Trust Fund Statutes and the Discharge of "Trustee" Debts Under Bankruptcy Code Section 523(a)(4)

By Thomas R. Morris*

Introduction

Pursuant to 11 USC 523(a)(4), a debt owing by an individual "for fraud or defalcation while acting in a fiduciary capacity" is not dischargeable in bankruptcy. Two United States Supreme Court cases, one from 1844 and one from 1934, establish a definition of "fiduciary" for purposes of section 523(a)(4).[1] However, the enactment by Congress and the state legislatures of "statutory trust" laws has created a new type of fiduciary duty not specifically addressed by the Supreme Court cases. The lower courts are not in agreement as to whether a statutory trust creates a "fiduciary capacity" for purposes of section 523(a)(4). As a result, there are a number of unanswered questions which arise under section 523(a)(4). Of particular interest to Michigan attorneys are questions relating to the dischargeability of liability under the Michigan Building Contract Fund Act (MBCFA) or "Builders Trust Fund."

This article addresses the historical development of the "fiduciary capacity" exception to discharge and the issues raised by the enactment of "statutory trust" laws, specifically the MBCFA, the most frequent source of dischargeability litigation under section 523(a)(4) in Michigan.

The development of the original exceptions to discharge

For several millennia there has been a concept in law and religion that debtors should be forgiven their debts.[2] Nevertheless, bankruptcy was long punishable by imprisonment, and fraudulent financial dealings by mutilation or death.[3] Prior to 1705, when the British Parliament enacted a law that allowed a discharge to qualifying debtors of "all debts," the concept of a discharge of a debtor meant a release from prison.[4]

It was not until 1800 that Congress acted upon its grant of constitutional authority "[t]o establish…uniform laws on the subject of bankruptcies."[5] The Bankruptcy Act of 1800 was limited to merchants.[6] Proceedings were commenced only by involuntary petition (although it was not uncommon for a debtor to arrange for creditors to file a petition).[7] A debtor whose creditors did not vote down a discharge, and who satisfied the requirements intended to punish dishonest and uncooperative debtors, was "discharged from all debts by him or her due or owing at the time he or she became bankrupt."[8] The 1800 Act was repealed in 1803.[9]

The Bankruptcy Act of 1841, enacted following the Panic of 1837, made federal bankruptcy relief available again.[10] With the 1841 act, provision was made for a voluntary bankruptcy petition.[11] The 1841 act also for the first time created a category of non-governmental debt that was not dischargeable.[12] Under the Bankruptcy Act of 1841, all debts "which shall not have been 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" were dischargeable.[13] An exception to discharge very similar to this original exception is now found in 11 USC 523(a)(4).

The Supreme Court defines the term "Fiduciary Capacity"

In *Chapman v Forsyth*,[14] Mr. Forsyth had been a partner in a firm which acted as a "commercial factor" and "commission merchant," and which owed a debt to its customer for the proceeds of sale of 150 bales of cotton sold by it, as agent, and received on the owner's account. The Supreme Court addressed the question whether this debt (for which Forsyth was liable as a partner) constituted a debt for "defalcation…while acting in [a] fiduciary capacity." The Supreme Court interpreted the term "fiduciary capacity" narrowly and held as follows:

> The…point is, whether a factor, who retains the money of his principal, is a fiduciary debtor within the act.

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> If the 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 punctuality and integrity of the debtor, and the 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.
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> The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee,' 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. A factor is not, therefore, within the act.[15]

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Bankruptcy law in the nineteenth century was sometimes controversial and sometimes met with indifference.[16] The result was that from 1800 to 1900 there was a federal bankruptcy act in effect for a total of less than 20 years.[17] By the time that *Chapman v Forsyth* was decided in 1844, the Bankruptcy Act of 1841 had already been repealed.

