

ERISA FIDUCIARIES IN BANKRUPTCY: PRESERVING INDIVIDUAL LIABILITY FOR DEFALCATION AND FRAUD DEBTS UNDER 11 U.S.C. § 523(a)(4)

INTRODUCTION

Corporate officers may go to jail for stealing from employee benefit funds, and may become personally liable to the funds for the lost assets, but can the beneficiaries recover the money if the culprit declares bankruptcy? There are numerous recent examples of employers who have stolen or grossly mismanaged employee benefit plan funds. In 2002, Enron employees lost big when they were blocked from selling their 401(k) Enron stock during part of the company's free fall from ninety dollars per share to less than fifty cents per share.¹ The same year, a trustee for a benefit plan was sentenced to two years in prison for fraud stemming from theft of employee benefit plan funds.² In this particularly egregious case, the plan trustee converted over \$240,000 of employee benefit plan funds for his own use,³ costing insurers and employees nearly half a million dollars.⁴

Plans and plan beneficiaries may be able to sue individuals who have abused their authority over employee benefit plan funds.⁵ Employee benefit plans are covered by the Employee Retirement Income Security Act of 1974 ("ERISA").⁶ ERISA is federal law that provides a comprehensive statutory framework for regulating the formation and management of employee benefit funds⁷ as well as defining rights and causes of action regarding such funds.⁸

¹ Ari Weinberg, *The Post-Enron 401(k)*, FORBES, Oct. 20, 2003, available at http://www.forbes.com/finance/2003/10/20/cx_aw_1020retirement.html (last visited May 10, 2006).

² Employee Benefit Plan Manager Sentenced for Fraud, Mar. 29, 2002, <http://www.usdoj.gov/usao/co/032902Frame1Source1.htm> (last visited May 10, 2006).

³ Over a three-year period, the plan manager wrote checks to himself, his wife, and to pay personal credit card bills, his landscaper, and wedding reception costs for his daughter. *Id.*

⁴ *See id.*

⁵ The Enron employees were allowed to sue the "firm, its directors and its 401(k) provider . . . for failing in their fiduciary role[s]." Weinberg, *supra* note 1.

⁶ 29 U.S.C. §§ 1001 - 1461 (2000).

⁷ *Id.* § 1001 (stating the purpose of ERISA is to protect "the continued well-being and security of millions of employees and their dependents . . . [by establishing] minimum standards . . . [and] assuring the equitable character of [employee benefit] plans and their financial soundness.").

Under ERISA, individuals may be held liable for criminal⁹ and civil¹⁰ sanctions. Plan beneficiaries may sue¹¹ a fiduciary who breaches his or her responsibilities to recover resulting losses to the plan, restore profits gained through use of plan assets, or for other legal and equitable relief.¹²

But what happens when an ERISA fiduciary with an individual debt to an ERISA fund declares bankruptcy? As a matter of public policy,¹³ the U.S. Bankruptcy Code (“Code”) bars discharge¹⁴ of certain debts,¹⁵ including debts

⁸ ERISA’s preemption clause imposes uniformity by superseding any state law claims that may relate to any ERISA plan. *Id.* § 1144. Congress intended that the courts develop a body of federal substantive law to adjudicate ERISA claims. “It is . . . intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.” 120 CONG. REC. 29928, 29942 (1974) (statement of Sen. Javits).

⁹ The criminal sanctions for violating ERISA were recently and dramatically increased. *See* 29 U.S.C.A. § 1131 (2002). In response to the Enron, WorldCom, Adelphia, and similar corporate debacles, the White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, Title IX, § 904, 116 Stat. 805, was passed as part of the Sarbanes-Oxley Act of 2002 corporate reform legislation. The penalty enhancement act increased maximum sentences for mail and wire fraud from five to twenty years. Criminal sanctions for violating ERISA were also dramatically increased. 29 U.S.C.A. § 1131 (2002) (maximum sentences increased from one to ten years, maximum fines for individuals increased from \$5,000 to \$100,000, and maximum fines for persons that are not individuals increased from \$100,000 to \$500,000).

¹⁰ ERISA § 502(a)(2), 29 U.S.C.A. § 1132 (2004).

¹¹ “A civil action may be brought . . . by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409.” 29 U.S.C. § 1132.

¹² ERISA § 409, 29 U.S.C. § 1109(a) provides for remedies against fiduciaries who have breached a duty to a plan:

[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

Id.

¹³ American bankruptcy law has consistently prohibited granting relief to debtors where the debt was “obtained by” fraud. Merav Biton, Note, *Lies, Filthy Lies and Archer v. Warner: Should We Allow Fraudulent Debtors to Side-Step Section 523(a)(2)(A)?*, 11 AM. BANKR. INST. L. REV. 267, 272–73 (2003). This prohibition follows early British common law and has been expanded from its early form. *Id.* at 272. When Congress expanded the prohibition in 1903, the legislative history stated the Congressional intent “to exclude beyond peradventure certain liabilities growing out of offenses against good morals” in “the interest of justice and honest dealing and honest conduct.” *Id.* at 273 (quoting H.R. REP. NO. 1698, 57th Cong., 1st Sess., 3, 6 (1902)). This legislative intent is still in force; “the Bankruptcy Act of 1978 enacted a ‘substantially similar provision’ to the 1903 provision . . . [and subsequent minor amendments] in no way signals a congressional intention to narrow the scope of the fraud exception.” *Id.* (citations omitted).

¹⁴ Discharge is the ultimate goal of an individual debtor in bankruptcy. Once a court grants a debtor discharge from a debt, the debtor’s liability on such debt is voided and creditors are enjoined from commencing, continuing, or enforcing any judgments against the debtor on the discharged debt. 11 U.S.C. § 524(a) (2000). Discharge is the embodiment of the “fresh-start” policy of bankruptcy which frees debtors

created by the debtor's¹⁶ bad acts. Section 523(a)(4) of the Code¹⁷ bars an individual debtor from discharging debts arising from "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny."¹⁸ If the debt arose from larceny or embezzlement,¹⁹ the resulting debt is not discharged in bankruptcy. Where the debt is incurred by the debtor's acts of "fraud or defalcation while acting in a fiduciary capacity,"²⁰ however, the bar to discharge only applies where "fiduciary capacity" can first be shown.²¹

For an ERISA plan beneficiary, however, this "fiduciary capacity" is not so easily established, and ERISA fiduciaries²² may likewise discover bankruptcy is an effective escape hatch from personal liability. There is a circuit split over whether ERISA fiduciary status satisfies the requirements for finding a "fiduciary capacity" under § 523(a)(4) of the Code.²³ The consequence of this inconsistency is that some ERISA fiduciaries may be able to discharge debts in bankruptcy that should otherwise be non-dischargeable under § 523(a)(4).

The recent circuit split on this issue highlights the need for a comprehensive approach. Both the initial rule by the Ninth Circuit²⁴ and the

from heavy debts and encourages further participation in the economy. The Report of the Commission of the Bankruptcy Laws of the United States concluded "debtors with 'fresh starts' are better enabled to participate in the credit economy." H.R. DOC. NO. 93-137, pt. 1 (1st Sess. 1973). For individuals, bankruptcy is the only way to achieve this fresh start. *Id.* ("Fresh start [is available] in the commercial credit economy through the limited liability and easy dissolvability of corporate persons. It is available to [individual] debtors in the consumer credit economy only through bankruptcy legislation.")

¹⁵ See generally 11 U.S.C. § 523.

¹⁶ The Code defines "debtor" as the "person or municipality concerning which a case under this title has been commenced." *Id.* § 101(13). A "person" may be an individual, partnership, corporation, or certain governmental units. *Id.* § 101(41). This Comment deals only with individuals (i.e., natural persons) seeking discharge of personal debts.

¹⁷ *Id.* § 523(a)(4).

¹⁸ *Id.*

¹⁹ *Id.* Debts arising from the individual debtor's embezzlement or larceny are not discharged. *Id.*

²⁰ *Id.*

²¹ The benefit plan seeking to recover plan assets must prove fiduciary capacity by a preponderance of the evidence. *Groger v. Garner*, 498 U.S. 279, 287–88 (1991).

²² ERISA defines fiduciary status functionally. An individual has fiduciary duties imposed on her to the extent she possesses or exerts certain types of authority or control over an employee benefit plan. 29 U.S.C. § 1002(21)(A) (2000).

²³ See *Hunter v. Philpott*, 373 F.3d 873, 876–77 (8th Cir. 2004) (stating the ERISA statute does not necessarily satisfy fiduciary capacity requirement, and instead analyzing debtor's relationship to benefit plans without reference to the statute). *Contra Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1190–91 (9th Cir. 2001) (holding ERISA statute satisfies fiduciary capacity requirement and analyzing whether debtor defalcated while acting as an ERISA fiduciary).

²⁴ See generally *In re Hemmeter*, 242 F.3d 1186.

recent split decision by the Eighth Circuit²⁵ fail to completely address ERISA fiduciary law in the context of § 523(a)(4) of the Code. The Ninth Circuit was the first to address this issue in *Blyler v. Hemmeter*.²⁶ It established the per se rule that ERISA fiduciaries satisfy the “fiduciary capacity” requirements of § 523(a)(4) and, therefore, any debts incurred from defalcation of ERISA fiduciary duties were barred from discharge.²⁷

The Eighth Circuit, in *Hunter v. Philpott*, recently disagreed with the per se rule.²⁸ The *Philpott* court held a determination of ERISA fiduciary status was not sufficient to satisfy the requirements of § 523(a)(4).²⁹ *Philpott* threatens the integrity of both ERISA and bankruptcy law in multiple ways, all stemming from the court’s vague reasoning and cursory analysis of ERISA fiduciary law. First, and most importantly, *Philpott* created uncertainty by rejecting the accepted rule while failing to replace it with any framework for analyzing ERISA fiduciary status in the context of § 523(a)(4).³⁰ Second, if *Philpott* is read broadly, it creates a potential judicial exception to ERISA fiduciary liability that is contrary to the intent and purpose of both ERISA and the Code.³¹ Finally, courts may apply *Philpott* to incorrectly withhold application of the § 523(a)(4) bar to dischargeability against other, non-ERISA statutory fiduciaries.³²

The conflicting case law regarding ERISA fiduciaries under § 523(a)(4) highlights the need for a better analytical approach. This Comment suggests such an approach. Part I provides a brief overview of the relevant bankruptcy and ERISA statutes. Part II analyzes the *In re Hemmeter* and *Philpott* interpretations of the ERISA fiduciary statute in the context of § 523(a)(4) of the Code. This analysis shows the circuit split is based largely on faulty understanding and application of the ERISA and Bankruptcy statutes. Part III shows the need for a unified approach to this question by discussing the public policy underlying the ERISA fiduciary statute and the non-dischargeability provisions of § 523(a)(4). Part III also highlights how an inconsistent approach to individual fiduciary bankruptcies creates the danger of eroding the

²⁵ See generally *Hunter*, 373 F.3d 873.

²⁶ *In re Hemmeter*, 242 F.3d at 1190.

²⁷ *Id.*

²⁸ *Hunter*, 373 F.3d at 875.

²⁹ *Id.* at 875.

³⁰ See *id.* at 876. The court instead engaged in a fact intensive evaluation of the “substance of the transaction” to decide whether the debtor was a fiduciary. See *id.*

³¹ See *infra* notes 196–207 and accompanying text.

³² See *infra* notes 196–207 and accompanying text.

intended protections of both statutes. Finally, in Part IV, this Comment proposes a five-part analysis addressing the requirements of both statutes in determining the applicability of § 523(a)(4) non-dischargeability to ERISA fiduciary debts. This analysis, by providing a comprehensive and structured approach, assures that individual fresh start is protected without sacrificing the legitimate claims of ERISA trust beneficiaries.

I. STATUTORY ANALYSIS: ERISA AND FIDUCIARY CAPACITY IN § 523(a)(4)

For § 523(a)(4) to apply, the debtor must be both a fiduciary under ERISA and act in a “fiduciary capacity” as defined by § 523(a)(4). The crux of the problem lies here—“fiduciary” under ERISA and “fiduciary capacity” under § 523(a)(4) are not co-extensive. Therefore, a debtor’s fiduciary status must satisfy both ERISA and the Code. Where both statutes are satisfied, the § 523(a)(4) bar will apply if the debt was incurred through an act of defalcation or fraud within the scope of the fiduciary’s duties.³³ The meaning of fiduciary under § 523(a)(4) of the Code and ERISA are each explained below.

A. “Fiduciary Capacity” Under § 523(a)(4) of the Code

Section 523(a)(4) bars discharge of individual debts arising from fraud or defalcation while acting in a fiduciary capacity.³⁴ The Code does not define “fraud,” “defalcation,” or “fiduciary capacity.”³⁵ These terms are judicially interpreted. Bankruptcy courts have consistently held only actual fraud is barred from discharge under § 523(a)(4); the policy of fresh start allows good faith debtors to discharge debts based on constructive fraud because such debts do not indicate any “moral turpitude” on the part of the debtor.³⁶ Defalcation, within the meaning of § 523(a)(4), generally includes “misappropriation of trust funds or money held in any fiduciary capacity” or the failure to account for such funds.³⁷ Fiduciary capacity was interpreted by the Supreme Court in

³³ See 11 U.S.C. § 523(a)(4) (2000); 29 U.S.C. § 1002(21)(A) (2000).

³⁴ 11 U.S.C. § 523(a)(4).

³⁵ See *id.* § 101.

