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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] said 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

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2 McGuinness, supra note 1.
3 Id.
4 Id.
6 Id.
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. 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.” 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. Despite such rulings, the majority rule is that an employer’s unpaid contributions are not plan assets. When the unpaid contributions are not plan assets, the employer is not liable for the contributions as an ERISA fiduciary.

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. These courts found that the individuals who had failed to make contributions to the employee benefit funds may be ERISA fiduciaries. 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. These circuits refrained from imputing ERISA fiduciary status to the employers.

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,” the circuits deciding this issue within the bankruptcy context recognize fiduciary status in very limited

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9 Id.; see also 29 U.S.C. § 1132(g) (2012).
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).
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#KXvl2fgefi3tggpE.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”).


\(^{25}\) 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.” 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.” 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.” 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.” Under most agreements, employers “participating in the same multiemployer plan often make equal contributions.” Thus, if two employers contribute to the same plan and one stops making payments, the plan could become underfunded quickly. 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.”

The earliest multiemployer pension plans were not created by CBAs. Instead, they were “solely administered by unions” and served to strengthen the power of unions. 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,
they would mandate that employees be in “good standing” within the union to gain access to the plans.\textsuperscript{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.\textsuperscript{37}

Following World War II, the federal government implemented several policies to curb inflation that ended up sparking pension reform and “spurring the creation of private pension plans.”\textsuperscript{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.”\textsuperscript{39} In addition, “wage stabilization efforts imposed a ceiling on wage increases to reduce inflationary pressures, but employee benefits, including pensions, were exempt.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{42} When Studebaker fell, “a number of abuses in pension plan structure became public.”\textsuperscript{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.\textsuperscript{44} Furthermore, “courts [had been] upholding practices of employers by reserving their rights to modify, decrease, or deny benefits or eliminate pensions at will.”\textsuperscript{45} These practices allowed employers to escape “a number of liabilities by asserting in

\textsuperscript{36} Id.
\textsuperscript{37} See id.
\textsuperscript{38} Sarah Steers, ERISA History, JURIST (Oct. 4, 2013, 12:01 PM), http://jurist.org/feature/2013/10/erisa-history.php.
\textsuperscript{39} Weinstein & Wiatrowski, supra note 34, at 20.
\textsuperscript{40} Id.
\textsuperscript{41} Inland Steel Co. v. NLRB, 170 F.2d 247, 251, 255 (7th Cir. 1948); see also Weinstein & Wiatrowski, supra note 34, at 20.
\textsuperscript{42} Steers, supra note 38.
\textsuperscript{44} Id.
\textsuperscript{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.
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).
52 Health Plans & Benefits, supra note 48.
disposition of its assets.” An ERISA fiduciary can also be any individual exercising “discretionary authority or discretionary responsibility in the administration of such plan.”

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. 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.” 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. In that case, Moulton Masonry & Construction, LLC entered into a CBA with the Bricklayers and Allied Craftworkers Pension Fund. This agreement required the company to make contributions to the pension fund. 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. 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. Eventually, the company complied with the requests from the pension fund’s auditor, and the auditor

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54. Id. § 1002(21)(A)(ii). 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. 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. 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.

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.” 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.’” The court held the company was liable to the pension fund under ERISA because of the terms governing the agreement.

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. 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.” 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.’” 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.
liable to make good to such plan any losses to the plan.” 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.

Mr. Moulton was the sole owner, officer, and shareholder of the company. 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. 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.

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. In that case, H&R Services entered into a CBA with a union. Under the agreement, the company promised to make contributions to the employee pension fund. Like the company in Bricklayers & Allied Craftworkers, the company in this case also failed to make the contributions. In response, the union filed suit against the company, and the district court granted summary judgment to the union. 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. 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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{84} The Halls therefore contended that the unpaid contributions were incapable of being “held” or “acquired” by the fund because they were unpaid.\textsuperscript{85} Unpersuaded, the court declined to limit the definition of “acquire” solely to physical possession of the contributions.\textsuperscript{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.\textsuperscript{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 . . ..”\textsuperscript{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.\textsuperscript{89}

