SECTION NOTE

OBA Bankruptcy and Reorganization Section:

The United States Supreme Court Determines that Reckless Conduct is Dischargeable in Bankruptcy

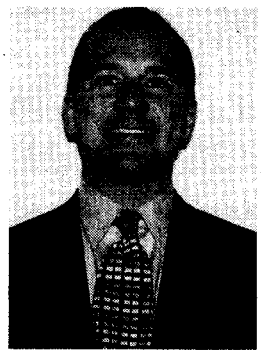
By Gary D. Hammond

On March 3, 1998, the United States Supreme Court ruled that the section 523(a)(6) "willful and malicious injury" exception to discharge in bankruptcy is limited to intentional torts and does not encompass mere negligent or reckless acts.[1] In *Kawaauhau v. Geiger*, the United States Supreme Court ruled that a medical malpractice claim is dischargeable even if the debtor/doctor intentionally renders medical care that proves to be inadequate.

In January 1983, Margaret Kawaauhau sought treatment from Dr. Paul Geiger for a foot injury. Dr. Geiger examined Ms. Kawaauhau and admitted her to a hospital to attend to the risk of infection resulting from the injury. Although Dr. Geiger knew that intravenous penicillin would be more effective, he prescribed oral penicillin because Ms. Kawaauhau wanted to minimize the cost of her treatment.

Dr. Geiger then departed on a business trip, leaving Ms. Kawaauhau in the care of other physicians. The other physicians decided Ms. Kawaauhau should be transferred to an infectious disease specialist. When Dr. Geiger returned from his business trip he canceled the transfer to the infectious disease specialist and discontinued all antibiotics because he believed the infection had subsided. Ms. Kawaauhau's condition deteriorated over the next few days, eventually requiring the amputation of her right leg below the knee.

Ms. Kawaauhau sued Dr. Geiger for malpractice. After a trial, the jury found Dr. Geiger liable and awarded Ms. Kawaauhau $355,000 in damages. Dr. Geiger, who did not carry malpractice insurance, moved to another state, where Ms. Kawaauhau began garnishing his wages. Dr. Geiger then filed bankruptcy. Ms. Kawaauhau objected to Dr. Geiger receiving a discharge from the malpractice judgment on the ground that the debt was excepted from discharge pursuant to 11 U.S.C. § 523(a)(6).[2] The bankruptcy court held that the debt was nondischargeable. The district court affirmed. A three-judge panel of the Court of Appeals for the Eighth Circuit reversed and a divided *en banc* court adhered to the panel's position.[3] The Eighth Circuit's opinion conflicted with the Sixth and Tenth Circuits.[4] The United States Supreme Court granted certiorari to resolve the conflict.



GARY D. HAMMOND is a partner at Groom, Hammond & Harris, P.C. He graduated from the University of Oklahoma with a B.B.A. (emphasis in Finance) in 1985, and a Juris Doctorate Degree in 1990. His practice is primarily in the areas of bankruptcy and litigation. A panel trustee for the Western District of Oklahoma, Mr. Hammond is an advisor of the Southwest Bankruptcy Conference, a member of the American Bankruptcy Institute, the Oklahoma County and OBA Bankruptcy and Reorganization Law Sections.

According to the United States Supreme Court the issue was whether section 523(a)(6) covers acts done intentionally that cause injury, or only acts done with the actual intent to cause injury. Affirming the Eighth Circuit, the United States Supreme Court stated "(t)he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury."[5] Further, the section 523(a)(6) language "triggers in the lawyer's mind the category of 'intentional torts,' as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend 'the consequences of an act,' not simply 'the act itself.'"[6]

The United States Supreme Court found further support for its narrow interpretation of sec-

tion 523(a)(6) in the section 523(a)(9) "drunk driving" and section 523(a)(12) "depository institution commitment" exceptions to discharge. According to the United States Supreme Court, because both of those sections deal with reckless acts, they would be rendered superfluous by a broad reading of section 523(a)(6).

The United States Supreme Court also distinguished the pre-Code case of *Tinker v. Caldwell*, 193 U.S. 473 (1904). Tinker involved the tort of "criminal conversation" and contained language suggesting that the identically worded exception to discharge in the Bankruptcy Act of 1898 applied to intentional acts that cause injury, even if done "without any particular malice." Rejecting the broad interpretation of Tinker, the United States Supreme Court read Tinker to support its "intentional tort" formulation of section 523(a)(6) because, at the time of Tinker, criminal conversation was within the traditional intentional tort category.[7]

Based on Kawaauhau it is clear that the United States Supreme Court is taking a narrow reading of 11 U.S.C. § 523(a)(6). Lower courts will have to revisit many of the decisions construing the "malicious" prong of section 523(a)(6). Under the principles of statutory construction, the "malicious" standard must impose some requirement that is not already included in the "willful" standard. Now that the United States Supreme Court has held that the "willful" standard requires intent to cause the injury, it is not clear what is left for the "malicious" standard to add to the section 523(a)(6) test.

1. See, *Kawaauhau v. Geiger*, 66 U.S.L.W. 4167, #97-115, __ U.S. __, 1998 WL 85302, 1998 U.S. Lexis 1595 (March 3, 1998).

2. 11 U.S.C. § 523(a)(6) states in pertinent part that an individual debtor does not receive a discharge from any debt "...for willful and malicious injury by the debtor to another entity or to the property of another entity."

3. See, 113 F.3d 848 (1997).

4. See, *Perkins v. Scharffe*, 817 F.2d 392 (6th Cir.), **cert. Denied**, 484 U.S. 853, 108 S.Ct. 156, 98 L.Ed.2d 112(1987), and *In re Franklin*, 726 F.2d 606 (10th Cir. 1984).

5. 1998 WL 85302, *3.

6. Id.

7. Id. at *4.