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FRAUD AND DEFALCATION BY A FIDUCIARY: THE AMORPHOUS EXCEPTION TO BANKRUPTCY DISCHARGE.

H.C. Jones III

I. INTRODUCTION

Section 523(a)(4) of the United States Bankruptcy Code provides that an individual debtor may not receive a bankruptcy discharge for any debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.”¹ Over the several iterations of this exception,² courts have struggled to define the terms “defalcation” and “fiduciary capacity,” creating much confusion.³ The current exception provides that fiduciary capacity is a prerequisite to defalcation for discharge purposes.⁴ However, without a finite definition of the former, the latter remains pliable; it is impossible to define defalcation without beginning with fiduciary capacity.⁵ Thus, the faulty parameters prescribed to either over time have residually affected the other.⁶

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1. 11 U.S.C. § 523(a)(4) (2012).
 2. *Id.*; Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978); Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878); Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843).
 3. See *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1758–59 (2013) (settling a circuit split over the requisite state-of-mind for defalcation); *Neal v. Clark*, 95 U.S. 704, 706 (1878) (discussing whether “fraud” carries a state-of-mind requirement); *Chapman v. Forsyth*, 43 U.S. 202, 205 (1844) (holding that “fiduciary capacity” exists only in the presence of an express trust relationship); *Spinoso v. Heilman (In re Heilman)*, 241 B.R. 137, 152 (Bankr. D. Md. 1999) (“It is an understatement to say that the courts are divided on the meaning of ‘fiduciary capacity’ for purposes of nondischargeability of debts for fraud or defalcation while acting in a fiduciary capacity . . .”).
 4. § 523(a)(4).
 5. “Defalcation is a vague, ill-defined term ripe for creative interpretation with almost no currency outside the fiduciary context.” Zvi S. Rosen, *Discharging Fiduciary Debts*, 87 AM. BANKR. L.J. 51, 53 (2013) (quoting Bradley M. Elbein, *An Obscure Revolution: The Liability of Professionals in Bankruptcy*, 48 S.C. L. REV. 743, 756 (1997)) (internal quotation marks omitted). But see *Bullock*, 133 S. Ct. at 1758–59 (requiring recklessness for a finding of defalcation without addressing fiduciary capacity).
 6. “In veering from the original definition of a ‘fiduciary capacity,’ the lower courts have then had to reconstruct the meaning of defalcation in order to avoid having this exception swallow the rule of presuming dischargeability.” Rosen, *supra* note 5, at 87.

Many federal courts have applied an improper standard and permitted various states to deem fiduciary in nature many standard commercial relationships.⁷ This has forced a choice upon subsequent courts: allow the proper defalcation standard (strict liability) to touch many commercial relationships that are not actually fiduciary; or restrict defalcation by imputing to it a novel intent requirement, thereby achieving an appropriate narrowness for the exception as a whole.⁸

In 2013, the Supreme Court addressed the defalcation standard, requiring that if a debtor's conduct is not intentional, it must be reckless.⁹ This is too narrow a requirement for defalcation. It is true that exceptions to discharge effectively strip away from a debtor an important mechanism, and should not be applied liberally.¹⁰ But this does not outweigh the long-standing significance of fiduciary capacity for the creditor, and the express intent of the debtor.¹¹ It would be absurd to favor *all debtors* over potentially innocent creditors who relied specifically on the trust relationship charged to a fiduciary.

In this Comment, I will argue for a return to the original understanding of fiduciary capacity espoused in *Chapman v. Forsyth*: only an express trust agreement can create a fiduciary relationship for purposes of a bankruptcy discharge.¹² I will argue further that fraud and defalcation relate to distinct breakdowns of the fiduciary relationship, and should not be interpreted as requiring similar intent. Maintaining a rigid definition of fiduciary capacity will ensure the relegation of fraud and defalcation to their proper spheres, while best serving the “fresh start” policy and presumption of dischargeability favored by bankruptcy law.

7. See *In re Heilman*, 241 B.R. at 156 & n.17 (listing cases in which courts deferred to state law precedents to decide the ultimate issue of fiduciary capacity).

8. See *Bullock*, 133 S. Ct. at 1761 (“[I]t is difficult to find strong policy reasons favoring a broader exception here . . .”).

9. *Id.* at 1759–60 (“[W]here the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong. We include as intentional . . . reckless conduct . . .”).

10. See *id.* at 1760–61.

11. See, e.g., *Chapman v. Forsyth*, 43 U.S. 202, 208 (1844).

12. *Id.*

II. EARLY BANKRUPTCY LAW AND THE “FRESH START” RATIONALE

A. The Fresh Start Policy and Exceptions to Discharge

Bankruptcy is written into the U.S. Constitution,¹³ but it originally was unclear whether Congress had the power to prescribe procedures for *voluntary* bankruptcy petitions.¹⁴ By modern standards, providing a fresh start to debtors is one of the law’s principle purposes,¹⁵ and courts tend to presume a discharge is permissible unless there is a clear exception stating otherwise.¹⁶

Exceptions to discharge provide that particular debts will survive a successful bankruptcy petition, such that the debtor is required to repay the creditor despite having received a discharge of all other debts.¹⁷ These exceptions have morphed over the years, but courts continually cite precedent that reflects congressional intent from antiquated versions.¹⁸ It is important to rein-in the current limits of the exceptions to discharge, as their consequences are significant.¹⁹ A firm understanding of the evolution of these exceptions can assist in interpreting them correctly.

B. Versions of the Exceptions to Discharge

1. Bankruptcy Act of 1841

The opening section of the Bankruptcy Act of 1841 (1841 Act) provided an avenue for debtors to voluntarily file for bankruptcy.²⁰ This was significant because it represented Congress’s first attempt to promulgate the “fresh start” policy to unfortunate debtors. While Congress was given the power “[t]o establish . . . uniform Laws on

13. U.S. CONST. art. 1 § 8, cl. 4.

14. Rosen, *supra* note 5, at 57 n.29.

15. Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 56–57 (“[O]ne of the central policies of our bankruptcy law is to give ‘the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.’”) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

16. *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013).

