

**Dated: July 30, 2019**  
**The following is ORDERED:**



*Jennie D. Latta*

---

**Jennie D. Latta**  
**UNITED STATES BANKRUPTCY JUDGE**

---

**UNITED STATES BANKRUPTCY COURT**  
**WESTERN DISTRICT OF TENNESSEE**  
**WESTERN DIVISION**

---

In re  
LARRY PARKE CHINN,  
Debtor.

Case No. 17-30912-L  
Chapter 7 (asset)

---

MINNESOTA LIFE INSURANCE COMPANY,  
Plaintiff,

v.  
LARRY PARKE CHINN,  
Defendant.

Adv. Proc. No. 18-00157

---

**ORDER DENYING MOTION TO DISMISS**

---

BEFORE THE COURT is the motion of Defendant Larry Parke Chinn (“Chinn”) to dismiss this proceeding pursuant to Federal Rule of Civil Procedure 12(b)(6) made applicable in bankruptcy by Federal Rule of Bankruptcy Procedure 7012(b). Plaintiff Minnesota Life Insurance Company (“Minnesota Life” or the “Company”) has filed a response in opposition to the motion and Chinn has filed a reply. The court heard oral argument on July 18, 2019. Chinn is represented

by attorneys Michael P. Coury and Ricky L. Hutchens of Glankler Brown, PLLC. Minnesota Life is represented by attorneys Kelly D. Simpkins and Kevin A. Rogers of Wells, Marble & Hurst, PLLC.

## **BACKGROUND**

Minnesota Life commenced this adversary proceeding on June 29, 2018, seeking a declaration that a judgment against Chinn in favor of Minnesota Life in the amount of \$3,274,236.25, representing unearned commissions on sales of life insurance policies, is excepted from discharge pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B), (a)(4), and (a)(6). Chinn filed an answer and then a motion for judgment on the pleadings, which, after briefing and argument, was conditionally granted giving Minnesota Life leave to file an amended complaint. Adv. Proc. Dkt. No. 51.

Minnesota Life filed its First Amended Complaint to Determine Dischargeability on April 3, 2019 (the “Amended Complaint”). It asks that the judgment against Chinn in favor of Minnesota Life be excepted from discharge pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B), and (a)(6), and in addition asks that Minnesota Life “recover a non-dischargeable judgment against Chinn for all commissions paid to Chinn, costs and expenses associated with underwriting and issuance of the 29 policies, lost premiums, monies paid to the six policyholders in Minnesota due to the Minnesota Department of Commerce’s determination that Chin [sic] made misrepresentations, attorney fees, expenses, consequential damages and injuries sustained as a result of his fraudulent, willful, and malicious scheme.” Adv. Proc. Dkt. No. 53, pp. 13-14.

Chinn filed his motion to dismiss the Amended Complaint on May 3, 2019. Minnesota Life filed a timely response on June 17, 2019, and Chinn filed his reply on July 16, 2019.

Chinn also filed a motion to strike portions of the Amended Complaint on May 6, 2019. Minnesota Life filed a timely response on June 17, 2019. By separate order, the Court has denied that motion.

The Amended Complaint alleges that Chinn entered into a Broker General Sales Contract (Fixed Products) with Minnesota Life on January 5, 2009, pursuant to which Chinn intended to sell insurance policies with high cash value riders (the “Contract”). Minnesota Life agreed to compensate him for those sales by commissions on products sold. The Amended Complaint alleges that the Contract provided that in the event policies were surrendered and premiums returned by Minnesota Life, Chinn would repay his commissions to Minnesota Life.

The Amended Complaint alleges that also on January 5, 2009, Chinn executed on behalf of his company, Financial Institution Consulting Corporation (“FICC”), a Broker General Agency Contract (Fixed Products) with Minnesota Life. The complaint alleges that “Chinn was the sole owner of FICC, his alter ego over which Chinn exercised complete domination and control, not only of finances, but of policy and business practice so that FICC had no separate mind, will or existence of its own with regard to the sale of [insurance policies].” The Amended Complaint alleges that under the Broker General Agency Contract, in the event policies were surrendered and premiums returned by Minnesota Life, FICC would repay commissions to Minnesota Life.