The next federal bankruptcy legislation, which followed the Panic of 1857, was the Bankruptcy Act of 1867.[18] The 1867 Act, viewed in the context of Reconstruction legislation, afforded relief to many southerners put in financial straits as a result of the Civil War.[19]

The Supreme Court narrowly construed the provision of the 1867 Act that excepted from discharge "debt created…while acting in any fiduciary character," choosing to follow *Chapman v Forsyth*'s strict, technical definition rather than broadening the exception to discharge based upon the different wording of the 1867 Act. After examining English law on the topic, the court concluded that the "English courts regard many transactions as frauds or breaches of trust under their statutes of common knowledge."[20] The court distinguished American law, concluding that perhaps the "liberal construction made in favor of the certificate of discharge in this country is due to the peculiar modes and habits of business prevailing among our people…. At all events, we think that [cases such as *Chapman v Forsyth*] accord with the true spirit and meaning of the act of congress, and with the necessities of our business conditions and arrangements".[21]

After the repeal in 1878 of the 1867 Act, the next federal bankruptcy law was not enacted until after the Panic of 1893. This was the Bankruptcy Act of 1898, which continued in effect (with amendments) for eighty years until passage of the present Bankruptcy Code in 1978. Under the 1898 Act, the exceptions to discharge came to resemble those of the current Bankruptcy Code. For example, section 17(a)(2) excluded from discharge "liabilities for…willful and malicious injuries to the person or property of another." Similar language is now found in 11 USC 523(a)(6). Section 17(a)(4) (carried over from the 1841 and 1867 acts and the source of the current section 523(a)(4)), excluded from discharge the liabilities of a bankrupt "created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The landmark case involving section 17(a)(4) of the 1898 Act was *Davis v Aetna Acceptance Co*,[22] in which the United States Supreme Court brought the logic and holding of *Chapman v Forsyth* into the twentieth century. In *Davis*, an automobile dealer who sold an Auburn sedan and failed to remit the proceeds to the finance company, Aetna Acceptance, was found to be entitled to a discharge of the resulting debt despite his written agreement to "hold [the automobile] as the property of [Aetna Acceptance] for the purpose of storage, and not to sell, pledge or otherwise dispose of it except upon consent in writing."[23]

The Supreme Court found that the meaning of the term "fraud or misappropriation while acting in a fiduciary capacity" to have been "fixed by judicial construction for very nearly a century."[24] The *Davis* court elaborated as follows:

> The statute 'speaks of technical trusts, and not those which the law implies from the contract'…. 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. In

> the words of Blatchford, J.: 'The language would seem to apply only to a debt created by a person who was already a fiduciary when the debt was created.' [citations omitted.] Was petitioner a trustee in that strict and narrow sense?
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> We think plainly he was not, though multiplicity of documents may have obscured his relation if the probe is superficial.[25]

The application of *Davis* under the Bankruptcy Code

Davis is still good law under the current Bankruptcy Code. But the confidence with which both it and *Chapman v Forsyth* had determined that specific commercial debts were not of a true fiduciary nature has not been of sufficient guidance to the courts. Recent decisions under section 523(a)(4) have given inconsistent results. "It is an understatement to say that the courts are divided on the meaning of 'fiduciary capacity' for purposes…of 523(a)(4)."[26]

The reason for these inconsistent results is that legislation enacted during and since the New Deal era in which *Davis* was decided has layered many types of commercial relationships with special treatment. Often that legislation uses terms adopted from the law of trusts to impose special duties on participants in commercial relationships. These laws have created a new species of implied trust, usually referred to as a "statutory trust" and aptly referred to by one court as an "occupational trust."[27] "In nineteenth century jurisprudence, the concept of 'trust' generally fell into two categories: (1) a voluntary trust, created by contract, often referred to as an 'express' trust, and (2) a trust created by operation of law…. The difficulty arose with the advent of statutorily-created 'trusts'."[28]

