



EMORY
LAW

Emory Bankruptcy Developments Journal

Volume 33
Issue 1 *A Tribute to Professor Grant W. Newton*

2016

Fighting an Uphill Battle: Reconciling Unpaid Contributions of Multiemployer Pension Plans with the Bankruptcy Code's Defalcation Provision

Nicole Adalaide Griffin

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/ebdj>

Recommended Citation

Nicole A. Griffin, *Fighting an Uphill Battle: Reconciling Unpaid Contributions of Multiemployer Pension Plans with the Bankruptcy Code's Defalcation Provision*, 33 Emory Bankr. Dev. J. 313 (2016).

Available at: <https://scholarlycommons.law.emory.edu/ebdj/vol33/iss1/10>

This Comment is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Bankruptcy Developments Journal by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

FIGHTING AN UPHILL BATTLE: RECONCILING UNPAID CONTRIBUTIONS OF MULTIEMPLOYER PENSION PLANS WITH THE BANKRUPTCY CODE'S DEFALCATION PROVISION

Five circuit courts have determined whether an employer's unpaid contributions due under an employee benefit plan can be classified as plan assets under ERISA. When unpaid contributions are plan assets, the individual exercising authority or control over the assets is imputed fiduciary status under ERISA and, in turn, owes certain fiduciary duties and obligations to the employee benefit funds. If the fiduciary fails to make the required contributions, thereby breaching his or her duties under ERISA, then he or she becomes personally liable for the unpaid contributions. In bankruptcy, this result means that the unpaid contributions would be a nondischargeable debt if the court holds the individual liable for defalcation.

In 2005, the Tenth Circuit was the first circuit to address whether unpaid contributions can be plan assets in a bankruptcy proceeding. Subsequently, in 2007 and 2015, the Sixth and Ninth Circuits decided this issue within the bankruptcy context and elected to either follow the Tenth Circuit's guidance or deviate slightly to reach an identical final result, making the unpaid contributions a dischargeable debt.

A circuit split now exists. On the one hand, the two circuits that decided this issue in nonbankruptcy proceedings have either (1) held an individual liable as an ERISA fiduciary for the unpaid contributions; or (2) recognized the potential to hold an individual liable for the unpaid contributions under the right set of circumstances. On the other hand, the three circuits that decided this issue in bankruptcy have either (1) failed to classify unpaid contributions as plan assets; or (2) failed to extend ERISA's definition of "fiduciary" into the bankruptcy context, ultimately finding that the debts are dischargeable in bankruptcy.

This Comment seeks to reconcile the circuit split by proposing a three-step approach that will allow courts determining this issue in bankruptcy proceedings to mirror their counterparts while still protecting and preserving the spirit of the Bankruptcy Code. Adopting this approach will bring clarity to a muddled and complex area of the law and ensure that dishonest debtors are

held accountable under § 523(a)(4) for their willful and conscious disregard of the fiduciary duties owed to dependent employees.

INTRODUCTION

Millions of Americans depend on employer contributions to employee benefit funds as a means of achieving their retirement savings goals.¹ Employer contributions represent “more than 35% of the total contributions on average to an employee’s workplace savings account.”² Employees place such a high value on employer contributions that 43% admitted “they would settle for lower pay if it meant they received a higher employer contribution to their retirement plan accounts.”³ Further, “only 13% [of employees] sa[id] they would take a job with no company match, even if it came with a higher pay level.”⁴

Dependence upon employer contributions may help explain why 64% of Americans are concerned about not having enough money for retirement.⁵ Gallup notes that “[s]ince [it] began polling Americans in 2001 about their financial concerns, a majority have continually been worried about not being able to afford retirement—the top overall concern in each of those 16 years.”⁶ These statistics suggest “that saving for retirement disquiets Americans in both good and bad economic times.”⁷ When employers fail to hold up their end of the bargain and become unable or unwilling to make the promised contributions, employees are often left frustrated and in need of legal assistance.⁸

With respect to multiemployer pension plans, “the amount of the employer’s contribution is usually set by a collective bargaining agreement

¹ See *Introduction to Multiemployer Plans*, PENSION BENEFIT GUARANTY CORP., <http://www.pbgc.gov/prac/multiemployer/introduction-to-multiemployer-plans.html> (last visited Sept. 21, 2016); Kevin McGuinness, *Employer Contributions Important to Employee Retirement Savings*, PLANSPONSOR (Aug. 12, 2014), http://www.plansponsor.com/Employer_Contributions_Important_to_Employee_Retirement_Savings.aspx.

² McGuinness, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ See Justin McCarthy, *Americans’ Financial Worries Edge Up in 2016*, GALLUP (Apr. 28, 2016), <http://www.gallup.com/poll/191174/americans-financial-worries-edge-2016.aspx>.

⁶ *Id.*

⁷ Andrew Dugan, *Retirement Remains Americans’ Top Financial Worry*, GALLUP (Apr. 22, 2014), <http://www.gallup.com/poll/168626/retirement-remains-americans-topfinancial-worry.aspx>.

⁸ See *Introduction to Multiemployer Plans*, *supra* note 1.

that specifies a contribution formula (such as \$3 per hour worked by each employee covered by the agreement) and further provides that contributions must be paid to the plan on a monthly basis.”⁹ If an employer fails to make the required contributions, the Employee Retirement Income Security Act (“ERISA”) “permits the plan to sue and obtain the delinquency plus interest, liquidated damages, court costs, and reasonable attorney fees.”¹⁰ Additionally, many courts have imputed fiduciary duties to employers in their individual capacities for failing to make the required contributions where the governing agreements specifically classify all employer contributions as plan assets.¹¹ Despite such rulings, the majority rule is that an employer’s unpaid contributions are *not* plan assets.¹² When the unpaid contributions are not plan assets, the employer is not liable for the contributions as an ERISA fiduciary.¹³

The circuit courts are divided on the issue of what constitutes a plan asset when dealing with unpaid contributions. Three circuits have held that the unpaid contributions themselves can be a plan asset.¹⁴ These courts found that the individuals who had failed to make contributions to the employee benefit funds may be ERISA fiduciaries.¹⁵ Two other circuits have held that the contractual right to bring a claim with respect to the unpaid contributions is the plan asset; the unpaid amounts themselves are not.¹⁶ These circuits refrained from imputing ERISA fiduciary status to the employers.¹⁷

When this issue arises in the context of a bankruptcy proceeding, the circuit courts split once again, but in a different way. While the circuits deciding this issue outside of bankruptcy interpret ERISA broadly, expanding the traditional understanding of what it means to be a “fiduciary,”¹⁸ the circuits deciding this issue within the bankruptcy context recognize fiduciary status in very limited

⁹ *Id.*

¹⁰ *Id.*; *see also* 29 U.S.C. § 1132(g) (2012).

¹¹ *See, e.g.,* Bricklayers & Allied Craftworkers Local 2 v. Moulton Masonry & Constr., LLC, 779 F.3d 182, 184 (2d Cir. 2015); ITPE Pension Fund v. Hall, 334 F.3d 1011, 1012 (11th Cir. 2003).

¹² *See* Cline v. Indus. Maint. Eng’g & Contracting Co., 200 F.3d 1233, 1234 (9th Cir. 2000).

¹³ *See* 29 U.S.C. § 1002(21)(A)(i).

¹⁴ *See Moulton Masonry*, 779 F.3d at 184–88; *Hall*, 334 F.3d at 1012; *see also* Bd. of Trs. v. Bucci (*In re Bucci*), 493 F.3d 635, 642 (6th Cir. 2007) (“For the sake of argument, the court will assume that the unpaid employer contributions here qualified as ERISA plan assets.”).

¹⁵ *See Moulton Masonry*, 779 F.3d at 188–89; *Hall*, 334 F.3d at 1012–16.

¹⁶ *See* Bos v. Bd. of Trs., 795 F.3d 1006, 1011 (9th Cir. 2015); Navarre v. Luna (*In re Luna*), 406 F.3d 1192, 1204 (10th Cir. 2005).

¹⁷ *See* Bos, 795 F.3d at 1010–12; *In re Luna*, 406 F.3d at 1203–04.

¹⁸ *See Moulton Masonry*, 779 F.3d at 188–89; *Hall*, 334 F.3d at 1012–15.

circumstances and interpret the definition of “fiduciary” narrowly.¹⁹ In other words, courts have been reluctant to impute fiduciary duties to employers when bankruptcy proceedings accompany the otherwise identical factual scenarios.²⁰ Thus, when a company owner in control of company finances files for bankruptcy in his or her individual capacity, the unpaid contributions are often dischargeable. This result leaves employees without a remedy.²¹ Because of the increasing amount of unpaid contributions and inconsistent judicial opinions, support for private pension reform has been rising steadily.²²

While the purpose of the Bankruptcy Code (the “Code”) is to provide a fresh start for the debtor by discharging contractual debts, thereby relieving the debtor of those obligations, the Code does not provide such relief for dishonest debtors who have engaged in fraudulent conduct.²³ This concept is hardly novel, and one would be hard pressed to find a court that would hold otherwise. By deviating from the reasoning of their counterparts, however, courts deciding this issue in bankruptcy are sidestepping ERISA and facilitating discharges for potentially dishonest debtors who have breached their fiduciary duties to employees. Thus, the conflict that the courts have created is illogical and further complicates an already complex area of the law.

Although ERISA plans “are just too complex and varied for everyone to understand” and “[e]mployees and plan participants cannot be expected to know all the ins and outs governing their ERISA plans,”²⁴ it should be understood that “fiduciaries—the people who run and manage the plans—have certain obligations to plan participants . . . [and] when they breach their fiduciary duty—employees can file an ERISA lawsuit to attempt to recover their missing funds.”²⁵ By refraining to impute fiduciary duties to employers

¹⁹ See *Bos*, 795 F.3d at 1010–12; *In re Bucci*, 493 F.3d at 637 (embracing the exception to the general rule that unpaid contributions are not plan assets but declining to recognize “a debtor’s status as an ERISA fiduciary as alone being sufficient . . . for purposes of § 523(a)(4)”; *In re Luna*, 406 F.3d at 1203–04.

²⁰ See, e.g., *Bos*, 795 F.3d at 1010–12; *In re Bucci*, 493 F.3d at 641–43; *In re Luna*, 406 F.3d at 1197.

²¹ See, e.g., *Bos*, 795 F.3d at 1012; *In re Bucci*, 493 F.3d at 637–38; *In re Luna*, 406 F.3d at 1197.

²² See generally Mark Miller, *Why Congress Needs to Reform Multi-Employer Pension Plans Now*, REUTERS (July 31, 2014, 9:10 AM), <http://www.reuters.com/article/2014/07/31/us-column-miller-pensions-idUSKBN0G01IM20140731#KXv12fggeif3rgpE.97> (explaining that “[p]olicymakers, legislators, business and labor groups have debated the issue for two years . . . [i]f Congress doesn’t act this year, it is very likely that major plans will fail and the multi-employer system will collapse”).

²³ See Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393 (1985).

²⁴ Heidi Turner, *Understanding ERISA Laws Complicated to Understand*, LAWYERSANDSETTLEMENTS.COM (Aug. 12, 2012), https://www.lawyersandsettlements.com/articles/stock_option/erisa-plan-lawsuit-retirement-employee-3-17970.html#.VoRlm5OAOko.

²⁵ *Id.*

who file for bankruptcy, courts have further, and unnecessarily, muddled ERISA law. If courts were to adopt a systematic approach that takes into account the totality of the circumstances surrounding each individual case, it would produce two effects. First, courts would be able to hold individual employers accountable for breaching their fiduciary duties. Second, courts would still be able to preserve the public policy concern of protecting honest debtors in bankruptcy proceedings.

This Comment will focus primarily on the bankruptcy component of the circuit split and will remain agnostic to all other aspects of the split. That is to say, this Comment will assume it is possible for unpaid contributions to be plan assets. This Comment will begin by discussing the history of multiemployer pension plans, while also providing insight on ERISA reforms. Next, this Comment will compare the broad interpretation “fiduciary” receives under ERISA with the narrow interpretation “fiduciary” receives under the Code by discussing the decisions of the circuit courts that have decided whether an individual can be held personally liable for an employer’s unpaid contributions. Finally, this Comment will propose a three-step approach courts should adopt when determining the dischargeability of unpaid contributions. First, when the governing agreement between the parties unambiguously categorizes unpaid contributions as plan assets, courts should defer to the contractual intent of the parties and recognize unpaid contributions as plan assets. Second, courts should presume that “fiduciary” has a consistent meaning under both ERISA and the Code. Third, courts should determine the dischargeability of unpaid contributions under § 523(a)(4) in a bankruptcy proceeding on a case-by-case basis after evaluating the totality of the circumstances.