17. *See generally* 11 U.S.C. § 523(a) (2012) (enumerating types of debts from which an individual debtor may not be discharged).

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

19. *See Kawaauhau v. Geiger*, 523 U.S. 57, 58 (1998) (explaining that a broad construction would render certain exceptions “superfluous”).

20. Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, 441 (repealed 1843).

the subject of Bankruptcies throughout the United States” by the U.S. Constitution, it did so only once prior to the 1841 Act.²¹ Even then, the Bankruptcy Act of 1800 (1800 Act) merely prescribed creditors’ rights for involuntary petitions against a debtor, now signaling that the current debtor-favored reading of the defalcation exception is quite disparate to Congress’s original intent.²²

The 1841 Act holds nondischargeable any debt “created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity.”²³ These “exceptions to discharge”—analogous to the current section 523 of the Bankruptcy Code²⁴—are actually pre-conditions to *any* voluntary bankruptcy petition; they are not *post facto* exceptions.²⁵ That is, the exceptions intercede the permissions granted by the passage, clearly indicating an intent to protect creditors who have relied on debtors to the extent of a fiduciary relationship: “All persons whatsoever, . . . owing debts, which shall not have been created in consequence of [enumerated fiduciary exceptions], . . . shall be deemed bankrupts”²⁶ Were the exceptions “tacked on” to the end, one might argue that they were an after-thought—that the primary purpose simply was to establish a “way out” for debtors. That is not the case here.

Further supporting this notion is the Supreme Court’s 1844 holding in *Chapman v. Forsyth*, interpreting the 1841 Act.²⁷ Today, *Chapman* stands primarily for the proposition that fiduciary capacity with regards to bankruptcy dischargeability should be limited to express trust relationships, but the Court addressed another important issue.²⁸ Interpreting the statute (which had been repealed at that point), the Court held, “[t]he debts here specified are excepted from the operation of the act. This exception applies to the debts and not to the person, if he owe other debts It was proper that Congress should not relieve from debts which had been incurred by a violation of good faith”²⁹

21. See Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803).

22. *Id.* at 21.

23. 5 Stat. at 441.

24. § 523(a)(4).

25. 5 Stat. at 441.

26. *Id.*

27. *Chapman v. Forsyth*, 43 U.S. 202 (1844).

28. *Id.*

29. *Id.* at 207.

There is a clear emphasis placed on preventing discharges by debtors who have breached a certain level of creditor-confidence. This is true even of debtors who are entitled to a discharge of other debts in the same bankruptcy proceedings.³⁰

Perhaps most telling is the 1841 Act's language itself. There is a semi-colon separating the exception from discharge of a public officer who commits defalcation and the exception from discharge of *any debt* incurred through fiduciary capacity.³¹ Recognizing the separation of these exceptions helps us to grasp the original meaning and the true weight of the burden imputed to fiduciaries.³²

The first section excepts from the operation of the law all debts “created in consequence of a defalcation as a public officer,” thus maintaining good faith to the government, or as “executor, guardian” etc., thus maintaining good faith to the estates entrusted to the petitioner, or “while acting in any other fiduciary capacity,” thus maintaining good faith generally to the trust reposed.³³

“Contemporary courts did not [ignore the semi-colon]. They understood this language as creating two distinct categories of debt—those that arose from a public officer's ‘defalcation,’ and those debts that arose from a fiduciary capacity.”³⁴

Because the Court in *Chapman* espoused the original standard for determining fiduciary relationships, its discussion of other terms in the now-defunct 1841 Act is particularly relevant. “The cases enumerated [are] ‘the defalcation of a public officer,’ ‘executor,’ ‘administrator,’ ‘guardian,’ or ‘trustee’”³⁵ In the Court's view, defalcation pertained only to the clause relating to public officers.³⁶

The Court did not quote the Act as “the defalcation of a public officer, executor, administrator”—as one would expect if defalcation were to apply to each enumerated relationship—rather, it separated the word defalcation from each of the others, applying it only to public officers.³⁷ Thus, the act of defalcation did not extend to the

30. *Id.* at 209.

31. 5 Stat. at 441.

32. *See id.*

33. Rosen, *supra* note 5, at 59 n.51 (quoting *Flagg v. Ely*, 1 Edm. Sel. Cas. 206, 208 (N.Y. Sup. Ct. 1846)).

34. *Id.* at 59.

35. *Chapman*, 43 U.S. at 208.

36. *See id.*

37. *See id.*

other enumerated relationships.³⁸ These other debts were nondischargeable because of the level of confidence reposed in the trustee by the beneficiary, not because of any particular action by the trustee.³⁹

That is not to say that courts should begin excepting from discharge *all* fiduciary debts; it is merely to highlight the original gravity of fiduciary capacity. The “defalcation exception” has a much different form today than in 1841.⁴⁰ Though the 1841 Act was repealed shortly after being enacted, another Bankruptcy Act was passed in 1867, carrying on the tradition of the exception.⁴¹ Congress amended the language, adding further confusion to the meaning of the relevant terms.⁴²

2. Bankruptcy Act of 1867

The Bankruptcy Act of 1867 (1867 Act) provided that “no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act.”⁴³ The shift from the 1841 Act to the 1867 Act did not represent a sizeable change to the exception. The exceptions for defalcation as a public officer and for any debt in a fiduciary capacity remained separate.⁴⁴

In the 19th Century, defalcation was understood to include all manner of failing to account for funds.⁴⁵ In this way, it could be argued that defalcation did not leave much to be added by the following clause, “or while acting in any fiduciary character.”⁴⁶ However, the separation of these two clauses most aptly points to Congress’s recognition of the express intent accompanying a fiduciary relationship. This was the second exception to discharge drafted within 30 years that plainly deemed *all* fiduciary debts nondischargeable.⁴⁷

38. *See id.*

39. *See id.* (“The [enumerated relationships] are . . . cases of . . . special trusts . . .”).

40. Compare 11 U.S.C. § 523(a)(4) (2012), with Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, 441 (repealed 1843).