Federal statutory trusts and dischargeability

At the federal level, the Perishable Agricultural Commodities Act of 1930 (PACA),[29] the Packers and Stockyards Act (PSA),[30] and the Employee Retirement Income Security Act of 1974 (ERISA),[31] impose "fiduciary" duties on purchasers/resellers of meat and farm produce, and employers.[32]

The cases that have applied the *Davis* express-trust standards to these statutes have yielded divergent results. The Sixth Circuit, in the recent case of *In re Bucci*,[33] followed an Eighth Circuit case, which held that ERISA does not create an express trust of which a corporate officer is the trustee.[34] However, at least one court has found ERISA to satisfy the requirements for nondischargeability with respect to a corporate officer.[35] The cases go both ways with respect to PACA.[36] Although there is no controlling Sixth Circuit case on PACA, *Bucci* gives a good indication that the Sixth Circuit would rule in favor of the debtor.

State statutory trusts

Numerous state laws enacted during or since the New Deal era have likewise engrafted the language of trust law onto commercial relationships. The result is to alter, in specified industries and occupations, the general rule of debtor-creditor law that, absent the grant of a lien on a particular item of property, a creditor has no claim to a particular asset and is not entitled to be paid out of particular funds. Various state "trust fund" statutes are applicable to construction contractors, insurance agents,[37] lottery sales agents, partners,[38] and bankers.[39]

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"Builders' trust fund" laws and dischargeability

The type of law most often involved in dischargeability litigation under section 523(a)(4) is the "builders' trust fund" law. At least 21 states have laws of this type.[40] New York's law was the source of the MBCFA. The MBCFA, enacted in 1931, provides, in relevant part, as follows:

> In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors or materialmen, and the contractor or subcontractor shall be considered the trustee of all funds so paid to him for building construction purposes.[41]

It was not until 1982 that the Sixth Circuit addressed the issue of whether the MBCFA creates an "express trust,"[42] the violation of which could give rise to a debt that was not dischargeable under former section 17(a)(4), the predecessor to section 523(a)(4). In *In re Johnson*,[43] the Sixth Circuit determined that a debt owing by a building contractor for his

failure to pay money out of a "building contract fund" to a supplier was not dischargeable. The court first determined that "[t]he question of who is a fiduciary for purposes of section 17(a)(4) is one of federal law, although state law is important in determining when a trust relationship exists."[44] The court went on to find that the MBCFA did establish an express or technical trust with respect to a contractor or subcontractor receiving the payments:

> The term "fiduciary" applies only to express or technical trusts and does not extend to implied trusts, which are imposed on transactions by operation of law as a matter of equity. *Davis v Aetna Acceptance Co*, 293 US 328, 333, 55 S Ct 151, 153, 79 L Ed 393 (1934); *Chapman v Forsyth*, 43 US (2 HO) 202, 207, 11 L Ed 236 (1884). Moreover, the requisite trust relationship must exist prior to the act creating the debt and without reference to it. *Davis, supra* at 333-34, 55 S Ct, at 153-54. State statutes which impose a trust *ex-maleficio* are not within the scope of section 17(a)(4) since such trusts only arise upon an act of misappropriation. *Id.* [additional citations omitted].
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> The Michigan Building Contract Fund Act imposes a "trust" upon the building contract fund paid by any person to a contractor or subcontractor for the benefit of the person making the payment, contractors, laborers, subcontractors and materialmen. Mich Comp Laws Ann section 570.151. The contractor or subcontractor receiving the payments is the "trustee". *Id*.
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> The Building Contract Fund Act satisfies the express or technical trust requirements of section 17(a)(4). The trust relationship is unambiguously imposed on a contractor or subcontractor by the language of the statute.
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> A fiduciary relationship established by the Building Contract Fund Act arises at the time any monies are paid to the contractor or subcontractor whether or not there are any beneficiaries of the trust at that time and continues until all of the trust beneficiaries have been paid. [Citations omitted.][45]

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Is *Johnson* the final word on the topic?