I. BACKGROUND

Pension law is no stranger to the old adage, “It gets worse before it gets better.” A series of incidents arose throughout the twentieth century that set the stage for ERISA’s enactment in 1974. Before discussing these incidents, however, it is important to understand the structure of a multiemployer pension plan.

A multiemployer pension plan is a “retirement plan negotiated by a union with a group of employers typically in the same industry.”²⁶ Multiemployer plans are most prominent among either small companies that do not establish their own employee benefit plans or “industries in which, because of seasonal or irregular employment and high labor mobility, few workers would qualify under an individual company’s plan if one were established.”²⁷ These plans “allow employees who move among employers within unionized industries—such as trucking, construction and grocery-store chains—to participate in the same retirement plan negotiated under either separate or common collective bargaining agreements.”²⁸ The collective bargaining agreements (“CBA”) govern the terms of multiemployer plans and state “how much the employers must contribute to the plans for their employees.”²⁹ Under most agreements, employers “participating in the same multiemployer plan often make equal contributions.”³⁰ Thus, if two employers contribute to the same plan and one stops making payments, the plan could become underfunded quickly.³¹ The Pension Benefit Guaranty Corporation, a federal agency created under ERISA to maintain private pension plans, estimates that “multiemployer pension plans covering about 1.5 million people are severely underfunded.”³² One major contributing factor to the insolvency of these plans is company bankruptcies.³³

The earliest multiemployer pension plans were not created by CBAs.³⁴ Instead, they were “solely administered by unions” and served to strengthen the power of unions.³⁵ With little federal regulation, unions were able to abuse their control over plans in two ways. First, unions would opportunistically access plan components during emergencies such as workers’ strikes. Second,

²⁶ *Facts About Multiemployer Pension Plan Funding*, PENSION RTS. CENT. (May 29, 2014), <http://www.pensionrights.org/publications/fact-sheet/facts-about-multiemployer-pension-plan-funding> (last visited Jan. 23, 2016).

²⁷ EMPLOYEE BENEFIT RESEARCH INSTITUTE, *MULTIEMPLOYER PLANS* (2009), <https://www.ebri.org/pdf/publications/books/fundamentals/fund14.pdf>.

²⁸ *Overview of Multiemployer Plans*, IRS, https://www.irs.gov/irm/part7/irm_07-011-006.html#d0e107 (last visited Jan. 23, 2016).

²⁹ *Facts About Multiemployer Pension Plan Funding*, *supra* note 26.

³⁰ EMPLOYEE BENEFIT RESEARCH INSTITUTE, *supra* note 27.

³¹ *See Facts About Multiemployer Pension Plan Funding*, *supra* note 26.

³² *PBGC Report Shows Improvement in Single-Employer Plans, but Underscores Increased Risks to Some Multiemployer Plans*, PENSION BENEFIT GUARANTY CORP. (June 30, 2014), <http://www.pbgc.gov/news/press/releases/pr14-08.html>.

³³ *Facts About Multiemployer Pension Plan Funding*, *supra* note 26.

³⁴ Harriet Weinstein & William Wiatrowski, *Multiemployer Pension Plans*, MONTHLY LAB. REV., Spring 1999, at 19, 20, <http://www.bls.gov/opub/mlr/cwc/multiemployer-pension-plans.pdf>.

³⁵ *Id.*

they would mandate that employees be in “good standing” within the union to gain access to the plans.³⁶ Thus, employees were at the mercy of unions, and they had nowhere else to turn to secure future benefits for themselves and their families.³⁷

Following World War II, the federal government implemented several policies to curb inflation that ended up sparking pension reform and “spur[ring] the creation of private pension plans.”³⁸ The first of these policies was the passage of “favorable tax regulations [that] made pension plans less expensive for employers by allowing them to deduct, as a business expense, contributions made to pension plans when computing their tax returns.”³⁹ In addition, “wage stabilization efforts imposed a ceiling on wage increases to reduce inflationary pressures, but employee benefits, including pensions, were exempt.”⁴⁰ Perhaps most importantly, however, in 1948 the Seventh Circuit affirmed the National Labor Relations Board’s order mandating that pension and insurance benefits be determined through collective bargaining.⁴¹ With this decision, the playing field between employers and employees was finally beginning to even out.

In the midst of progress, 1964 brought the infamous collapse of the Studebaker-Packard Corporation and “the inadequately funded pension plan did not have enough assets to finance the benefits owed to over 7,000 employees.”⁴² When Studebaker fell, “a number of abuses in pension plan structure became public.”⁴³ For example, “[u]nreasonably high vesting thresholds prevented long-time workers from qualifying for benefits” and the pension rules defined “unbroken service” too narrowly.⁴⁴ Furthermore, “courts [had been] uph[olding] practices of employers by reserving their rights to modify, decrease, or deny benefits or eliminate pensions at will.”⁴⁵ These practices allowed employers to escape “a number of liabilities by asserting in

³⁶ *Id.*

³⁷ *See id.*

³⁸ Sarah Steers, *ERISA History*, JURIST (Oct. 4, 2013, 12:01 PM), <http://jurist.org/feature/2013/10/erisa-history.php>.

³⁹ Weinstein & Wiatrowski, *supra* note 34, at 20.

⁴⁰ *Id.*

⁴¹ *Inland Steel Co. v. NLRB*, 170 F.2d 247, 251, 255 (7th Cir. 1948); *see also* Weinstein & Wiatrowski, *supra* note 34, at 20.

⁴² Steers, *supra* note 38.

⁴³ Karen A. Zurlo, *Private Pension Protections Since ERISA: The Expanded Role of the Individual*, 39 J. SOC. & SOC. WELFARE 49, 53 (2012).

⁴⁴ *Id.*

⁴⁵ *Id.*

plan documents that workers were claiming benefits against the plan, and not against the assets of the corporation.”⁴⁶ Thus, courts were getting it wrong and many commentators suggested that “Studebaker’s bankruptcy highlighted the need for federal legislation to amend pension plan abuses and protect workers from corporate bankruptcy.”⁴⁷ The stage was now set for ERISA’s debut.

A. *ERISA’s Application in Nonbankruptcy Proceedings*

Congress enacted ERISA in 1974 to set minimum standards for voluntarily established pension plans and to provide protection for individuals in these plans.⁴⁸ In other words, an employer does not have to set up a pension plan for its employees. If the employer chooses to do so, however, “it is held to certain specific minimum standards.”⁴⁹ Federal courts have agreed that ERISA is “a remedial statute deserving of broad construction.”⁵⁰ ERISA “applies to virtually all private-sector corporations, partnerships, and proprietorships, including non-profit corporations—regardless of their size or number of employees.”⁵¹

ERISA requires that a voluntary pension plan contain certain provisions, including

provid[ing] participants with plan information . . . about plan features and funding; provid[ing] fiduciary responsibilities for those who manage and control plan assets; require[ing] plans to establish a grievance and appeals process . . . and giv[ing] participants the right to sue for benefits and breaches of fiduciary duty.⁵²

ERISA defines a “fiduciary” as any individual that “exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or

⁴⁶ *Id.*

⁴⁷ Steers, *supra* note 38; see Zurlo, *supra* note 43, at 52–53.

⁴⁸ *Health Plans & Benefits: ERISA*, U.S. DEP’T OF LABOR, <http://www.dol.gov/dol/topic/health-plans/erisa.htm> (last visited July 13, 2016).

⁴⁹ Steers, *supra* note 38.

⁵⁰ *ITPE Pension Fund v. Hall*, 334 F.3d 1011, 1015 (11th Cir. 2003); see *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 123 (4th Cir. 1991); see also *LoPresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997) (holding that an individual who signed checks and decided when creditors were paid was personally liable as an ERISA fiduciary).

⁵¹ Ryan McParland, *ERISA: A Statute’s History, Purposes, and Progression*, NY ST. BAR ASS’N: L. STUDENT CONNECTION (June 1, 2011, 7:46 PM), http://nysbar.com/blogs/lawstudentconnection/2011/06/erisa_history_purposes_and_pro.html.

⁵² *Health Plans & Benefits*, *supra* note 48.

disposition of its assets.”⁵³ An ERISA fiduciary can also be any individual exercising “discretionary authority or discretionary responsibility in the administration of such plan.”⁵⁴

Since “[t]he text of ERISA does not give a relevant definition for what constitutes an ‘asset’ of an ERISA fund,” courts have had to develop the proper rule and are divided as to whether unpaid contributions can be plan assets.⁵⁵ When unpaid contributions are classified as plan assets under ERISA, “officers of the nonpaying corporation with control and authority over the unpaid contributions may be held liable for the amount of nonpayment.”⁵⁶ As this section will discuss, once the court recognizes unpaid contributions as plan assets, the individual in charge of contributing to the employee benefit funds is considered a “fiduciary” under ERISA and therefore held personally liable for the unpaid contributions.

1. *The Second Circuit*

In *Bricklayers & Allied Craftworkers Local 2 v. Moulton Masonry & Construction*, the Second Circuit held an individual personally liable as an ERISA fiduciary for unpaid contributions to the employee benefit plans.⁵⁷ In that case, Moulton Masonry & Construction, LLC entered into a CBA with the Bricklayers and Allied Craftworkers Pension Fund.⁵⁸ This agreement required the company to make contributions to the pension funds.⁵⁹ Duane Moulton, the sole owner, officer, and shareholder of the company, signed the agreement, reported the employees’ working hours to the pension fund, and acted in connection with the auditor.⁶⁰ A few years after the agreement’s execution, the pension fund requested a payroll audit pursuant to the terms of the agreement, but the company refused to cooperate, and the district court entered a default judgment against the company and Mr. Moulton.⁶¹ Eventually, the company complied with the requests from the pension fund’s auditor, and the auditor

⁵³ 29 U.S.C. § 1002(21)(A)(i) (2012).

⁵⁴ *Id.* § 1002(21)(A)(iii). An individual who “renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so” is also a fiduciary for ERISA purposes. *Id.*

⁵⁵ *Hall*, 334 F.3d at 1013.

⁵⁶ *Id.* at 1012.

⁵⁷ 779 F.3d 182, 189 (2d Cir. 2015).

⁵⁸ *Id.* at 184.

⁵⁹ *Id.*

⁶⁰ *Id.* at 185.

⁶¹ *Id.*

determined the company owed \$451,300.52 in unpaid contributions to the pension funds.⁶² Shortly thereafter, the district court granted the pension fund's motion for default judgment against the company and Mr. Moulton, holding each jointly and severally liable.⁶³ The defendants appealed and argued, in relevant part, that questions of fact existed as to their liability for the unpaid contributions to the pension funds.⁶⁴

In determining whether the company was liable for the unpaid contributions, the court looked to the language of § 515 of ERISA, which states that “any employer who is obligated to make contributions to a multiemployer plan . . . under the terms of a collectively bargained agreement shall . . . make such contributions in accordance with the terms and conditions of . . . such agreement.”⁶⁵ The court also noted that under ERISA, “if such an employer fails to make the required contributions, the court ‘shall award the plan’: ‘unpaid contributions,’ ‘interest,’ ‘liquidated damages provided for under the plan,’ ‘attorney’s fees and costs,’ and ‘such other legal or equitable relief the court deems appropriate.’”⁶⁶ The court held the company was liable to the pension fund under ERISA because of the terms governing the agreement.⁶⁷

With respect to Mr. Moulton's liability, however, the district court refrained from explicitly stating why it also found Mr. Moulton personally liable for the unpaid contributions.⁶⁸ The court reasoned that “because no [] evidence suggested that the individual and corporate defendant are alter egos, Moulton could not have been found to be an ‘employer’ under Section 515 of ERISA.”⁶⁹ Section 409 of ERISA, however, “provides an independent basis for Moulton's liability in his individual capacity as a ‘fiduciary.’ A fiduciary, under ERISA is ‘someone who exercises any discretionary authority or discretionary control respecting management of [an ERISA benefit] plan *or* exercises any authority or control respecting management or disposition of its assets.’”⁷⁰ When a fiduciary withholds plan assets, he becomes “personally

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 185–86.

⁶⁵ *Id.* at 187–88 (citing 29 U.S.C. § 1145 (2012)).

⁶⁶ *Id.* at 188 (citing 29 U.S.C. § 1132(g)(2)).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*; see 29 U.S.C. § 1145.