³⁶ *Neal v. Clark*, 95 U.S. 704, 709 (1878) (interpreting section 33 of the Bankruptcy Act of 1867); see also, e.g., *Ozburn v. Moore (In re Moore)*, 277 B.R. 141, 151 (Bankr. M.D. Ga. 2002) (fraud for purposes of § 523(a)(4) of the Code includes only intentional deceit).

³⁷ *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1190 (9th Cir. 2001). Defalcation does not require intent. *Id.* The courts, however, are split into roughly two groups concerning what constitutes defalcation. The first interpretation does not require mental culpability and includes all failures to account for funds. See *id.* (stating innocent failure to fully account for trust assets is non-dischargeable); *Republic of Rwanda v. Uwimana (In re Uwimana)*, 274 F.3d 806, 811 (4th Cir. 2001) (stating an innocent mistake could

*Davis v. Aetna Acceptance Co.*³⁸ This interpretation remains authoritative.³⁹ Although *Davis* was decided under the Bankruptcy Act of 1898,⁴⁰ the interpretation of “fiduciary capacity” as stated in *Davis* was retained when Congress enacted the Bankruptcy Reform Act of 1978.⁴¹

The Court in *Davis* held that only a subset of fiduciary debts was barred from discharge. The Court distinguished between two types of fiduciary capacities: those that exist before the debt is created and those that are created when the debt is incurred.⁴² The Court held the second type of fiduciary status was not sufficient to satisfy the bar to dischargeability.⁴³ “It 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.”⁴⁴

The core requirement of *Davis* is that the fiduciary capacity be established *before* the debt is incurred.⁴⁵ Thus to create a fiduciary capacity “in the strict and narrow sense,”⁴⁶ there must be an express, technical, or statutory trust.⁴⁷

constitute defalcation); *Tudor Oaks Ltd. P’ship v. Cochrane (In re Cochrane)*, 124 F.3d 978, 984 (8th Cir. 1997) (defalcation includes innocent fiduciary defaults); *Antlers Roof-Truss & Builders Supply v. Storie (In re Storie)*, 216 B.R. 283, 288 (B.A.P. 10th Cir. 1997) (negligent failure to account is defalcation). The second interpretation requires some level of mental culpability varying from recklessness to deceit. See *Rutanen v. Baylis (In re Baylis)*, 313 F.3d 9, 20 (1st Cir. 2002) (stating the fiduciary’s acts must be “so egregious that they come close to the level that would be required to prove fraud, embezzlement, or larceny”); *Meyer v. Rigdon*, 36 F.3d 1375, 1385 (7th Cir. 1994) (stating “mere negligence” is not defalcation); *Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249, 257 (6th Cir. 1982) (same); *Cent. Hanover Bank & Trust Co. v. Herbst*, 93 F.2d 510, 512 (2d Cir. 1937) (“[D]efalcation’ may demand some portion of misconduct.”); *Chao v. Duncan (In re Duncan)*, 331 B.R. 70, 87 (Bankr. E.D.N.Y. 2005) (stating defalcation occurs when the “debt arises as a result of conscious misconduct or breach of the duty giving rise to the debtor’s fiduciary status.”).

³⁸ 293 U.S. 328 (1934).

³⁹ See, e.g., *The Andy Warhol Found. for Visual Arts, Inc. v. Hayes (In re Hayes)*, 183 F.3d 162, 166 (2d Cir. 1999).

⁴⁰ The Court applied section 35(4) of the old title XI, which barred discharge of debts created “‘by [the debtor’s] fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.’” *Davis*, 293 U.S. at 331; see also *Gupta v. E. Idaho Tumor Inst., Inc. (In re Gupta)*, 394 F.3d 347, 350 n.3 (5th Cir. 2004) (stating old and new bankruptcy fiduciary “provisions are materially indistinguishable”).

⁴¹ See, e.g., *Hunter v. Philpott*, 373 F.3d 873, 876 (8th Cir. 2004).

⁴² *Davis*, 293 U.S. at 333.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1189–90 (9th Cir. 2001).

⁴⁶ *Davis*, 293 U.S. at 333.

⁴⁷ Courts are consistent in applying the threshold requirements of *Davis*, although courts are inconsistent in their definitions of which trusts meet the threshold requirement. See *Hunter v. Philpott*, 373 F.3d 873, 875 (8th Cir. 2004) (stating fiduciary relationship in § 523(a)(4) of the Code limited to trustees of express trusts). *But see LSP Inv. P’ship v. Bennett (In re Bennett)*, 989 F.2d 779, 784 (5th Cir. 1993) (stating the technical or

An express trust is one intentionally entered into by the parties, either through formal contract or through intent inferred from the circumstances.⁴⁸ In a technical trust the fiduciary's only duty is to transfer the trust property to the beneficiary.⁴⁹ In a statutory trust the trust obligations are imposed on the parties by law.⁵⁰

Davis does not bar discharge of debts arising from equitable trusts created by incomplete transfers or acts of wrongdoing. *Davis* itself dealt with an *ex malificio* trust that arose out of a wrongful act of conversion.⁵¹ *Ex malificio* trusts are created by operation of law as a matter of equity.⁵² *Davis* has been applied to exclude defalcation and fraud liability under § 523(a)(4) for fiduciary duties based on ex post trusts such as constructive,⁵³ resulting,⁵⁴ and implied⁵⁵ trusts.⁵⁶ A statutory trusts also fails the *Davis* test where the statute creates ex post trusts such as those described above.⁵⁷

express trust requirement includes formal trust agreements and trust-type obligations imposed by law); *Allen v. Romero (In re Romero)*, 535 F.2d 618, 621 (10th Cir. 1976) (holding technical trusts or those imposed by law meet threshold requirement of *Davis*).

⁴⁸ See, e.g., *Horejs v. Steele (In re Steele)*, 292 B.R. 422, 427 (Bankr. D. Colo. 2003).

⁴⁹ BLACK'S LAW DICTIONARY 1517 (7th ed. 1999). A technical trust may also be referred to as a passive, dry, general, nominal, simple, naked, or ministerial trust. *Id.* Most cases use the term 'technical trust' to refer to any trust that defines the fiduciary's duty prior to and without reference to an act of fiduciary wrongdoing. See, e.g., *Rain Bird Corp. v. Salisbury (In re Salisbury)*, 331 B.R. 682, 692 (Bankr. N.D. Miss. 2005).

⁵⁰ See 1 AUSTIN W. SCOTT, JR. ET AL., SCOTT ON TRUSTS § 17.5 (4th ed. 1998).

⁵¹ *Davis*, 293 U.S. at 330.

⁵² See, e.g., *Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249, 251 (6th Cir. 1982).

⁵³ A constructive trust is an equitable remedy imposed to redress a wrong or prevent unjust enrichment. BLACK'S LAW DICTIONARY 1515 (7th ed. 1999). It is remedial in character and the intent of the parties to form a trust does not control. See RESTATEMENT (THIRD) OF TRUSTS § 1 cmt. e (2003). Also referred to as an implied trust, involuntary trust, trust *de son tort*, trust *ex delicto*, trust *ex maleficio*, remedial trust, or trust *in invitum*. BLACK'S LAW DICTIONARY 1515 (7th ed. 1999).

⁵⁴ A resulting trust arises when a transferor makes an incomplete transfer of her beneficial interest in a trust to others without expressly retaining the portion not effectively transferred. RESTATEMENT (THIRD) OF TRUSTS § 7 cmt. a (2003). The Third Restatement of Trusts defines a resulting trust as

aris[ing] when a person (the "transferor") makes or causes to be made a disposition of property under circumstances (i) in which some or all of the transferor's beneficial interest is not effectively transferred to others (and yet not *expressly* retained by the transferor) and (ii) which raise an unrebutted presumption that the transferor does not intend the one who receives the property (the "transferee") to have the remaining beneficial interest.

Id. A resulting trust may also be referred to as an implied or presumptive trust. BLACK'S LAW DICTIONARY 1517 (7th ed. 1999).

⁵⁵ See *supra* note 49 and accompanying text.

⁵⁶ See, e.g., *Runnion v. Pedrazzini (In re Pedrazzini)*, 644 F.2d 756, 758 (9th Cir. 1981).

⁵⁷ See *Blyler v. Hemetter (In re Hemmeter)*, 242 F.3d 1186, 1190 (9th Cir. 2001) (a statutory fiduciary is a fiduciary for purposes of § 523(a)(4) if it meets the *Davis* requirements).

Whether the *Davis* threshold requirement for fiduciary capacity is met is a question of federal law.⁵⁸ State law is often important in this analysis because state law (either statutory or common) often imposes trust-type obligations on parties.⁵⁹ However, federal statutes can and do create fiduciary duties; ERISA is only one example of a federal law that creates fiduciary liability.⁶⁰ Whatever the source of the fiduciary duty, legal or contractual labels are not controlling.⁶¹ Where an express or technical trust is asserted, the court will look to the intentions of the parties.⁶² Where a statutory trust is asserted, the court assesses the relationship established by the relevant law to determine if it is fiduciary in nature under federal law.⁶³

To be a fiduciary under federal law, two requirements must be met.⁶⁴ First, the trust *res* must be identified, and second, the fiduciary's obligations must be imposed prior to the alleged wrongdoing.⁶⁵ These requirements are implicitly reflected in *Davis*; the fiduciary duty (which can only be defined in relation to and after the trust *res* is identified) must exist prior to the debt.

B. *The Imposition of Fiduciary Status Under ERISA*

ERISA was enacted as a remedial measure designed to protect the interests of participants in employee benefit plans⁶⁶ by mandating standards of conduct, obligations and responsibilities for plan fiduciaries, and by providing sanctions

⁵⁸ *E.g.*, Carlisle Cashway v. Johnson (*In re Johnson*), 691 F.2d 249, 251 (6th Cir. 1982).

⁵⁹ *See, e.g.*, Angelle v. Reed (*In re Angelle*), 610 F.2d 1335, 1341 (5th Cir. 1980).

⁶⁰ *See, e.g.*, Daily Income Fund v. Fox, 464 U.S. 523, 534 (1984) (fiduciary duties imposed by the Investment Company Act of 1940 (ICA), 15 U.S.C. § 80a-35b. (2000)); *see also* United States v. Mitchell, 463 U.S. 206, 215 (1983) (fiduciary duties imposed on the federal government by the Tucker Act, 28 U.S.C. § 1941 (2000)).

⁶¹ *E.g.*, *In re McGee*, 353 F.3d 537, 540 (7th Cir. 2003) (“The meaning of the words in § 523(a)(4) is a question of federal law, which state and local governments cannot influence by attaching the word ‘trust’ or any equivalent label to arrangements that lack the normal attributes of those devices.”) (citations omitted); *In re Pedrazzini*, 644 F.2d at 758 n.2 (“The precise manner in which a trust is created, by consent or by statute, is of little importance. Rather, the focus should be on whether true fiduciary responsibilities have been imposed.”).

⁶² *Davis* dealt with a putative express trust. *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 334 (1934). In holding the contract did not create an express trust despite the document labels, the court stated “[t]he resulting obligation is not turned into one arising from a trust because the parties to one of the documents have chosen to speak of it as a trust.” *Id.*

⁶³ *See id.*

⁶⁴ *See, e.g.*, Blyler v. Hemetter (*In re Hemetter*), 242 F.3d 1186, 1190 (9th Cir. 2001).

⁶⁵ *Id.*

⁶⁶ H.R. REP. NO. 93-533, (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639. (“The Employee Benefit Security Act as reported by the Committee is designed to remedy certain defects in the private retirement system.”).

and remedies in federal court when those responsibilities are breached. ERISA was designed to encourage participation in private employee benefit plans by providing uniform standards of plan administration.⁶⁷ ERISA provided for enforcement of these standards through both criminal and civil actions against fiduciaries that breach their duties to a covered plan.⁶⁸ Uniformity of enforcement is achieved by operation of ERISA's preemption clause, which bars any state-law claims related to ERISA plans.⁶⁹ This is true even where state law provides a claim not provided under the civil remedies statute of ERISA.⁷⁰ Because liability for fiduciaries is solely determined by ERISA,⁷¹ whether an entity is an ERISA fiduciary is crucial to determining whether ERISA or state law governs potential liability.

ERISA creates fiduciary responsibilities in two ways. An entity or individual may be an ERISA fiduciary as either a "named fiduciary"⁷² or under ERISA's functional test.⁷³ A "named fiduciary" is responsible for an ERISA plan's operation and administration; each plan must be in writing and identify at least one "named fiduciary."⁷⁴ Named fiduciaries are often administrative bodies, not individuals. Corporations often appoint "administrative

⁶⁷ The bill had five broadly stated purposes:

(1) establish equitable standards of plan administration; (2) mandate minimum standards of plan design with respect to the vesting of plan benefits; (3) require minimum standards of fiscal responsibility by requiring the amortization of unfunded liabilities; (4) insure the vested portion of unfunded liabilities against the risk of premature plan termination; and (5) promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits.

Id.

⁶⁸ "Provision is made for the imposition of criminal penalties on those willfully violating their duties under the Act. . . . [Civil enforcement may be] initiated by the Secretary of Labor as well as participants and beneficiaries." *Id.*

⁶⁹ ERISA § 514(a) "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."

⁷⁰ Given the high stakes of preemption, defining what "relates to" an ERISA plan is a heavily litigated issue. *See, e.g., Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 333 (2003); *Egelhoff v. Egelhoff*, 532 U.S. 141, 146–51 (2001); *Boggs v. Boggs*, 520 U.S. 833, 839–42 (1997).