There are at least two fundamental legal questions posed by a claim of nondischargeability under the MBCFA and 523(a)(4) for "defalcation while acting in a fiduciary capacity."[46]

The first is: Does the MBCFA establish an "express trust" that meets the requirements to impose a "fiduciary duty" on the trustee such that a defalcation of that fiduciary duty will render the resulting debt nondischargeable for purposes of section 523(a)(4)? With *In re Johnson*, the question of whether the MBCFA imposes an express trust is settled in this circuit. But the question may not be forever settled. Holdings of other courts provide a basis for a challenge to that holding. "[T]he cases are divided over the question whether a statute that…deems a debtor a fiduciary in order to enlarge the remedies for default makes the debtor a 'fiduciary' for purposes of section 523(a)(4)."[47] A definite position on this issue is taken by *In re Heilman*,[48] which concluded that a statute on its own simply cannot create an express trust: "A statutory trust cannot be a technical trust—as express trusts are sometimes referred to—in the absence of the execution of a formal trust agreement between the parties."[49] In contrast, *Johnson* found the MBCFA to satisfy the "express trust" requirement of *Davis* because the MBCFA is in writing. Whether or not the Sixth Circuit reached the correct result, this is not what most courts have taken the term "express trust" to mean.[50]

A more narrow but related challenge is that the MBCFA, unlike its New York counterpart for example, does not require segregation of the so-called "trust funds."[51] Rather than requiring segregation or separate accounting for "builders trust funds", the MBCFA punishes a building contractor who, "with intent to defraud," misuses building contract funds.[52] A true trust, many courts have held, requires that the trust funds be segregated in some manner. The Supreme Court, in the 1890 case of *Upshur v Briscoe*,[53] noted the lack of a segregation requirement as support for its conclusion that no trust existed.[54] In *Davis*, there was likewise no segregation requirement.[55] The Court of Appeals for the Fifth Circuit, in *In re Tran*,[56] found the lack of a segregation requirement in the

Texas Lottery Act to render it insufficient to create nondischargeability under 523(a)(4). In *In re Boyle*,[57] the Fifth Circuit held that the Texas construction fund law likewise did not create an express trust since it did not require segregation of funds. In *In re McCue*,[58] a PACA case, the court concluded that for a statutory trust to satisfy the express-trust requirements of section 523(a)(4), the statute must require a segregation of trust funds.

Is officer liability under the MBCFA dischargeable?

The second question, which was not addressed in *Johnson*, is: Who is the trustee? Specifically, is an officer/director/manager/employee of a contractor organized as a corporation or LLC (hereinafter, "officer") the trustee when the MBCFA does not specifically impose duties on the particular officer? Are the other elements of an "express trust" present with respect to an officer who was not personally a party to the transaction, who did not personally agree to serve as trustee, and who personally was not given title to property (the "building contract funds")? Does a position of responsibility in a business that is subject to a statutory trust result in nondischargeable personal liability of the officer when the business fails to pay its creditors? What elements must be established for there to be nondischargeable officer liability?

In *Johnson*, the Sixth Circuit distinguished other state statutes that "impose only criminal or other penalties on a general contractor."[59] Citing a number of cases from other jurisdictions, the court of appeals concluded that "[t]here the statutory trust arises only upon the active misappropriation and cannot be said to exist prior to the law and without reference to it even though a technical or express trust may exist at that time."[60] This statement seems to describe the situation when an officer who is not technically the "contractor" is held to be the "trustee." It therefore seems to portend that the Sixth Circuit would find officer liability under the MBCFA to be dischargeable.

In *Johnson*, the debtor, Mr. Johnson, was the actual contractor. Mr. Johnson, a sole proprietor,[61] personally entered into contracts for the construction of pole barns and personally received payment pursuant to those contracts. Mr. Johnson failed to pay fully a supplier, Carlisle Cashway, Inc., for materials used in the construction of the buildings.