⁷⁰ *Moulton Masonry*, 779 F.3d at 188 (quoting *Finkel v. Romanowicz*, 577 F.3d 79, 85 (2d Cir. 2009) (quoting 29 U.S.C. § 1002(21)(A)(i))).

liable to make good to such plan any losses to the plan.”⁷¹ While not all corporate officers and executives are fiduciaries under ERISA, those who “determin[e] which of the company’s creditors w[ill] be paid or in what order” are considered fiduciaries.⁷²

Mr. Moulton was the sole owner, officer, and shareholder of the company.⁷³ In this capacity, Mr. Moulton decided which creditors the company would pay, and he “exercised control over money due and owing” to the pension funds.⁷⁴ Thus, because Mr. Moulton both controlled the company’s finances and personally failed to make the monetary contributions owed to the pension funds, the court held that Mr. Moulton was indeed an ERISA fiduciary and thus liable to the pension fund for the unpaid contributions classified as plan assets under the agreement.⁷⁵

2. *The Eleventh Circuit*

In *ITPE Pension Fund v. Hall*, the Eleventh Circuit, when confronted with a slightly different set of facts, determined that an individual could be held liable as a fiduciary for the unpaid contributions only when the governing agreement clearly stated that the unpaid contributions were plan assets.⁷⁶ In that case, H&R Services entered into a CBA with a union.⁷⁷ Under the agreement, the company promised to make contributions to the employee pension fund.⁷⁸ Like the company in *Bricklayers & Allied Craftworkers*, the company in this case also failed to make the contributions.⁷⁹ In response, the union filed suit against the company, and the district court granted summary judgment to the union.⁸⁰ When the company failed to comply with the court’s order, the union sued Roger and Hope Hall directly, the company’s general manager and president, respectively.⁸¹ The issues on appeal were whether unpaid contributions can be classified as plan assets, and, if so, whether the

⁷¹ *Id.* (quoting 29 U.S.C. § 1109(a)).

⁷² *Id.* (quoting *Finkel*, 577 F.3d at 86).

⁷³ *Id.* at 185.

⁷⁴ *Id.* at 189.

⁷⁵ *Id.* at 188–89.

⁷⁶ 334 F.3d 1011, 1014 (11th Cir. 2003).

⁷⁷ *Id.* at 1012.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

Halls were imputed fiduciary duties and therefore personally liable for the unpaid contributions.⁸²

In resolving whether the unpaid contributions were plan assets, the court noted that “unpaid employer contributions are not assets of a fund unless the agreement between the fund and the employer specifically and clearly declares otherwise.”⁸³ The Halls argued that the unpaid employer contributions were not plan assets because the terms “Pension Fund” and “Fund” were defined in the agreement as “all property of every kind *held* or *acquired* under the provisions of [the] instrument.”⁸⁴ The Halls therefore contended that the unpaid contributions were incapable of being “held” or “acquired” by the fund because they were unpaid.⁸⁵ Unpersuaded, the court declined to limit the definition of “acquire” solely to physical possession of the contributions.⁸⁶

Since the plan contractually owns or controls the unpaid contributions by nature of the agreement, the court found that the unpaid contributions could fall within the scope of the term’s definition.⁸⁷ In reaching this conclusion, the court relied on the dictionary definition of “acquire,” which means “to come into possession *or ownership* of . . .” and Black’s Law Dictionary definition of the term as “[t]o gain possession *or control* of . . .”⁸⁸ Since the agreement must specifically and clearly articulate that unpaid contributions were intended to be plan assets, however, the court continued its analysis of the agreement.⁸⁹

The “Establishment of Fund” section of the agreement stated, in relevant part,

the [] Fund . . . shall be comprised of all monies received and held by the Trustees from employer contributions . . ., all income from investments made and held by the Trustees, . . . or any other property received and held or *receivable* by the Trustees for the uses and purposes set forth in th[e] agreement.⁹⁰

⁸² *Id.* at 1012–13.

⁸³ *Id.* at 1013.

⁸⁴ *Id.* at 1014 (emphasis added).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 18 (2d ed. 1987) (emphasis added)); *Acquire*, BLACK’S LAW DICTIONARY (7th ed. 1999) (emphasis added).

⁸⁹ *Id.*

⁹⁰ *Id.* (emphasis added).

In this case, the argument turned on the last clause of that section.⁹¹

After reviewing both parties' arguments, the court determined that both interpretations had merit.⁹² Since an agreement must specifically and clearly articulate that unpaid contributions were intended to be classified as plan assets, the court stated that "a person should not be attributed fiduciary status under ERISA and held accountable for performance of the strict responsibilities required of him in that role, if he is not clearly aware of his status as a fiduciary."⁹³ Thus, while the court acknowledged that ERISA deserves broad construction, it was not willing to construe the statute so broadly that it would impute fiduciary duties to an individual without notice when he or she did not contract for such responsibility.⁹⁴ The court remanded the case to the district court so the parties could engage in discovery and argument for purposes of determining contractual intent.⁹⁵ With this opinion, the Eleventh Circuit effectively took the stance that parties get what they contract for—nothing more and nothing less.

While courts generally do not consider unpaid contributions by employers to be plan assets,⁹⁶ many plan documents define plan assets to include all required contributions—even ones set to be made at a future date.⁹⁷ For this reason, both the Second and Eleventh Circuits found that when an agreement specifically defines an employee benefit fund to include future unpaid contributions by employers, then the unpaid contributions are plan assets.⁹⁸ Further, in such circumstances, individuals who possess authority and control

⁹¹ *Id.*

⁹² *Id.* at 1015. The union argued that because receivable property is property of the fund, and unpaid contributions are receivable, the unpaid contributions are clearly plan assets. *Id.* at 1014. However, Mr. and Mrs. Hall argued that the unpaid contributions were not plan assets because they were not "received and held" by the trustees. *Id.* at 1015. According to the Halls, the provision that "any *other* property received or held or receivable by the Trustees" did not apply to "employer contributions" because the agreement addressed the "asset-status" of employer contributions in a separate category preceding that provision. *Id.* In response, the union argued that "any *other* property received or held or receivable by the Trustees" was a "catch-all provision" that covered "all *other* property" not otherwise classified as an asset under the agreement—i.e., unpaid employer contributions. *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 1016.

⁹⁶ See *Cline v. Indus. Maint. Eng'g & Contracting Co.*, 200 F.3d 1233, 1234 (9th Cir. 2000).

⁹⁷ James McElligott Jr. & Robert Wynne, *Ninth Circuit: Multiemployer Plan Calling Unpaid Contributions "Plan Assets" Does Not Make Persons Controlling Contribution Payments ERISA Fiduciaries*, JD SUPRA BUSINESS ADVISOR (Aug. 13, 2015), www.jdsupra.com/legalnews/ninth-circuit-multiemployer-plan-44468/.

⁹⁸ See *Bricklayers & Allied Craftworkers Local 2 v. Moulton Masonry & Constr., LLC*, 779 F.3d 182, 184 (2d Cir. 2015); *Hall*, 334 F.3d at 1012.

over the plan assets are imputed fiduciary duties under ERISA and held personally liable for the unpaid contributions.⁹⁹

B. ERISA's Application in Bankruptcy Proceedings

When the circuit courts have decided these issues within the bankruptcy context, however, they have completely abandoned the aforementioned reasoning and further muddled the law surrounding ERISA.¹⁰⁰ If unpaid contributions are classified as plan assets, and an individual exercising authority or control over those assets is imputed fiduciary status under ERISA, those unpaid contributions could be considered a nondischargeable debt in bankruptcy.¹⁰¹ For the reasons discussed below, however, courts have refrained to give “fiduciary” a consistent meaning under both ERISA and the Code.

While the Code does not specifically define “fiduciary,” some courts have held that “if an individual is a fiduciary for purposes of ERISA, [then] the individual is also treated as a fiduciary for purposes of § 523(a)(4).”¹⁰² Other courts, however, take a more limited approach in recognizing fiduciary status within the bankruptcy context because of their apprehension surrounding the notion of unpaid contributions as nondischargeable debts for individual debtors.¹⁰³ As this section will show, three circuit courts have either improperly declined to classify unpaid contributions as plan assets or refrained from imposing ERISA fiduciary status to the individual in an attempt to protect the debtor.¹⁰⁴

1. The Sixth Circuit

In *Board of Trustees v. Bucci (In re Bucci)*, the Sixth Circuit determined this issue within the context of a bankruptcy proceeding.¹⁰⁵ Charles Bucci, president and sole shareholder of Floors by Bucci, signed a CBA on behalf of his company, requiring it to make monthly contributions to the employees' pension fund.¹⁰⁶ After failing to make the required contributions for more than

⁹⁹ See *Moulton Masonry*, 779 F.3d at 184; *Hall*, 334 F.3d at 1012.

¹⁰⁰ See, e.g., *Bos v. Bd. of Trs.*, 795 F.3d 1006, 1007 (9th Cir. 2015); *In re Bucci*, 493 F.3d 635, 637 (6th Cir. 2007); *In re Luna*, 406 F.3d 1192, 1197 (10th Cir. 2005).

¹⁰¹ See *McElligot & Wynne*, *supra* note 97.

¹⁰² *Bos*, 795 F.3d at 1008 (citing *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1190 (9th Cir. 2001)).

¹⁰³ *Id.* at 1011.

¹⁰⁴ See, e.g., *Bos*, 795 F.3d at 1007; *In re Bucci*, 493 F.3d at 637; *In re Luna*, 406 F.3d at 1197.

¹⁰⁵ 493 F.3d at 637.

¹⁰⁶ *Id.* at 637–38.

a year, Mr. Bucci filed a chapter 7 bankruptcy petition in his individual capacity and listed in his schedules a \$99,000 debt to the pension fund for unpaid contributions.¹⁰⁷ In response, the trustee, on behalf of the fund, filed an adversary proceeding in the bankruptcy court seeking a declaration that the unpaid contributions should not be discharged.¹⁰⁸

Mr. Bucci was the only officer and director of his company; made all corporate decisions; and did not separate his corporate and personal finances.¹⁰⁹ Thus, the plan trustee argued Mr. Bucci was the alter ego of his company and, as such, his failure to make the required contributions was a “defalcation while acting in a fiduciary capacity” under § 523(a)(4) of the Code.¹¹⁰ Even though Mr. Bucci conceded that he was the alter ego of his company, the court stated that a “defalcation is limited to situations where the parties to a creditor-debtor relationship intend for the debtor to act as a trustee of the monies owed.”¹¹¹

The bankruptcy court held that § 523(a)(4) did not apply because Mr. Bucci was not a fiduciary of the unpaid contributions.¹¹² While it was undisputed that Mr. Bucci was contractually obligated to make the contributions, the evidence did not show that Mr. Bucci acted as a trustee.¹¹³ The district court affirmed the bankruptcy court’s decision, determining ERISA did not apply under the premise that “being a fiduciary under ERISA’s broad definition of that term is not enough” to impute fiduciary status to an individual in a bankruptcy proceeding.¹¹⁴

On appeal, the Sixth Circuit had to consider whether the unpaid contributions were a nondischargeable debt under § 523(a)(4) since Mr. Bucci had previously conceded to being the alter ego of his company and therefore potentially liable for the unpaid contributions.¹¹⁵ The court defined

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 637.

¹⁰⁹ *Id.* at 638.

¹¹⁰ *Id.* at 637; *see also* 11 U.S.C. § 523(a)(4) (2012).

¹¹¹ *In re Bucci*, 493 F.3d at 638. The Sixth Circuit noted the bankruptcy court’s reliance on Sixth Circuit precedent that limited § 523(a)(4) “to only those situations involving an express or technical trust relationship arising from placement of a specific res in the hands of the debtor.” *In re Bucci*, No. 05-10195, 2006 WL 4458363, at *4 (Bankr. N.D. Ohio Mar. 24, 2006) (quoting *Commonwealth Land Title Co. v. Blaszkak* (*In re Blaszkak*), 397 F.3d 386, 391 (6th Cir. 2005) (quoting *R.E. Am., Inc. v. Garver* (*In re Garver*), 116 F.3d 176, 180 (6th Cir. 1997))), *aff’d sub nom.* Bd. of Trs. of Ohio Carpenters’ Pension Fund v. Bucci, 351 B.R. 876 (N.D. Ohio 2006), *aff’d sub nom. In re Bucci*, 493 F.3d 635 (6th Cir. 2007).

¹¹² *Id.* at 637.

¹¹³ *Id.* at 638.

¹¹⁴ *Id.* at 639.

