REVERSED.

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Notes:

<sup>1</sup> California Civil Code 3294 allows imposition of exemplary (punitive) damages "[i]n an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice."

<sup>2</sup> Section 523(a)(6) provides: "A discharge under . . . 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."

<sup>3</sup> 523 U.S. 57 (1998).

<sup>4</sup> *In re Jercich*, 243 B.R. 747, 751 (B.A.P. 9th Cir. 2000).

<sup>5</sup> *Id.*

<sup>6</sup> *In re Kadjevich*, 220 F.3d 1016, 1019 (9th Cir. 2000) (citation omitted).

<sup>7</sup> 11 U.S.C. 523(a)(6).

<sup>8</sup> 978 F.2d 1151, 1154 (9th Cir. 1992).

<sup>9</sup> *Id.* (emphasis added) (citing *In re Moultrie*, 51 B.R. 368, 373-74 (Bankr. W.D. Wash. 1985) (noting that "[o]nly debts arising from tortious acts are nondischargeable under 523(a)(6)" but recognizing that acts involving "breach of contract . . . may also involve tortious acts such as interference with contract relations"); *In re Haynes*, 19 B.R. 849, 851 (Bankr. E.D. Mich. 1982) ("[A] debt arising out of a mere breach of contract absent any showing that the purpose of the breach was to cause injury is not a non-dischargeable debt within the meaning of 523(a)(6).").

<sup>10</sup> *In re Jercich*, 243 B.R. 747, 751 (B.A.P. 9th Cir. 2000).

<sup>11</sup> Although some courts have used the term "independent tort" in analyzing whether a debt arising from a breach of contract is excepted from discharge under 523(a)(6), see, e.g., *In re Akridge*, 71 B.R. 151, 154 (Bankr. S.D. Cal. 1987), none of those courts have defined the term in the same manner as BAP--that a tort is independent only "if the conduct at issue would be tortious even if a contract between the parties did not exist." 243 B.R. at 751. For purposes of clarity, we avoid the use of the term "independent tort" and focus instead on whether the debtor engaged in tortious conduct that resulted in willful and malicious injury.

<sup>12</sup> 4 Collier on Bankruptcy P 523.12 (15th ed. rev. 2000).

<sup>13</sup> See *Riso*, 978 F.2d at 1154; *In re Trammell*, 172 B.R. 41 (Bankr. W.D. Ark. 1994) (excepting from discharge under 523(a)(6) a debt arising out of a

breach of the covenant not to compete); In re Ketaner, 149 B.R. 395 (Bankr. E.D. Va. 1992) (same); see also In re Smith, 160 B.R. 549, 55354 (N.D. Tex. 1993) ("[I]t was not necessary for the bankruptcy court to find that [the debtors'] actions constituted an independent tort other than fraud in order to hold the [debt to the plaintiff] nondischargeable pursuant to 523(a)(6). The bankruptcy court was only required to find that [the debtors'] willful and malicious conduct caused damage to the [plaintiff]."); In re Moultrie, 51 B.R. 368, 373-74 (Bankr. W.D. Wash. 1985) (noting that "[o]nly debts arising from tortious acts are nondischargeable under 523(a)(6)," but that acts involving breach of contract "may also involve tortious acts such as interference with contract relations"); In re Haynes, 19 B.R. 849, 851 (Bankr. E.D. Mich. 1982) ("[A] debt arising out of a mere breach of contract absent any showing that the purpose of the breach was to cause injury is not a non-dischargeable debt within the meaning of 523(a)(6)."); In re Rivera, 238 F. Supp. 233, 234 (S.D.N.Y. 1965) ("[T]he theory of recovery-tort or contract-is immaterial [to the 523(a)(6) inquiry].").

<sup>14</sup> Grogan v. Garner, 498 U.S. 279, 286 (1991) (noting that while the "fresh start" is "a central purpose of the [Bankruptcy] Code," this opportunity is limited to the "honest but unfortunate debtor"); In re Bugna, 33 F.3d 1054, 1059 (9th Cir. 1994) (same).

<sup>15</sup> In re Janc, 251 B.R. 525, 543-44 (Bankr. W.D. Mo. 2000).