41. Act of Mar. 2, 1867, ch. 176, 14 Stat. 517, 533 (repealed 1878).

42. *See supra* note 2.

43. 14 Stat. at 533.

44. *Id.*

45. *See infra* note 110 and accompanying text.

46. 14 Stat. at 533.

47. *Id.*

It is worth noting that Congress inserted “fraud or embezzlement” into the enumerated exceptions in the 1867 Act, though clearly not within the purview of the “fiduciary character” provision.⁴⁸ This may have been a precursor to the forcible insertion of the “action-exceptions” (fraud and defalcation) under the umbrella of fiduciary capacity, brought to fruition by the Bankruptcy Act of 1898.⁴⁹

3. Bankruptcy Act of 1898

The Bankruptcy Act of 1898 (1898 Act) was the point of no return. The 1898 Act provided that “[a] discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.”⁵⁰ This was the first time specific actions had been included within the fiduciary capacity exception,⁵¹ and the current Bankruptcy Code mirrors this construction.⁵²

Congress included several provisions now present in section 523 of the U.S Bankruptcy Code, *Exceptions to Discharge*, having nothing to do with fiduciary obligations.⁵³ The inclusion of additional exceptions forced courts to begin narrowing the various provisions’ meanings, so as not to except *all* debts from discharge.⁵⁴ This tightening resulted mostly from courts applying precedent concerning repealed versions of the exception to current versions.⁵⁵

Twenty years before the enactment of the 1898 Act, in *Neal v. Clark*, the Supreme Court determined that fraud for dischargeability purposes required “actual fraud.”⁵⁶ The Court reasoned that “a passage will be best interpreted by reference to that which precedes and follows it.”⁵⁷ Because “fraud” was enumerated alongside “embezzlement” at the time, fraud must have required intentional

48. *Id.*

49. *See infra* Part II.B.3.

50. Act of July 1, 1898, ch. 541, 30 Stat. 544, 550–51 (repealed 1978).

51. *See id.*; 14 Stat. at 533; Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, 441 (repealed 1843).

52. 11 U.S.C. § 523(a)(4) (2012).

53. *See generally id.* § 523 (excepting from discharge debts incurred by tax, non-fiduciary frauds and false-pretenses, willful and malicious injury to a creditor’s property, etc.).

54. *See supra* Part II.A (explaining that bankruptcy laws and courts interpreting them attempt to maintain the presumption of discharge, and support the “fresh start” policy).

55. *See supra* note 18 and accompanying text.

56. 95 U.S. 704, 709 (1877) (“[F]raud referred to in that section means positive fraud, or fraud in fact, . . . as does embezzlement.”).

57. *Id.* at 708.

wrongdoing or moral turpitude, like embezzlement.⁵⁸ Courts still cite this analysis today.⁵⁹

However, the Court in *Neal* was analyzing the 1867 Act, which contained fraud and embezzlement as exceptions to discharge irrespective of the relationship between the creditor and debtor—there was no fiduciary requirement.⁶⁰ Of course, the fiduciary relationship was no less important in 1898 than it was in 1841; the Supreme Court cited *Chapman*'s 1844 express trust language long after the passage of the 1898 Act.⁶¹ Thus, fraud may have required “moral turpitude or intentional wrongdoing” after 1900, but not because of the Court’s 1878 interpretation of a different version of the Act.⁶² When Congress moved fraud to the fiduciary capacity exception, a new analysis of its requirements was warranted, but not undertaken; even the Supreme Court still refers to *Neal*.⁶³

The 1898 exception represents an attempt to enumerate the various ways a fiduciary debtor may incur a debt to a creditor, and to prevent those debts from being discharged in most circumstances.⁶⁴ The reality of the exception probably was that “embezzlement” and “misappropriation” were superfluous terms for fiduciary capacity, which is why they were excluded from later versions of the exception.⁶⁵ Fraud and defalcation, however, are distinct actions by a fiduciary, so they remain in the modern exception.⁶⁶

4. The Bankruptcy Code

The 1898 Act was repealed in 1978 with the advent of the U.S. Bankruptcy Code.⁶⁷ While section 523 largely was based upon the exceptions listed in the 1898 Act, it also expanded them.⁶⁸ Section 523(a)(4), which is still in effect today, declared nondischargeable any debt resulting from “fraud or defalcation while acting in a

58. *Id.* at 709.

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

60. *Neal*, 95 U.S. at 707; *see supra* note 48 and accompanying text.

61. *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934) (citing *Chapman* as fixing the rigid structure of fiduciary capacity).

62. *Neal*, 95 U.S. at 709.

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

64. *See Act of July 1, 1898*, ch. 541, 30 Stat. 544, 550–51 (repealed 1978).

65. “Embezzlement” and “misappropriation” are not within the fiduciary capacity exception of the current U.S. Bankruptcy Code. 11 U.S.C. § 523(a)(4) (2012).

66. *Id.*

67. 30 Stat. at 544.

68. § 523(a)(4).

fiduciary capacity, embezzlement, or larceny.”⁶⁹ Clearly, “embezzlement” and “larceny” are outside of the fiduciary capacity exception, leaving “fraud” and “defalcation” as the only actions that can except a fiduciary’s debt from discharge.⁷⁰

Because fiduciary capacity is a prerequisite for the relevant fraud and defalcation, the definitions of these terms are co-dependent. Most directly, courts cannot ascribe “fraud” and “defalcation” their proper definitions without harnessing the original spirit of “fiduciary capacity,” as was established in *Chapman v. Forsyth* in 1844.⁷¹

III. FIDUCIARY CAPACITY

A. *Chapman v. Forsyth*

In *Chapman v. Forsyth*, the Court provided the groundwork for understanding fiduciary capacity for purposes of a bankruptcy discharge.⁷² The defendant (Forsyth) was a “factor,” working on behalf of the plaintiff (Chapman).⁷³ Factors were similar to modern-day consignment shops, selling goods on behalf of others with the express intention of returning the profits, less a commission.⁷⁴ Chapman had engaged Forsyth to sell 150 bales of cotton, but was never given the profits of the sale.⁷⁵ After Forsyth declared bankruptcy under the 1841 Act, Chapman challenged the discharge, claiming that Forsyth had incurred his debt while acting in a fiduciary capacity.⁷⁶

The Court held that a factor was not a fiduciary for purposes of a bankruptcy discharge:

If the [bankruptcy act] embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the

69. *Id.*

70. *Id.*

71. *Chapman v. Forsyth*, 43 U.S. 202, 208 (1844).