¹¹⁵ *Id.*

“defalcation” as “encompass[ing] not only embezzlement and misappropriation by a fiduciary, but also the ‘failure to properly account for such funds.’”¹¹⁶ A debt is nondischargeable as a defalcation when the evidence shows: “(1) a preexisting fiduciary relationship; (2) breach of that fiduciary relationship; and (3) a resulting loss.”¹¹⁷ The court stated that it “construes the term ‘fiduciary capacity’ found in the defalcation provision of § 523(a)(4) more narrowly than the term is used in other circumstances.”¹¹⁸

Following the Supreme Court’s decision in *Davis v. Aetna Acceptance Co.*, in which the Court determined that an individual may be a fiduciary if he or she was a trustee before the “act of wrongdoing,”¹¹⁹ the Sixth Circuit noted that the defalcation provision applies only to “those situations involving an express or technical trust relationship arising from placement of a specific res in the hands of the debtor.”¹²⁰ To show that an express or technical trust relationship exists, a creditor must demonstrate: “(1) an intent to create a trust; (2) a trustee; (3) a trust res;¹²¹ and (4) a definite beneficiary.”¹²² The court also noted that it is possible for a statute to create a trust for purposes of § 523(a)(4) if it “defines the trust res, imposes duties on the trustee, and those duties exist prior to any act of wrongdoing.”¹²³

Implementing this analysis, the plan trustee argued that ERISA created an express trust because the employer contributions, classified as plan assets under ERISA, created the necessary trust res.¹²⁴ Further, Mr. Bucci was an ERISA trustee because “he exercised control over the assets by choosing to not pay the contributions.”¹²⁵ Lastly, ERISA imposed managerial duties on Mr. Bucci because it required him to hold the plan assets for his employees’ benefit.¹²⁶

¹¹⁶ *Id.* (quoting *Capitol Indemnity Corp. v. Interstate Agency, Inc.* (*In re Interstate Agency*), 760 F.2d 121, 125 (6th Cir. 1985)).

¹¹⁷ *Id.* (quoting *In re Blaszak*, 397 F.3d 386, 390 (6th Cir. 2005)).

¹¹⁸ *Id.* (quoting *In re Blaszak*, 397 F.3d at 391).

¹¹⁹ 293 U.S. 328, 333 (1934).

¹²⁰ *In re Bucci*, 493 F.3d at 639–40 (quoting *In re Garver*, 116 F.3d 176, 178 (6th Cir. 1997)); see *Davis*, 293 U.S. at 333.

¹²¹ Res, commonly referred to as corpus, is “[t]he property for which a trustee is responsible; the trust principal.” *Corpus*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹²² *In re Bucci*, 493 F.3d at 640 (quoting *In re Blaszak*, 397 F.3d at 391–92).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*; see also *Moore v. LaFayette Life Ins. Co.*, 458 F.3d 416, 438 (6th Cir. 2006) (defining an ERISA fiduciary as an individual “who exercises discretionary control or authority over a plan’s management, administration, or assets”).

¹²⁶ *In re Bucci*, 493 F.3d at 640.

In assessing this argument, the court made two important determinations. First, the court noted that neither of the lower courts addressed whether the employer contributions were indeed plan assets under ERISA.¹²⁷ Following the logic of the Eleventh Circuit, however, the court assumed the employer contributions were plan assets because Mr. Bucci and the pension fund's agreement specifically provided that "contributions due to be received are assets belonging to the fund."¹²⁸

Second, the court pointed out that the plan trustee did not argue the agreement itself made Mr. Bucci a trustee, but rather Mr. Bucci was an ERISA fiduciary because he exercised authority and control over the plan assets when he actively chose not to pay the contributions.¹²⁹ The court found this reasoning to be flawed and problematic because for a trust relationship to satisfy § 523(a)(4), the fiduciary "must have duties that preexist the act creating the debt."¹³⁰ Mr. Bucci's breach of his contractual obligation to make the employer contributions was simultaneously the act that created the debt and the exercise of control; therefore, Mr. Bucci was an ERISA fiduciary.¹³¹ Thus, the trust relationship "spr[ung] from the act from which the debt arose," and it therefore failed to create an express or technical trust for purposes of § 523(a)(4).¹³²

The court declined to extend ERISA's broad interpretation of fiduciary to the defalcation provision.¹³³ In bankruptcy proceedings, the court emphasized that individual debtors have "only a contractual obligation to pay the employer contributions," which is not enough to trigger the fiduciary component of the defalcation provision.¹³⁴ Thus, the unpaid contributions were a dischargeable debt in Mr. Bucci's bankruptcy proceeding.

¹²⁷ *Id.* at 642.

¹²⁸ *Id.*; see *ITPE Pension Fund v. Hall*, 334 F.3d 1011, 1013 (11th Cir. 2003) ("Traditionally, the proper rule, developed by caselaw, is that unpaid employer contributions are not assets of a fund unless the agreement between the fund and the employer specifically and clearly declares otherwise.").

¹²⁹ *In re Bucci*, 493 F.3d at 643.

¹³⁰ *Id.*; see *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934); *Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249, 252 (6th Cir. 1982).

¹³¹ *In re Bucci*, 493 F.3d at 643.

¹³² *Id.*

¹³³ *Id. But see In re Hemmeter*, 242 F.3d 1186, 1190 (9th Cir. 2001) (holding that "ERISA satisfies the traditional requirements for a statutory fiduciary to qualify as a fiduciary under § 523(a)(4)").

¹³⁴ *In re Bucci*, 493 F.3d at 643.

2. *The Tenth Circuit*

In *Navarre v. Luna (In re Luna)*, the Tenth Circuit also addressed this issue within the context of a bankruptcy proceeding.¹³⁵ In *In re Luna*, the Tenth Circuit determined that the unpaid contributions were a dischargeable debt in the debtor's bankruptcy.¹³⁶ Joyce and Mark Luna each owned 50% of Luna Steel Erectors. Ms. Luna was the company's president, secretary, and record-keeper, and Mr. Luna was the company's vice president.¹³⁷ Ms. Luna, acting as owner of the company, entered into a CBA with a local union, which obligated the company to make monthly contributions to the pension funds.¹³⁸ As with the other cases, the financial state of the company weakened, and the Lunas failed to make the required contributions.¹³⁹

In an effort to keep the company afloat, Ms. Luna withdrew \$43,000 from her IRA and \$7,000 in savings bonds and deposited it into the company bank account.¹⁴⁰ Further, Mr. Luna took out a personal loan for \$30,000 and lent it to the company.¹⁴¹ These cash advances proved to be futile, and the company was unable to reimburse the Lunas.¹⁴² Out of options, the Lunas agreed to dissolve the company.¹⁴³ Their growing financial obligations forced each of them to file chapter 7 bankruptcy petitions in their individual capacities.¹⁴⁴ At the time of their filing dates, more than \$120,000 was owed to the pension funds.¹⁴⁵ In response, the plan trustee filed suit in the United States Bankruptcy Court seeking a declaration that the Lunas be held personally liable for the unpaid contributions, and that the debt be classified as nondischargeable under § 523(a)(4).¹⁴⁶ Since the Lunas exclusively managed the plan assets, they exercised the necessary authority and control required to subject them to fiduciary status under ERISA.¹⁴⁷ The plan trustee asserted this classification

¹³⁵ 406 F.3d 1192, 1197 (10th Cir. 2005).

¹³⁶ *Id.* at 1199.

¹³⁷ *Id.* at 1197.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1198; *see* 29 U.S.C. § 1002(21)(A) (2012).

was enough for the Lunas also to be treated as fiduciaries under the defalcation provision.¹⁴⁸

The bankruptcy court disagreed, finding the unpaid contributions were not plan assets. The court found the plan trustee's argument to be incomplete because "while ERISA imposes fiduciary obligations under § 523(a)(4) of the Code, [] unpaid contributions do not constitute plan assets."¹⁴⁹ Since unpaid contributions must be classified as plan assets to trigger ERISA fiduciary status in this context, the court held that the Lunas had not engaged in defalcation, and the debt should be discharged in bankruptcy.¹⁵⁰ The plan trustee appealed, and the district court affirmed the decision of the bankruptcy court.¹⁵¹

After the district court affirmed the bankruptcy court's decision,¹⁵² the Tenth Circuit addressed two issues: (1) whether unpaid plan contributions were plan assets; and (2) whether the Lunas were fiduciaries.¹⁵³ First, the plan trustee argued that "unpaid contributions become plan assets at the time they become due and owing."¹⁵⁴ The Lunas, however, asserted that their obligation to make contributions was purely contractual because "contributions owed to the Pension Fund did not become plan assets until they [were] paid to it."¹⁵⁵

Since ERISA does not define what establishes an "asset" of an ERISA fund, the court began its analysis by looking at the plain meaning of the term "asset."¹⁵⁶ The court turned to Black's Law Dictionary, which defines "Asset" as "(1) an item that is owned and has value; (2) the entries on a balance sheet showing the items of property owned, including cash, inventory, equipment, real estate, accounts receivable, and good will; (3) all the property of a person available for paying debts."¹⁵⁷ The court interpreted the definition to mean "the person or entity holding the asset has an ownership interest in a given thing,

¹⁴⁸ *In re Luna*, 406 F.3d at 1198.

¹⁴⁹ *Id.* The plan trustee argued that the Lunas had engaged in "fraud or defalcation" while acting in a fiduciary capacity because they generated some income and incurred personal expenses during the time period that they failed to make the required contributions to the pension funds. *Id.* at 1197.

¹⁵⁰ *Id.* at 1198.

¹⁵¹ *Id.*

¹⁵² *Id.* (finding that "unpaid contributions do not become plan assets until they have been paid into particular funds").

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1199.

¹⁵⁷ *Id.* (quoting *Asset*, BLACK'S LAW DICTIONARY 112 (7th ed. 1999)).

whether tangible or intangible.”¹⁵⁸ To determine ownership interest, the court next looked to the common law of property.¹⁵⁹

While an ERISA plan does not have a “present interest” in the unpaid contributions until they are actually paid and received by the plan, it does hold a “future interest” in the “collection of the contractually-owed contributions.”¹⁶⁰ The court held the district court erred in finding that the unpaid contributions were not plan assets under ERISA.¹⁶¹ While its method departed from the Eleventh Circuit’s “contractual language approach,” the court recognized that “in some cases reference to the plan documents will aid in the determination of what constitutes a plan asset.”¹⁶² In this case, the language in the agreement concerning whether unpaid contributions were plan assets was unclear.¹⁶³ With this reasoning, the court created a novel interpretation of plan assets by recognizing them as the “contractual right to collect the unpaid contributions” instead of the unpaid contributions themselves.¹⁶⁴

Next, the court determined that the Lunas were not ERISA fiduciaries. In reaching this conclusion, the court had to consider whether the Lunas “exercise[d] any authority or control respecting management or disposition of [plan] assets.”¹⁶⁵ The court made two important findings in this assessment. First, the court stated: “The act of failing to make contributions to the funds cannot reasonably be construed as taking part in ‘management’ or ‘disposition’ of a plan asset.”¹⁶⁶ Since the court recognized the plan asset to be the *contractual right* to collect the unpaid contributions, not the unpaid contributions themselves, “[i]t is the Trustees, not the Lunas, who control the contractual right to collect unpaid contributions from the Lunas.”¹⁶⁷

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*; see U.S. Dep’t of Labor, Office of Pension & Welfare Benefit Programs (ERISA), Advisory Opinion No. 93-14A (May 5, 1993) (“The assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law. In general, the assets of a welfare plan would include any property, tangible or intangible, in which the plan has a beneficial ownership interest.”).

¹⁶⁰ *In re Luna*, 406 F.3d at 1199.

¹⁶¹ *Id.* at 1200.

¹⁶² *Id.* at 1200–01.

¹⁶³ *Id.* at 1201.

¹⁶⁴ *Id.* at 1204 (explaining that “even if the [plan] asset were the unpaid contributions themselves, it is still not clear that the statutory definition [of an ERISA fiduciary] would be met . . . there were never any earmarked funds or segregated account for the contributions.”).

¹⁶⁵ *Id.* at 1201; see 29 U.S.C. § 1002(21)(A)(i) (2012).

¹⁶⁶ *In re Luna*, 406 F.3d at 1204.

¹⁶⁷ *Id.* at 1206.

Second, the court determined that the Lunas' sole discretionary choice to not make the required contributions was insufficient to impose fiduciary status.¹⁶⁸ The Lunas "exercised no control over how the Trustees manage[d] or dispose[d] of that asset;"¹⁶⁹ their only duty under the agreement was to make the monthly contributions.¹⁷⁰ The Lunas' decision to use what money they had to pay other business expenses instead of contributing to the pension funds "was a business decision [and] not a breach of fiduciary duty."¹⁷¹ The court therefore held that the Lunas were "merely debtors" and not ERISA fiduciaries.¹⁷² Thus, the unpaid contributions were a dischargeable debt in bankruptcy.¹⁷³

3. *The Ninth Circuit*

The Ninth Circuit is the most recent circuit to address the issue, and the court opted to follow the approaches of the Sixth and Tenth Circuits. In *Bos v. Board of Trustees*, Gregory Bos was the president and owner of Bos Enterprises.¹⁷⁴ Mr. Bos, on behalf of the company, entered into the Carpenters' Master Agreement, which required the company to contribute monthly payments to the pension funds.¹⁷⁵ Soon afterward, Mr. Bos struggled financially and failed to make the required contributions.¹⁷⁶ Mr. Bos signed a promissory note personally guaranteeing the unpaid contributions, totaling \$359,592.09.¹⁷⁷ After Mr. Bos failed to make payments on the note, the board of trustees filed a grievance against Mr. Bos and the company to recover the unpaid contributions, and an arbitrator awarded the board \$504,282.59.¹⁷⁸ Mr. Bos and his spouse then filed a joint chapter 7 petition, and the board filed a complaint against Mr. Bos contesting the dischargeability of the \$504,282.59 in unpaid contributions under § 523(a)(4).¹⁷⁹

¹⁶⁸ *Id.* at 1208.