Unlike Mr. Johnson, many if not most people in the building-construction business work for or own a corporation or LLC that conducts the business. Michigan case law holds that an officer or other agent of a corporate contractor who causes the corporation to violate the MBCFA can face both criminal and civil liability for the violation.[62] The Sixth Circuit, in an unpublished decision in *In re Kriegish*,[63] upheld the bankruptcy court and district court decisions that found the corporate officer's liability nondischargeable under 523(a)(4). However, there was no discussion of the issue arising from the fact that Mr. Kriegish was an officer of a contractor, but was not himself a contractor. Nor was there a finding that he was the "contractor" under the MBCFA. A number of lower courts have also considered the question of officer liability for violations of the MBCFA, but none of the reported decisions has discussed whether a corporate officer or other corporate agent qualifies as the "contractor," and therefore the trustee, under the MBCFA for purposes of section 523(a)(4).[64]

In recent unpublished decisions, bankruptcy judges Phillip J. Shefferly and Thomas J. Tucker, of the Eastern District of Michigan, have reached different conclusions as to whether the MBCFA satisfies the "express trust" requirement of section 523(a)(4) with respect to a corporate officer who did not, individually, enter into a construction contract. Judge Tucker granted a motion for dismissal of "defalcation while acting in a fiduciary capacity" claims under section 523(a)(4) for the reason that the MBCFA did not make the corporate officer the trustee of building contract funds.[65]

Judge Shefferly denied a similar motion, holding that because the courts have treated corporate officers found guilty of the misuse of building contract funds as though they were the "contractor," the application of the MBCFA to a corporate officer satisfies the express-trust requirement.[66] This holding is consistent with the unpublished opinion in *In re Kriegish*. But *Kriegish*, as noted above, contains no discussion of the issue.

Is the definition of "contractor" in the MBCFA broad enough to encompass not only a person who enters into a contract, but also a corporate officer? If so, which corporate officer or other corporate agent will be liable? Is the liability limited to the corporate officer who exercises sufficient (and inappropriate) control over the funds such that he or

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she can be said to have personally caused a misappropriation of the funds? Is this merely a broad definition of "contractor" under the MBCFA, or is it *ex maleficio* liability? If it is *ex maleficio* liability, *Davis* holds this to be insufficient to constitute a breach of a fiduciary duty for purposes of section 523(a)(4).

Conclusion

In *Johnson*, the MBCFA was held to impose an express trust, so unless and until *Johnson* is overturned, the liability of a sole-proprietor contractor for a breach of trust under the MBCFA is not dischargeable. The question that remains to be explicitly addressed by the Sixth Circuit is whether a corporate officer of a corporate contractor is himself or herself the "contractor" and the trustee under an express trust.

Remaining issues for the U.S. Supreme Court are (1) whether a statute can impose "fiduciary capacity" obligations; and, if so, (2) what are the requirements for a statute to do so. Until those issues are considered, dischargeability of debts under the MBCFA and other federal and state "statutory trust" laws will be neither certain nor uniform.

NOTES

1. The cases are identified below. *See* notes 12 and 16. For a definition of "fraud" under 523(a)(4), see *In re Chavez*, 140 BR 413, 423 (Bankr WD Tex 1992). For a definition of "defalcation", see *In re Garver*, 116 F3d 176, 179 (6th Cir 1997) and *In re Millikan*, 188 Fed Appx 699, 701-702 (10th Cir 2006). Because defalcation under 523(a)(4) is a lesser standard, there is not a lot of discussion in the cases of the elements of fraud under 523(a)(4).

2. DeMarco, Robert T., *History of Bankruptcy,* http://www.bankruptcytx.com/bankruptcy-history.htm.

3. *Id. See also* Pomykala, Joseph, *Bankruptcy's Origins in Debtor Perpetrated Crime,* http://pages.townson.edu/jpomy/origins.pdf. The most thorough and useful works on 19th-century American bankruptcy are: Warren, Charles, *Bankruptcy in United States History* (Harvard Univ. Press, 1935) and Mann, Bruce H., *Republic of Debtors: Bankruptcy in the Age of American Independence* (Harvard Univ. Press, 2003).