72. *Id.*

73. *Id.* at 206.

74. *Id.* at 206–07.

75. *Id.* at 206.

76. *Id.*

punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act The cases enumerated . . . are not cases of implied but special trusts, and the “other fiduciary capacity” mentioned must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract.⁷⁷

In 1934, the Court claimed that this standard “has been applied . . . in varied situations with unbroken continuity” ever since.⁷⁸ Additionally, courts of appeal often rely on *Chapman*, as quoted and augmented by its progeny.⁷⁹ Yet, many courts have strayed from *Chapman*, allowing state law to determine the existence of a fiduciary relationship irrespective of an express trust analysis.⁸⁰

B. The (De-)Evolution of the Fiduciary Relationship

If fiduciary capacity is not narrowly drawn, courts run the risk of “making the exception so broad that it reaches such ordinary commercial relationships as creditor-debtor and principal-agent.”⁸¹ Many courts “have in effect ignored the Supreme Court’s teaching regarding technical and express trusts . . . [and] simply look to state law to see if some fiduciary obligation in a general sense has been created.”⁸² “The problem with deferring to State law the decision of what constitutes fiduciary capacity is that State law considers

77. *Id.* at 208.

78. *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934) (citing *Neal v. Clark*, 95 U.S. 704, 708 (1877)); *Tindle v. Birkett*, 205 U.S. 183, 184–86 (1907); *Crawford v. Burke*, 195 U.S. 176, 193 (1904); *Upshur v. Briscoe*, 138 U.S. 365, 375–376 (1891); *Noble v. Hammond*, 129 U.S. 65, 68 (1889); *Hennequin v. Clews*, 111 U.S. 676, 682 (1884).

79. *Arvest Mortg. Co. v. Nail (In re Nail)*, 680 F.3d 1036, 1039 (8th Cir. 2012) (citing *Aetna*, 293 U.S. at 333 (quoting *Chapman*, 43 U.S. at 208)); *Follett Higher Educ. Grp., Inc. v. Berman (In re Berman)*, 629 F.3d 761, 768 (7th Cir. 2011) (quoting *Chapman*, 43 U.S. at 207).

80. *See Spinoso v. Heilman (In re Heilman)*, 241 B.R. 137, 156 & n.17 (Bankr. D. Md. 1999) (listing cases in which the court deferred to state law precedents to decide the ultimate issue of fiduciary capacity).

81. *Id.* at 159 (quoting *Borg-Warner Acceptance Corp. v. Miles (In re Miles)*, 5 B.R. 458, 460 (Bankr. E.D. Va. 1980)).

82. *Banco 18 v. Reeves (In re Reeves)*, 124 B.R. 5, 10 (Bankr. D.N.H. 1990) (citing a litany of cases in which the court permitted state law fiduciary classifications to carry its decision).

practically every agent to be a fiduciary within the scope of his or her employment.”⁸³

To effectuate the proper standard, courts must determine whether a trustee willingly accepted the responsibilities associated with an express trust: “The characteristics of an express trust include an explicit declaration of the creation of a trust, a clearly defined trust *res*, and an intent to create a trust relationship.”⁸⁴ This has been widely misapplied.

In *In re Heilman*, the Bankruptcy Court for the District of Maryland cataloged instances where courts had strayed from the appropriate standard: “Opinions are split as to attorneys, corporate directors, officers and shareholders, general partners, limited partners, and joint venturers, property managers, insurance agents, lottery agents, and contractors, subcontractors and homebuilders.”⁸⁵ In those cases, a significant number of courts allowed state law to take precedence.⁸⁶ The court explained that “while state law is important in determining when a trust relationship exists, the issue of whether the debtor was acting in a fiduciary capacity is ultimately a federal question.”⁸⁷

There are examples in almost every circuit of bankruptcy courts and appellate courts failing to adhere to this standard, creating an amalgam of case law defining fiduciary capacity.⁸⁸ The result is that whether a fiduciary can receive a discharge depends largely on the

83. *In re Heilman*, 24 B.R. at 157 & n.18 (cataloging cases).

84. *In re Reeves*, 124 B.R. at 9 (quoting *R.I. Lottery Comm’n v. Cairone (In re Cairone)*, 12 B.R. 60, 62 (Bankr. D.R.I. 1981)).

85. *In re Heilman*, 241 B.R. at 152–55 & nn. 9–15 (footnotes omitted) (citing cases with differing opinions on fiduciary capacity in each of the listed professions).

86. *Id.* at 156.

87. *Id.* at 158 (internal brackets omitted) (quoting *Stahl v. Lang (In re Lang)*, 108 B.R. 586, 589 (Bankr. N.D. Ohio 1989)).

88. *See id.* at 156 n.17. The court listed cases from across the country where judges merely applied a state law standard:

Schriebman v. Zanetti-Gierke (In re Zanetti-Gierke), 212 B.R. 375 (Bankr. D. Kan. 1997) (a partner is not a fiduciary under Kansas and Missouri law for purposes of § 523(a)(4)); *Smith v. Young (In re Young)*, 208 B.R. 189 (Bankr. S.D. Cal. 1997) (fiduciary capacity is a question of Federal law, but State law is considered for purpose of determining the existence of a trust); *Krishnamurthy v. Nimmagadda (In re Krishnamurthy)*, 209 B.R. 714 (B.A.P. 9th Cir. 1997) (whether a relationship is a fiduciary one within the meaning of § 523(a)(4) is a question of Federal law that can be resolved by looking to State law; under California law, a partner is a fiduciary).