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

\begin{quote}
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.
\end{quote}

\textsuperscript{82} Id. at 1012–13.
\textsuperscript{83} Id. at 1013.
\textsuperscript{84} Id. at 1014 (emphasis added).
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{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)).
\textsuperscript{89} Id.
\textsuperscript{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

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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. at 1016.
95 See Cline v. Indus. Maint. Eng’g & Contracting Co., 200 F.3d 1233, 1234 (9th Cir. 2000).
96 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.\textsuperscript{99}

\subsection*{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.\textsuperscript{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.\textsuperscript{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).”\textsuperscript{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.\textsuperscript{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.\textsuperscript{104}

\subsubsection*{1. The Sixth Circuit}

In \textit{Board of Trustees v. Bucci (In re Bucci)}, the Sixth Circuit determined this issue within the context of a bankruptcy proceeding.\textsuperscript{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.\textsuperscript{106} After failing to make the required contributions for more than

\begin{itemize}
\item \textsuperscript{99} See \textit{Moulton Masonry}, 779 F.3d at 184; \textit{Hall}, 334 F.3d at 1012.
\item \textsuperscript{100} See, e.g., \textit{Bos v. Bd. of Trs.}, 795 F.3d 1006, 1007 (9th Cir. 2015); \textit{In re Bucci}, 493 F.3d 635, 637 (6th Cir. 2007); \textit{In re Luna}, 406 F.3d 1192, 1197 (10th Cir. 2005).
\item \textsuperscript{101} See McElligot & Wynne, \textit{supra} note 97.
\item \textsuperscript{102} \textit{Bos}, 795 F.3d at 1008 (citing Blyler v. Hemmeter (In re Hemmeter), 242 F.3d 1186, 1190 (9th Cir. 2001)).
\item \textsuperscript{103} Id. at 1011.
\item \textsuperscript{104} See, e.g., \textit{Bos}, 795 F.3d at 1007; \textit{In re Bucci}, 493 F.3d at 637; \textit{In re Luna}, 406 F.3d at 1197.
\item \textsuperscript{105} 493 F.3d at 637.
\item \textsuperscript{106} Id. at 637–38.
\end{itemize}
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. 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.

Mr. Bucci was the only officer and director of his company; made all corporate decisions; and did not separate his corporate and personal finances. 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. 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 intent for the debtor to act as a trustee of the monies owed.”

The bankruptcy court held that § 523(a)(4) did not apply because Mr. Bucci was not a fiduciary of the unpaid contributions. 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. 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.

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. The court defined

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107 *Id.*
108 *Id.* at 637.
109 *Id.* at 638.
110 *Id.* at 637; see also 11 U.S.C. § 523(a)(4) (2012).
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.’”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{118}

Following the Supreme Court’s decision in \textit{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,”\textsuperscript{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.”\textsuperscript{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;\textsuperscript{121} and (4) a definite beneficiary.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{124} Further, Mr. Bucci was an ERISA trustee because “he exercised control over the assets by choosing to not pay the contributions.”\textsuperscript{125} Lastly, ERISA imposed managerial duties on Mr. Bucci because it required him to hold the plan assets for his employees’ benefit.\textsuperscript{126}

\begin{itemize}
  \item \textsuperscript{116} \textit{Id.} (quoting Capitol Indemnity Corp. v. Interstate Agency, Inc. (\textit{In re Interstate Agency}, 760 F.2d 121, 125 (6th Cir. 1985)).
  \item \textsuperscript{117} \textit{Id.} (quoting \textit{In re Blaszak}, 397 F.3d 386, 390 (6th Cir. 2005)).
  \item \textsuperscript{118} \textit{Id.} (quoting \textit{In re Blaszak}, 397 F.3d at 391).
  \item \textsuperscript{119} 293 U.S. 328, 333 (1934).
  \item \textsuperscript{120} \textit{In re Bucci}, 493 F.3d at 639–40 (quoting \textit{In re Garver}, 116 F.3d 176, 178 (6th Cir. 1997)); \textit{see Davis}, 293 U.S. at 333.
  \item \textsuperscript{121} Res, commonly referred to as corpus, is “[t]he property for which a trustee is responsible; the trust principal.” \textit{Corpus}, \textit{BLACK’S LAW DICTIONARY} (10th ed. 2014).
  \item \textsuperscript{122} \textit{In re Bucci}, 493 F.3d at 640 (quoting \textit{In re Blaszak}, 397 F.3d at 391–92).
  \item \textsuperscript{123} \textit{Id.}
  \item \textsuperscript{124} \textit{Id.}
  \item \textsuperscript{125} \textit{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”).
  \item \textsuperscript{126} \textit{In re Bucci}, 493 F.3d at 640.
\end{itemize}
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. 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.”