The Amended Complaint alleges that in 2009, Chinn and FICC sold 29 Eclipse Index Life Policies (the “Policies”) with face values ranging from \$2,310,000 to \$20,000,000. Each of the Policies included a Surrender Value Enhancement Agreement (“SVEA”) which provided that the surrender value for each of the first three years would equal the total premiums paid, which meant that a policyholder who elected to surrender his policy within the first three years would be returned all premiums previously paid.

The Amended Complaint alleges that Chinn elected to front load the first three years' commissions for the sale of the Policies. It alleges that Chinn knew that so long as the Policies remained in effect for one year, the chargeback for advanced commissions would be less than 100%.

The Amended Complaint alleges that it paid Chinn \$10,153,416.26 for the 29 Policies. It alleges that all of the Policies were surrendered within three years of issue, and as a result, Chinn owed chargebacks of \$4,196,995.40.

The Amended Complaint alleges that on December 28, 2010, FICC signed a Promissory Note agreeing to pay the outstanding debt and Chinn guaranteed the note.

The Amended Complaint alleges that Chinn never intended to make all the payments required by the note and that he did not intend to pay the entire balance owed to Minnesota Life by its maturity date, January 1, 2014.

The Amended Complaint alleges that Chinn paid \$896,000 to Minnesota Life and Minnesota Life withheld \$763,696.68 in commissions earned by Chinn in order to offset the chargebacks. This left a balance owed on the note of \$2,537,298.72.

The Amended Complaint alleges that Minnesota Life filed suit in the United States District Court for the Western District of Tennessee and was awarded a judgment in the amount of \$3,274,236.25 against Chinn and FICC.

Chinn filed a voluntary petition under Chapter 7 of the Bankruptcy Court on December 13, 2017.

The Amended Complaint alleges that the obligation represented by the judgment is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A), 523(a)(2)(B), and 523(a)(2)(6), and, in addition, that Minnesota Life "recover a non-dischargeable judgment against Chinn for all

commissions paid to Chinn, costs and expenses associated with the underwriting and issuance of the 29 policies, lost premiums, monies paid to the six policyholders in Minnesota due to the Minnesota Department of Commerce's determination that Chin [sic] made misrepresentations, attorney fees, expenses, consequential damages and injuries sustained as a result of his fraudulent, willful, and malicious scheme." Amended Complaint, Adv. Proc. Dkt. No. 53, pp. 13-14

### **THE MOTION TO DISMISS**

Chinn argues that the Amended Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) because it fails to state a claim upon which relief can be granted. Specifically, Chinn asserts that:

- (1) The allegations of the Amended Complaint fail to state a claim under section 523(a)(2)(A) because the alleged fraudulent conduct is not pled with sufficient particularity. Motion to Dismiss, Adv. Proc. Dkt. No. 60, p. 14.
- (2) The allegations of the Amended Complaint fail to state a claim under section 523(a)(2)(B) because they fail to identify why Chinn's statement concerning his personal net worth was materially false; fail to demonstrate reasonable reliance, and fail to demonstrate that Chinn made the statement concerning his personal net worth with intent to deceive. Motion to Dismiss, Adv. Proc. Dkt. No. 60, pp. 25-26.
- (3) The allegations of the Amended Complaint fail to state a claim under section 523(a)(6) because they demonstrate a mere breach of contract, not tortious conduct contemplated in the requirement of a "willful and malicious injury." Motion to Dismiss, Adv. Proc. Dkt. No. 60, p. 28.

(4) The damages sought in the Amended Complaint for the administrative costs of underwriting and issuing the Policies lack justification and factual particularity.

Motion to Dismiss, Adv. Proc. Dkt. No. 60, p. 30.

## DISCUSSION

The basic pleading standard applicable to this adversary proceeding is set out at Federal Rule of Civil Procedure 8 made applicable in bankruptcy by Federal Rule of Bankruptcy Procedure 7008. Rule 8 provides:

- (a) Claims for Relief. A pleading that states a claim for relief must contain:
- (1) a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
  - (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
  - (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

In addition, “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake,” while “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b), made applicable by Fed. R. Bankr. P. 7009(b).