4. *Central Va Comm College v Katz*, 546 US 356, 364 (2006).

5. US Const, Art. I, § 8. Bankruptcy Act of 1800, section 1, Ch 19, 2 Stat 19 (repealed 1803). The text of the 1800 Act is available on the Library of Congress Web site, http://memory.loc.gov/ammem/amlaw/lwsl.html. Search *Statutes at Large*, for Vol 2 (6th Congress, 1st Session).

6. 1800 Act, § 34.

7. *Pomykala, supra*, note 7.

8. 1800 Act, § 36. However, section 62 provided that nothing contained in the act impaired obligations for "money due to the United States or to any of them". Such obligations were outside of the category of dischargeable "debt". Thus, the original exception to discharge was actually for debts owing to the government.

9. Act of Dec 19, 1803, ch 6, 2 Stat 248.

10. Although states can enact bankruptcy laws, a state law cannot provide for a discharge of an obligation owing (as of the date of enactment) to a citizen of another state. *Brown v Smart*, 145 US 454, 457 (1892).

11. 1841 Act, 5 Stat 440, § 1, repealed by Act of March 3, 1843, Ch 82, 5 Stat 614.

12. The discharge under the 1841 Act was of all debts that were provable under the act. 1841 Act, § 4. Presumably, this did not include tax obligations. *US v Herron*, 87 US 251 (1873). *See also* Tabb, Charles J, "The Top Twenty Issues in the History of Consumer Bankruptcy", 2007 U Ill L R 9, 21-22 (2007). Section 2 provided that "nothing in this act shall be construed to annul, destroy, or impair any lawful rights of married women, or minors…which are not inconsistent with (other) provisions…of this act." In other words, support obligations were not discharged. Thus, the defalcation exception was actually one of the first three exceptions to discharge.

13. 1841 Act, § 1. This wording is not clear because it is phrased in the form of eligibility to be a bankrupt under the act, not an exception to discharge. But the courts construed it as an exception to discharge. See note 14.

14. 43 US 202 (1844).

15. *Id.* at 208.

16. *DeMarco, supra* at 8.

17. *US v Kras*, 409 US 434, 446-448 (1973).

18. Act of Mar 2, 1867, Ch 176, 14 Stat 517, *amended by* Act of June 22, 1874, Ch 390, 18 Stat 178, *repealed by* Act of June 7, 1878, Ch 170, 20 Stat 99.

19. Flaherty, Jane, review of *The Reconstruction of Southern Debt: Bankruptcy After the Civil War* by Elizabeth Lee Thompson. www.h-net.org.

20. *Hennequin v Clews*, 111 US 676 (1884).

21. *Id.* at 683-684.

22. 293 US 328 (1934).

23. *Id.* at 330.

24. *Id.* at 333.

25. *Id.* at 333-34.

26. *In re Heilman*, 241 BR 137, 152 (Bankr ED Md 1999).

27. *In re Turner*, 134 BR 646, 655 (Bankr ND Okla 1991) (contains insightful analysis of the 19th century cases and legislation).

28. *Quaif v Johnson*, 4 F3d 950, 953 (11th Cir 1993).

29. 7 USC 499 *et seq*.

30. 7 USC 181 *et seq*.

31. USC 1001 *et seq*.

32. *Heilman, supra* at 153 (cataloging cases). Federal income taxes withheld from employee wages are also held in trust by the employer. 26 USC 7501. However, the imposition and the discharge of "responsible personal liability" is governed by specific provisions of the Internal Revenue Code and Bankruptcy Code. *See* 26 USC 6672 and 11 USC 523(a)(1). Therefore, 523(a)(4) is not called into play with respect to personal liability for withheld taxes.

33. 493 F3d 635 (6th Cir 2007) (discussing only employer contributions; the issue of "withheld" employee contributions was not examined on appeal).