¹⁶⁹ *Id.* at 1204.

¹⁷⁰ *Id.* at 1206.

¹⁷¹ *Id.* at 1207–08 (emphasizing that the Lunas were trying to keep their company afloat in the face of depleting finances and were forced to prioritize which financial obligations were most important).

¹⁷² *Id.* at 1204–05.

¹⁷³ *Id.* at 1208.

¹⁷⁴ 795 F.3d 1006, 1007 (9th Cir. 2015).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1008.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* While Mr. Bos did make one payment for \$30,824.99 after signing the note, the remaining outstanding balance went unpaid. *Id.*

¹⁷⁹ *Id.*

Mr. Bos personally controlled the money that was contractually required to be paid to the pension funds under both the agreement and the promissory note.¹⁸⁰ Since the agreement “defined the funds as including contributions ‘required . . . to be made’ to the funds,” the bankruptcy court concluded that the unpaid contributions were plan assets.¹⁸¹ Thus, the court held that Mr. Bos “had committed defalcation while acting as a fiduciary of the funds and [] the \$504,282.59 debt to the funds was therefore nondischargeable.”¹⁸² The district court subsequently affirmed the decision of the bankruptcy court on the same grounds.¹⁸³ Mr. Bos appealed and argued that he was not a fiduciary under the defalcation provision.¹⁸⁴

The Ninth Circuit, following the reasoning of the Sixth Circuit, stated, “For a debt to be held nondischargeable under § 523(a)(4)’s defalcation provision, the debtor must have been a fiduciary prior to his commission of the fraud or defalcation.”¹⁸⁵ The act that created the debt therefore cannot be the same act creating the fiduciary relationship.¹⁸⁶ Further, in this circuit, “[i]f an individual is a fiduciary for purposes of [ERISA], the individual is also treated as a fiduciary for purposes of § 523(a)(4).”¹⁸⁷

The court also determined that the unpaid contributions were not plan assets,¹⁸⁸ ignoring the decisions of its district courts and adopting the reasoning from the Sixth and Tenth Circuits.¹⁸⁹

¹⁸⁰ *Id.* at 1009.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1008.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*; see *In re Hemmeter*, 242 F.3d 1186, 1190 (9th Cir. 2001).

¹⁸⁸ The Ninth Circuit has “consistently held that unpaid contributions by employers to employee benefit funds are not plan assets.” *Bos*, 795 F.3d at 1009; see *Cline v. Indus. Maint. Eng’g & Contracting Co.*, 200 F.3d 1223, 1234 (9th Cir. 2000). However, several district courts within the Ninth Circuit have deviated from the precedent set in *Cline* when “the plan document expressly defines the fund to include future payments.” *Bos*, 795 F.3d at 1009; see *Bd. of Trs. v. River View Constr.*, No. C-12-03514 PJH DMR, 2013 WL 2147418, at *6, 18 (N.D. Cal. 2013) (concluding that “when the plan document defined the fund as including ‘all contributions required . . . to be made,’ unpaid contributions were plan assets”); *Trs. of the S. Cal. Pipe Trades Health & Welfare Tr. Fund v. Temecula Mech., Inc.*, 438 F. Supp. 2d 1156, 1165 (C.D. Cal. 2006) (concluding that “when the plan document defined the fund as including money ‘due and owing to the fund by the employers,’ unpaid contributions were plan assets”). Under these circumstances, the courts have imputed ERISA fiduciary status to employers based upon their “control over unpaid contributions to the fund[s].” *Bos*, 795 F.3d at 1009.

¹⁸⁹ *Bos*, 795 F.3d at 1011–12.

In an attempt to avoid the problem of the same act creating both the wrongdoing and the fiduciary status, the board argued that “[the plan] asset could be classified as amounts which the employer must eventually contribute to the plan, but which are not yet due.”¹⁹⁰ The court rejected this argument, however, because “until the time payment is due, the plan does not actually possess the money, and in fact has no present right to it.”¹⁹¹ The plan asset is more appropriately classified as “the contractual right to bring a claim against the employer for delinquent payments if the payments are in fact never made.”¹⁹²

The court further noted that even if the language in the agreement and the promissory note dictated that unpaid contributions be classified as plan assets, the defalcation provision would remain inapplicable because Mr. Bos lacked control over the plan assets prior to his default.¹⁹³ Since neither the company nor Mr. Bos ever exercised control over the plan assets, the court held that “the unpaid contributions to employee benefit funds are not plan assets [and] [Mr.] Bos did not engage in defalcation for purposes of § 523(a)(4).”¹⁹⁴ Thus, the unpaid contributions were a dischargeable debt in bankruptcy.¹⁹⁵

The key issue here that courts seem to be misunderstanding is that the extension of the reasoning purported by both the Second and Eleventh Circuits does not necessarily mean that every fiduciary debtor who finds himself or herself in such an unfortunate situation will be slammed with nondischargeable debt.¹⁹⁶ One of the fundamental goals of the bankruptcy system is “[to give] the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.”¹⁹⁷ The fresh start is an important social policy; however, courts should not construe it so broadly that we throw away our ability to hold dishonest debtors accountable for their misdeeds against others.

¹⁹⁰ *Id.* at 1011.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 1012.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See *Chao v. Duncan (In re Duncan)*, 331 B.R. 70, 82 (Bankr. E.D.N.Y. 2005) (“[Not] every debt arising from or related to an ERISA violation by an ERISA fiduciary will be excepted from discharge by Section 523(a)(4).”).

¹⁹⁷ *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

II. ANALYSIS

Courts should adopt a three-step approach to determine whether an employer's unpaid contributions to employee benefit funds are dischargeable in bankruptcy. First, courts should treat CBAs like other contractual agreements and enforce provisions that designate employer contributions as plan assets. This Comment will demonstrate that while a collectively bargained agreement for a multiemployer pension plan is different from a typical contractual agreement, the normal rules and guidelines of contract law still apply. Where the provisions of a contract are unclear, courts try to determine, and enforce, the intent of the parties. Courts should apply the same principles of contract interpretation in these scenarios and find that where a CBA clearly designates employer contributions as plan assets, parties to the agreement intended for that provision to be fully upheld.

Second, in a bankruptcy proceeding, courts should presume the term "fiduciary" is consistent in both ERISA and the Code. Third, courts should adopt the Supreme Court's narrow reading of the defalcation provision. This Comment will demonstrate that this narrow reading provides an avenue of relief for employees who have been wronged by dishonest debtors while simultaneously preserving an honest debtor's fresh start in bankruptcy.

This three-step approach will bring clarity to an already muddled and complex area of the law and ensure that dishonest debtors are held accountable under § 523(a)(4) for their willful and conscious disregard of the fiduciary duties owed to dependent employees.

A. Courts Should Defer to the Intent of the Parties

1. Collective Bargaining Agreements Are "Super Contracts"

When a CBA specifically defines that all employer contributions are plan assets, courts should preserve contractual intent. The Supreme Court has stated that "a collective bargaining agreement is not an ordinary contract."¹⁹⁸ In fact, "the collective agreement may have more 'contractualness' than many other bargained transactions."¹⁹⁹ The collective agreement is not a standard contract used purely to sell a commodity or ensure the repayment of a loan.²⁰⁰ Instead,

¹⁹⁸ John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550 (1964).

¹⁹⁹ Clyde W. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 534 (1969).

²⁰⁰ See *id.*

one multiemployer agreement often binds hundreds of employers and their employees while simultaneously guiding the parties through an ongoing employment relationship and covering many facets of their particularized industry.²⁰¹ Thus, “the collective agreement is pre-eminently an instrument of private planning, and its qualities of complexity and continuity reflect the importance of its planning function.”²⁰² In fact, “[w]hen measured against the complexity of the relationship they govern, collective agreements provide more detailed planning and make more complete provision for contingencies, both foreseen and unforeseen, than many of the commercial contracts”²⁰³

In other words, CBAs are “super contracts” because of their complexity and the number of people they affect. When problems arise under a CBA, the ramifications are huge because of the number of people affected.²⁰⁴ The employer and the individuals representing the employees must carefully negotiate and plan the terms that will govern for many years to come—potentially even decades.²⁰⁵

Despite the parties’ best efforts to be meticulous, however, the resulting CBA “cannot possibly provide for the myriad of variant situations which might arise” because of “the diverse congeries of matters” that the agreement covers.²⁰⁶ Since CBAs contemplate nearly every aspect of the employment relationship,²⁰⁷ a faulty or ambiguous provision does not lead to an end of the agreement or relationship. The parties must remedy the problem so the show can go on.

Because of the nature of CBAs, if an agreement clearly states that plan assets include unpaid contributions, then the language in the agreement should govern. In an atmosphere filled with “pressures to reach a settlement,” courts should take the unambiguous language of a CBA at face value so the parties can better focus on the inevitable gaps and ambiguities that may give rise to extensive litigation.²⁰⁸ The majority of litigation surrounding CBAs arises because “the officers of the union, or management, or both, are unwilling to

²⁰¹ *See id.* at 528.

²⁰² *Id.* at 534.

²⁰³ *Id.* at 535.

²⁰⁴ *See id.* at 529.

²⁰⁵ *See id.* at 530.

²⁰⁶ *Id.* at 529.

²⁰⁷ *Id.* at 528.

²⁰⁸ *See id.* at 529.

accept responsibility for agreeing to an inescapable result.”²⁰⁹ But, “[i]t is not the province of the court to rewrite an agreement to rectify an ambiguity, to avoid hardship to a party, or because one party has become dissatisfied with its terms.”²¹⁰ When courts interpret CBAs, “the traditional rules of contract interpretation apply as long as they are consistent with federal labor policies.”²¹¹ Since “[t]he text of ERISA does not give a relevant definition for what constitutes an ‘asset’ of an ERISA fund,” the natural next step, therefore, is for the courts to defer to the intent of the parties.²¹²

2. *Unpaid Contributions Are Plan Assets when Accompanied with Clear Language*

Despite the general rule that unpaid contributions are not plan assets,²¹³ we have seen that five circuits²¹⁴ have either classified unpaid contributions as plan assets or hypothesized the possibility that unpaid contributions could be plan assets under certain circumstances. The hesitation of full recognition arises when a bankruptcy proceeding accompanies the issues at hand.²¹⁵ This hesitation is unwarranted, however, since courts can evaluate each issue individually before deciding whether to hold a debtor liable for defalcation.

Because the first step in a bankruptcy case involving a debtor’s unpaid contributions is to determine whether the delinquent contributions are plan assets, courts should adopt the reasoning of the Second and Eleventh Circuits and simply look to the governing agreement for clear, specific language that classifies unpaid employer contributions as plan assets.²¹⁶ This determination is important because ERISA provides fiduciary responsibilities for those managing and controlling plan assets.²¹⁷ If the language is present, then the

²⁰⁹ *Id.* at 536.

²¹⁰ *Young v. Anne Arundel Cty.*, 146 Md. App. 526, 587 (Md. Ct. Spec. App. 1992).

²¹¹ *Aeronautical Indus. Dist. Lodge 91 v. United Tech. Corp.*, 230 F.3d 569, 576 (2d Cir. 2000).

²¹² *See ITPE Pension Fund v. Hall*, 334 F.3d 1011, 1013 (11th Cir. 2003).

²¹³ *See Cline v. Indus. Maint. Eng’g & Contracting Co.*, 200 F.3d 1233, 1234 (9th Cir. 2000).

²¹⁴ *See Bos v. Bd. of Trs.*, 795 F.3d 1006, 1007 (9th Cir. 2015); *Bricklayers & Allied Craftworkers Local 2 v. Moulton Masonry & Constr., LLC*, 779 F.3d 182, 184 (2d Cir. 2015); *In re Bucci*, 493 F.3d 635, 637 (6th Cir. 2007); *In re Luna*, 406 F.3d 1192, 1197 (10th Cir. 2005); *Hall*, 334 F.3d at 1012.

²¹⁵ *See Bos*, 795 F.3d at 1007.