⁷¹ 29 U.S.C. § 1132(a)(3) (2000) provides for civil remedies. The scope of this statute was addressed in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) which, in dicta, limited enforcement against non-fiduciaries. Some lower courts have subsequently held ERISA does not permit claims against non-fiduciaries. *See, e.g., Reich v. Cont'l Casualty Co.*, No. 89-C-7692, 1993 WL 257250 (N.D. Ill. July 6, 1993) (dismissing claim against non-fiduciary). *But see Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 988–89 (3d Cir. 1995) (holding plan administrator liable for material misrepresentations of non-fiduciary agents).

⁷² 29 U.S.C. § 1102(a)(2).

⁷³ *Id.* § 1002(21)(A).

⁷⁴ ERISA § 402, 29 U.S.C. § 1102(a)(2).

committees”⁷⁵ to serve as named fiduciaries; for collectively-bargained plans⁷⁶ each plan’s joint board of trustees⁷⁷ is usually considered the “named fiduciary.”

ERISA’s functional test is far more sweeping than the named fiduciary clause.⁷⁸ Indeed, the functional definition of ERISA § 3(21)(A) includes named fiduciaries, named trustees, designated administrators, and any other person designated under ERISA to carry out fiduciary responsibilities.⁷⁹ The functional test imposes fiduciary duties on persons⁸⁰ in four circumstances. ERISA defines a person as a fiduciary *to the extent* the person (1) exercises *any* discretionary control or discretionary authority with respect to the *management of the plan*, (2) exercises *any* authority or control over *plan asset management or disposition*, (3) has discretionary authority or discretionary responsibility for the *administration of the plan* (exercised or not), or (4) *provides investment advice* concerning the plan assets for which the person is compensated.⁸¹ The functional test is contained in 29 U.S.C. § 1002(21)(A), which states

a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he 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, or (iii) he has any

⁷⁵ Joseph A. Simone, *Fiduciary Responsibility and Prohibited Transactions Under ERISA*, in UNDERSTANDING ERISA 2002, at 563, 570 (PLI Tax Law & Practice Course, Handbook Series No. J-536, 2002).

⁷⁶ Collectively-bargained plans are also called Taft-Hartley plans; such a plan is a pension plan formed under a collective bargaining agreement and is governed by the provisions of the Labor-Management Relations (Taft-Hartley) Act. 29 U.S.C. §§ 141-187.

⁷⁷ The board of trustees for a collectively-bargained plan includes representatives of both the participating employers and the union. Simone, *supra* note 75, at 602 n.6.

⁷⁸ 29 U.S.C. § 1002(21)(A).

⁷⁹ James Lockhart, Annotation, *When is Employer, Labor Union, Affiliated Entity or Person, or Pension or Welfare Plan “Fiduciary” Within Meaning of § 3(21)(A)(i) or (iii) of Employee Retirement Income Security Act of 1974 (29 U.S.C.A. § 1002(21)(A)(i) or (iii))*, 178 A.L.R. FED. § 2(a), at 129 (2005).

⁸⁰ “Person” for purposes of 29 U.S.C. § 1002(21)(A) includes “an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.” ERISA § 3(9), 29 U.S.C. § 1002(21)(A).

⁸¹ See Simone, *supra* note 75, at 571.

discretionary authority or discretionary responsibility in the administration of such plan.⁸²

There are three important points to note about the functional test. First, formal authority is not necessary for the imposition of fiduciary status; § 1002(21)(A)(i) creates fiduciary status for those exercising any discretionary authority regardless of whether such authority was ever formally granted.⁸³ Second, this functional definition of “fiduciary” under ERISA is broader than at common law, which requires a formal trusteeship.⁸⁴ Third, ERISA fiduciary duties and liability may exist even if those duties have been delegated to others; any retention of discretionary power attaches fiduciary obligations.⁸⁵ Section 1002(21)(A)(iii) imposes fiduciary liability on those who have been granted discretionary authority regardless of whether such discretion is ever exercised.⁸⁶

Applying the functional test is not always easy because it rejects formalistic labeling as a basis for determining fiduciary status. Identifying a person as an ERISA fiduciary is only half of the inquiry because the statute limits the fiduciary responsibilities to the scope of that person’s control or authority over plan assets or management. A person could be a fiduciary for some purposes and not others.⁸⁷ This makes ERISA both sweeping in scope and precise in application; every person who meets the functional test will have fiduciary duties imposed on him or her, but that duty is limited in scope.⁸⁸ Therefore, it is necessary to determine the person was an ERISA fiduciary acting within the scope of his fiduciary obligations before ERISA will impose fiduciary duties. Two situations that commonly arise are whether the contested fiduciary status attaches to an employer and whether the fiduciary status applies personally to a

⁸² 29 U.S.C. § 1002(21)(A).

⁸³ See Lockhart, *supra*, note 79 at 161.

⁸⁴ See, e.g., Hunt v. Hawthorne Assocs., Inc., 119 F.3d 888, 892 n.2 (11th Cir. 1997); Brock v. Hendershott, 840 F.2d 339, 341–42 (6th Cir. 1988).

⁸⁵ See Hogan v. Metromail, 107 F. Supp. 2d 459, 474–75 (S.D.N.Y. 2000) (finding corporation was sufficiently alleged to be a fiduciary notwithstanding delegation of plan administration duties where evidence suggested the corporation made final decision regarding plan); Dall v. Chinet Co., 33 F. Supp. 2d 26, 33 (D. Me. 1998) (finding employer to be fiduciary notwithstanding designation of named fiduciary where employer possessed discretionary powers sufficient to make it a functional trustee).

⁸⁶ See, e.g., Curico v. John Hancock Mut. Life Ins. Co., 33 F.3d 226, 233 (3d Cir. 1994).

⁸⁷ See, e.g., Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996); Varity Corp. v. Howe, 516 U.S. 489, 498 (1996).

⁸⁸ E.g., Amato v. W. Union Int’l, Inc., 773 F.2d 1402, 1416–17 (2d Cir. 1985) (holding employers are not fiduciaries when they conduct business not regulated by ERISA), *abrogated on other grounds*, Mead Corp. v. Tilley, 490 U.S. 714 (1989).

corporate officer.⁸⁹ Because debts are often challenged as non-dischargeable on one of these two bases, it is important to have a basic understanding of when ERISA imposes fiduciary duties upon employers and corporate officers.

An employer may be both a plan sponsor and a fiduciary. A plan sponsor is simply an entity that provides a plan covered under ERISA such as an employer who offers health and pension benefit plans.⁹⁰ ERISA does not impose fiduciary duties on plan sponsors in their capacities as decision-makers of which benefits to offer.⁹¹ To determine whether a plan sponsor is a fiduciary, courts have uniformly applied the functional test in ERISA § 3(21)(A).⁹² Because the functional test heavily emphasizes discretionary control, courts consider the existence of discretion the “sine qua non of fiduciary duty” under ERISA.⁹³ Complete discretion is not required; *any* level of discretion satisfies the statutory definition.⁹⁴ Where discretion exists, any attempt to disclaim such fiduciary responsibility is void as against public policy.⁹⁵

Courts have developed general principles for determining whether a plan sponsor is a fiduciary. To determine whether a sponsor is a fiduciary, courts focus on the sponsor’s role in the plan or the sponsor’s activities in relation to the plan.⁹⁶

A sponsor may be a fiduciary by the nature of its defined role in relation to an ERISA plan. First, fiduciary duties exist where the plan documents designate the sponsor as a fiduciary.⁹⁷ Status as a sponsor is insufficient, by

⁸⁹ Both *Philpott* and *In re Hemmeter* dealt with the contested personal fiduciary status of individuals who were either owners or officers of employer corporations.

⁹⁰ 29 U.S.C. § 1002(16)(B) (2000).

⁹¹ *Noorily v. Thomas & Betts Corp.*, 188 F.3d 153, 158 (3d Cir. 1999) (stating sponsor was not a fiduciary when making business decisions allowed for by the plan regarding employees’ eligibility).

⁹² *See, e.g., Howe v. Varsity Corp.*, 516 U.S. 489, 504 (1996) (noting “the primary function of the fiduciary duty is to constrain the exercise of *discretionary* powers which are controlled by no other specific duty If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose.”).

⁹³ *Pohl v. Nat’l Benefits Consultants, Inc.*, 956 F.2d 126, 129 (7th Cir. 1992); *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

⁹⁴ ERISA confers fiduciary status upon any person who has “any discretionary control or discretionary authority.” 29 U.S.C. § 1002(21)(A); *see supra* notes 70–76 and accompanying text.

⁹⁵ *See Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1460 (9th Cir. 1995) (quoting 29 U.S.C. § 1110).

⁹⁶ *See infra* notes 97–121 and accompanying text. These inquiries track the ERISA statutes conferring fiduciary responsibilities based on status as a named fiduciary, or based on application of the functional definition statute. *See* 29 U.S.C. §§ 1002(21)(A), 1102(a)(2).

⁹⁷ A sponsor can remove these obligations by fully delegating the responsibilities and by not retaining any effective control over the delegated functions. *See, e.g., McDermott Food Brokers, Inc. v. Kessler*, 899 F.

itself however, to confer fiduciary status.⁹⁸ Mere participation in a multi-sponsor plan, such as those offered by labor unions, does not confer fiduciary status on a sponsor.⁹⁹ Transfer of control over a plan from one sponsor to another will also transfer fiduciary obligations.¹⁰⁰ Second, a plan sponsor becomes a fiduciary to the extent its employees carry out fiduciary duties.¹⁰¹ Designating corporate officers or employees to act as fiduciaries does not automatically create fiduciary liability for all actions of the designated employee.¹⁰² The designating entity will be deemed to have fiduciary obligations only to the extent the designated individual carries out ERISA fiduciary duties.¹⁰³ Third, where the sponsor has delegated its fiduciary duties to an external individual or entity, the sponsor retains fiduciary obligations if it retains effective control.¹⁰⁴

In addition to role-based fiduciary duties, certain activities may confer fiduciary status upon a sponsor.¹⁰⁵ These include activities relating to plan design, plan administration, and control of plan assets.¹⁰⁶ In general, a plan sponsor is not a fiduciary when making “design” decisions, which include activities relating to the adoption, amendment, or even termination of a plan.¹⁰⁷ Communication of these design decisions to plan participants, however, is a

Supp. 928, 932–33 (N.D.N.Y. 1995) (employer not a fiduciary where all powers delegated except the ability to select administrators).

⁹⁸ See, e.g., *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (plan sponsors are generally free to adopt, modify, or terminate welfare plans for any reason and do not act as fiduciaries when undertaking those actions); see also *Martinez v. Schlumberger, Ltd.*, 338 F.3d 407, 430 (5th Cir. 2003) (sponsor not acting as fiduciary by merely amending a plan).

⁹⁹ Some instances may require majority sponsor action to confer fiduciary liability. *Alfarone v. Bernie Wolff Constr. Corp.*, 788 F.2d 76, 79 (2d Cir. 1986).

¹⁰⁰ Fiduciary duties attach to the extent that the successor sponsor has assumed control, but do not include liability for acts or events wholly occurring before the assumption of any fiduciary duties. See, e.g., *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 85 (2d Cir. 2001).

¹⁰¹ See *Confer v. Custom Eng'g Co.*, 952 F.2d 34, 37 (3d Cir. 1991) (holding individual officer's acts were imputed to the named corporate fiduciary where the officers had no individual discretionary roles as to plan administration).

¹⁰² See 29 U.S.C. § 1002(21)(A) (2000).

¹⁰³ *Id.*

¹⁰⁴ See *Rondor Music Int'l, Inc. v. Great W. Life & Annuity Ins. Co.*, No. 97-55051, 1998 U.S. App. LEXIS 7883, at *6–7 (9th Cir. Apr. 20, 1998); *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996); *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988); *Ed Miniati, Inc. v. Global Life Ins. Group Inc.*, 805 F.2d 732, 736 (7th Cir. 1986); *Welsh v. Quabbin Timber Inc.*, 943 F. Supp. 98, 109 (D. Mass. 1996).

¹⁰⁵ See *infra* notes 106–21 and accompanying text.

¹⁰⁶ See *Lockhart*, *supra* note 79, § 2(a). These activities track the ERISA fiduciary statute creating fiduciary status for persons exercising discretionary control or authority over plan management, having any discretionary authority or responsibility in plan administration, or exercising any authority or control over disposition of plan assets. See 29 U.S.C. § 1002(21)(A).

¹⁰⁷ See *Lockhart*, *supra* note 79, §§ 19–37.

generally recognized fiduciary duty.¹⁰⁸ Decisions that do not rise to the level of “design” may have fiduciary obligations attached.¹⁰⁹

Many activities related to the ongoing administration of a plan are fiduciary in nature. Again, fiduciary duties attach where the sponsor exercises discretion in carrying out administrative activity.¹¹⁰ Plan administrative activities that may carry fiduciary obligations include general administrative activities, individual eligibility determinations, plan registration activities, decisions to offer severance, and decisions regarding claims.¹¹¹ Where administrative duties are delegated to a trustee, fiduciary duties attach to the extent the sponsor retains the ability to select, discharge, or oversee an administrative trustee.¹¹²

A plan sponsor may become an ERISA fiduciary if it exercises the requisite control over plan assets. ERISA does not define what constitutes plan assets,¹¹³ although wage deduction contributions are defined as plan assets.¹¹⁴ Where the sponsor exercises control over plan assets by merely carrying out plan terms in a non-discretionary manner, no fiduciary status is conferred.¹¹⁵ However, courts have held a sponsor who makes or participates in investment decisions, even if restricted, is a fiduciary.¹¹⁶ A sponsor is a fiduciary to the

¹⁰⁸ See *Varity Corp. v. Howe*, 516 U.S. 489, 503 (1996) (discretionary authority to communicate with beneficiaries fell within plan administration fiduciary duties).