Id.

jurisdiction hearing the bankruptcy petition.⁸⁹ This is unacceptable, as “it is important to have a uniform interpretation of federal law.”⁹⁰

C. The Appropriate Standard

The original *Chapman v. Forsyth* standard is the appropriate one for determining fiduciary capacity.⁹¹ “Express trusts are those which are created by the direct and positive acts of the parties, by some writing, or deed, or will, or by words either expressly or impliedly evincing an intention to create a trust.”⁹² There must be “the separation of the legal and beneficial interests in a . . . ‘res,’ . . . whereby the legal interests are held by . . . the trustee, for the benefit of another, the beneficiary.”⁹³ It is only under these conditions, and not when a trust arises after the fact, that a fiduciary relationship exists.⁹⁴

That is,

[i]t is not enough that by the very act of wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as a trustee *ex maleficio*. He must have been a trustee before the wrong and without reference thereto “The language would seem to apply only to a debt created by a person who was already a fiduciary when the debt was created.”⁹⁵

The proper definition of fiduciary capacity has a heightened duty of care for the beneficiary built in, and a party cannot become a trustee

89. See *supra* note 88; see also Rosen, *supra* note 5, at 73–77.

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

91. See Rosen, *supra* note 5, at 52 (“[C]ourts should follow the approach of the Ninth, Eighth and Fourth Circuits that looks to the origins of these terms, when . . . ‘fiduciary capacity’ required the existence of an express or technical trust.”).

92. *In re Heilman*, 241 B.R. at 161 (quoting *Wertin v. Wertin*, 13 N.W.2d 749, 751 (Minn. 1944)).

93. See *id.* (quoting 17 AM. JUR. 2D *Trusts* § 20 (1992)).

94. *Id.* at 161–62 (“Only the parties themselves can create a fiduciary relationship in fact. A statute may recognize that relationship and impose additional burdens upon it, including criminal liability for its abuse. A statute may even purport to convert a breach of contract into a breach of a trust *ex maleficio*, but these are in the nature of constructive or resulting trusts, arising by operation of law, and therefore distinguishable from express or technical trusts for purposes of nondischargeability of debt in bankruptcy.”).

95. *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934) (quoting *Upshur v. Bricoe*, 138 U.S. 365, 378 (1891)).

merely by way of breaching a pre-existing duty to a creditor.⁹⁶ Such debts would have not arisen from an express trust.⁹⁷

It is with this proper understanding in mind that the offenses specific to fiduciary capacity should be considered. A creditor must show that “(1) an express trust existed, (2) the debt was caused by fraud or defalcation, and (3) the debtor acted as a fiduciary *at the time the debt was created*.”⁹⁸ Adhering to this strict construction, there is no need to restrict the defalcation exception, particularly considering that fraud already carries a state-of-mind requirement.⁹⁹

IV. FRAUD AND DEFALCATION

A. Precedent

1. Fraud

It has been settled since 1877 that fraud under the Bankruptcy laws requires actual fraud, not constructive fraud.¹⁰⁰ Nevertheless, it is important to critique how the rationale for the current fraud standard has survived so uniformly over the years; the standard from *Neal* has been applied for 137 years despite multiple changes to the exception.¹⁰¹

Actual fraud means “positive fraud, or fraud in fact, involving moral turpitude or intentional wrong.”¹⁰² The Court’s rationale for this requirement was the placement of fraud alongside embezzlement in the 1867 Act.¹⁰³ Of course, the fraud included in the 1867 Act is more analogous to the current section 523(a)(2)(A), not the fraud within the defalcation exception.¹⁰⁴ That is, in interpreting fraud to mean actual fraud, the Court was construing a portion of the

96. *In re Heilman*, 241 B.R. at 161–162.

97. *See* *Chapman v. Forsyth*, 43 U.S. 202, 208 (1844).

98. Ann K. Wooster, Annotation, *Who Is Acting in “Fiduciary Capacity” Within Meaning of Fraud or Defalcation Discharge Exception in Bankruptcy (11 U.S.C.A. § 523(a)(4))—Fiduciary Capacity of Debtors Other Than Sales, Purchasing, or Leasing Agent Debtors*, 17 A.L.R. FED. 2d 33 (2015) (emphasis added).

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

100. *Neal v. Clark*, 95 U.S. 704, 709 (1877).

101. *See* *Sachan v. Huh (In re Huh)*, 506 B.R. 257, 264 (B.A.P. 9th Cir. 2014) (stating that, despite policy shifts in the current Bankruptcy Code, *Neal* has not been overruled and “constitute[s] part of the background to the adoption” of aspects of the Code).

102. *Neal*, 95 U.S. at 709.

103. *Id.*

104. *See* 11 U.S.C. § 523(a)(2)(A) (2012); *see also supra* Part II.B.3.

provision not within the fiduciary capacity exception, but a stand-alone fraud provision.¹⁰⁵

After the 1898 Act included fraud under the fiduciary capacity exception, the logic supporting the imputation of a heightened state-of-mind merely remained unchallenged.¹⁰⁶ The exhaustive list of actions triggering an exception from discharge under fiduciary capacity became fraud and defalcation, with fraud containing an intent requirement from its prior interpretation.¹⁰⁷ With this construction, it was only a matter of time before the Court would use some version of a *noscitur a sociis* (known from its associates) analysis to conclude that defalcation also would require some form of intent.¹⁰⁸

2. Defalcation

The exact definition of defalcation is unclear, but the Supreme Court addressed recently its state-of-mind requirement.¹⁰⁹ Professor Zvi Rosen provides a thorough explanation of the origins of the term defalcation in his article, *supra*, arguing for a strict liability requirement, as appears to have been the early understanding.¹¹⁰

In 1937, Judge Learned Hand wrote in *Central Hanover Bank & Trust Co. v. Herbst*, while sitting on the Court of Appeals for the Second Circuit, “[c]olloquially perhaps the word, ‘defalcation,’ ordinarily implies some moral dereliction, but in [the 1841 Act] it may have included innocent defaults, so as to include all fiduciaries who for any reason were short in their accounts.”¹¹¹

There, the bankrupt (the defendant for purposes of the defalcation suit) had been appointed receiver of a parcel of land as the result of a foreclosure in the Supreme Court of New York.¹¹² He received monetary allowances totaling nearly \$50,000, which he withdrew and spent.¹¹³ The trouble was that the defendant did not wait for the

105. Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878).