To survive a motion under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court is directed first to identify allegations that are “no more than conclusions, [and thus] are not entitled to the assumption of truth,” and then to determine whether the allegations that are well pled “plausibly give rise to an entitlement to relief.” *Iqbal*, 556 U.S. at 679. The heightened pleading standard of Rule 9(b) “is to provide the defendant with fair notice of the alleged fraudulent conduct so the defendant may prepare an informed response, to protect the defendant’s reputation

from allegations of fraud, to narrow discovery, and to prevent ‘fishing expeditions.’” *Guardian Fin. Co. v. Metzger (In re Metzger)*, 2018 WL 6985674, slip op. at \*3 (Bankr. S.D. Ohio, Sept. 4, 2018), citing *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 466-67 (6th Cir. 2011). Indeed,

Rule 9(b) is not to be read in isolation, but is to be interpreted in conjunction with Federal Rule of Civil Procedure 8 .... Rule 8 requires only “a short and plain statement of the claim” made by “simple, concise, and direct allegations.” ... Rule 8 is commonly understood to embody a regime of “notice pleading” where technical pleading requirements are rejected in favor of an approach designed to reach the merits of the action.... When read against the backdrop of Rule 8, it is clear that the purpose of Rule 9 is not to reintroduce formalities to pleading, but is instead to provide defendants with a more specific form of notice as to the particulars of their alleged misconduct.

*United States ex rel. Bledsoe v. Community Health Systems, Inc.*, 501 F.3d 493, 503 (6th Cir. 2007) (quoting *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679 (6th Cir. 1988).

The motion before this court is aimed at testing the adequacy of the pleadings, not at making a final determination of responsibility. “The purpose of a motion under Rule 12(b)(6) is to test the legal sufficiency of the complaint, not the probability of success on the merits.” *Kennedy v. R.W.C., Inc.*, 359 F. Supp. 2d 636, 639 (E.D. Mich. 2005).

### **The Section 523(a)(2)(A) Claim**

Bankruptcy Code section 523(a)(2)(A) excepts from discharge those debts “for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by ... false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s ... financial condition.” 11 U.S.C. § 523(a)(2)(A). As Judge Richard Posner once observed:

No learned inquiry into the history of fraud is necessary to establish that it is not limited to misrepresentations and misleading omissions. “Fraud is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of truth. No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.” *Stapleton v. Holt*, 207 Okla. 443, 250 P.2d 451, 453-54 (Okla. 1952).

*McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000); *see also Mellon Bank v. Vitanovich (In re Vitanovich)* 259 B.R. 873, 877 (B.A.P. 6th Cir. 2001) (adopting the position of the Seventh Circuit that actual fraud as used in 11 U.S.C. § 523(a)(2)(A) is not limited to misrepresentations and misleading omissions.) “When a debtor intentionally engages in a scheme to deprive or cheat another of property or a legal right, that debtor has engaged in actual fraud and is not entitled to the fresh start provided by the Bankruptcy Code.” *Vitanovich*, 259 B.R. at 877. “Although ‘fraud’ connotes deception or trickery generally, the term is difficult to define more precisely.” *Husky Int’l Electronics, Inc. v. Ritz*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 1581, 1586 (2016). As the *Husky Int’l* Court explains:

“Actual fraud” has two parts: actual and fraud. The word “actual” has a simple meaning in the context of common-law fraud: It denotes any fraud that “involv[es] moral turpitude or intentional wrong.” *Neal v. Clark*, 95 U.S. 704, 709, 24 L. Ed. 586 (1878). “Actual” fraud stands in contrast to “implied” fraud or fraud “in law,” which describe acts of deception that “may exist without the imputation of bad faith or immorality.” *Ibid.* Thus, anything that counts as “fraud” and is done with wrongful intent is “actual fraud.”