<sup>16</sup> See In re Bailey, 197 F.3d 997, 1000 (9th Cir. 1999) ("While bankruptcy law governs whether a claim is nondischargeable under 523(a)(6), this court looks to state law to determine whether an act falls within the tort of conversion.").

<sup>17</sup> Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 460 (Cal. 1994) (In Bank). At the time of the state court judgment, the breach of the covenant of good faith and fair dealing in employment contracts was deemed to also constitute a tort. Since that time, the California Supreme Court has held that tort remedies are not necessarily available for breach of the implied covenant of good faith and fair dealing in the employment setting. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 401 (Cal. 1988) (In Bank); see *Newman v. Emerson Radio Corp.*, 772 P.2d 1059, 1060 (Cal. 1989) (In Bank) (holding that the rule announced in "Foley is fully retroactive, applying to all cases not yet final as of January 30, 1989, the date the decision in Foley

became final."). As discussed below, however, the breach at issue in this case--the willful nonpayment of wages--can constitute tortious conduct even under present California law.

<sup>18</sup> *Rattan v. United Servs. Auto. Assoc.*, 101 Cal. Rptr. 2d 6, 11 (Cal. Ct. App. 2000); see *Applied Equip.*, 869 P.2d at 460 (noting that California law imposes an obligation binding every person "to abstain from injuring the person or property of another, or infringing upon any of his rights"; that this "duty is independent of the contract"; and that the "omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty") (citations, quotations and ellipses omitted).

<sup>19</sup> *Gould v. Maryland Sound Indus., Inc.*, 37 Cal. Rptr. 2d 718, 723 (Cal. Ct. App. 1995) (holding that discharge to avoid payment of wages is cognizable in tort as a wrongful discharge).

<sup>20</sup> *Id.* at 723-24 (quotations, citations and ellipses omitted).

<sup>21</sup> The state court specifically cited California Labor Code 203, which provides in relevant part:

If an employer willfully fails to pay . . . any wages of an employee who . . . quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

Cal. Labor Code 203. From the state court's findings, it is clear that Jercich also violated California Labor Code 216, which makes it a misdemeanor for an employer, having the ability to pay, to willfully refuse to pay wages due and payable after demand for the wages has been made.

<sup>22</sup> Cal. Civil Code 3294(c)(2); *Applied Equip.*, 869 P.2d at 461.

<sup>23</sup> 523 U.S. 57 (1998).

<sup>24</sup> *Id.* at 59, 64.

<sup>25</sup> See *id.* at 64.

<sup>26</sup> 242 U.S. 138 (1916).

<sup>27</sup> *Id.* at 141-42.

<sup>28</sup> See *id.*

<sup>29</sup> 197 F.3d 997, 1000 (9th Cir. 1999).

<sup>30</sup> Id. at 1000 (quoting *Transamerica Comm. Fin. Corp. v. Littleton*, 942 F.2d 551, 554 (9th Cir. 1991)).

<sup>31</sup> *In re Miller*, 156 F.3d 598, 604 (5th Cir. 1998).

<sup>32</sup> Id.

<sup>33</sup> *In re Markowitz*, 190 F.3d 455, 465 n.10 (6th Cir. 1999). The Sixth Circuit noted, however, that it is not enough that the debtor should have known his decisions and actions put another at risk for injury; rather, to be excepted from discharge under 523(a)(6), the debtor must actually will or desire the harm or have knowledge that the harm is substantially certain to occur. Id.

<sup>34</sup> *In re Baldwin*, 245 B.R. 131, 136 (B.A.P. 9th Cir. 2000).

<sup>35</sup> Moreover, imposing a specific intent requirement as urged by Jercich would produce absurd results that could not possibly have been intended by Congress.

For example, if a showing of specific intent were required, a debtor could sell, without consequence, collateral subject to a security agreement with the knowledge that such an act violates the security agreement as long as the debtor did not have the specific intent to injure the creditor but instead had the specific intent to get the money for the debtor's own use.

<sup>36</sup> *In re Bammer*, 131 F.3d 788, 791 (9th Cir. 1997) (en banc) (quotations omitted); see *Bailey*, 197 F.3d at 1000 (making it clear that our maliciousness standard--and in particular our "just cause and excuse" prong--survived *Geiger*); but see *In re Miller*, 156 F.3d at 606 (Fifth Circuit holding that the "just cause or excuse" standard has been displaced by *Geiger* and collapsing the "willful" and "malicious" prongs into a single inquiry).