106. Act of July 1, 1898, ch. 541, 30 Stat. 544, 550–51 (repealed 1978).

107. *Id.*

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

109. *Id.* (“Thus, where the conduct does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong.”) (emphasis added).

110. See Rosen, *supra* note 5, at 53 (“By the beginning of the 19th century, defalcation was used more commonly to refer to an impermissible ‘holding back’ of funds. In this context, it covered both an intentional failure to remit funds, . . . and a mere negligent failure or inability to account for funds.”).

111. 93 F.2d 510, 511 (2d Cir. 1937).

112. *Id.*

113. *Id.*

plaintiff's appeal window to close, and did not consult with the plaintiff regarding whether it planned to appeal.¹¹⁴ The plaintiff *did* appeal, and the defendant was ordered to remit a portion of the funds, but was unable to pay the balance.¹¹⁵

The Court of Appeals of New York decided that the defendant's surety was responsible to pay the remainder, so the surety filed suit against the defendant in his voluntary bankruptcy petition, seeking to have his debt to the surety excepted from discharge.¹¹⁶ The surety alleged that the defendant had incurred the debt by "fraud, embezzlement misappropriation [sic], or defalcation while acting as an officer or in [a] fiduciary capacity."¹¹⁷

The court assumed *arguendo* that the defendant's conduct did not constitute fraud, embezzlement, or misappropriation, because it found affirmatively that the conduct was, in fact, defalcation.¹¹⁸ En route to this finding, Judge Hand explained that "[w]hatever was the original meaning of 'defalcation,' it must here have covered other defaults than deliberate malversations, else it added nothing to the words, 'fraud or embezzlement.'"¹¹⁹

Despite acknowledging that defalcation must include "malversations" with no heightened state of mind, Judge Hand ultimately *did* provide a lengthy description of what knowledge could be imputed to the defendant:

In the case at bar the bankrupt had not been entirely innocent—not, for instance like the victim of an employee—though possibly one may acquit him of deliberate wrongdoing. A judge had awarded him the money, and *prima facie* he was entitled to it; but he knew, or if he did not know, he was charged with notice (having held himself out as competent to be an officer of the court), that the order would not protect him if it were reversed; and that it might be reversed until the time to appeal had expired. He made no effort to learn from the plaintiff whether it meant to

114. *Id.*

115. *Id.*; *see also* Central Hanover Bank & Trust Co. v. Williams, 280 N.Y.S. 314, 315 (N.Y. App. Div. 1935).

116. *Herbst*, 93 F.2d at 511; *see also* Central Hanover Bank & Trust Co. v. Nat'l Surety Corp., 10 N.W.2d 560, 560–61 (N.Y. 1937).

117. *Herbst*, 93 F.2d at 511.

118. *Id.*

119. *Id.* Puzzlingly, the Supreme Court, in *Bullock* cited the following dicta from Judge Hand's opinion, while leaving out the above text: defalcation "*may* have included innocent defaults." 133 S. Ct. 1754, 1759 (2013).

appeal, and he did not wait until it could no longer do so; he took his chances.¹²⁰

It is worth noting here that the court appears to be “hedging its bets” by analyzing the defendant’s state of mind.¹²¹ That is, Judge Hand understood that a finding of defalcation was unimpeachable if the state-of-mind were present; whereas a finding of defalcation for an accidental default may have been criticized.¹²²

This holding is mistaken as requiring a positive intent of defalcation.¹²³ This standard was applied simply because of the confusing and redundant enumerated offenses, which, in any event, are much different in the current version of the exception.¹²⁴

For confirmation, one need look no further than the court’s disclaimer at the end of the opinion: “All we decide is that when a fiduciary takes money upon a conditional authority which may be revoked and knows at the time that it may, he is guilty of a ‘defalcation’ though it may not be a ‘fraud,’ or an ‘embezzlement,’ or perhaps not even a ‘misappropriation.’”¹²⁵ Judge Hand’s opinion ultimately would be used as support for a state-of-mind requirement.¹²⁶

B. Intent Requirement

Prior to the Supreme Court’s (faulty) settling in *Bullock* of the debate over an intent requirement, the circuit courts were split into three groups:

The First and Second Circuits require[d] “a showing of conscious misbehavior or extreme recklessness—a showing akin to the showing required for scienter in the securities law context.” The Fifth, Sixth, Seventh, and Eleventh Circuits require[d] a general “showing of recklessness by the fiduciary” beyond mere negligence. By way of contrast, the Fourth, Eighth and Ninth Circuits utilize[d] a standard closer to the traditional meaning of defalcation—not

120. *Herbst*, 93 F.2d at 512.

121. *See id.*

122. “[D]efalcation may demand some portion of misconduct; we will assume arguendo that it does.” *Id.* (internal quotation marks omitted).

123. *Id.*

124. 11 U.S.C. § 523(a)(4) (2012).

125. *Herbst*, 93 F.2d at 512.

126. *Id.*

imposing any intent requirement, but rather focusing on the “actus reus,” or the type of action or inaction that constitutes a defalcation.¹²⁷

The appropriate standard is that previously followed by the Fourth, Eighth, and Ninth Circuits. “[T]he ‘essence of defalcation in the context of § 523(a)(4) is a failure to produce funds entrusted to a fiduciary.’”¹²⁸ Defalcation should be limited to a failure to account for the trust *res*,¹²⁹ and would therefore not require intent to achieve the proper level of narrowness. “[F]or purposes of [§ 523(a)(4)], an act need not ‘rise to the level of . . . embezzlement or even misappropriation.’”¹³⁰ “[N]egligence or even an innocent mistake which results in misappropriation or failure to account is sufficient.”¹³¹ This is not a harsh penalty; it is a recognition of the responsibilities ascribed to a fiduciary if analyzed under the proper construction.¹³²

The new standard set by the Supreme Court in *Bullock* undoubtedly will restrict the exception to a degree rendering it moot. If applying the appropriate fiduciary capacity standard, as well as the new defalcation standard, only near criminally-reckless activities will suffice. There is a heightened duty of care already imputed to a fiduciary.¹³³ Requiring a heightened state of mind for defalcation disregards the careful attention accorded to fiduciary duties.