*Id.* at 1586. In contrast to false pretenses or false representation, actual fraud does not require a misrepresentation or reliance by a creditor on an action taken by the debtor. *Husky Int’l*, 136 S. Ct. at 1587. Instead, a “creditor must prove that (1) the debtor perpetrated a fraud against the creditor; (2) the debtor acted with an intent to defraud; and (3) the creditor sustained loss or damage as a proximate cause of the fraud.” *Taylor v. Demopoulos (In re Demopoulos)*, 2008 WL 4489153, at \*8 (Bankr. N.D. Ill., Sept. 23, 2008) (citing *McClellan*, 217 F.3d at 893-94).

In its essence, the Amended Complaint alleges that Chinn fraudulently induced Minnesota Life to pay commissions to him and/or FICC based upon the sale of life insurance policies using a fraudulent scheme involving (1) false representations to the policy holders that they would be



responsible for paying three or fewer annual premiums when in fact he knew that payments for a much longer period would be required to keep the policies in effect; and (2) false representations to Minnesota Life that he personally met with each of the customers. The Amended Complaint alleges that these false representations were instrumental to Chinn's fraudulent scheme to receive and retain commissions from Minnesota Life far in excess of what he would otherwise be entitled. The Amended Complaint alleges that Chinn knew that the statements made to customers were false, but that he nevertheless either made these statements himself or directed FICC employees, agents, and marketing representatives to make these statements on his behalf. The Amended Complaint further alleges that Chinn concealed from Minnesota Life the fact that he was splitting commissions earned from the sale of the Policies with FICC employees, agents, and marketing representatives. The Amended Complaint alleges that the false representations were made orally and through written materials such as unauthorized illustrations, spreadsheets, and marketing materials made at the direction of Chinn but concealed from Minnesota Life. The Amended Complaint further alleges that as part of the fraudulent scheme, Chinn induced customers to finance premiums through premium finance lenders, such as First Insurance Funding Corporation, because he knew that customers were more likely to purchase the policies if they could finance the premiums. The Amended Complaint alleges that Chinn knew that when policy holders realized that they would be required to make premium finance payments beyond the periods and amounts represented by Chinn, they would surrender their policies or the premium finance lenders would request surrender due to nonpayment of interest. The Amended Complaint alleges that in order to increase the commissions that he would retain, in some instances Chinn caused FICC to pay interest on the premium finance loans. The Amended Complaint alleges that all 29 of the policyholders identified in Exhibit A to the Amended Complaint surrendered their policies prior

to the three-year period under the SVEA, which allowed them to receive a full refund of the premiums paid to Minnesota Life. The Amended Complaint alleges that as the result of the surrender of these policies, FICC was obligated to repay unearned commissions to Minnesota Life, and that FICC signed a promissory note which Chinn guaranteed for the repayment of the unearned commissions. The Amended Complaint alleges that when the note was not timely paid, Minnesota Life received a judgment against FICC and Chinn in the amount of \$3,274,236.75 for the return of advanced, unearned commissions.

The allegations of the Amended Complaint are more than adequate to put Chinn on notice of the claims being made against him and they adequately describe a fraudulent scheme whereby Chinn was able to receive and retain commissions in excess of what he would otherwise be entitled. The Amended Complaint is directed to a fairly narrow universe of policies originated by FICC in 2009 which are set out at Exhibit A. The exhibit identifies the policies by number and initials of the owners and insured. It provides the application date, policy date, and surrender date. The Amended Complaint adequately describes the “who, what, where, and when” of the alleged fraudulent scheme.

The Amended Complaint alleges that Chinn acted on his own or through FICC, a company established by him and for which he served as President and CEO, and its employees, agents, and marketing representatives. A debtor may be held personally liable for the debts of a corporation to the extent of his participation in tortious acts that resulted in harm to its creditor. *In re Leonard*, 2012 WL 1565120, at \*4 (Bankr. E.D. Tenn. May 2, 2012) (citing *In re Interstate Agency, Inc.*, 760 F.2d 121, 125 (6th Cir. 1985) (Michigan law); *Cash Am. Fin. Servs., Inc. v. Fox (In re Fox)*, 370 B.R. 104, 113 (B.A.P. 6th Cir. 2007 (Ohio law); *Cooper v. Cordova Sand & Gravel Co.*, 485 S.W.2d 261, 271-72 (Tenn. Ct. App. 1971) (Tennessee law)).