<sup>37</sup> Cal. Civ. Code 3294(c)(2).

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
(Chapter 7)

CASE NO: 11-32498-RBR

AVRAHAM DVIR  
1110 SE 6 Avenue  
Pompano Beach, FL 33060

Debtor

\_\_\_\_\_ /

BRENDA BAUMANN

Plaintiff

v.

AVRAHAM DVIR

Defendant

\_\_\_\_\_ /

**BRENDA BAUMAN'S COMPLAINT OBJECTING TO DISCHARGEABILITY OF  
A DEBT PURSUANT TO 11 U.S.C. §523**

Brenda Bauman ("Bauman"), by and through her undersigned counsel and pursuant to 11 USC §523 brings this adversary proceeding objecting to the dischargeability of the debt of Brenda Bauman and Debtor Avraham Dvir ("Dvir") on the following causes of action:

**The Parties, Jurisdiction and Venue**

1. On \_\_\_\_\_, the Debtor filed a voluntary petition under Chapter 7.
2. Bauman is an individual who originally brought claims in Broward Circuit Court against Dvir, styled *Brenda Bauman v. Avraham Dvir*, Case 10-14296 CACE 08. The Broward Circuit Court case alleges willful malicious actions of

Dvir in violation of the Fair Labor Standards Act, the Florida Whistleblower Act and various IRS regulations pertaining to misclassification of employees.

Several Final Judgments were entered against Dvir by the Broward County Circuit Court in this action. This is an action pursuant to 11 USC § 523 wherein Bauman is seeking a determination by this Court that the debt due to Bauman by Dvir is non-dischargeable.

3. This Court has jurisdiction over this adversary proceeding pursuant to 28 USC § 1334. In accordance with Bankruptcy Rule 7001, this proceeding must be commenced as an adversary proceeding.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1409.

#### **Facts Supporting Bauman's Claims**

5. At all times material hereto, Bauman was an employee of Dvir and his companies.

6. At all times material hereto, Dvir improperly, knowingly and maliciously, classified all of his employees, including Bauman, as independent contractors and failed and refused to pay all required federal and state payroll taxes.

7. Moreover, Dvir, knowing and maliciously, refused and failed to pay overtime to his employee such as Bauman who worked over forty hours in a given week in violation of the Fair Labor Standards Act.

8. Finally, when Bauman complained to Dvir about his illegal conduct, Dvir knowingly and maliciously terminated the employment of Bauman in violation of the Florida Whistleblower Statute.

### **Count I Objection to Discharge Pursuant to 11 U.S.C. § 523 (6)**

9. All of the allegations contained in paragraphs 1 to 8 of this Complaint are incorporated by reference in this Count I.

10. 11 U.S.C. § 523(a) provides in part:

(a) A discharge under Section 727, 1141, 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt—...

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

WHEREFORE, Bauman prays that judgment be entered in favor of Bauman and against Dvir, excepting Bauman's debt to Dvir from discharge pursuant to 11 U.S.C. § 523, *et. seq.*

### **Count II Action for Money Judgment Against Dvir**

11. All of the allegations contained in paragraphs 1 through 10 of this Complaint are incorporated by reference in this Count II.

12. Pursuant to the provisions of 11 U.S.C. § 523, upon this Court's entering an order excepting a debt from discharge, this Court may also enter a judgment in favor of the creditor against the debtor.

13. As set forth herein, Dvir is indebted to Bauman in the amounts set forth in the Final Judgments of the Broward County Circuit Court.

14. If this Court grants relief to Bauman as to any one or more of the other counts of this Complaint, then Bauman is entitled to a Judgment against Dvir for the amount due and owing, plus accrued interest, and collection costs.

WHEREFORE, Bauman demands that money judgment be entered against Dvir in such an amount as this Court finds to be owed by Dvir to Bauman.

Dated this \_\_\_\_ day of November 2011.

I HEREBY CERTIFY that I am admitted to the U.S. District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this Court as set forth in Local Rule 2090-1(A).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with this Court on November 14, 2011 with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to all counsel of record.