V. BULLOCK V. BANKCHAMPAIGN

In *Bullock*, the Supreme Court held that, for defalcation, conduct lacking bad faith, moral turpitude, or other immoral conduct, requires an *intentional* wrong.¹³⁴ In reaching this conclusion, the Court relied

127. Rosen, *supra* note 5, at 77–78 (footnotes omitted).

128. *Id.* at 78 (quoting Blyler v. Hemmeter (*In re Hemmeter*), 242 F.3d 1186, 1191 (9th Cir. 2001)).

129. *Id.* at 82.

130. Republic of Rwanda v. Uwimana (*In re Uwimana*), 274 F.3d 806, 811 (4th Cir. 2001) (quoting Pahlavi v. Ansari (*In re Ansari*), 113 F.3d 17, 20 (4th Cir. 1997)).

131. *Id.*

132. *See supra* Part III.B.

133. *See supra* Part III.B. This would require that a debtor had entered into an express trust relationship for the benefit of the creditor, knowing precisely the responsibilities of the relationship, and then acted with the recklessness prescribed by the model penal code in failing to remit the funds in his charge.

134. *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1759 (2013) (“[W]e include reckless conduct of the kind set forth in the Model Penal Code. Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the

on five considerations: (1) statutory context; (2) that the chosen definition defines defalcation differently from its linguistic neighbors in the statute; (3) concurrence with the principle that “exceptions to discharge should be confined to those plainly expressed”; (4) that some circuits have applied a similar interpretation without administrative or practical difficulties; and (5) the importance of uniform interpretation of federal law.¹³⁵

(1) Statutory context. The Court determined that the statutory context strongly favors an interpretation of defalcation that requires an intentional wrong.¹³⁶ In reaching this decision, the Court referenced Justice Harlan’s opinion in *Neal*.¹³⁷ Accordingly, it held that defalcation should be interpreted keeping in mind that the exception includes fraud, embezzlement, and larceny—a point the Court considered strong support for reading into defalcation a state-of-mind requirement.¹³⁸ However, Justice Harlan was interpreting a version of the discharge provision that excluded fraud from the fiduciary capacity exception.¹³⁹ In fact, the version in question, the 1867 Act, required on its face that *all* fiduciary debts were nondischargeable.¹⁴⁰

Regardless, the Court relied on the interpretation of a *different* fraud provision from the one situated beside the word it was attempting to define (defalcation), and found support in that provision for a heightened intent requirement.¹⁴¹ Ironically, had this case been litigated in 1878, defining defalcation would have been a moot point because *all* fiduciary debts were nondischargeable by the plain language of the 1867 Act.¹⁴²

Similarly, it is difficult to understand why the intent requirements of “embezzlement” and “larceny” should play a role in the construction of defalcation, when both terms clearly are situated outside of the purview of the fiduciary capacity exception.¹⁴³ Embezzlement and larceny are sufficient alone to except from

fiduciary ‘consciously disregards’ (or is willfully blind to) ‘a substantial and unjustifiable risk’ that his conduct will turn out to violate a fiduciary duty.”).

135. *Id.* at 1759–61.

136. *Id.* at 1760.

137. *Id.*

138. *Id.*

139. *Neal v. Clark*, 95 U.S. 704, 706 (1877).

140. Act of Mar. 2, 1867, ch. 176, 14 Stat. 517, 533 (repealed 1878).

141. *Bullock*, 133 S. Ct. at 1759–60.

142. 14 Stat. at 533.

143. See 11 U.S.C. § 523(a)(4) (2012).

discharge a debt; there is no express trust relationship required.¹⁴⁴ It follows then that whatever the state of mind required for those actions—not presupposing a heightened duty of care—it should have no bearing on the state of mind required for defalcation. Nonetheless, this was the Supreme Court’s lead argument for a heightened intent requirement for a finding of defalcation.¹⁴⁵

(2) The definition of defalcation is contrastable with that of fraud, embezzlement, and larceny.¹⁴⁶ That is, defalcation with a heightened intent requirement is not identical to the other enumerated actions, and each of those actions are not merely “special cases of defalcation.”¹⁴⁷ This explanation offers nothing over a strict-liability interpretation. Embezzlement and larceny do not require a fiduciary relationship,¹⁴⁸ and fraud still can overlap with defalcation within the Court’s interpretation;¹⁴⁹ it is a distinction without a difference.

Further, the Court acknowledges that “[t]he statutory provision makes clear that . . . [embezzlement and larceny] apply outside of the fiduciary context.”¹⁵⁰ It is not clear the virtue of providing distinct definitions between non-fiduciary action-exceptions (embezzlement and larceny) and fiduciary action-exceptions (fraud and defalcation). Presumably, the distinction arises out of favoring non-superfluous statutes.¹⁵¹

This logic is not ubiquitous, however: section 523(a)(2)(A) contains actual fraud as an enumerated exception,¹⁵² yet actual fraud is exactly what is required by section 523(a)(4), per the Court’s analysis.¹⁵³ It appears that in certain instances, exceptions specifically within the fiduciary context are sufficiently

144. *See id.*

145. *Bullock*, 133 S. Ct. at 1759–60.

146. *Id.* at 1760.

147. *Id.*

148. *See* § 523(a)(4).

149. *Bullock*, 133 S. Ct. at 1760 (“‘[D]efalcation,’ unlike ‘fraud,’ may be used to refer to *nonfraudulent* breaches of fiduciary duty.”) (citing *Defalcation*, BLACK’S LAW DICTIONARY (9th ed. 2009)). This is true, but it does not change the fact that defalcation may be used to refer to *fraudulent* breaches of fiduciary duty as well; there still is no steadfast definition of the term. Using this construction, defalcation can encompass fraud *and* the blank space left over.