¹⁰⁹ For example, fiduciary duties may attach to decisions that affect existing, vested benefits. See, e.g., *Amato v. W. Union Int'l, Inc.*, 773 F.2d 1402, 1417 (2d Cir. 1985), *abrogated on other grounds*, *Mead Corp. v. Tilley*, 490 U.S. 714 (1989).

¹¹⁰ See 29 U.S.C. § 1002(21)(A).

¹¹¹ These duties do not include entirely non-discretionary activities such as purely clerical or ministerial activities. See, e.g., *Sengpiel v. The B.F. Goodrich Co.*, 156 F.3d 660, 665–66 (6th Cir. 1998).

¹¹² See, e.g., *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996) (employer's power to choose and remove fiduciaries was sufficient “discretionary authority” over the plan administration to make it a fiduciary); see also *Rondor Music Int'l, Inc. v. Great W. Life & Annuity Ins. Co.*, No. 97-55051, 1998 U.S. App. LEXIS 7883, at *6–7 (9th Cir. Apr. 20, 1998); *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988); *Ed Miniati, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 736 (7th Cir. 1986).

¹¹³ See, e.g., *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 89 (1993).

¹¹⁴ 29 C.F.R. § 2510.3-102(a) defines “plan assets” as amounts that a participant has withheld from his wages by an employer for contribution to the plan as of the earliest date on which such contribution can reasonably be segregated from the employer's general assets. Some federal courts have held plan assets are not limited to wage deductions and include other employer contributions. See *Bd. of Trs. of Airconditioning & Refrigeration Indus. Health & Welfare Trust Fund v. J.R.D. Mech. Servs., Inc.*, 99 F. Supp. 2d 1115, 1120 (C.D. Cal. 1999).

¹¹⁵ See, e.g., *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 74 F.3d 20, 22 (1st Cir. 1996) (stating merely making investments as authorized by trustee does not constitute discretionary control).

¹¹⁶ See *Trs. of Hotel Employees & Rest. Employees Int'l Union Welfare Pension Fund v. Amivest Corp.*, 733 F. Supp. 1180, 1184 (N.D. Ill. 1990) (authorizing outside firm to make investments was discretionary control); *Schoenholtz v. Doniger*, 628 F. Supp. 1420, 1428–30 (S.D.N.Y. 1986) (holding officers' prevention

extent it has discretionary control over the payment of benefits.¹¹⁷ The obligation to make payments to an ERISA plan is generally held to make an employer a fiduciary.¹¹⁸ Where an employer holds specific funds earmarked as plan assets which are owed to a plan, the employer is a fiduciary in relation to those identified funds.¹¹⁹ An employer is not a fiduciary, however, where the plan merely identifies monies owed as accounts receivable.¹²⁰ Employers are typically held to be fiduciaries to the extent they retain custody of money withheld from employees to fund a plan.¹²¹

A corporate officer or employer may be held personally liable for breaching fiduciary duties owed to a plan under ERISA. Courts disagree as to

of investment constituted control of plan assets); *Davidson v. Cook*, 567 F. Supp. 225, 238–39 (E.D. Va. 1983) (holding individual was a plan fiduciary where he exercised discretion in the administration of the plan by failing to report serious delinquent payments owed to plan). *But see* *Flake v. Hoskins*, 55 F. Supp. 2d 1196, 1219–20 (D. Kan. 1999) (holding corporate adoption of “poison-pill” anti-takeover measures does generally not constitute control of plan assets); *Cosgrove v. Circle K Corp.*, 884 F. Supp. 350, 352 (D. Ariz. 1995) (holding employer not a fiduciary where no discretionary authority exercised over plan assets that were part of an acquisition).

¹¹⁷ *See* *Kopilas v. Dispigna*, No. 90 Civ. 5075 (JFK), 1992 U.S. Dist. LEXIS 5863, at *9 (S.D.N.Y. Apr. 28, 1992) (employer’s obligation to make payments to multi-sponsor plan not fiduciary where contract did not indicate employer had any discretionary control or authority with respect to the plan); *Pension Benefit Guar. Corp. v. Solmsen*, 671 F. Supp. 938, 945–46 (E.D.N.Y. 1987) (holding individual responsible for forwarding payments to plan was fiduciary).

¹¹⁸ *See* *Local Union 2134, United Mine Workers of Am. v. Powhatan Fuel, Inc.*, 828 F.2d 710, 713 (11th Cir. 1987) (holding president of company was obligated to attempt to maintain sufficient funds for plan administration); *Ches v. Archer*, 827 F. Supp. 159, 170 (W.D.N.Y. 1993) (holding corporate officers may have breached fiduciary duties by failing to establish a plan funding policy); *Schwartz v. Interfaith Med. Ctr.*, 715 F. Supp. 1190, 1196 (E.D.N.Y. 1989) (holding employer barred from administering self-insured health plan based on conflict of interest with fiduciary duties); *Solmsen*, 671 F. Supp. at 938–39 (holding former president and owner of corporation a fiduciary where he exercised discretion in paying other corporate expenses and in not making plan contributions). *But see* *Navarre v. Luna (In re Luna)*, 406 F.3d 1192, 1205–06 (10th Cir. 2005) (holding employer’s failure to make contractually obligatory payments to plan was not a fiduciary breach); *Noble v. Cumberland River Coal Co.*, 26 F. Supp. 2d 958, 963 (E.D. Ky. 1998) (holding employer not fiduciary by merely funding the plan).

¹¹⁹ *See* *PMTA-ILA Containerization Fund v. Rose*, No. Civ. A. 94-5635, 1995 WL 461269, at *4 (E.D. Pa. Aug. 2, 1995) (finding president of sponsor was fiduciary where plan clearly defined and designated unpaid monies as plan assets).

¹²⁰ Even where monies owed are not considered plan assets, there is a statutory obligation to make the payments within a certain period. Under 29 C.F.R. § 2510.3-102, the longest “maximum time period” before which participant-withheld contributions must be segregated by an employer under any circumstances is ninety days from the date the amounts would otherwise have been payable to the employee plus two extensions of ten business days each.

¹²¹ *See* *LoPresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997) (holding corporate officer who made decisions to pay other corporate accounts with employee contributions was fiduciary). *But see id.* at 40–41 (holding second officer with access to employee contributions not a fiduciary where officer lacked discretion in deciding which accounts to pay).

what extent an individual may be personally liable as a fiduciary. Two lines of authority have emerged on this issue.

The first tracks the ERISA statutory definition of fiduciary and holds corporate officers can be liable as fiduciaries provided their conduct meets the functional definition of the statute.¹²² This reasoning emphasizes the statute's functional operation and places individual liability on those who exercise control over trust assets. Focusing on actual control is designed to discourage abuse of discretionary authority over assets belonging to others.

The second line of authority suggests corporate officers are not individually liable as fiduciaries to the extent they are acting on behalf of the named corporate fiduciary.¹²³ This line of cases provides a shield to personal liability as long as the officer acts within the corporate form.¹²⁴ These cases preserve the protections provided by the corporate form to corporate officers and employees.¹²⁵ Courts following this line of authority provide for individual ERISA fiduciaries under federal common law veil piercing doctrine.¹²⁶ The second line of cases is more well reasoned because it provides for corporate liability by recognizing that corporations act only through their agents, while

¹²² See *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993); *Maney v. Fischer*, Pension Plan Guide P 23942U, No. 96 Civ. 0561 (RMV), 1998 U.S. Dist. LEXIS 4077, at *10–11 (S.D.N.Y. Mar. 31, 1998) (holding personal liability may be established under 29 U.S.C. § 1002(21)(A) and showing conduct that justifies piercing the corporate veil is not required); *Eaton v. D'Amato*, 581 F. Supp. 743, 747 (D.D.C. 1980) (holding corporate officers acting within their roles may be individual fiduciaries).

¹²³ See, e.g., *Confer v. Custom Eng'g Co.*, 952 F.2d 34, 38 (3d Cir. 1991) (holding officers not individually liable as fiduciaries where they acted on behalf of their employer corporation).

¹²⁴ *Id.*

¹²⁵ A corporation is treated as a legal entity separate from its owners. See, e.g., *Vill. of Camelback Prop. Ass'n v. Carr*, 538 A.2d 528, 532–33 (Pa. Super. Ct. 1988). Generally, a corporation is liable under agency law for acts of its officers and employees where those acts are within the scope of the individual's authority. See, e.g., *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 565–66 (1982) (holding principal corporation liable for its agent's antitrust violation where the agent acted with apparent authority). In exceptional circumstances, such as where fraud is committed by a corporate agent, a court may disregard the corporate entity. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003).

¹²⁶ Some circuits require some element of fraudulent intent before piercing the corporate veil. See, e.g., *Crane v. Green & Freedman Baking Co.*, 134 F.3d 17, 23 (1st Cir. 1998) (stating “fraudulent intent is a sine qua non” to an ERISA veil piercing claim against an individual officer or employee). This assumes an individual who acts fraudulently is not acting on behalf of the corporation. See *id.* Other courts use a multi-factor analysis to determine whether a corporation is a “legal fiction” such that the individual, and not the corporation, committed the ERISA violation. See, e.g., *Trs. of the Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188, 199 (3d Cir. 2003). The federal common law “alter-ego” doctrine is also relevant to ERISA fiduciary law. See *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 587–89 (6th Cir. 2006). The doctrine is aimed at companies attempting to evade ERISA obligations by changing their corporate forms (such as a sham sale of a company designed to cancel a labor contract). *Id.*

also providing for individual liability where the corporate form should be disregarded due to principles of equity.

To find personal liability for ERISA fiduciary obligations, the second line of authority considers individuals to be fiduciaries where their actions are found to be an abuse of the corporate form.¹²⁷ In these instances, the courts pierce the corporate veil to find the individual, rather than the corporation, liable for the underlying ERISA violation.¹²⁸ The doctrine of veil piercing states that where a corporation is little more than a legal fiction, the court will disregard the legal protections of the corporate form and treat the corporation as an alter ego of the individual.¹²⁹ Because the doctrine is designed to rectify abuses of the corporate form, the scope of the remedy may be affected by the harm claimed.¹³⁰

Whether the court should pierce the corporate veil pursuant to an ERISA claim is a question of federal law.¹³¹ There are no rigid tests for veil piercing; courts acknowledge the federal standard for veil piercing is imprecise and fact intensive.¹³² The guiding rule is the corporate form may be disregarded in the interests of fairness, equity, and public policy.¹³³ Under the doctrine, courts look for circumstances that are indicative of underlying unfairness that rises to a level akin to fraud.¹³⁴ Some courts require a threshold determination that the officer is an ERISA fiduciary before analyzing whether an officer may be personally liable on an ERISA claim.¹³⁵

¹²⁷ See, e.g., *Lutyk*, 332 F.3d at 199.

¹²⁸ *Peacock v. Thomas*, 516 U.S. 349, 354 (1996).

¹²⁹ *Id.*

¹³⁰ *Lutyk*, 332 F.3d at 193 n.6.

¹³¹ See *Hudson County Carpenters Local Union No. 6 v. V.S.R. Constr. Corp.*, 127 F. Supp. 2d 565, 569 (D.N.J. 2000). Veil piercing is not an independent cause of action under ERISA, rather, veil piercing is a way to establish vicarious liability for an ERISA claim. *Peacock*, 516 U.S. at 354. Once the underlying federal ERISA claim is established, the courts apply general federal veil piercing doctrine to determine if an individual should be held responsible for the corporate act. See *Hudson County*, 127 F. Supp. 2d at 569.

¹³² See, e.g., *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry.*, 210 F.3d 18, 26 (1st Cir. 2000); *cf.* *Carpenters & Joiners Welfare Fund v. Wayne*, No. 02-779 (JNE/JGL), 2003 U.S. Dist. LEXIS 12921, at *8 (D. Minn. July 21, 2003).

¹³³ See, e.g., *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981).

¹³⁴ *Id.*

¹³⁵ *Local Union No. 98, IBEW v. Garney Morris, Inc.*, No. 03-5272, 2004 U.S. Dist. LEXIS 9528, at *4-5 (E.D. Pa. May 21, 2004) (stating the Third Circuit may require ERISA fiduciary status to be established as a threshold requirement to a veil piercing claim against a corporate officer).

II. LACK OF CLARITY AND THE CIRCUIT SPLIT: ERISA FIDUCIARIES AND 11 U.S.C. § 523(A)(4)

Although courts have not often addressed the issue of ERISA fiduciary status in relation to § 523(a)(4) of the Code, two lines of authority have emerged. The first line is based on *In re Hemmeter*,¹³⁶ which was the first circuit court opinion to address the issue. In *In re Hemmeter*, the Ninth Circuit held a statutory fiduciary under ERISA satisfied the “fiduciary capacity” requirement of § 523(a)(4) of the Code.¹³⁷ Generally, this initial holding has been followed.¹³⁸ However, the Eighth Circuit’s opinion in *Hunter v. Philpott*, 373 F.3d 873 (8th Cir. 2004), created a split with the accepted rule of *In re Hemmeter* by holding an ERISA fiduciary does not necessarily satisfy § 523(a)(4). The lack of clarity and possible court confusion over ERISA fiduciary law is the more likely cause of the split, rather than any fundamental disagreement over the interpretation of ERISA or § 523(a)(4) of the Code.¹³⁹ The respective decisions are analyzed below to clarify the split and the reasoning supporting each decision.