Behren Law Firm  
2893 Executive Park Drive  
Suite 203  
Weston, FL 33331  
(954) 636-3802  
(954) 636-2153 (Fax)  
scott@behrenlaw.com

By: Scott M. Behren



**7. Documents:** Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. (See instruction #7, and the definition of "redacted".)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

**8. Signature:** (See instruction #8)

Check the appropriate box.

- I am the creditor.       I am the creditor's authorized agent.  
(Attach copy of power of attorney, if any.)
- I am the trustee, or the debtor,  
or their authorized agent.  
(See Bankruptcy Rule 3004.)
- I am a guarantor, surety, indorser, or other codebtor.  
(See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Company: \_\_\_\_\_

Address and telephone number (if different from notice address above): \_\_\_\_\_

(Signature)

(Date)

Telephone number: \_\_\_\_\_ email: \_\_\_\_\_

*Penalty for presenting fraudulent claim:* Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

**INSTRUCTIONS FOR PROOF OF CLAIM FORM**

*The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.*

**Items to be completed in Proof of Claim form**

**Court, Name of Debtor, and Case Number:**

Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

**Creditor's Name and Address:**

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

**1. Amount of Claim as of Date Case Filed:**

State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

**2. Basis for Claim:**

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

**3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:**

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

**3a. Debtor May Have Scheduled Account As:**

Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

**3b. Uniform Claim Identifier:**

If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

**4. Secured Claim:**

Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

**5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507 (a).**

If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

**6. Credits:**

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

**7. Documents:**

Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

**8. Date and Signature:**

The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

**DEFINITIONS****Debtor**

A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

**Creditor**

A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

**Claim**

A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

**Proof of Claim**

A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

**Secured Claim Under 11 U.S.C. § 506 (a)**

A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien.

A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

**Unsecured Claim**

An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

**Claim Entitled to Priority Under 11 U.S.C. § 507 (a)**

Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

**Redacted**

A document has been redacted when the person filing it has masked, edited out, or otherwise deleted certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

**Evidence of Perfection**

Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

**INFORMATION****Acknowledgment of Filing of Claim**

To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system ([www.pacer.psc.uscourts.gov](http://www.pacer.psc.uscourts.gov)) for a small fee to view your filed proof of claim.

**Offers to Purchase a Claim**

Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

UNITED STATE BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
(Chapter 13)

Case No. 10-3330-RBR

AVRAHAM DVIR  
1110 SE 6 Ave.  
Pompano Beach, FL 33060

Debtor

NOTICE OF RULE 2004 EXAMINATION

PLEASE TAKE NOTICE that the Petitioning Creditor, by and through its undersigned counsel, will take the following Rule 2004 Examination:

<u>Name</u>	<u>Date</u>	<u>Time</u>
AVRAHAM DVIR	September 7, 2010	10:00 a.m.

at the offices of Behren Law Firm, 2893 Executive Park Drive, Suite 203, Weston, FL 33331, for above-styled cause and to have with you the following:

See, Exhibit "A" attached hereto.

The examination shall continue day to day, weekends and holidays excepted, until completed. If the examinee receives this notice less than seven (7) days prior to the scheduled examination date (or less than ten (10) days if the examination is taking place outside of Florida), the examination will be rescheduled upon timely request to a mutually agreeable time.

The examination is being conducted pursuant to FRBP 2004 and L. R. 204, and will be taken before an officer authorized to record the testimony. The scope of the examination shall be as described in FRBP 2004. Pursuant to L.R. 204, no order shall be necessary.

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this court set forth in Local Rule 2090-1(A).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been faxed this \_\_\_ day of August 2010 to: David Marshall Brown, Esq., Brown, Van Horn, P.A., 330 N. Andrews Ave., Suite 450, Ft. Lauderdale, FL 33301.

Behren Law Firm  
2893 Executive Park Drive, STE 203  
Weston, Florida 33331  
Telephone: (954) 636-3802  
Facsimile: (954) 636-2153

By: \_\_\_\_\_  
Scott M. Behren  
Florida Bar No. 987786

**Exhibit "A"**

Please bring with you the following:

1. All documents evidencing your current monthly gross wages, salary and commissions of as referenced in Schedule I of your Petition for Bankruptcy. This shall include all paychecks, paycheck stubs, W-2's, etc.
2. All documents evidencing your alleged rent or home mortgage payments as referenced in Schedule J of your Bankruptcy Petition.
3. All documents evidencing your electric and heating fuel bills as referenced in Schedule J of your Petition for Bankruptcy.
4. All documents evidencing your water and sewer bills as referenced in Schedule J of your Petition for Bankruptcy.
5. All documents evidencing your telephone bill as referenced in Schedule J of your Petition for Bankruptcy.
6. All documents evidencing your cable bills as referenced in Schedule J of your Petition for Bankruptcy.