²¹⁶ *See, e.g., Hall*, 334 F.3d at 1012; *Trs. of Constr. Indus. v. Archie*, No. 2:12–CV–225 JCM (VCF), 2014 WL 846498, at *4 (D. Nev. 2014) (holding that unpaid contributions were plan assets based upon the language in the agreement); *Galgay v. Gangloff*, 677 F. Supp. 295, 301 (M.D. Penn. 1987) (declaring that the “clear and undisputed language [of the agreement] stating [] title to all monies ‘due and owing’ the plaintiff fund is ‘vested’ in the fund,” thereby classifying “any delinquent employer contributions vested assets of the plaintiff fund”).

²¹⁷ *Health Plans & Benefits*, *supra* note 48.

unpaid contributions are plan assets. If the language is not present, then the default rule²¹⁸ prevails; the unpaid contributions are not plan assets; and the inquiry ends.

With this approach in mind, “[t]rustees seeking to maximize the trust fund’s ability to collect employer contributions should explicitly define in the plan documents and agreements with employers that plan assets include all unpaid employer contributions in the hands of the employer.”²¹⁹ While the recognition of unpaid contributions as plan assets places “heavy responsibilities on employers,” it only does so “to the extent that . . . an employer freely accept[ed] those responsibilities in collective bargaining.”²²⁰ Indeed, many plan documents define plan assets to include all required contributions. A court’s progression to step two *infra* is therefore highly likely.²²¹

This approach would produce two benefits. First, not only does this approach provide clarification for courts by offering a hard line rule for determining whether unpaid contributions are plan assets, but it also spares employees and employers from having to dedicate time, energy, and resources to litigation over unambiguous contract language. Second, this method is consistent with the traditional rules of contract interpretation, which require courts to give deference to the unambiguous language of an agreement.²²² It is clear, then, that courts should adopt a different approach when determining the dischargeability of a debtor’s unpaid contributions, but this step is just the first in this inquiry.

²¹⁸ See EMPLOYEE BENEFITS SEC. ADMIN., U.S. DEP’T OF LABOR, FIELD ASSISTANCE BULLETIN 2008-1 1 (Feb. 1, 2008) (“Employer contributions become an asset of the plan only when the contribution has been made.”).

²¹⁹ Neal S. Schelberg & Aaron J. Feuer, *Fiduciary Liability for Unpaid Employer Contributions*, 51 BENEFITS MAG., Aug. 2014, at 42, 45, <http://www.ifebp.org/inforequest/ifebp/0165697.pdf>.

²²⁰ *Hall*, 334 F.3d at 1014 (citing *NYSA-ILA Med. & Clinical Servs. Fund ex rel. Capo v. Catucci*, 60 F. Supp. 2d 194, 201 (S.D.N.Y. 1999)).

²²¹ See *McElligott Jr. & Wynne*, *supra* note 97.

²²² See *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 929 (2015); see also WILLISTON ON CONTRACTS, § 30:6 (4th ed. 2009) (“When a collective-bargaining agreement is unambiguous, its meaning must be ascertained in accordance with its plainly expressed intent.”).

B. Presumption of Consistent Usage of “Fiduciary” Under ERISA and the Code

Second, courts should presume the term “fiduciary” is consistent in both ERISA and the Code in a bankruptcy proceeding.²²³ This section proceeds in three parts. First, it will examine what it means to be an ERISA fiduciary and explain how the circuit courts have applied the guiding language of ERISA in nonbankruptcy proceedings. Second, it will discuss what it means to be a fiduciary under the Code and assess how the circuit courts have refrained from imputing ERISA fiduciary status to debtors in bankruptcy proceedings. Third, it will argue that courts should presume that “fiduciary” has a consistent meaning under both ERISA and the Code.

1. ERISA: Construing “Fiduciary” Broadly

After determining that unpaid contributions are plan assets, courts should next assess whether the individual is an ERISA fiduciary. Each employee benefit fund must appoint “one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.”²²⁴ Aside from these designated fiduciaries, “individuals may acquire fiduciary status if they exercise the fiduciary functions set forth [under ERISA].”²²⁵ Recall that ERISA defines a “fiduciary” as an individual who “exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its asset.”²²⁶

Further, an ERISA fiduciary can also be any individual exercising “discretionary authority or discretionary responsibility in the administration of such plan.”²²⁷ The common activities of ERISA fiduciaries include “providing

²²³ While this section ultimately argues for a presumption of consistent usage for the term “fiduciary,” the best way for parties to avoid this part of the analysis in court is to obligate the individuals who will be making the employer contributions to take on fiduciary duties within the contract. If the contract explicitly names these individuals as fiduciaries, then there will be no need for further discussion, and the court can proceed to step three *infra*. See *In re Luna*, 406 F.3d 1192, 1202 (10th Cir. 2005) (“Assessing whether a person is a named fiduciary under the terms of a plan is, of course, a straightforward inquiry. Deciding whether a person has assumed functional or de facto fiduciary status, however, is a more difficult exercise.”). This Comment will assume, however, that the individuals charged with making employer contributions were not designated as fiduciaries in the governing agreement.

²²⁴ 29 U.S.C. § 102(a) (2012).

²²⁵ *In re Luna*, 406 F.3d at 1201; see 29 U.S.C. § 1002(21)(A).

²²⁶ 29 U.S.C. § 1002(21)(A)(i).

²²⁷ *Id.* § 1002(21)(A)(iii).

investment advice, administrative control over a plan, advising on whom to retain as legal or investment advisors to a plan, and, ultimately, how to invest plan assets.”²²⁸ Thus, the relevant question becomes whether the owner, or potentially any officer or executive, exercised “control and authority” over the unpaid contributions.²²⁹ If so, then the individual satisfies the requirements of an ERISA fiduciary and becomes personally liable for the unpaid contributions.²³⁰

The circuit courts are inconsistent in determining what forms of conduct constitute exercising “control and authority” over unpaid contributions, as decisions from the Second and Eleventh Circuits demonstrate. In *Bricklayers & Allied Craftworkers Local 2 v. Moulton Masonry & Construction*, the Second Circuit found that an individual exercises control or authority when that individual knowingly “determin[es] which of the company’s creditors w[ill] be paid or in what order.”²³¹ Thus, if the individual controlling the company’s finances fails to make the monetary contributions owed to the funds, then the individual has sufficiently exercised control or authority over the unpaid contributions.²³² That individual will therefore be held liable for the debt as an ERISA fiduciary.²³³

In *ITPE Pension Fund v. Hall*, the Eleventh Circuit remanded the case to the district court to determine whether the parties intended for unpaid contributions to be plan assets.²³⁴ The court noted, however, that it would have followed an approach similar to the Second Circuit’s in *Moulton Masonry* if the contractual language had clearly stated that unpaid contributions were plan assets.²³⁵

²²⁸ *In re Luna*, 406 F.3d at 1201; *see also* *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142–43 (1985) (stating that ERISA fiduciary duties “relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest”).

²²⁹ *See* *ITPE Pension Fund v. Hall*, 334 F.3d 1011, 1012 (11th Cir. 2003); 29 U.S.C. § 1002(21)(A).

²³⁰ *See* *Bricklayers & Allied Craftworkers Local 2 v. Moulton Masonry & Constr., LLC*, 779 F.3d 182, 188 (2d Cir. 2015).

²³¹ *Id.* (quoting *Finkel v. Romanowicz*, 577 F.3d 79, 86 (2d. Cir. 2009)).

²³² *See id.* at 189.

²³³ *Id.*

²³⁴ *See* *Hall*, 334 F.3d at 1016 (“If the district court finds that this section was clearly intended by the parties to make unpaid employer contributions assets of the Fund, then summary judgment . . . is not appropriate.”).

²³⁵ *See id.*

2. *The Code: Construing “Fiduciary” Narrowly*

While the Code does not define “fiduciary,” the Supreme Court in *Davis v. Aetna Acceptance Co.* mandated that the term be construed “strict[ly] and narrow[ly].”²³⁶ Thus, unlike ERISA’s broad definition of “fiduciary,” the term has a much more limited meaning under the Code’s defalcation provision.²³⁷ Because the receipt of a discharge is essential for facilitating a debtor’s fresh start, courts narrowly construe exceptions to discharge under the Code.²³⁸ Commentators have interpreted *Davis* to provide “the framework for determining whether a debt arises from a fiduciary relationship that satisfies the fiduciary-capacity element of § 523(a)(4).”²³⁹ The Court stated, “[i]t is not enough that by the very act of wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as a trustee *ex maleficio*. He must have been a trustee before the wrong and without reference thereto.”²⁴⁰ In other words, bankruptcy law demands that an individual’s fiduciary status predate any wrongdoing or debt that arises because of an action by the individual. The creation of the debt or an act of wrongdoing does not itself make the individual a fiduciary for purposes of § 523(a)(4).

In contrast, the Sixth, Ninth, and Tenth Circuits have taken a drastically different approach when deciding the fiduciary status of a debtor in bankruptcy.²⁴¹ The Tenth Circuit in *In re Luna*, when given the first opportunity to examine this issue in the bankruptcy context, declined to use the language governing the agreement to determine step one: the status of unpaid contributions; the court turned to the principles of property law instead.²⁴² In doing so, the court still found that the unpaid contributions were plan assets, but only because the ERISA plan possessed “a future interest in the collection

²³⁶ 293 U.S. 328, 333 (1934); *see also* *Chapman v. Forsyth*, 43 U.S. 202, 208 (1844) (holding that a factor who retains the money of his principal is not a fiduciary debtor under bankruptcy law because the law “speaks of technical trusts and not those which the law implies from contract”). *See generally* Emil Khatchatourian & Brendan M. Gage, *Unpaid ERISA Contributions and Fiduciary Liability Under § 523(a)(4)*, 32 AM. BANKR. INST. J., Nov. 2013 at 52, Westlaw, 32-Nov. Am. Bankr. Inst. J. 52.

²³⁷ Khatchatourian & Gage, *supra* note 236, at 52.

²³⁸ *See In re Stone*, 91 B.R. 589, 591 (D. Utah 1988) (“A central purpose of bankruptcy legislation is to provide the debtor with comprehensive relief from the burden of his debts by discharging virtually all financial obligations. Therefore, courts have narrowly construed exceptions to discharge in favor of the debtor in order to not frustrate this fundamental policy . . .”).

²³⁹ Khatchatourian & Gage, *supra* note 236, at 52.

²⁴⁰ *Davis*, 293 U.S. at 333; *see also* *Upshur v. Briscoe*, 138 U.S. 365, 378 (1891) (“The language would seem to apply only to a debt created by a person who was already a fiduciary when the debt was created.”).

²⁴¹ *See Bos v. Bd. of Trs.*, 795 F.3d 1006, 1011–12 (9th Cir. 2015); *In re Bucci*, 493 F.3d 635, 643 (6th Cir. 2007); *In re Luna*, 406 F.3d 1192, 1201 (10th Cir. 2005).

²⁴² 406 F.3d at 1199.

of the contractually owed contributions.”²⁴³ Thus, when deciding if an individual debtor exercised authority or control over the unpaid contributions, the court held that such a finding would be improbable.²⁴⁴

By this logic, the trustees of the plan, not the debtor, controlled the contractual right to collect the unpaid contributions from the debtor.²⁴⁵ The plan trustees’ right to “enforce their contractual rights is entirely up to [them]; the [debtors], meanwhile, have no say over whether this right will be enforced or not.”²⁴⁶ In reaching this decision, the court stated that “ERISA’s definition of ‘fiduciary’ is broad but . . . Congress did not intend [for discretion alone to trigger fiduciary status], for it would . . . undermine the very purpose of ERISA by creating an enormous disincentive to offer an employee-benefit fund or contract with one.”²⁴⁷

Two years later, the Sixth Circuit in *In re Bucci* advanced the notion that a debtor’s status as an ERISA fiduciary is different from its status as a fiduciary under the defalcation provision of the Code.²⁴⁸ The court determined that to be a fiduciary under § 523(a)(4), “the alleged fiduciary must have duties that preexist the act creating the debt.”²⁴⁹ Thus, while an individual’s decision to refrain from making required payments to the funds is enough to trigger fiduciary status under ERISA, this decision, without more, is unable to make the debtor a fiduciary for purposes of § 523(a)(4).²⁵⁰ This interpretation of “fiduciary” is consistent with the court’s long history of “constru[ing] the term ‘fiduciary capacity’ found in the defalcation provision of § 523(a)(4) more narrowly than the term is used in other circumstances.”²⁵¹

In 2015, the Ninth Circuit in *Bos v. Board of Trustees* agreed with the Tenth Circuit’s holding in *In re Luna* by finding that unpaid contributions are “more appropriately classified as the contractual right to bring a claim against the employer for delinquent payments if the payments are in fact never made.”²⁵² Thus, the “control or authority” over the asset belongs to the plan

²⁴³ *See id.*

²⁴⁴ *See id.* at 1202.