A. *Establishing the Rule: In re Hemmeter*

The Ninth Circuit, in *In re Hemmeter*, held debts incurred from acts of fraud or defalcation while acting as an ERISA fiduciary barred from discharge in bankruptcy.¹⁴⁰ The court was the first to address the question of whether the ERISA fiduciary statute creates a “fiduciary capacity” that meets the *Davis*¹⁴¹ threshold requirement for § 523(a)(4) defalcation.¹⁴² The court answered in the affirmative, holding an individual who was a fiduciary for ERISA purposes

¹³⁶ Blyler v. Hemmeter (*In re Hemmeter*), 242 F.3d 1186, 1188 (9th Cir. 2001).

¹³⁷ *Id.*

¹³⁸ See generally *Cal-Micro, Inc. v. Cantrell (In re Cantrell)*, 329 F.3d 1119 (9th Cir. 2003); *Steinman v. Hicks*, 352 F.3d 1101 (7th Cir. 2003); *Chao v. Duncan (In re Duncan)*, 331 B.R. 70, 82 (Bankr. E.D.N.Y. 2005) (“[W]here 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.”) (emphasis removed); *Starzer v. Swihart (In re Starzer)*, 331 B.R. 444 (Bankr. E.D. Cal. 2005); *Consumers Produce Co. v. Masdea (In re Masdea)*, 307 B.R. 466 (Bankr. W.D. Pa. 2004); WILLIAM E. KNEPPER & DAN A. BAILEY, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* § 9.07 (perm. ed., rev. 2005); BARRY STUART ZISMAN, *BANKS & THRIFTS: GOVERNMENT ENFORCEMENT & RECEIVERSHIP* § 28.11 (perm ed., rev. 2005).

¹³⁹ See *infra* Part II.B.

¹⁴⁰ Blyler v. Hemmeter (*In re Hemmeter*), 242 F.3d 1186, 1190 (9th Cir. 2001).

¹⁴¹ *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 330 (1934).

¹⁴² *In re Hemmeter*, 242 F.3d at 1188.

was also a fiduciary within the meaning of § 523(a)(4).¹⁴³ Both the facts and the analysis of this case are relatively clear and straightforward.

An ERISA plan beneficiary alleged a corporate officer was individually liable as an ERISA fiduciary and, therefore, the beneficiary's claim against the individual could not be discharged in bankruptcy.¹⁴⁴ The corporate officer, although not individually a named fiduciary, was a member of the board of directors, which was a named fiduciary to the plan at issue.¹⁴⁵ The plan beneficiaries alleged the corporate officer breached an ERISA fiduciary duty in administering the plan.¹⁴⁶ This alleged breach occurred when the officer invested plan assets in company stock, which subsequently lost most of its value.¹⁴⁷

The Ninth Circuit's opinion addressed the requirements that the officer be an ERISA fiduciary and have acted in a "fiduciary capacity" as defined by § 523(a)(4) before the claim could be assessed against the officer-debtor's bankruptcy estate.¹⁴⁸ The court specifically analyzed whether the ERISA fiduciary statute satisfied the threshold requirements of *Davis*.¹⁴⁹ *Davis* was satisfied, the court held, where the ERISA statute created fiduciary obligations sufficient to create a traditional (i.e., not *ex malificio*) trust.¹⁵⁰ The trust satisfied *Davis* because the ERISA fiduciary statute (i) defined the trust to which the fiduciary owed duties,¹⁵¹ (ii) identified the fiduciary's fund management duties,¹⁵² and (iii) imposed obligations prior to the alleged wrongdoing.¹⁵³

The *In re Hemmeter* decision did not provide comprehensive guidance to subsequent courts, however, for two reasons. First, the decision dealt with a named fiduciary.¹⁵⁴ While the court applied the functional test to confirm the

¹⁴³ *Id.* at 1190 (finding ERISA statute sufficient to satisfy traditional requirements of statutory fiduciary where it "imposes obligations on the fiduciary prior to the . . . wrongdoing").

¹⁴⁴ *Id.* at 1189–90.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1189–91.

¹⁴⁸ *See id.*

¹⁴⁹ *Id.* at 1189–90.

¹⁵⁰ *Id.* at 1190.

¹⁵¹ *Id.* (stating the creation of the ERISA plan identifies the trust *res*).

¹⁵² *Id.* (stating ERISA sets forth the fiduciary's fund management duties).

¹⁵³ *Id.* (Fiduciary "duties necessarily arise upon creation of an ERISA plan and predate the creation of any debt to the plan participant creditor.").

¹⁵⁴ *Id.* at 1188 (stating debtor was a named fiduciary of one of the two ERISA plans that brought suit alleging breach of fiduciary duties in regards to the plans).

debtor was an ERISA fiduciary, the court did not clarify that the functional definition of fiduciary is controlling, and therefore the court's analysis was equally applicable to named and functional fiduciaries.¹⁵⁵

Second, the court's holding did not address a corporate officer or employee's potential shield from individual ERISA fiduciary liability. The court held the debtor's status as an ERISA fiduciary satisfied the "fiduciary capacity" requirement of § 523(a)(4) but he had not committed defalcation.¹⁵⁶ While the debtor was acting in his fiduciary capacity in making investment decisions for the plan, his poor investment decisions did not constitute defalcation.¹⁵⁷ Because there was no defalcation, the court did not reach the issues of whether the individual corporate officer would be liable for defalcation or whether the corporation would be liable for its agent's defalcation.¹⁵⁸ *In re Hemmeter*, then, is properly read only to address the threshold issue of whether an ERISA fiduciary satisfies § 523(a)(4) of the Code. Whether the debt arises from an act of fraud or defalcation, whether the act was done within the scope of the debtor's fiduciary duties, or whether the debt is properly the liability of the individual are separate inquiries that are not central to the main holding of *In re Hemmeter*.¹⁵⁹

B. Creating the Circuit Split: *Hunter v. Philpott*

The Eighth Circuit's departure from *In re Hemmeter* likely reflects a misunderstanding of the scope of the *In re Hemmeter* decision. In *Philpott*, the Eighth Circuit conflated the issues of fiduciary capacity and liability in holding an ERISA fiduciary does not necessarily satisfy the requirements of "fiduciary capacity" under § 523(a)(4).¹⁶⁰ This collapsing of liability analysis into the

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1190–91.

¹⁵⁷ The court stated "the essence of defalcation [was] . . . the failure to produce funds entrusted to a fiduciary." *Id.* at 1191. Defalcation, therefore, did not include "normal acts within the business judgment of the fiduciary . . . that do not involve failure to account for or produce [plan] funds." *Id.*

¹⁵⁸ Individual liability for corporate officers may be found on either an independent ERISA fiduciary basis or on an alternative corporate veil-piercing basis. 29 U.S.C. § 1002(21)(A) (2000); *see also, e.g.*, *Local 159 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 985 (9th Cir. 1999). However, veil piercing is not an independent cause of action under ERISA; it is a way to impose liability for an underlying cause of action. *Peacock v. Thomas*, 516 U.S. 349, 354 (1996). Veil piercing allows an action against an individual who would otherwise be protected by the corporate form. *See id.*

¹⁵⁹ *In re Hemmeter*, 242 F.3d at 1190.

¹⁶⁰ *Hunter v. Philpott*, 373 F.3d 873, 874 (8th Cir. 2004). The court did not analyze whether the ERISA statute met the *Davis* test nor whether the debtor was acting as an ERISA fiduciary when the alleged defalcation occurred. *See id.* Instead, the court determined the debtor's actions did not establish a fiduciary relationship while simply ignoring the ERISA fiduciary statute. *Id.* The court's conclusion that the ERISA

threshold issue of fiduciary capacity is the primary explanation for the split.¹⁶¹ It is necessary to separate these issues, and their factual bases, when comparing *Philpott* with *In re Hemmeter*.

In *Philpott* the debtor was one of two equal owners, sole shareholders, and officers of a corporation.¹⁶² The corporation signed an employment contract with a union, in which the corporation became a member of a multi-sponsor plan.¹⁶³ Monthly contributions owed under the contract were paid out of the corporation's general fund.¹⁶⁴ The corporation failed to make two payments, during which time cash withdrawals were made for other purposes and both owners issued checks to themselves.¹⁶⁵ The plan beneficiaries sued the corporation for the unpaid contributions, whereupon the debtor-owner-officer filed for individual bankruptcy.¹⁶⁶ The plan beneficiaries then brought an adversary proceeding to bar the debt from discharge, alleging the debtor committed defalcation while acting in a fiduciary capacity.¹⁶⁷ The plan beneficiaries contended the defalcation made the debtor-owner-officer individually liable for the corporation's debts to the plan and that § 523(a)(4) barred the discharge of that debt in bankruptcy.¹⁶⁸

The *Philpott* case was more factually and legally complicated than *In re Hemmeter*.¹⁶⁹ These complexities are likely the reason for the *Philpott* court's flawed analysis of both the factual and legal issues. The primary problem in *Philpott* is the court's imprecise application of *Davis* to the ERISA fiduciary statute.¹⁷⁰ This misapplication is further complicated by the court's confused analysis of fiduciary duty issues in the case.¹⁷¹ Together, the flawed

statute itself was insufficient to create fiduciary capacity was flawed because the conclusion was based on the debtor's actions without addressing whether the ERISA fiduciary statute even applied to the debtor actions.

¹⁶¹ See *infra* notes 190–95 and accompanying text.

¹⁶² *Philpott*, 373 F.3d at 874.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 875.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 875.

¹⁶⁹ See *id.* at 874 (8th Cir. 2004) (concerning liability of individual who was a functional ERISA fiduciary and an owner-officer of a closely held corporation); cf. *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1191 (9th Cir. 2001) (holding no defalcation committed by named ERISA fiduciary).

¹⁷⁰ See *Philpott*, at 874. The court failed to analyze the language of 29 U.S.C. § 1002(21)(A) in light of the *Davis* requirements, and instead focused on the debtor's "relationship" to the fund. *Id.* at 876.

¹⁷¹ The court emphasized that the debtor had no part in the management or administration of the plan in holding the debtor was not a fiduciary under *Davis* and, therefore, the debtor's failure to make payments to the plan was not defalcation. See *id.* at 876. This conflates the separate ERISA fiduciary duties owed in relation

application and analysis are the basis of the court's decision. Separating them reveals the unsound basis for the opinion and highlights the need for a comprehensive approach to these issues.

Philpott misconstrues *Davis* and its progeny and therefore misconstrues the requirements of "fiduciary capacity" under § 523(a)(4).¹⁷² Neither the statute nor the case law interpreting § 523(a)(4) support this flawed analysis, and the opinion has serious implications for ERISA fiduciary liability in bankruptcy.

First, the *Philpott* court misconstrued *Davis* and its progeny in deciding an ERISA fiduciary does not necessarily have "fiduciary capacity" as defined in § 523(a)(4). Initially, the court concluded *Davis* excludes equitable, ex-post trusts from § 523(a)(4).¹⁷³ *Davis* states this exclusion by the term of art "strict and narrow sense," meaning a fiduciary relationship had to exist before the alleged wrongdoing for purposes of the statutory bar from discharge for defalcation debts.¹⁷⁴ However, *Philpott* incorrectly applied this term of art to exclude fiduciary duties created by a statutory trust.¹⁷⁵ The *Philpott* court summarily excluded statutory trusts under the rubric of a misconstrued "strict and narrow" requirement¹⁷⁶ and implied only trusts that explicitly identify individual fiduciaries satisfy the *Davis* requirements.¹⁷⁷ This incorrect reading of *Davis* improperly abrogates fiduciary duties created by federal statute. *Davis* merely requires a pre-existing, defined duty to an identified trust.¹⁷⁸ *Philpott* fails to show the ERISA statute is insufficient to meet this de minimus requirement.¹⁷⁹

to plan assets into the duties owed by those who manage or administer ERISA plans. See 29 U.S.C. § 1002(21)(A) (2000). Fiduciary duties owed by those who exercise control over plan assets are independent of any other ERISA fiduciary duties. See *id.* Fiduciary obligations attached to control or disposition of plan assets satisfy *Davis* where the *res* and the duties are defined prior to and without regard to any fiduciary misconduct. See *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 330 (1934).

¹⁷² See *supra* note 170.

¹⁷³ *Philpott*, 373 F.3d at 875–76.

¹⁷⁴ *Davis*, 293 U.S. at 333 (interpreting § 17(2) of the Bankruptcy Act of 1898, ch. 541, § 17(2), 30 Stat. 544, 550 (1898) (repealed 1978)).

¹⁷⁵ *Philpott*, 373 F.3d at 876 ("To the extent that . . . [the debtor's corporation was] *technically* a trustee of the trusts, we believe that it was nevertheless not a trustee 'in the strict and narrow sense,' as required to bar discharge" (emphasis added)). The court dismissed, without analysis, the issue of whether a statute can satisfy the requirements of § 523(a)(4). See *id.* at 877.

¹⁷⁶ See *generally id.* (holding the ERISA statute was not sufficient to meet the *Davis* requirement without analyzing the ERISA statute).

¹⁷⁷ See *id.* at 876 (debtor was not personally a party to the contract imposing obligations to the plan).

¹⁷⁸ See *supra* notes 42–50 and accompanying text.

¹⁷⁹ The court examined the debtor's duties very closely, but stopped short of reversing the lower court's finding that the debtor was a fiduciary under the ERISA statute. See *Philpott*, 373 F.3d at 876–77.