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. 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.” 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. Thus, the trust relationship “sprung 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).

The court declined to extend ERISA’s broad interpretation of fiduciary to the defalcation provision. 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. Thus, the unpaid contributions were a dischargeable debt in Mr. Bucci’s bankruptcy proceeding.

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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. In In re Luna, the Tenth Circuit determined that the unpaid contributions were a dischargeable debt in the debtor’s bankruptcy. 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. 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. As with the other cases, the financial state of the company weakened, and the Lunas failed to make the required contributions.

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. Further, Mr. Luna took out a personal loan for $30,000 and lent it to the company. These cash advances proved to be futile, and the company was unable to reimburse the Lunas. Out of options, the Lunas agreed to dissolve the company. Their growing financial obligations forced each of them to file chapter 7 bankruptcy petitions in their individual capacities. At the time of their filing dates, more than $120,000 was owed to the pension funds. 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). Since the Lunas exclusively managed the plan assets, they exercised the necessary authority and control required to subject them to fiduciary status under ERISA. The plan trustee asserted this classification

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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.\footnote{In re Luna, 406 F.3d at 1198.}

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.”\footnote{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.} 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.\footnote{Id. at 1198.} The plan trustee appealed, and the district court affirmed the decision of the bankruptcy court.\footnote{Id.}

After the district court affirmed the bankruptcy court’s decision,\footnote{Id.} the Tenth Circuit addressed two issues: (1) whether unpaid plan contributions were plan assets; and (2) whether the Lunas were fiduciaries.\footnote{Id.} First, the plan trustee argued that “unpaid contributions become plan assets at the time they become due and owing.”\footnote{Id. at 1199.} 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.”\footnote{Id. (quoting Asset, BLACK’S LAW DICTIONARY 112 (7th ed. 1999)).}

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.”\footnote{Id. at 1198.} 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.” The court interpreted the definition to mean “the person or entity holding the asset has an ownership interest in a given thing,
whether tangible or intangible.”

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.” The court held the district court erred in finding that the unpaid contributions were not plan assets under ERISA. 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.” In this case, the language in the agreement concerning whether unpaid contributions were plan assets was unclear. 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.

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.” 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.” Since the court recognized the plan asset to be the contractual right to collect 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.”

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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.”).
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.\textsuperscript{168} The Lunas “exercised no control over how the Trustees manage[d] or dispose[d] of that asset;”\textsuperscript{169} their only duty under the agreement was to make the monthly contributions.\textsuperscript{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.”\textsuperscript{171} The court therefore held that the Lunas were “merely debtors” and not ERISA fiduciaries.\textsuperscript{172} Thus, the unpaid contributions were a dischargeable debt in bankruptcy.\textsuperscript{173}

3. \textit{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 \textit{Bos v. Board of Trustees}, Gregory Bos was the president and owner of Bos Enterprises.\textsuperscript{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.\textsuperscript{175} Soon afterward, Mr. Bos struggled financially and failed to make the required contributions.\textsuperscript{176} Mr. Bos signed a promissory note personally guaranteeing the unpaid contributions, totaling $359,592.09.\textsuperscript{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.\textsuperscript{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).\textsuperscript{179}

\begin{footnotes}
\item[168] \textit{Id.} at 1208.
\item[169] \textit{Id.} at 1204.
\item[170] \textit{Id.} at 1206.
\item[171] \textit{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).
\item[172] \textit{Id.} at 1204–05.
\item[173] \textit{Id.} at 1208.
\item[174] 795 F.3d 1006, 1007 (9th Cir. 2015).
\item[175] \textit{Id.}
\item[176] \textit{Id.} at 1008.
\item[177] \textit{Id.}
\item[178] \textit{Id.} While Mr. Bos did make one payment for $30,824.99 after signing the note, the remaining outstanding balance went unpaid. \textit{Id.}
\item[179] \textit{Id.}
\end{footnotes}
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. 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. 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.” The district court subsequently affirmed the decision of the bankruptcy court on the same grounds. Mr. Bos appealed and argued that he was not a fiduciary under the defalcation provision.