²⁴⁵ *See id.*

²⁴⁶ *See id.*

²⁴⁷ *See id.* at 1208.

²⁴⁸ 493 F.3d 635, 643 (6th Cir. 2007).

²⁴⁹ *Id.*

²⁵⁰ *See id.*

²⁵¹ *Id.* at 639.

²⁵² *Bos v. Bd. of Trs.*, 795 F.3d 1006, 1011 (9th Cir. 2015).

trustees, not the employer.²⁵³ Further, and coinciding with the court's "limited approach . . . in recognizing fiduciary status . . . in the § 523(a)(4) context," it also found merit in the Sixth Circuit's reasoning, which distinguished the definition of an ERISA fiduciary from a fiduciary for purposes of § 523(a)(4).²⁵⁴

3. *Two Become One*

Because the fundamental purpose of bankruptcy law is to facilitate a fresh start for the honest but unfortunate debtor, scholars have argued that "[t]he *Davis* fiduciary analysis must be distinguished from ERISA's definition of a fiduciary."²⁵⁵ While this argument has merit, it ultimately threatens and disfavors the protections afforded to employees under ERISA. Thus, the issue necessarily becomes one of reconciliation. What are courts to do in the face of conflicting federal laws and social policies? While "[t]here is no way to predict with certainty how the Court [would] resolve a conflict between competing federal laws . . . [t]he resolution of this conflict usually depends on whether the majority of Justices view the question presented primarily from the perspective of bankruptcy law or non-bankruptcy law."²⁵⁶ The Supreme Court should view the "fiduciary conflict" primarily from the perspective of ERISA.²⁵⁷ In other words, the Court should insist on a presumption of consistent usage for the term "fiduciary" for purposes of ERISA and the Code to give employees an opportunity to fight another day in this uphill battle.

In recent decades, "the [Supreme] Court has decided a few cases resolving the conflict between bankruptcy law and pension law."²⁵⁸ While both laws serve important policies and functions, the Court "has uniformly resolved these conflicting policies in favor of the pension law . . ." In *Patterson v. Shumate*, the Court held that "an ERISA-qualified pension plan may be excluded from

²⁵³ See *id.* at 1011–12.

²⁵⁴ See *id.* at 1011.

²⁵⁵ Khatchaturian & Gage, *supra* note 236, at 52. But see *In re Fahey*, 482 B.R. 678, 695 (B.A.P. 1st Cir. 2012) ("[W]here the debt arises from an ERISA fiduciary acting in his fiduciary capacity under that statute, then § 523(a)(4)'s 'fiduciary capacity' requirement will be met."); *In re Duncan*, 331 B.R. 70, 82 (Bankr. E.D.N.Y. 2005) ("[I]t seems reasonable and appropriate to look to ERISA's definition of a fiduciary in order to assess whether the requirement of fiduciary capacity has been met.")

²⁵⁶ KENNETH N. KLEE, *BANKRUPTCY AND THE SUPREME COURT* 60 (2008).

²⁵⁷ See *In re Duncan*, 331 B.R. at 82 ("[I]t is routine to give meaning to Bankruptcy Code terms by reference to non-bankruptcy law."). See *infra* discussion step three, applying § 523(a)(4) and ultimately determining whether the unpaid contributions will be a nondischargeable debt.

²⁵⁸ KLEE, *supra* note 256, at 80.

the property of the bankruptcy estate pursuant to § 541(c)(2).”²⁵⁹ While this decision undoubtedly limits a creditor’s ability to reach a debtor’s assets, the Court’s ruling preserves an individual’s retirement benefits. This holding is “consistent with both bankruptcy and ERISA policies” because, in theory, a creditor will benefit from the assets that comprise property of the debtor’s estate.²⁶⁰ The Court’s opinion effectively furthered three important ERISA policies: “[1] no exceptions to ERISA’s anti-alienation provisions; [2] ERISA’s goal of protecting pension benefits; and [3] *uniform national treatment of pension benefits*.”²⁶¹ The third policy the Court listed is by far the most important ERISA goal, for without uniform national treatment of pension benefits, we regress as a society and fail the American worker.²⁶²

Courts’ insistence on separating the meaning of fiduciary in the bankruptcy context from its meaning under ERISA is unnecessary and confusing. On the one hand, it is important for courts to construe § 523(a)(4) narrowly. When an individual employer files for bankruptcy, certainly “Congress [did not mean] to impose fiduciary obligations on all employer-contributors.”²⁶³ In bankruptcy, “unless [the debtor] has violated some norm of behavior specified [under the Code],” the law attempts to contrive the best way for the parties involved to move forward.²⁶⁴ Thus, “the principal advantage bankruptcy offers an individual lies in the benefits associated with discharge.”²⁶⁵ If the court deprives a debtor of a discharge, then it robs the debtor of the opportunity to rebuild.

On the other hand, “it is important to have a uniform interpretation of federal law.”²⁶⁶ While bankruptcy law contains its own unique set of circumstances, procedures, and policies, there is no need for “fiduciary” to have a different meaning within this context. “Uniform treatment . . . by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving ‘a windfall merely by reason of the happenstance of bankruptcy.’”²⁶⁷ Thus, courts should

²⁵⁹ 504 U.S. 753, 765 (1992).

²⁶⁰ KLEE, *supra* note 256, at 88; *see Patterson*, 504 U.S. at 758.

²⁶¹ KLEE, *supra* note 256, at 88; *see Patterson*, 504 U.S. at 764–65 (emphasis added).

²⁶² *See supra* notes 39–44 and accompanying text.

²⁶³ *In re Luna*, 406 F.3d 1192, 1208 (10th Cir. 2005).

²⁶⁴ Jackson, *supra* note 23, at 1393.

²⁶⁵ *Id.*

²⁶⁶ *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1761 (2013).

²⁶⁷ *Butner v. United States*, 440 U.S. 48, 55 (1979) (quoting *Lewis v. Mfrs. Nat’l Bank*, 364 U.S. 603, 609 (1961)).

extend the reasoning of both the Second and Eleventh Circuits so that the ERISA definition of “fiduciary” is preserved in the bankruptcy context. In other words, “being an ERISA fiduciary is sufficient to satisfy the fiduciary capacity requirement of § 523(a)(4).”²⁶⁸

It is important to remember that Congress, “prompted by public outcry over inadequacies in the private pension system, enacted ERISA as a means of protecting employees’ retirement income.”²⁶⁹ ERISA’s objectives are “to increase the number of pension plan participants and to assure that participants receive their benefits.”²⁷⁰ To achieve this goal, “ERISA’s declared policy is to protect the interests of participants through the creation of standards for disclosure, fiduciary obligations, vesting, funding and plan termination insurance.”²⁷¹ ERISA is a broad, remedial statute that addresses violations with both civil remedies and criminal penalties.²⁷² Thus, to declare that contract law is an employee’s best and only means to receive unpaid contributions undermines the very purpose of ERISA and the efforts of Congress in passing such a complex and remedial statute.

By giving ERISA the broad interpretation it deserves, courts should consider an individual who possesses the ability to refrain from making payments owed to the funds an ERISA fiduciary. When such an individual neglects to pay the funds, and, in turn, directs the money elsewhere, he or she is absolutely “exercis[ing] . . . discretionary authority or discretionary control respecting management of such plan or . . . disposition of its asset.”²⁷³ While this broad interpretation undoubtedly places great responsibility on employers, it does so only “to the extent that . . . an employer freely accept[ed] [such a responsibility] in collective bargaining.”²⁷⁴ If, after weighing the risks, the employer does not wish to take on such responsibility, then the employer should, during the bargaining process, object to the inclusion of any language in the agreement classifying unpaid contributions as plan assets. As indicated

²⁶⁸ *In re Bucci*, 493 F.3d 635, 640 (6th Cir. 2007); see *In re Hemmeter*, 242 F.3d 1186 (9th Cir. 2001) (holding that “an ERISA fiduciary is also a fiduciary under § 523(a)(4)”; see also *In re Duncan*, 331 B.R. 70, 82 (Bankr. E.D.N.Y. 2005); *Weaver v. Weston (In re Weston)*, 307 B.R. 340, 343 (Bankr. D.N.H. 2004); *Morgan v. Musgrove (In re Musgrove)*, 187 B.R. 808, 814 (Bankr. N.D. Ga. 1995).

²⁶⁹ Gail Cagney, Note, *Corporate Officers as Employers: ERISA Liability Under ERISA*, 52 BROOK. L. REV. 1211, 1212 (1987).

²⁷⁰ *Id.* at 1214.

²⁷¹ *Id.*

²⁷² *Id.* at 1215.

²⁷³ 29 U.S.C. § 1002(21)(A)(i) (2012).

²⁷⁴ *ITPE Pension Fund v. Hall*, 334 F.3d 1011, 1014 (11th Cir. 2003) (citing *NYSA-ILA Med. & Clinical Servs. Fund ex rel. Capo v. Catucci*, 60 F. Supp. 2d 194, 201 (S.D.N.Y. 1999)).

in step one, if unpaid contributions are not plan assets, then the delinquent employer cannot be imputed fiduciary duties within this context. Thus, this approach increases employees' chances of receiving the money owed to their retirement accounts, while also protecting employers from an overarching statute assigning liability not agreed upon by the parties.²⁷⁵

Assigning fiduciary status to an individual who has knowingly failed to make contributions to employee benefit funds does not, in and of itself, make that individual's debt nondischargeable in bankruptcy.²⁷⁶ Thus, as the Supreme Court noted in *Patterson*, such a construction would be "consistent with both bankruptcy and ERISA policies."²⁷⁷ This broader definition of fiduciary simply safeguards the purpose of ERISA, which is to ensure that employees receive the benefits they deserve.²⁷⁸ Under this approach, courts can and should prevent debtors who willfully breached²⁷⁹ fiduciary duties to their employees from having the unpaid contributions discharged in bankruptcy. At the same time, courts will remain able to protect the honest debtor from his creditors because of the Supreme Court's narrow reading of the defalcation provision discussed in the next section.

C. *The Defalcation Provision and Nondischargeable Debts*

The third and final step for courts to determine is whether the debtor is liable for defalcation. To reach this point, the court must have done two things: (1) found unambiguous language in the CBA that makes unpaid contributions plan assets; and (2) preserved the definition of fiduciary under ERISA by

²⁷⁵ See *id.* at 1015 (quoting *Herman v. NationsBank Tr. Co.*, 126 F.3d 1354, 1366 (11th Cir. 1997)). The court stated:

If ERISA did not limit the definition of fiduciaries to those with knowledge of their authority and discretion, then persons or entities could become subject to fiduciary liability without notice. Such a result would not only be unfair, but it would also disserve a core purpose of ERISA, which is to create a system whereby accountable fiduciaries are motivated by their accountability to protect the interests of participants in ERISA plans.

Id.

²⁷⁶ See *In re Duncan*, 331 B.R. 70, 82 (Bankr. E.D.N.Y. 2005) ("[I]n the Section 523(a)(4) context, it seems reasonable and appropriate to look to ERISA's definition of a fiduciary in order to assess whether the requirement of fiduciary capacity has been met. This does not mean that every debt arising from or related to an ERISA violation by an ERISA fiduciary will be excepted from discharge by Section 523(a)(4). But where the debt arises from an ERISA fiduciary acting in his or her fiduciary capacity under the statute, then Section 523(a)(4)'s requirement that the debtor act in a fiduciary capacity will be met.").

²⁷⁷ *Patterson v. Shumate*, 504 U.S. 753, 758 (1992); see KLEE, *supra* note 256, at 88.

²⁷⁸ See Cagney, *supra* note 269, at 1214.

²⁷⁹ See *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1759 (2013).

extending it to the bankruptcy proceeding. In other words, the debtor has knowingly refrained from making contributions to the employee benefit funds and has been imputed fiduciary status under ERISA, which the court agrees to recognize in bankruptcy. Courts should determine whether the debtor is liable for defalcation on a case-by-case basis after evaluating the totality of the circumstances and by keeping in mind the purposes of both ERISA and the Code.²⁸⁰

Denying a discharge for a debt created by an individual's improper conduct has a long history in American jurisprudence.²⁸¹ The term "defalcation" first appeared in bankruptcy law in 1841 to prohibit the discharge of debts "created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity."²⁸² In *Central Hanover Bank & Trust Co. v. Herbst*, Judge Learned Hand famously stated: "Colloquially, perhaps the word, '[d]efalcation,' ordinarily implies some moral dereliction, but in th[e] context [of the 1841 Act] it may have included innocent defaults, so as to include all fiduciaries who for any reason were short in their accounts."²⁸³ However, Judge Hand noted that the Supreme Court in *Chapman v. Forsyth* limited the meaning of fiduciary to "special" or "technical" fiduciaries.²⁸⁴

The Bankruptcy Act of 1867 simplified the existing defalcation provision to "defalcation as a public officer, or while acting in *any* fiduciary character."²⁸⁵ Additionally, the 1867 Act expanded the defalcation provision to any "debt created by the fraud or embezzlement of the bankrupt" directly before the defalcation provision.²⁸⁶ With these revisions, Judge Hand pondered that "[w]hatever was the original meaning of 'defalcation,' it must here have covered other defaults than deliberate malversations, else it added nothing to

²⁸⁰ See Cagney, *supra* note 269, at 1214; Jackson, *supra* note 23, at 1393 ("THE principal advantage bankruptcy offers an individual lies in the benefits associated with discharge.").