In reaching this incorrect conclusion in contravention of *In re Hemmeter*, the *Philpott* court ignored the precedent upon which *In re Hemmeter* relied for the proposition that a statute may create fiduciary capacity under § 523(a)(4).¹⁸⁰ Local ordinances as well as state and federal statutes have all been held to create fiduciary capacity under § 523(a)(4).¹⁸¹ Instead, *Philpott* relied heavily on *Barclays American/Business Credit, Inc. v. Long (In re Long)*¹⁸² for the proposition that the nature of the transaction dictates whether a relationship is fiduciary.¹⁸³

The *Philpott* court's reliance on a "relationship" analysis to determine whether fiduciary obligations exist is correct because determining fiduciary capacity is a question of federal law.¹⁸⁴ While a statute may create an obligation, statutory labels are not controlling in determining whether those obligations are fiduciary.¹⁸⁵ However, the *Philpott* court did not analyze the ERISA fiduciary statute *in any way* to determine if it created fiduciary obligations under federal law.¹⁸⁶

¹⁸⁰ See *Runnion v. Pedrazzini (In re Pedrazzini)*, 644 F.2d 756, 758 n.2 (9th Cir. 1981) ("The precise manner in which a trust is created, by consent or by statute, is of little importance. Rather, the focus should be on whether true fiduciary responsibilities have been imposed."); see also *supra* note 24.

¹⁸¹ *In re McGee*, 353 F.3d 537, 541 (7th Cir. 2003) (holding local ordinance regulating security deposits on rental real property created fiduciary capacity); *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1190 (9th Cir. 2001) (holding ERISA statute created fiduciary capacity); *Quaif v. Johnson*, 4 F.3d 950, 952 (11th Cir. 1993) (holding Georgia insurance regulation statute created fiduciary capacity).

¹⁸² *Barclays Am./Bus. Credit, Inc. v. Long (In re Long)*, 774 F.2d 875 (8th Cir. 1985).

¹⁸³ *Philpott*, 373 F.3d at 876. However, this precedent is also misconstrued; *In re Long* stated a statute may create fiduciary responsibilities. *In re Long*, 774 F.2d at 878. No fiduciary liability was found in *In re Long* primarily because there was no relevant statute creating such fiduciary responsibilities. *Id.* The *In re Long* court stated

[w]e recognize that there are cases charging individuals, by virtue of their corporate officer status, with the corporation's fiduciary duties. To the extent these cases hold that a statute or other state law rule may create fiduciary status in an officer which is cognizable in bankruptcy proceedings, we agree. We question, however, the propriety of imposing a corporation's fiduciary duties on a stockholder-employee in the absence of such a local rule, and decline to do so outside the special contexts in which the doctrine arose.

Id. (citations omitted). The *In re Long* court was unwilling to extend the corporate fiduciary doctrine to create a fiduciary duty to third parties to contracts; this is quite unlike the direct duty, mandated by statute, at issue in *Philpott*. *Id.*

¹⁸⁴ See *supra* note 58 and accompanying text.

¹⁸⁵ *Id.*

¹⁸⁶ See generally *Philpott*, 373 F.3d at 874. The federal standard is stated in *Davis*; the statute must identify the trust and the fiduciary's obligations in relation to the trust before the alleged act of wrongdoing. *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934). The Ninth Circuit applied this test and found the ERISA definition of fiduciary satisfied the federal standard. *In re Hemmeter*, 242 F.3d at 1190. The standard does not require that every fiduciary be identified, only that the statute must identify the obligations owed to the trust. *Id.*

Rather than reviewing the lower court's findings that the debtor was an ERISA fiduciary and the debtor incurred the debt through defalcation while acting in a fiduciary capacity, the court used a fuzzy "relationship" analysis to hold the debtor did not have fiduciary capacity for purposes of § 523(a)(4).¹⁸⁷ The court used this "relationship" analysis to negate fiduciary debt non-dischargeability under § 523(a)(4) despite a finding of fiduciary capacity.¹⁸⁸ The court's analysis relied on irrelevant facts in making the threshold determination that the statutory definition of an ERISA fiduciary does not satisfy "fiduciary capacity."¹⁸⁹

Despite the analytical shortcomings of the opinion, the ultimate result of *Philpott* is not obviously wrong.¹⁹⁰ *Philpott* is a veritable minefield of ERISA fiduciary issues, including a determination of corporate fiduciary liability regarding the administration or management of the plan,¹⁹¹ a determination of what constitutes plan assets to which fiduciary obligations are owed,¹⁹² and a determination of the debtor's individual liability for ERISA fiduciary obligations owed as a corporate officer.¹⁹³ Each of those issues presents an independent basis for fiduciary liability under ERISA, and either of the second two might have provided an independent basis for reversing the lower court.¹⁹⁴ The court's reasoning applied a vague analysis that used elements of these issues, however, rather than the de minimus requirements of *Davis*, in reaching its conclusion that there was no fiduciary capacity.¹⁹⁵

¹⁸⁷ See *Philpott*, 373 F.3d at 876–77.

¹⁸⁸ See *id.* at 875. The circuit court did not reverse the bankruptcy court's determination that *Philpott* was an ERISA fiduciary yet still held *Philpott* "was not a fiduciary" and so did not reach the defalcation question. *Id.* at 875 n.1.

¹⁸⁹ See *supra* notes 170–79 and accompanying text.

¹⁹⁰ Even if the Eighth Circuit had held the ERISA statute created fiduciary capacity for purposes of 11 U.S.C. § 523(a)(4), the court may still have held the discharge bar did not apply because the debtor was not acting within his fiduciary capacity, or that the action did not rise to the level of defalcation.

¹⁹¹ See *Philpott*, 373 F.3d at 876–77 (discussing whether the debtor was a fiduciary where he had no control over the administration or management of the plan).

¹⁹² See generally *id.* *Philpott* involved accounts receivable, which are not always considered to be "plan assets" under 29 U.S.C. § 1002(21)(A). See *supra* notes 119–21 and accompanying text.

¹⁹³ Because the debtor in *Philpott* was an owner-officer of a closely held corporation, the debtor might have been held personally liable for the corporation's ERISA violation under veil piercing. See *supra* notes 123–35.

¹⁹⁴ The court could have reversed the lower court by holding either the accounts receivable did not constitute plan assets under 29 U.S.C. § 1002(21)(A) or the debtor could not be held liable for the corporation's ERISA violation.

¹⁹⁵ *Philpott*, 373 F.3d at 876–77. The debtor's relationship with the plan was "basically contractual, not fiduciary, in nature." *Id.* at 877.

The facts the *Philpott* court used in its “relationship” analysis included the following: the debtor was not an individual party to the plan contract and did not guarantee the corporation’s performance on the contract, the corporation arguably did not have power to appoint employer trustees of the plan, and the exact nature of the corporation’s financial obligation to the plan was indeterminate.¹⁹⁶ Each of these facts are potentially relevant in determining potential ERISA fiduciary status, but only the last is relevant to the claim in *Philpott*.¹⁹⁷

First, that the debtor was not a named fiduciary and did not agree to personal liability does not foreclose fiduciary responsibilities.¹⁹⁸ The *Philpott* court’s reliance on this fact was misplaced because ERISA uses a functional definition of fiduciary rather than a formalistic one.¹⁹⁹ That the debtor did not personally guarantee the corporation’s performance is irrelevant to determining his individual fiduciary responsibilities.²⁰⁰

Second, the possibility that the corporation had no power of appointment was relevant to a determination that the corporation was not a fiduciary as to the management or administration of the plan.²⁰¹ The claim in *Philpott*, however, was based on a breach of fiduciary duties regarding the control of

¹⁹⁶ See *id.* at 877–76.

¹⁹⁷ The claim in *Philpott* was for defalcation in the management or disposition of plan assets under 29 U.S.C. § 1002(21)(A)(i). *Id.* at 875. If the corporation’s obligation to the plan did not include the disposition of plan assets, and was instead only a contractual obligation to pay accounts receivable, then the debtor may not have had fiduciary obligations under ERISA as to those debts. See *supra* notes 120–24 and accompanying text.

¹⁹⁸ ERISA’s functional definition does not depend on either formal designation or personal acknowledgement of fiduciary duties. See 29 U.S.C. § 1002(21)(A)(i).

¹⁹⁹ See *id.*

²⁰⁰ See *supra* note 95 and accompanying text. Attempts to nullify ERISA fiduciary duty by contract are void as against public policy. See *supra* note 95 and accompanying text. It is conceivable that an individual may voluntarily assume personal liability that would otherwise belong to a corporation by tendering a personal guarantee of the corporation’s performance. However, it is also possible courts would invalidate such a putative guarantee as void.

²⁰¹ ERISA imposes fiduciary status in relation to plan administration or management only where there is discretionary control or discretionary authority. 29 U.S.C. § 1002(21)(A)(i) and (iii).

plan assets.²⁰² Therefore, lack of appointment power was not relevant to the issue before the court.²⁰³

Third, the court questioned the imposition of fiduciary liability where the corporation owed money to the plan.²⁰⁴ Fiduciary obligations attach to those who exercise any authority or control over funds that are identified as plan assets.²⁰⁵ The *Philpott* court, however, did not examine the contract to determine whether the corporation was deemed to hold plan assets.²⁰⁶ If there were no plan assets in the corporation's general account, then there would be no fiduciary obligation to make a payment relation to disposition of general account funds. Even if there were plan assets in the corporate account, the debtor may not have been individually responsible for fiduciary obligations in relation to those assets.²⁰⁷ For individual fiduciary liability to attach in this case, the debtor must have been acting as an ERISA fiduciary in exercising control over plan assets and must have individual liability for those actions.²⁰⁸ Again, the *Philpott* court did not directly address whether the ERISA statute provided for direct personal liability or whether such liability could be justified under the doctrine of piercing the corporate veil.²⁰⁹

²⁰² The statute provided for fiduciary obligations for a person who exercises any authority or control over plan assets. *Id.* § 1002(21)(A). Discretion is not a necessary element for fiduciary obligations in this context. *Id.* This reflects the higher standard Congress intended to impose on those who had access to plan assets. *See id.* However, mere access to plan funds, without discretion, may not be sufficient to create ERISA fiduciary duties. *LoPresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997) (holding officer with access to employee contributions not a fiduciary where officer lacked discretion in deciding which accounts to pay).

²⁰³ The fiduciary statute is disjunctive, in relevant part creating fiduciary duties for *either* exercising "any discretionary authority or discretionary control" over plan management *or* "any authority or control" over management or disposition of plan assets, *or* having "any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). A finding that the defendant in *Philpott* had no part of managing or administering the plan did not resolve whether the defendant was a fiduciary as to the management or disposition of plan assets. *Id.*

²⁰⁴ *Hunter v. Philpott*, 373 F.3d 873, 876 (8th Cir. 2004) (holding "simply possessing property to which an ERISA plan asserts a claim does not" create fiduciary obligations).

²⁰⁵ *See supra* note 81 and accompanying text.

²⁰⁶ *Philpott*, 373 F.3d at 876. Fiduciary obligations attach to obligations to hand over plan assets; no fiduciary obligations attach to accounts receivables owed to plans because such receivables are not property of the plan, but rather are contractual rights to collect in the future. *Navarre v. Luna (In re Luna)*, 406 F.3d 1192, 1199–1200 (10th Cir. 2005).

²⁰⁷ The *Philpott* court referred to this issue when it stated the debtor could not simply be treated as "an alter ego" of the corporation. *Philpott*, 373 F.3d at 877.

²⁰⁸ *See supra* note 12 and accompanying text. The Eight Circuit does not appear to have adopted either line of reasoning. However, some district courts have followed the line that posits individual liability based on the statute without regard to whether the officer or employee was acting within the scope of her agency. *See, e.g., Moore v. Williams*, 902 F. Supp. 957, 964 (N.D. Iowa 1995).

²⁰⁹ *See Philpott*, 373 F.3d at 877. The lower court held the contract created a fiduciary relationship between the individual debtor and the plan. *Id.* at 875. That holding is questionable because it is more likely

The *Philpott* court cited the above-mentioned facts as part of its “relationship” analysis in determining that there was no fiduciary capacity. These facts, however, are completely irrelevant to the threshold issue of whether an ERISA fiduciary satisfies “fiduciary capacity” under § 523(a)(4).²¹⁰ As a result of its flawed analysis, the holding of *Philpott* is highly problematic in three ways. First, it contravenes the plain meaning and legislative intent of ERISA.²¹¹ Second, it creates an improper limitation on § 523(a)(4).²¹² Third, it creates uncertainty and confusion in the future judicial analysis of ERISA fiduciaries, and statutory fiduciaries generally, in the context of § 523(a)(4).

ERISA casts a broad net in creating fiduciary responsibilities, creating duties whenever an individual exercises *any* discretionary authority or control in either the administration or management of an ERISA plan or in the disposition of its assets.²¹³ The *Philpott* court, however, did not address the ERISA statute at all in its determination that the debtor had no fiduciary obligation to the plan.²¹⁴ As a rule of statutory construction, the plain meaning of a statute is given effect first.²¹⁵ The court here simply fails to address whether the debtor met the ERISA definition of fiduciary.²¹⁶ The Eighth Circuit’s failure to give effect to the plain meaning of the ERISA statute results in future uncertainty when applying the functional definition of fiduciary under ERISA in the bankruptcy context.²¹⁷ The result is a judicial rewrite of the ERISA statute’s application in bankruptcy that analyzes each transaction for a

the debtor incurred fiduciary liability by virtue of individual control over plan assets; the basis of fiduciary liability would not need to be provided for in the contract. See 29 U.S.C. § 1002(21)(A) (2000) (no requirement of written delegation of fiduciary duties in functional ERISA fiduciary definition).