The Amended Complaint alleges numerous facts from which it may be inferred that Chinn acted with complete knowledge of what he was about, and thus of his intent to defraud Minnesota Life. Among these are Chinn's extensive knowledge of premium financing; Chinn's superior knowledge of law and financial transactions; Chinn's specific knowledge of how commissions are paid upon the sale of life insurance policies and the schedule of commission repayment in the event of early surrender of a policy; Chinn's request that his commissions be paid up front; Chinn's misrepresentation that he personally met with every applicant; and Chinn's creation and use of false and misleading illustrations and promotional materials. These facts, if taken as true, support the inference that Chinn intended to defraud Minnesota Life.

Chinn argues that the fact that part of the note given for unearned premiums was paid prior to judgment indicates that he had no intent to deceive Minnesota Life. While it is true that courts will consider payments made to a lender as indicative of a lack of fraudulent intent, where, as here, the debt itself is alleged to have sprung from a fraudulent scheme, attempts to repay will not be dispositive of the issue. Fraudulent intent has been adequately pled. The weight and effect to be given to Chinn's repayment efforts are best left for trial.

The Amended Complaint adequately alleges that it was damaged as a result of Chinn's fraudulent scheme. Specifically, the Amended Complaint alleges that all premiums were repaid to the holders of the Policies that are the subject of the Amended Complaint, while Chinn and/or FICC retained a substantial part of the commissions paid to them. The Amended Complaint alleges that Minnesota Life incurred additional damages in the form of administrative costs for the policies it issued. And the Amended Complaint alleges that it was damaged as the result of payments made to six policyholders under an order of the Minnesota Department of Commerce concerning Chinn's misrepresentations.

Minnesota Life has adequately pled a claim for actual fraud under section 523(a)(2)(A).

The motion to dismiss should be denied as to that claim.

### **The Section 523(a)(2)(B) Claim**

Bankruptcy Code section 523(a)(2)(B) excepts from discharge those debts for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(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.

11 U.S.C. § 523(a)(2)(B). With respect to section 523(a)(2)(B), the Amended Complaint alleges that Chinn made false representations regarding his financial condition in connection with a policy issued to FICC which insured Chinn. The Amended Complaint refers to an “Advisor Attestation for Premium Financing” attached as Exhibit J which appears to be signed by “Larry P. Chinn” as “Advisor” and which gives an estimated net worth of Larry P. Chinn as client of \$122,770,000. The Attestation is dated April 10, 2009. The Amended Complaint apparently alleges that this misrepresentation of Chinn's net worth includes a false statement concerning the value of FICC, but there is not specific reference to the value of FICC in Exhibit J. The Amended Complaint alleges that Chinn made these misrepresentations to induce Minnesota Life to issue a policy to FICC and to allow Chinn to earn a commission on the sale of the policy. The Amended Complaint alleges that Chinn intended to deceive Minnesota Life in making these misrepresentations and that Chinn incurred a debt to Minnesota Life for chargebacks resulting from the surrender of the policy.

Chinn argues that the motion to dismiss should be granted with respect to this claim because the Amended Complaint fails to specify why the statement concerning Chinn's net worth was materially false, fails to demonstrate reliance, and fails to plead facts that demonstrate that

Chinn caused the statements to be made or published with intent to deceive. The motion to dismiss also claims that the Attestation was not signed by Chinn in his capacity as insured “and so was not a representation made in connection with obtaining the issuance of his policy.” Motion to Dismiss, Adv. Proc. Dkt. No. 60, pp. 26-27.

In response, Minnesota Life points to the fact that FICC and Chinn failed to repay the note given on December 28, 2010, just one year after the Policies were written and eighteen months after the Attestation was given. Minnesota Life suggests that if Chinn’s net worth and the value of FICC had been as stated they should have been able to make the required payments on the note. Instead, they defaulted and suit was filed in February 2015.