²⁸¹ See *Cent. Hanover Bank & Tr. Co. v. Herbst*, 93 F.2d 510, 511 (2d Cir. 1937) ("Under the Act of 1800 . . . a discharge relieved bankrupts of all their debts without exception, provided they conducted themselves properly; but the statute applied only to those engaged in commerce and was confined to involuntary bankruptcies."). In 1841, Congress extended this reasoning to voluntary bankruptcy proceedings. *Id.* (Ch. 9, § 4, 5 Stat. 440, 443 (1841) (repealed 1843) [hereinafter 1841 Act]).

²⁸² *Id.* (citing 1841 Act, § 1, 5 Stat. at 441).

²⁸³ *Id.*

²⁸⁴ *Id.* (citing *Chapman v. Forsyth*, 43 U.S. 202, 208 (1844)); see *supra* notes 236–240 and accompanying text (discussing the Supreme Court's interpretation of "fiduciary" for bankruptcy purposes).

²⁸⁵ *Cent. Hanover Bank*, 93 F.2d at 511 (emphasis added) (citing Bankruptcy Act of 1867, ch. 176, § 33, 14 Stat. 517, 533 (amended 1874 and repealed 1878) [hereinafter 1867 Act]).

²⁸⁶ 1867 Act, ch. 176, § 33, 14 Stat. at 533; see *Cent. Hanover Bank*, 93 F.2d at 511.

the words, ‘fraud or embezzlement.’”²⁸⁷ Thus, Judge Hand’s “interpretation of defalcation created an ambiguity regarding the level of culpability required to constitute defalcation.”²⁸⁸ Within the midst of such ambiguity, however, Judge Hand presents a compelling argument that the standard for defalcation may have been much broader than the narrow reading the provision receives from courts today.

Congress enacted § 523(a)(4) of the Code to punish the dishonest debtor and, when appropriate, this provision gives the court the ability to find that debt arising from unpaid contributions is not dischargeable in a fiduciary debtor’s bankruptcy proceeding.²⁸⁹ Section 523(a)(4) “does not discharge an individual debtor from any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.”²⁹⁰ In *Bullock v. BankChampaign, N.A.*, the Supreme Court considered the scope of the term “defalcation” and held that defalcation “includes a culpable state of mind requirement akin to that which accompanies application of the other terms in the same statutory phrase.”²⁹¹ The Court described the state of mind requirement “as one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior.”²⁹² In other words, “where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong.”²⁹³ Intentional conduct is both “conduct that the fiduciary knows is improper [and] reckless conduct of the kind that the criminal law often treats as the equivalent.”²⁹⁴ For the conduct to be reckless, the fiduciary must engage in a conscious disregard for, or willful blindness to, “a substantial and unjustifiable risk” that his conduct “will turn out to violate a fiduciary duty.”²⁹⁵

The Court reasoned that this interpretation “is also consistent with a set of statutory exceptions that Congress normally confines to circumstances where strong, special policy considerations, such as the presence of fault, argue for preserving the debt, thereby benefiting, for example, a typically more honest

²⁸⁷ *Id.*

²⁸⁸ Elizabeth Vanderlinde, *Intentional Conduct May Be Required to Prove Defalcation Under Section 523(a)(4) in Certain Circuits*, 4 ST. JOHN’S BANKR. RESEARCH LIBR. NO. 28, at 2 (2012).

²⁸⁹ See 11 U.S.C. § 523(a)(4) (2012); McElligott Jr. & Wynne, *supra* note 97.

²⁹⁰ 11 U.S.C. § 523(a)(4).

²⁹¹ 133 S. Ct. 1754, 1757 (2013).

²⁹² *Id.*

²⁹³ *Id.* at 1759.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

creditor.”²⁹⁶ The Court noted that “[i]n the absence of fault, it is difficult to find strong policy reasons favoring a broader exception here.”²⁹⁷ Thus, a court should find a debtor who was acting in a fiduciary capacity liable for defalcation on a case-by-case basis after evaluating the totality of the circumstances.

The bar for satisfying defalcation is high,²⁹⁸ and as such, an individual employer who simply forgets to make one payment to an employee benefit fund will not reach that bar. Since this Comment advocates for courts to take a new approach when evaluating whether an individual debtor is guilty of defalcation for failing to make contributions to employee benefit funds, it is difficult to determine precisely what factors need to be present for a court to declare the debt nondischargeable in bankruptcy. Arguably, an individual’s decision to refrain from making the required payments to the funds is intentional conduct that “the fiduciary knows is improper.”²⁹⁹ *Bullock* demands, however, that the intentional conduct also be reckless of the kind punishable by criminal law.³⁰⁰ Thus, this requirement is one that courts can use to truly protect an honest but unfortunate debtor in bankruptcy.

In bankruptcy, courts should look for factors mitigating the debtor’s act of nonpayment. Why is the debtor delinquent in making the required contributions? Where did the money go instead? What does the financial picture of the debtor’s business look like? When did events take a turn for the worse? Has the debtor done anything to remedy the situation? If courts ask questions such as these when determining if a debtor is guilty of defalcation, they can discern a clearer picture of the debtor’s character and habits. Did the debtor take his fiduciary duties seriously, or did he disregard completely any responsibilities or obligations owed to the employee benefit funds for personal gain? If the court determines the latter to be true, then it should hold the debtor’s unpaid contributions nondischargeable in bankruptcy.³⁰¹

²⁹⁶ *Id.* at 1761.

²⁹⁷ *Id.*

²⁹⁸ *See id.* at 1759.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *See id.* at 1761 (stating that “circumstances where strong, special policy considerations, such as the presence of fault, argue for preserving the debt, thereby benefiting, for example, a typically more honest creditor”).

CONCLUSION

This three-step approach preserves the contractual intent of the parties to make unpaid contributions plan assets of multiemployer pension plans; gives “fiduciary” a consistent meaning under both ERISA and the Code; and makes unpaid contributions a nondischargeable debt when a court holds a dishonest debtor liable for defalcation. While this three-step approach certainly will not eliminate every problem in this ongoing battle, it will give employees an opportunity to fight another day.³⁰² If courts elect to adopt this approach, trustees representing the employees must engage in a cost–benefit analysis to determine if litigation is the correct course of action. There is no guarantee that the debtor will be able to pay the employee benefit funds even if all three steps set forth in this Comment are easily satisfied, for one cannot get blood from a stone. This idiom unfortunately remains true even for the worst, most despicable stones. Further, if the debtor can pay some money to the funds, will the amount outweigh the costs of litigating the case? This is an important question, but it is one every individual weighs before entering our judicial system. The choice to litigate belongs to the people. When a court either refuses to acknowledge an employer’s unpaid contributions as plan assets or fails to extend ERISA’s definition of “fiduciary” to a bankruptcy proceeding, it deprives the employee of his or her choice whether to litigate because he or she will automatically lose every time. Thus, this three-step approach provides the best chance for employees to receive unpaid contributions while simultaneously furthering the purposes of ERISA and the spirit of the Code.

As of March 2015, “[e]mployer-provided retirement benefits were available to 31% of private industry workers in the lowest wage category (the 10th percentile).”³⁰³ Further, “88 percent of workers in the highest wage category (the 90th percentile) had access to retirement benefits.”³⁰⁴ These employees count on their employers to hold up their end of the bargain and make the required contributions to employee benefit funds. If employers fail to do so, then the aggrieved employees have no choice but to rely on the courts for the justice they deserve. In a society where 55% of Americans “break even or spend more than they make each month,” the majority of households “do

³⁰² See Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors’ Bargain*, 91 YALE L.J. 857, 858 (1982) (“[T]he claimants who fare best in the bankruptcy process hold special entitlements under applicable non-bankruptcy law.”).

³⁰³ John Sullivan, *Two-Thirds of Workers Have Access to Retirement Benefits: DOL*, 401KSPECIALIST (July 29, 2015), <https://401kspecialistmag.com/two-thirds-of-workers-have-access-to-retirement-benefits-dol/>.

³⁰⁴ *Id.*

not consider themselves ready for a sudden financial setback.”³⁰⁵ Thus, when courts (1) reject the language in agreements classifying unpaid contributions as plan assets, (2) fail to extend the definition of an ERISA fiduciary to the bankruptcy context, or (3) ultimately find the dishonest fiduciary not guilty of defalcation, they may be facilitating more bankruptcy filings—ones filed by the employees because of their employer’s disregard for his or her fiduciary duties.

A court may ultimately find that the fiduciary debtor did not engage in a conscious disregard for, or willful blindness to, “a substantial and unjustifiable risk” that would cause the debtor to breach a fiduciary duties and be guilty of defalcation.³⁰⁶ In fact, perhaps the debtor is a sympathetic debtor like Joyce and Mark Luna who “turned over for [the company’s] benefit approximately \$43,000 from [a personal] IRA . . . \$7,000 in savings bonds, none of which [the company] ever repaid . . . and a \$30,000 [personal loan] from a local bank” in attempts to keep the company afloat for everyone involved.³⁰⁷ In a situation like this one, it would be illogical to hold the debtor’s large debts arising from unpaid contributions nondischargeable under § 523(a)(4). Sometimes, unforeseen financial tragedies occur despite our best efforts. The Code exists for this reason—“to grant a fresh start to the honest but unfortunate debtor.”³⁰⁸

But, “it is unlikely that Congress would have fashioned a proof standard that favored an interest in giving the perpetrators of fraud a fresh start over an interest in protecting the victims of fraud.”³⁰⁹ Not all fiduciary debtors will be as sympathetic as the Lunas. There will be, and likely have been, fiduciary debtors who meet the defalcation standard laid out by the Supreme Court in *Bullock*.³¹⁰ They will possess “a culpable state of mind . . . involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior” and will have engaged in “conduct that the

³⁰⁵ Associated Press, *More than HALF of Americans still break even or live beyond their means each month*, DAILY MAIL (Feb. 27, 2015, 4:43 PM), <http://www.dailymail.co.uk/news/article-2971021/Pew-study-Americans-stressed-despite-improved-economy.html>; see also Abby Hayes, *Why You Should Never Try to Keep Up with the Joneses*, U.S. NEWS & WORLD REP.: MY MONEY (Apr. 10, 2015, 8:30 AM), <http://money.usnews.com/money/blogs/my-money/2015/04/10/why-you-should-never-try-to-keep-up-with-the-joneses> (“Many Americans live beyond their means.”).

³⁰⁶ See *Bullock*, 133 S. Ct. at 1759.

³⁰⁷ *In re Luna*, 406 F.3d 1192, 1197 (10th Cir. 2005).

³⁰⁸ *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

³⁰⁹ *Id.* at 279.

³¹⁰ See *Bullock*, 133 S. Ct. at 1757–59.

fiduciary knows is improper.”³¹¹ It is a civil disservice for courts to preemptively fail to extend the reasoning of the Second and Eleventh Circuits to bankruptcy proceedings. If courts continue on this path, they will ensure that fraudulent actions go unpunished because they will have eliminated the employees’ avenue to hold fiduciary debtors accountable when the appropriate fact patterns arise.

NICOLE ADALAIDE GRIFFIN*

³¹¹ *Id.* at 1759.

* Executive Managing Editor, *Emory Bankruptcy Developments Journal*; J.D. Candidate, Emory University School of Law (2017); B.A., *summa cum laude*, Georgia State University (2012). First, I would like to thank the Robert T. Thompson Professor of Law, Rafael Pardo, for sharing his passion for bankruptcy law, introducing me to the practice area, and being a mentor and friend. I am grateful for his guidance and inspiration in writing this Comment. Next, I would like to thank the *Emory Bankruptcy Developments Journal* staff members and editors, particularly our Editor-in-Chief, Jake Jumbeck, and my fellow Executive Managing Editors, Sophie Macon and Joseph Sherman, for their patience, diligence, and enthusiasm in editing this Comment. Finally, I would like to give a special thanks to Benjamin Hopp and my Labrador, Delilah, for their continuous love and support throughout my academic career.