²¹⁰ All of the facts and issues the court dwelt upon were relevant to the scope of ERISA fiduciary duties and to potential personal liability under veil piercing, but not to whether an ERISA fiduciary has “fiduciary capacity.” See *supra* Part II.B.

²¹¹ See *supra* note 7 and accompanying text.

²¹² See *infra* Part III.

²¹³ See *supra* notes 76–81 and accompanying text.

²¹⁴ *Philpott*, 373 F.3d at 877. “Any possible trust relationship between *Philpott* and the Funds could only have come into existence when he incurred some individual financial liability to the Funds.” *Id.*

²¹⁵ “In construing a statute, we look first to the plain meaning of the words of the statute.” *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999) (citing *Salinas v. United States*, 522 U.S. 52 (1997)).

²¹⁶ Instead, the court appeared to confuse the issues of fiduciary status under ERISA and fiduciary capacity under the Code when it stated the debtor had no preexisting trust relationship but never challenged the lower court’s holding that such a relationship existed. *Philpott*, 373 F.3d at 875.

²¹⁷ Uncertainty may arise where a debtor meets the plain meaning of the ERISA statute but may or may not have been acting within the functional definition when the alleged defalcation occurred. Failure to address the ERISA statute makes determining fiduciary capacity much more difficult. See *supra* note 160.

fiduciary duty outside of the plain meaning of the statute.²¹⁸ The result is an unsupported weakening of ERISA liability in bankruptcy.²¹⁹

This outcome also weakens § 523(a)(4) by denying its applicability to a statutory trust.²²⁰ The court's imprecise "relationship" test does not capture the elements of a federal fiduciary relationship as required under § 523(a)(4).²²¹ Therefore, future application of this test has the potential to abrogate other statutory fiduciary responsibilities in the bankruptcy context which otherwise meet the requirements of *Davis*.²²² Even if § 523(a)(4) is not further limited by application of the *Philpott* court's reasoning, the complexity of the ERISA fiduciary issue and the court's amorphous analysis in the bankruptcy context creates uncertainty in this area of the law.

III. PROTECTING ERISA TRUST BENEFICIARIES AND THE INTEGRITY OF § 523(a)(4) OF THE CODE

There is a clear need to prevent potential confusion in dealing with ERISA fiduciaries in the bankruptcy context. Confusion that results in an undermining of ERISA fiduciary obligations in the bankruptcy context weakens the protections intended by both statutes.²²³ ERISA was enacted to provide comprehensive, high standards of fiduciary duties as part of its overall aim of furthering the participation in and protection of private employee benefit programs.²²⁴ The Code seeks to grant a debtor's fresh start while at the same time protecting those who have been injured by the debtor's wrongful acts.²²⁵ Both policies are violated where an ERISA fiduciary is allowed to discharge a defalcation debt in bankruptcy.

²¹⁸ See *Philpott*, 373 F.3d at 874 (holding ERISA functional fiduciary definition does not satisfy fiduciary capacity under 11 U.S.C. § 523(a)(4) without reference to the ERISA statute).

²¹⁹ See *supra* notes 7, 66–67 and accompanying text (discussing Congressional intent that ERISA be applied expansively to protect intended employee beneficiaries).

²²⁰ By ignoring the ERISA statute in its analysis of fiduciary capacity, the *Philpott* court implied ERISA, and perhaps any statute, was incapable of establishing fiduciary capacity under *Davis*. See *Philpott*, 373 F.3d at 873.

²²¹ The relationship test fails to establish whether the statute defined the *res* and the fiduciary duties owed in relation to the trust prior to and without reference to any fiduciary misconduct. See *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934).

²²² Fiduciary responsibilities of debtors may be weakened if subsequent courts ignore relevant statutes and look only to the debtor's actions and contractual obligations. See *infra* Part III.

²²³ See *supra* notes 34–36, 66–67 and accompanying text.

²²⁴ See *supra* notes 7, 180.

²²⁵ See *supra* notes 13–14 (discussing legislative history of the bankruptcy policy underlying 'fresh start' and the discharge bar on debts incurred through fraud).

Section 523(a)(4) reflects a balance between the competing policies of protecting innocent trust beneficiaries from abuses of fiduciary power²²⁶ and providing a “fresh start” for bankrupts.²²⁷ Protecting trust beneficiaries is a policy that is central to both ERISA and § 523(a)(4).²²⁸ This policy does not conflict with fresh start where ERISA is applied correctly. The *Philpott* decision, however, reflects a “thumb on the scale” in favor of fresh start that may have the effect of encouraging fiduciary misconduct.²²⁹

The holding in *Philpott* contains an implicit and disturbingly broad proposition that ERISA fiduciary status is irrelevant to fiduciary capacity under § 523(a)(4).²³⁰ *Philpott* implies both a judicial limitation on the functional definition of an ERISA fiduciary,²³¹ and a limitation that recognizes only express ERISA fiduciary liability in bankruptcy.²³² ERISA’s functional definition of fiduciary reflects the strong underlying policy of protecting trust assets from any person with the capacity to exert influence over trust decisions or funds.²³³ Denying ERISA its functional definition of fiduciary in bankruptcy effectively nullifies much of the protection afforded to trust beneficiaries under ERISA and the Code.²³⁴ This limitation would severely hinder the effectiveness of ERISA as a deterrent of fiduciary misconduct.

²²⁶ Beneficiaries are protected where their fraud and defalcation claims are not discharged in the individual fiduciary’s bankruptcy. See 11 U.S.C. § 524(a)(4) (2000). Indeed, the interests of trust beneficiaries were strengthened by the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. BAPCPA made § 524(a)(4) debts non dischargeable in chapter 13 cases. Pub. L. No. 109-31, § 314(b), 2005 U.S.C.C.A.N. (119 Stat.) (codified as amending 11 U.S.C. § 1328(a) (2005)).

²²⁷ Generally, the fresh start policy requires exceptions to discharge be construed narrowly against a creditor and liberally in favor of the debtor. See, e.g., *United Food & Commercial Workers’ Union Local 1995 v. Eldridge (In re Eldridge)*, 210 B.R. 188, 192 (N.D. Ala. 1997). This results in a narrow interpretation of fiduciary duties under § 523(a)(4). See *id.*

²²⁸ See *supra* note 7 and accompanying text.

²²⁹ The *Philpott* court favored fresh start by discounting fiduciary capacity as created by the ERISA statute. See generally *Hunter v. Philpott*, 373 F.3d 873 (8th Cir. 2004).

²³⁰ *Id.* at 875 (“We are not satisfied that the simple determination that an individual is an ERISA fiduciary is enough . . .”). Quite to the contrary, determining whether an individual is an ERISA fiduciary is often far from a “simple” task because the functional definition requires a fact-intensive inquiry into the individual’s control and discretion over the plan or plan assets.

²³¹ The limitation is that the statute cannot create fiduciary capacity and the court will look instead to the actions and contractual obligations of the debtor. See *id.* at 873.

²³² The *Philpott* court wrongly interpreted the *Davis* “strict and narrow” language to exclude a trust relationship created by statute, instead interpreting *Davis* to only include express fiduciary relationships (i.e., those created by contract). See *id.* at 875–87; see also *supra* note 175 and accompanying text (no “trust relationship” where debtor not named in contract).

²³³ See *supra* note 7 and accompanying text.

²³⁴ Failing to give effect to the ERISA fiduciary statute in bankruptcy creates a potentially harmful situation where trust beneficiaries cannot get the benefit of the § 523(a)(4) bar and are also denied any other avenue of redress because ERISA preempts any other causes of action. See *supra* note 8.

ERISA was created to counter wide-spread abuses in private pension funds;²³⁵ creating a liability loophole would encourage a new wave of benefit plan misconduct because named fiduciaries are rarely ever individuals.²³⁶ Under *Philpott*, bankruptcy becomes a potential haven for discharging ERISA defalcation debts incurred by functional fiduciaries.²³⁷ ERISA plans may subsequently become less secure as fiduciary behavior is affected by this new moral hazard.²³⁸ This is a particularly troubling possibility in the ERISA context because ERISA deliberately focuses on functional control to create broader fiduciary liability than the traditional liability under the common law of trusts.²³⁹

The *Philpott* court's implicit disapproval of ERISA's broad fiduciary definition might well stem from a reluctance to create personal liability for acts of corporate officers acting as ERISA fiduciaries.²⁴⁰ It might well be that creating personal liability in the bankruptcy context for ERISA fiduciaries would discourage individuals from fulfilling these much-needed functions.²⁴¹ This concern is alleviated, however, by ERISA's preemption²⁴² and penalty clauses.²⁴³ The preemption clause limits any causes of action relating to ERISA plans to the remedies provided within ERISA itself.²⁴⁴ ERISA fiduciaries can look to ERISA statutes and the substantive federal law

²³⁵ One of Congress's express purposes in enacting ERISA was to replace an ineffectual predecessor statute that lacked enforcement provisions. Gail Cagney, *Corporate Officers as Employers: Eristic Liability Under ERISA*, 52 BROOK. L. REV. 1211, 1215 n.14 (1987).

²³⁶ Most plans name administrative bodies or trustee groups as named fiduciaries. However, the functional definition of ERISA § 3(21)(A) is far more important to determining fiduciary status because it is much more encompassing. See *supra* note 7 and accompanying text.

²³⁷ Because many state causes of action are preempted by ERISA, a failure to apply ERISA liability in bankruptcy may effectively eliminate personal liability for violations of ERISA fiduciary law. See *supra* note 8.

²³⁸ See *supra* notes 8, 236.

²³⁹ See *supra* note 7 and accompanying text; see also Cagney, *supra* note 235, at 1215 (ERISA enforcement procedures were designed to give "participants and beneficiaries broad remedies for redressing or preventing violations of [ERISA].").

²⁴⁰ See *Hunter v. Philpott*, 373 F.3d 873, 876 (8th Cir. 2004) (stressing individual debtor was not a signatory to the contract or guarantor of the corporation's performance on said contract).

²⁴¹ See generally Larry Ribstein, *In the Wake of Corporate Reform: One Year In the Life of Sarbanes-Oxley—A Critical Review Symposium Issue: Sarbox: The Road to Nirvana*, 2004 MICH. ST. L. REV. 279, 291 (discussing the possibility that personal liability for professional service providers under Sarbanes Oxley might result in a shortage of professionals willing to take on riskier clients).

²⁴² See *supra* note 8 and accompanying text (discussing the effect of preemption to bar any state claims relating to ERISA plans).

²⁴³ See *supra* notes 9, 12, and accompanying text (discussing criminal and civil causes of action for violations of ERISA).

²⁴⁴ See *supra* note 8.

interpreting them to determine their rights and obligations without the risk of unforeseen state-law fraud or defalcation claims being levied against them.²⁴⁵

Philpott has troubling implications for § 523(a)(4) beyond the ERISA context. It can be read broadly for the rather disturbing and over-reaching proposition that a *federal statute*, or any statute for that matter, has no impact on the determination whether fiduciary status exists in the § 523(a)(4) context.²⁴⁶ *Philpott*'s amorphous "relationship" test is a poor test; it does not look to the statute at issue²⁴⁷ and does not directly address the requirements of *Davis*.²⁴⁸ The application of such a standardless analysis could easily lead to the improper abrogation of other types of valid statutory trust obligations in the bankruptcy context.

IV. STATUTORY TRUSTS AND "FIDUCIARY CAPACITY" UNDER § 523(A)(4)— THE FIVE PART ANALYSIS

The reasoning in *Philpott* should not be extended because it does not contain a comprehensive framework for whether the functional ERISA fiduciary definition creates fiduciary capacity under § 523(a)(4). *In re Hemmeter* also fails to provide an explicit framework for this analysis.²⁴⁹ *Philpott* is correct to the extent it rejected blanket liability for ERISA fiduciaries under § 523(a)(4).²⁵⁰ The *Philpott* opinion goes too far, however, in failing to give effect to the ERISA statute as establishing a fiduciary duty that creates fiduciary capacity for purposes of § 523(a)(4).

²⁴⁵ State law may be relevant if corporate officer liability is premised on the doctrine of piercing the corporate veil. *See Cagney, supra* note 235, at 1217 (stating there is widespread ambiguity and differences among states in the interpretation and application of this doctrine). However, the doctrine does not create defalcation or fraud liability; it acts to equitably place the liability where it belongs for fraud or defalcation that has already been shown. *See, e.g., Morris v. N.Y. State Dep't of Taxation & Fin.*, 623 N.E.2d 1157, 1160 (N.Y. 1993) ("[A]n attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners.").

²⁴⁶ *See generally* *Hunter v. Philpott*, 373 F.3d 873 (8th Cir. 2004).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *See generally* *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1190 (9th Cir. 2001). The court thoroughly analyzed the threshold issue but concluded with only minimal analysis that the debtor was acting in a fiduciary capacity and that his action did not rise to the level of defalcation. *Id.*

²⁵⁰ Establishing fiduciary capacity is only the threshold requirement under 11 U.S.C. § 523(a)(4); it is also necessary to establish the debtor was acting within her fiduciary capacity when the debt arose and the debtor's action constituted defalcation or fraud.