150. *Id.*

151. *See id.* (quoting *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 698 (1995)).

152. § 523(a)(2)(A).

153. *Neal v. Clark*, 95 U.S. 704, 709 (1877).

distinguishable, so as not to require the Court to “treat statutory terms as surplusage.”¹⁵⁴

(3) Exceptions to discharge ought to be confined to those plainly expressed in the statute. The Court explains that this consideration would benefit nonprofessional trustees,¹⁵⁵ meaning that debtors without a full understanding of the responsibilities inherent in the relationship are spared from the perpetual insolvency that would accompany a nondischargeable debt. Of course, applying the appropriate fiduciary capacity standard would eliminate many of these innocent nonprofessional debtors in the first place.¹⁵⁶

Here, the Court has touched upon the very crux of the issue: the new defalcation standard is a result of a pervasive misunderstanding of the proper fiduciary capacity standard. If courts more consistently applied the original standard—requiring an express trust—the harm to nonprofessional trustees would be minimal, or at least limited to those who knowingly accepted the responsibility.¹⁵⁷ It would be perverse to protect some small number of nonprofessional trustees who ill-advisedly entered into a fiduciary relationship rather than hold accountable potentially many more savvy, but negligent, debtors.

(4) Some circuits have applied a similar interpretation without statutory or administrative difficulties.¹⁵⁸ There is no evidence to doubt the veracity of this contention, but the point is invalid. There is evidence supporting the efficacy of applying either of the other standards previously used by the courts of appeal as well.¹⁵⁹

(5) Interpreting federal statutes uniformly is important. The irony of this contention is that the very reason for the narrowing of the defalcation exception is the uneven application of the fiduciary capacity standard.¹⁶⁰ The Court reasoned that Congress intended for each of the action-exceptions (embezzlement, larceny, fraud, and defalcation) to be read in similar ways, but this disregards the fiduciary relationship.¹⁶¹

It makes no sense to require a similar intent of the provisions within the fiduciary capacity exception and those outside of it. The

154. *Bullock*, 133 S. Ct. at 1760 (quoting *Babbitt*, 515 U.S. at 698).

155. *Id.* at 1761.

156. *See supra* Part III.C.

157. *See supra* Part III.C.

158. *Bullock*, 133 S. Ct. at 1761.

159. Rosen, *supra* note 5, at 77–78.

160. *See supra* Part III.B.

161. *Bullock*, 133 S. Ct. at 1760.

former can be committed only by a person who has willingly entered into an express trust relationship; the latter can be committed by anyone, regardless of their relationship to the creditor.¹⁶²

VI. DELINEATING THE EXCEPTIONS

Fraud and defalcation, whatever their definitions, are at issue only with regard to fiduciaries.¹⁶³ In this context, fraud requires intentional misrepresentation, and defalcation now requires recklessness.¹⁶⁴ Intentional misrepresentation is an appropriate requirement for a finding of fraud, but not because of precedent from 1878.¹⁶⁵ Rather, fraud ought to require an intentional misrepresentation because the act itself may occur without any true damage to the creditor. That is, a trustee may fraudulently incur a debt to his beneficiary, not by any loss sustained by the beneficiary, but because of an undue pecuniary gain to the trustee.¹⁶⁶ To require such a debt to survive a successful bankruptcy petition would be extraordinary, considering that the creditor would have suffered no actual loss. Thus, debts incurred by fraud should be excepted from discharge only if the debtor had an intent to defraud the creditor.

On the other hand, a trustee who incurs a debt by defalcation necessarily will have affected a loss to the beneficiary.¹⁶⁷ Dictionaries have carried similar definitions of defalcation since 1867, and the crux is that the trustee defaulted on his debt to the beneficiary, meaning the beneficiary incurred a real loss of the trust *res*.¹⁶⁸ Such a debt should not be discharged, as the entire point for

162. 11 U.S.C. § 523(a)(4) (2012).

163. *Id.*

164. *Bullock*, 133 S. Ct. at 1760.

165. *Neal v. Clark*, 95 U.S. 704, 709 (1877).

166. *Bullock*, 133 S. Ct. at 1759 (assuming that defalcation was broad enough to cover a fiduciary's failure to make a trust more than whole). If the Court assumes *arguendo* that defalcation was this broad, the same must apply with equal force to fraud. In fact, it is more likely that a debt by fraud would create a situation where the trustee is required to remit funds to the beneficiary of greater than the original amount of the trust.

167. *See supra* notes 118–19 and accompanying text.

168. *See Bullock*, 133 S. Ct. at 1758 (“[A] law dictionary in use in 1867 defines the word ‘defalcation’ as ‘the act of a defaulter,’ which, in turn, it defines broadly as one ‘who is deficient in his accounts, or fails in making his accounts correct.’”) (citations omitted); *id.* (providing a definition from BLACK’S LAW DICTIONARY: “a non fraudulent default.”) (citations omitted); *see also supra* note 118 and accompanying text.

the creditor of a fiduciary relationship is the faithful execution of the trustee's duties.¹⁶⁹

A proper definition of "fiduciary capacity" requires that the trustee knows the responsibilities of being a fiduciary at the outset of the relationship, so there is no undue burden on fiduciary debtors.¹⁷⁰ The fraudulent acquisition of an undue benefit should require intentional wrongdoing to be excepted from discharge; but withholding from the beneficiary the very *res* that was the point of the transaction should carry strict liability.

VII. CONCLUSION

A return to the original definition of fiduciary, as espoused in *Chapman v. Forsyth*, can forestall any future expansion of the exceptions to discharge by rendering unnecessary the constant redefining of terms to prevent the steady undoing of its purpose.¹⁷¹

With proper definitions of fiduciary capacity, fraud, and defalcation, and a proper understanding of why those terms are placed alongside (though clearly separated from) embezzlement and larceny, courts could begin to apply a uniform standard for exceptions to discharge.

169. *See supra* Part III.B.

170. *See supra* Part III.B.

171. *See supra* note 12 and accompanying text.