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.” 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).”

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

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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[es].” 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.” 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.” 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.”

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. 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).” Thus, the unpaid contributions were a dischargeable debt in bankruptcy.

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. 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.” 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


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.” In fact, “the collective agreement may have more ‘contractualness’ than many other bargained transactions.” The collective agreement is not a standard contract used purely to sell a commodity or ensure the repayment of a loan. Instead,

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. 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.” 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 . . . .”

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. 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.

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. Since CBAs contemplate nearly every aspect of the employment relationship, 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. The majority of litigation surrounding CBAs arises because “the officers of the union, or management, or both, are unwilling to

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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 circuits 214 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

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209 Id. at 536.
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); Galguy 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 rule\textsuperscript{218} 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.”\textsuperscript{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.”\textsuperscript{220} Indeed, many plan documents define plan assets to include all required contributions. A court’s progression to step two \textit{infra} is therefore highly likely.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{218} See \textit{Employee Benefits Sec. Admin., U.S. Dep’t of Labor, Field Assistance Bulletin 2008-11} (Feb. 1, 2008) (“Employer contributions become an asset of the plan only when the contribution has been made.”).


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

\textsuperscript{221} See McElligott Jr. & Wynne, \textit{supra} note 97.

\textsuperscript{222} See M & G Polymers USA, LLC \textit{v. Tackett}, 135 S. Ct. 926, 929 (2015); see also \textit{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. 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.” Aside from these designated fiduciaries, “individuals may acquire fiduciary status if they exercise the fiduciary functions set forth [under ERISA].” 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.”

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

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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.


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


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”).
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

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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.
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.

By this logic, the trustees of the plan, not the debtor, controlled the contractual right to collect the unpaid contributions from the debtor. 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.” 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.”

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. 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.” 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). This interpretation of “fiduciary” is consistent with the court’s long history of “constr[ing] the term ‘fiduciary capacity’ found in the defalcation provision of § 523(a)(4) more narrowly than the term is used in other circumstances.”

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.” Thus, the “control or authority” over the asset belongs to the plan

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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. 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).

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.” 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.” The Supreme Court should view the “fiduciary conflict” primarily from the perspective of ERISA. 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.” 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

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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.”).
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

260 K LEE, supra note 256, at 88; see Patterson, 504 U.S. at 758.
261 K LEE, 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.
(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).”

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.” ERISA’s objectives are “to
increase the number of pension plan participants and to assure that participants
receive their benefits.” 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.” ERISA is a broad, remedial statute that addresses violations with
both civil remedies and criminal penalties. 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.” 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.” 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);

269 Gail Cagney, Note, Corporate Officers as Employers: Eristic Liability Under ERISA, 52 BROOK. L.

270 Id. at 1214.

271 Id.

272 Id. at 1215.


274 ITPE Pension Fund v. Hall, 334 F.3d 1011, 1014 (11th Cir. 2003) (citing NYSA-ILA Med. & Clinical
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 breached 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.

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 dereflection, 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.
Thus, Judge Hand’s “interpretation of defalcation created an ambiguity regarding the level of culpability required to constitute defalcation.”

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. 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.” In Bullock v. Bank Champaign, 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.” 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.” 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.” 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.” 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.”

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

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287 Id.
292 Id.
293 Id. at 1759.
294 Id.
295 Id.
creditor.” The Court noted that “[i]n the absence of fault, it is difficult to find strong policy reasons favoring a broader exception here.” 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, 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.” Bullock demands, however, that the intentional conduct also be reckless of the kind punishable by criminal law. 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.

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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


\(^{304}\) 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

306 See Bullock, 133 S. Ct. at 1759.
307 In re Luna, 406 F.3d 1192, 1197 (10th Cir. 2005).
309 Id. at 279.
310 See Bullock, 133 S. Ct. at 1757–59.
fiduciary knows is improper.” 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.

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311 Id. at 1759.

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