Applying the notice pleading standard of Rule 8, the allegations of the Amended Complaint with respect to the section 523(a)(2)(B) claim adequately state a claim that Chinn obtained money (a commission) and property (the policy) by use of a statement in writing concerning Chinn’s financial condition. The allegation that Minnesota Life issued a policy in the rather large face amount of \$18,000,000, (with, it may be presumed, a concomitant premium liability), when taken as true, makes it appropriate for a court to infer that Minnesota Life reasonably relied upon the statement concerning Chinn’s personal net worth and FICC’s value in issuing the policy and paying the commission. “[R]easonable reliance’ under § 523(a)(2)(B) ‘is a factual determination to be made in light of the totality of the circumstances.’” *Condidorio v. Regions Bank (In re Condidorio)*, 2011 WL 1157286, \*4 (Bankr. M.D. Tenn. Feb. 23, 2011) (quoting *Boston Mort. Corp. v. Ledford (In re Ledford)*, 970 F.2d 1556, 1560 (6th Cir. 1992)). The reasonable reliance standard is not “a rigorous requirement, but rather is directed at creditors acting in bad faith.” *Id.* at \*5 (quoting *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1166 (6th Cir. 1985)).

The question at this stage is the adequacy of the pleading, not whether the plaintiff will ultimately prevail on the merits. Minnesota Life has adequately pled reliance.

The final requirement for a section 523(a)(2)(B) claim is that the debtor published the false statement with intent to deceive. Chinn argues that the Amended Complaint fails to plead any facts to establish that Chinn intended to deceive, but in fact the Amended Complaint alleges that “[t]hese misrepresentations were made by Chinn for the purpose of inducing Minnesota Life to issue a policy to FICC, as well as to allow Chinn to obtain a commission for the sale of the Policy.” Amended Complaint, Adv. Proc. Dkt. No. 53, p. 12. In other words, Chinn misrepresented facts in order to gain a monetary advantage. From this allegation it is reasonable to infer that Chinn intended to deceive Minnesota Life concerning his true net worth and the value of FICC in order to obtain issuance of the policy.

Chinn adds one additional argument concerning the capacity in which Chinn signed the Attestation. Chinn says the fact that he did not sign the Attestation in his capacity as insured somehow takes this alleged false statement outside of what is required to state a claim under section 523(a)(2)(B). That section, however, places no limit upon the capacity of a debtor who uses a false statement about his or an insider’s financial condition to obtain money, property or services. So long as the debtor made or published the statement with intent to deceive, the related debt is excepted from discharge. Clearly, additional facts concerning the use of the Attestation must be developed at trial, but the Amended Complaint has adequately pled a claim for relief under section 523(a)(2)(B).

### **The Section 523(a)(6) Claim**

Bankruptcy Code section 523(a)(6) excepts from discharge a debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” 11 U.S.C.

§ 523(a)(6). Where fraud is alleged, it is sometimes difficult to distinguish causes of action contemplated under section 523(a)(2) from those under section 523(a)(6). One of the main differences is the measure of recovery. For section 523(a)(2) claims, the measure of recovery is the money, property, services, or other benefits received by the debtor. For section 523(a)(6) claims, the measure of recovery is the damage sustained by another entity. *See ITT Life Ins. Corp. v. Haakenson (In re Haakenson)*, 159 B.R. 875, 887 (Bankr. D. N.D. 1993). The situations that may give rise to a cause of action under section 523(a)(6) are much broader than those that may give rise to a cause of action under section 523(a)(2). *Id.* “[Section] 523(a)(6) covers debts ‘for willful and malicious injury,’ whether or not that injury is the result of fraud ..., whereas § 523(a)(2)(A) covers only fraudulent acts.” *Husky Int’l Electronics*, 136 S. Ct. at 1588. The measure of damages under section 523(a)(2) is the value of the money, property, services, or benefits obtained by the debtor. The measure of damages under section 523(a)(6) is the damages sustained by the other entity. *Id.*

Section 523(a)(6) requires proof of a willful and malicious injury. “The 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.” *Kawaauhau v. Geiger*, 523 U.S. 57, 62, 118 S. Ct. 974, 977 (1998). The debtor must have intended the consequences of his acts, not simply the acts themselves. *Id.* Section 523(a)(6) brings to mind the category of intentional torts, which are defined as “those motivated by a desire to inflict injury or those substantially certain to result in injury.” *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, (6th Cir. 1999) (citing Restatement (Second) of Torts § 8A, at 15 (1964)).