7. All documents evidencing your home maintenance bills as referenced in Schedule J of your Petition for Bankruptcy.

8. All documents evidencing your food bills as referenced in Schedule J of your Petition for Bankruptcy.

9. All documents evidencing your clothing bills as referenced in Schedule J of your Petition for Bankruptcy.

10. All documents evidencing your laundry or dry-cleaning bills as referenced in Schedule J of your Petition for Bankruptcy.

11. All documents evidencing your medical or dental bills as referenced in Schedule J of your Petition for Bankruptcy.

12. All documents evidencing your transportation bills as referenced in Schedule J of your Petition for Bankruptcy.

13. All documents evidencing your recreation bills as referenced in Schedule J of your Petition for Bankruptcy.

14. All documents evidencing your auto insurance bills as referenced in Schedule J of your Petition for Bankruptcy.

15. All documents evidencing your expenses from operation of business profession or farm of as referenced in Schedule J of your Petition for Bankruptcy.

16. All checking account bank statements for the past five years for any of your checking accounts.

17. All bank account statements for the past five years for any of your savings accounts.

18. A complete copy of your bankruptcy petition and all schedules and/or exhibits thereto.

19. Any and all federal income tax returns for you for 2000 through 2008.

\_\_\_\_20. All documents supporting any of your schedules filed with the Court in support of your Petition for Bankruptcy.\_\_\_\_\_

\_\_\_\_21. All documents showing all inventory and sales of your inventory in 2007 and 2008.

\_\_\_\_22. Copies of all federal and state income tax and/or state property tax returns filed by You for the years 2000 through 2008.

23. The originals of all certificates of stock, bonds or other securities, including evidence of ownership of uncertificated securities, owned or beneficially held

by You, either alone or jointly with any other person or persons.

24. Copies of all financial statements issued or prepared by or on behalf of You showing your financial condition during the years 2000 through 2008.

25. All applications for financing or loans made by You to any bank, savings and loans institution, or lending institution of any kind during the years 2000 through 2008.

26. All original notes, deeds, title certificates, mortgages, financing statements, security instruments or liens of any kind showing or tending to show the existence of debts owed to You or property owned by her in which he has a security interest.

27. All financial, business and property records, and all papers, passbooks, record books and books of account, which tend to disclose the extent and the nature of all financial interests, property and property rights owned by You and the location thereof.

28. All passbooks with respect to all savings accounts, checking accounts and savings and loan association share accounts owned by You, solely or jointly, with any individual or business entity.

29. The most recent bank ledger sheets, statements, certificates, reports or other writings in your possession, custody or control, with respect to all bank accounts owned by You solely or jointly, with any individual or business entity.

30. All checkbooks or checking accounts owned by You solely or jointly, in any business enterprise, or owned by him in which You has an interest.

31. The original deeds to all real property owned by You, solely or jointly.

32. The latest available balance sheets and other financial statements in your possession, custody or control with respect to any and all business enterprises of whatever nature in which You possesses any ownership interest, whether as a partner, joint venturer, stockholder or otherwise.

33. Your accounts receivable ledger or other record which sets forth the names and addresses of all persons or business enterprises that are indebted to him, and the amounts of each indebtedness.

34. Any bills of sale, deeds, contracts or other documents showing transfer of any and all property executed by You during the years 2000 through 2008.

35. Any listing of inventories or other records showing property owned in the

years 2000 through 2008.

36. All policies of insurance or applications for policies of insurance covering any personalty, valuables, jewelry, art works, antiques or other insurable items owned by You.

37. All titles to any motor vehicles, boats/yachts or aircraft in which You have an ownership or beneficial interest.

38. All customer lists, payments received form all customers and/or invoices send to customers sine 2000.

39. All accounting records of yours from 2000 through 2008 in electronic format (either Quickbooks, Quicken, Peachtree, etc.).