It is necessary to pay close attention to the applicability of the functional definition of fiduciary under ERISA in the bankruptcy context for two reasons. First, ERISA uses “fiduciary” in a broader sense than is used at common law because it focuses on actual control or authority and does not require a formal trusteeship.²⁵¹ Looking only to traditional trust law, then, will likely not capture all of the fiduciary relationships intended to be covered by the federal statute. Second, the statute limits the fiduciary relationship “to the extent” the individual or entity has or exercises her fiduciary authority or power.²⁵² In every bankruptcy proceeding under § 523(a)(4), it is necessary to determine the exact scope of fiduciary duties an entity or individual owes to a plan beneficiary. The ERISA fiduciary statute does not give rise to blanket liability under § 523(a)(4); it is necessary to determine whether the debtor was acting in her capacity as an ERISA fiduciary when the act giving rise to the individual debt occurred.²⁵³

A general roadmap to this complex issue would be helpful in navigating all the intricate analyses required. The technicalities of ERISA fiduciary law, the confusion apparent in *Philpott*,²⁵⁴ and the limited holding of *In re Hemmeter*²⁵⁵ make it apparent that a comprehensive analysis of this issue has not been stated in the cases dealing with ERISA fiduciary law in the bankruptcy context.

A thorough analysis of the ERISA fiduciary definition in the context of § 523(a)(4) has five elements that must be addressed.²⁵⁶ They are whether (1) the ERISA functional definition of fiduciary is sufficient under *Davis* to create a fiduciary capacity,²⁵⁷ (2) the debtor is a fiduciary under the ERISA statute,²⁵⁸ (3) the debtor was acting within the scope of her ERISA fiduciary duties when the act giving rise to the debt occurred,²⁵⁹ (4) that act constituted defalcation or

²⁵¹ Lockhart, *supra* note 79.

²⁵² 29 U.S.C. § 1002(21)(A) (2000).

²⁵³ The Code does not provide for discharge of liability for defalcation while acting in a fiduciary capacity. 11 U.S.C. § 523(a)(4) (2000).

²⁵⁴ See *Hunter v. Philpott*, 373 F.3d 873, 876–77 (8th Cir. 2004) (incorrectly concluding a lack of plan management fiduciary responsibilities supported a finding that no fiduciary obligations existed as to plan assets).

²⁵⁵ See *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1190 (9th Cir. 2001) (addressing in detail only fiduciary capacity under 11 U.S.C. § 523(a)(4)).

²⁵⁶ These elements are derived from the statutory elements of 11 U.S.C. § 523(a)(4), the requirements of *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934), and the functional definition of fiduciary under 29 U.S.C. § 1002(21)(A).

²⁵⁷ *Davis*, 293 U.S. at 330.

²⁵⁸ See 29 U.S.C. § 1002(21)(A) (2000).

²⁵⁹ See 11 U.S.C. § 523(a)(4) (2000).

fraud,²⁶⁰ and (5) the debtor is liable for the defalcation debt where the debtor is a corporate officer or employee.²⁶¹ Each of these elements must be addressed and decided affirmatively before the § 523(a)(4) bar applies to deny discharge of debt.²⁶²

The first element is the threshold issue of whether ERISA section 3(21)(A) creates a “fiduciary capacity” under *Davis*.²⁶³ This is the central issue addressed in *In re Hemmeter*.²⁶⁴ This element requires that the fiduciary responsibility that is the basis for the defalcation claim satisfy the *Davis* test.²⁶⁵ *Davis* held fiduciary duties must exist prior to the act giving rise to the contested debt.²⁶⁶ The ERISA definition satisfies *Davis* if it accomplishes the following three things: (1) defines the trust *res*, (2) defines the fiduciary duties owed by the fiduciary, and (3) imposes the fiduciary duties before and independently of any alleged act of wrongdoing.²⁶⁷ *In re Hemmeter* held the ERISA fiduciary definition satisfied this legal test and thereby created fiduciary capacity for purposes of § 523(a)(4).²⁶⁸ This holding is true for all fiduciary obligations defined by ERISA section 3(21)(A) because the statute imposes liabilities to a defined trust²⁶⁹ at the instant a person acquires the requisite discretion or control over the plan or its assets.²⁷⁰ The obligation arises regardless of whether there is any misconduct; therefore, the fiduciary obligation exists prior to misconduct and without reference to it. ERISA section 3(21)(A) necessarily satisfies the requirements of *Davis*.²⁷¹

While the first element can be shown without reference to the facts, the remaining four elements are fact intensive inquiries that require an application of ERISA fiduciary law. The second element is that the debtor qualify as a

²⁶⁰ *See id.*

²⁶¹ *See supra* Part I.B.

²⁶² *See* 11 U.S.C. § 523(a)(4).

²⁶³ *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 330 (1934).

²⁶⁴ *See Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1189–90 (9th Cir. 2001).

²⁶⁵ *Id.*

²⁶⁶ *Davis*, 293 U.S. at 334.

²⁶⁷ Satisfying *Davis* also satisfies the standard for a fiduciary relationship as defined by federal common law. *See In re Hemmeter*, 242 F.3d at 1189–90. Courts have not hesitated to apply federal trust common law to ERISA fiduciaries. *See Steinman v. Hicks*, 352 F.3d 1101, 1106 (7th Cir. 2003) (assuming applicability of federal trust common law to actions of ERISA trustee).

²⁶⁸ *In re Hemmeter*, 242 F.3d at 1190.

²⁶⁹ All ERISA plans must be in writing. ERISA § 1102(a)(1) (2000). A written summary plan description is required by section 1022(a), which is designed to apprise plan participants of their rights and obligations under their plan. *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 402 (6th Cir. 1998).

²⁷⁰ *See* 29 U.S.C. § 1001(21)(A)(i)-(iii).

²⁷¹ *See In re Hemmeter*, 242 F.3d at 1190.

fiduciary under section 3(21)(A). This requires identifying the basis for the fiduciary obligation²⁷² and determining whether the debtor had the requisite control or discretion to act in a fiduciary role.²⁷³ The fiduciary obligation may relate to the administration of the plan, management of the plan, control over the plan assets, or providing investment advice for which the plan compensates the person.²⁷⁴ The debtor must also have the requisite amount of discretion described by the statute to be deemed a fiduciary.²⁷⁵ For each of the bases for fiduciary status, the following levels of capacity are required: having discretionary authority or discretionary control over the plan administration, exercising discretionary control or discretionary authority over the management of the plan, exercising *any* control or authority respecting management or disposition of plan assets (discretion is not required where fund assets are the basis of fiduciary duty), and providing investment advice for which the person is compensated either directly or indirectly.²⁷⁶ This element should be closely examined where the putative fiduciary is a sponsor in a multi-sponsor group, or is the successor or predecessor of another fiduciary. It is uncertain whether a sponsor in a multi-sponsor plan can have the requisite discretion for some fiduciary roles.²⁷⁷ If a debtor is a fiduciary in more than one capacity, the level of control for each capacity must be noted.

Once the debtor is determined to be an ERISA fiduciary, the third element must be established—the debtor must have been acting as a fiduciary within the scope of his or her fiduciary duties when the contested debt arose.²⁷⁸ This element requires a qualitative analysis of the act; if the act lacked the requisite level of discretion then no fiduciary duty was owed even if the debtor was generally a fiduciary.²⁷⁹ For example, a fiduciary with discretionary authority over plan administration will not be a fiduciary to the extent he or she performs non-discretionary administrative acts, such as clerical tasks.

²⁷² See *supra* note 81 and accompanying text (describing the four possible fiduciary roles under ERISA).

²⁷³ See 29 U.S.C. § 1002(21)(A) (2000).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ It is uncertain whether a single sponsor can be a fiduciary where plan administration or management requires approval of other sponsors or group action. See *Alfarone v. Bernie Wolff Constr. Corp.*, 788 F.2d 76, 79 (2d Cir. 1986); *Eureka Paper Box Co. v. WBMA, Inc., Voluntary Employee Benefits Trust*, 767 F. Supp. 642, 651 (M.D. Pa. 1991).

²⁷⁸ 11 U.S.C. § 523(a)(4) (2000).

²⁷⁹ See 29 U.S.C. § 1002(21)(A).

The act must also rise to the level of fraud or defalcation.²⁸⁰ This is the fourth element in the analysis. Courts are roughly split into three groups on what constitutes defalcation for purposes of § 523(a)(4).²⁸¹ One group includes every failure to fully account for or produce plan funds, even those based on innocent mistake.²⁸² Other courts require some level of culpability. They reason the policy of fresh start dictates that a debtor not be refused discharge for innocent mistakes.²⁸³ A second group looks for some level of negligence, and the third looks for recklessness such that the act almost rises to the level of fraud.²⁸⁴

The last element is that the debtor-fiduciary act outside the scope of their authority as a corporate officer or employee.²⁸⁵ If the debtor was acting within the scope of her employment, then he or she may be shielded from personal liability by the corporate form.²⁸⁶ If the debtor was acting outside the scope of his or her agency, or was abusing the corporate form, then individual liability on the debt may be appropriate. If it is, and all the foregoing elements are satisfied as well, then the debt is properly barred from discharge under § 523(a)(4).

CONCLUSION

The recent circuit split over ERISA fiduciary capacity in the bankruptcy context shows the need for a better understanding of the relevant law and the need for a thorough analytical framework. The *Philpott* decision, which held an ERISA fiduciary does not necessarily have fiduciary capacity for purposes of § 523(a)(4),²⁸⁷ should not be followed. It is vaguely reasoned and lacks an appropriate basis in ERISA fiduciary law. Application of its holding has very negative implications for enforcing ERISA fiduciary liability. The decision misconstrues or ignores precedent and incorrectly reads a limitation into § 523(a)(4) that effectively and impermissibly abrogates a portion of the

²⁸⁰ See 11 U.S.C. § 523(a)(4).

²⁸¹ See *supra* note 37.

²⁸² See *supra* note 37.

²⁸³ See *supra* note 37 and accompanying text (discussing judicial interpretations of defalcation in the § 523(a)(4) context).

²⁸⁴ See *supra* note 37 and accompanying text.

²⁸⁵ See *supra* Part I.B.

²⁸⁶ See *supra* notes 9–10 and accompanying text (discussing individual liability under ERISA for corporate officers).

²⁸⁷ *Hunter v. Philpott*, 373 F.3d 873, 876 (8th Cir. 2004).

ERISA statute defining fiduciary liability in the bankruptcy context. This decision also has negative implications for the mis-application of § 523(a)(4) to other technical trusts. The *Philpott* “relationship” test²⁸⁸ for fiduciary capacity is not soundly based on precedent and has no stated guidance for applying it. The court improperly applied a vague analysis in contravention of the ERISA statute. No further investigation into the existence of the fiduciary relationship is warranted where a federal statute has created fiduciary liability that meets *Davis*.²⁸⁹ To do so is to undermine the purpose of ERISA in protecting beneficiaries. This approach threatens any similar non-traditional fiduciary liability and, as such, runs contrary to the movement towards increased personal liability for corporate misconduct and fraud.

The imprecise analysis in *Philpott* highlights the need for a complete analytical framework assessing ERISA fiduciaries in the context of § 523(a)(4). In analyzing whether to bar a defalcation debt from discharge based on an individual’s ERISA fiduciary capacity, five distinct elements are present. Incorrectly analyzing any one of these elements could lead to improper discharge, which harms ERISA plan beneficiaries, or to the improper denial of discharge, which harms individuals and creates unwarranted liability in connection with ERISA plans. Failure to approach this analysis with a structured approach could easily result in more confusion of the kind seen in *Philpott*.²⁹⁰ Using the five step analysis ensures all legal requirements are met and all facts are assessed correctly.

Because the analysis is complex and requires the application of two statutes, it is important to clearly state all the requirements for the purpose of clarity even if the analysis need not be completed. *In re Hemmeter* is a perfect example of how not stating all the elements may lead to subsequent misinterpretation by other courts.²⁹¹ *In re Hemmeter* dealt primarily with the first element, the threshold issue of whether the ERISA fiduciary statute creates fiduciary capacity for purposes of § 523(a)(4).²⁹² The analysis shows that it does; the ERISA fiduciary statute creates sufficient fiduciary capacity for all four fiduciary roles it describes. After analyzing this issue, the *In re*

²⁸⁸ See *supra* notes 184–213 and accompanying text.

²⁸⁹ *Davis* treated fiduciary relationships that are established by statute identically to those created by operation of common law or contract. All trusts had to meet the same minimum standards. See *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 330 (1934).

²⁹⁰ See *supra* Part II.B.

²⁹¹ See generally *Philpott*, 373 F.3d 873 (analyzing ERISA fiduciary status without reference to ERISA fiduciary statute).

²⁹² See *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1190 (9th Cir. 2001).

Hemmeter court found there was no individual liability because the act alleged did not constitute defalcation.²⁹³

The *Philpott* decision failed to reach the same conclusion as *In re Hemmeter* because it conflated other elements of the analysis into its determination of the threshold issue. The *Philpott* court's unwillingness to find a fiduciary capacity creates the danger that fiduciaries will not be held accountable as Congress intended. This judicial abrogation of accountability is completely unwarranted and unnecessary. ERISA fiduciaries are not likely to be exposed to frivolous claims under § 523(a)(4) in bankruptcy because the creditor plan beneficiaries are required to prove all the necessary elements. Judicial protection of ERISA fiduciaries only works to harm plan beneficiaries by promising an escape from liability.

Generally, the five part analysis is very fact intensive, except for the threshold element. The ERISA statute always satisfies the *Davis* test. While making this element part of the analysis may seem superfluous, it is needed to prevent the confusion in *Philpott* from perpetuating and creating even more uncertainty and inaccuracy in this area of the law. A failure to do so creates a loophole in bankruptcy through which those who have abused their fiduciary capacities may escape liability. Neither ERISA nor the Code were designed to strip trust beneficiaries of protection from abusive fiduciary behavior, and courts should not create judicial loopholes for culpable fiduciaries.

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²⁹³ *Id.* at 1191.

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