The Amended Complaint alleges that when the policies were surrendered, Minnesota Life had a property right in the commissions paid to Chinn, and that Chinn acted in a willful and

malicious manner by unlawfully retaining the portion of the advanced premiums that should have been returned to Minnesota Life. That claim mirrors the section 523(a)(2) claims. The Amended Complaint also alleges, however, that Chinn caused Minnesota Life to incur damages in the form of administrative costs and lost profits resulting from the early surrender of the 29 Policies. This request goes well beyond the claim for unearned commissions.

Chinn argues that the Amended Complaint alleges no more than a breach of contract, which, without more, cannot constitute the willful and malicious injury required under section 523(a)(6). Chinn perhaps fails to apprehend the breadth of Minnesota Life's claim.

Taken in isolation, the mere failure to repay chargeback premiums does not rise to the level of a willful and malicious injury. But the fact of nonpayment should not be taken in isolation. The Amended Complaint alleges that the nonrepayment was part of an elaborate scheme intended from its inception to defraud and harm Minnesota Life. The fact that Chinn denies that this is so does not mean that Minnesota Life has failed to adequately plead its claim. Minnesota Life alleges that it not only lost the commissions that it paid to FICC but also the administrative costs it incurred as the result of underwriting and the lost profits it reasonably expected to earn on the policies produced by Chinn. The court has already determined that the Amended Complaint adequately pleads Minnesota Life's claims for fraud. The Amended Complaint further alleges that because of Chinn's unique knowledge of premium financing and the insurance industry, he was able to devise a scheme that benefited him while causing substantial harm to Minnesota Life. For example, the Amended Complaint alleges that "Chinn had previously perfected his scheme through the sale of policies issued by other carriers for several years prior to the sale of the Policies issued by Minnesota Life, by making the same type of false representation." Amended Complaint, ¶ 26. The Amended Complaint also alleges:



32. Because of Chinn's extensive experience with premium finance lenders, set forth above, Chinn knew that the finance companies or lending institutions would require significant interest payments prior to the end of the three-year SVEA period. Chinn knew that when customers became aware that they would be required to make further interest payments to the premium finance lenders to keep the Policies in force (which was contrary to Chinn's representations), customers would either surrender their Policies or the premium finance lenders would request surrender of the Policies due to non-payment of interest.

Amended Complaint, Adv. Proc. Dkt. No. 53, ¶ 32.

34. At the time of the sale of the Policies, Chinn knew that some, or all of the policyholders would surrender the Policies after the first year and within the three-year period under the SVEA, which would nevertheless generate substantial commissions for Chinn. Moreover, on information and belief, FICC also paid interest on at least some of the loans which financed premiums for the purchase of the Policies. This was done so that the Policies would remain in force another year to increase the commissions he would retain upon the surrender of the policy.

Amended Complaint, Adv. Proc. Dkt. No. 53, ¶ 34.

The Amended Complaint alleges that what was anticipated by Chinn is precisely what happened. All 29 of the policies written by Chinn during 2009 were surrendered early. Minnesota Life refunded the entire premium for each of them with the result that it earned nothing from the sales. The Amended Complaint alleges that in addition to the commissions withheld by Chinn, Minnesota Life incurred administrative costs as the result of writing the policies. The Amended Complaint alleges facts that tend to show that Chinn either intended to injure Minnesota Life or was substantially certain that his acts would result in injury to Minnesota Life. If all of these allegations are taken as true, as they must be for purposes of this motion, Minnesota Life has adequately pled a claim for relief under section 523(a)(6).

### **CONCLUSION**

For the foregoing reasons, the Motion to Dismiss the First Amended Complaint is **DENIED**.

cc: Debtor/Defendant  
Attorneys for Debtor/Defendant  
Plaintiff  
Attorneys for Plaintiff  
Chapter 7 Trustee