34. *Hunter v Philpott*, 373 F3d 873 (8th Cir 2004).

35. *In re Duncan*, 331 BR 70 (Bankr EDNY 2005).

36. Compare *In re Nix*, 1992 WL 119143 (MD Ga 1992) (PACA liability of corporate officer nondischargeable) with *In re McCue*, 324 BR 389 (Bankr

MD Fla 2005). *See also Nuchief Sales, Inc v Harper*, 150 BR 416, 418-19 (Bankr ED Tenn 1993); *In re Stout*, 123 BR 412 (Bankr WD Okla 1990); *In re Snyder*, 171 BR 532 (Bankr D Md 1994).

37. *See In re Blasczak*, 397 F3d 386 (6th Cir 2005).

38. *See Heilman*, 241 BR at 155, n 14 (comprehensive listing) and 15 ALR Fed 337 (outlining issue by industry). As to partners, see *In re Kraus*, 37 BR 126 (Bankr ED Mich 1984) (holding that Michigan Uniform Partnership Act, MCL 449.21, creates an express trust).

39. *See In re Millikan, supra*.

40. An overview of this type of legislation can be found in 3 Bruner & O'Connor, Construction Law § 8:41.

41. MCL 570.151. Note that proposed revisions to the MBCFA are under discussion.

42. *Davis* used the term "technical trust" instead of the term "express trust", but the terms are synonymous.

43. 691 F2d 249 (6th Cir 1982).

44. *Id.* at 251.

45. *Id.* at 252-253. Query whether the MBCFA "unambiguously" imposes a trustee-beneficiary relationship. The definition of "building construction" and "building contract" is subject to varying interpretations. *See, e.g., In re Skilled Trades*, 1 BR 396 (Bankr WD Mich 1979) and *In re Yacos*, 370 BR 131 (Bankr ED Mich 2007). As discussed below, there is room for disagreement as to who is the "contractor" in a case not involving a sole proprietor. *See also In re Hunt*, 352 BR 579 (Bankr WD Mich 2006) (manufacturer of modular homes not engaged in "building construction").

46. Dischargeability claims based upon the MBCFA might also be brought under 523(a)(2) (false pretenses, fraud), 523(a)(4) (embezzlement, larceny), 523(a)(6) (willful and malicious injury), or 523(a)(7) (state criminal restitution). Those other theories are beyond the scope of this article.

47. *In re Marchiando*, 13 F3d 1111, 1115 (7th Cir 1994).

48. 241 BR 137 (Bankr D Md 1999).

49. *Id.* at 161 (citing § 159, Trusts, 76 Am Jur 2d 191 (1992)). *Accord, In re Marchiando*, 13 F3d 1111 (7th Cir 1994) (state lottery sales agent law determined not to create 523(a)(4) fiduciary duty; decision based on analysis of the "knowledge" and "power" of the parties to the transaction).

50. *In re Turner*, 134 BR 646, 654 (Bankr ND Okla. 1991); *In re Holmes*, 117 BR 848 (Bankr D Md 1990); *In re Angelle*, 610 F2d 1335, 1340 (5th Cir 1980). But many courts have not drawn a distinction between statutory trusts and express or technical trusts. *In re Ardolino,* 298 BR 541, 546 (Bankr WD Pa 2003); *In re Librandi*, 183 BR 379, 382 (MD Pa 1995). *Johnson* is an example of cases which hold or assume that a statute can impose an express trust.

51. *In re Morris Ketchum, Jr. and Assoc*, 409 F Supp 743, 746 (SDNY 1975); McKinney's Lien Law § 75.

52. MCL 570.152.

53. 138 US 365 (1890).

54. *Id.* at 375.

55. "The only writing at all suggestive of a trust is the one characterized as a trust receipt." *Davis* at 334. Note that the trust receipt was a device replaced with the security agreement upon the adoption of the Uniform Commercial Code.

56. 151 F3d 339 (5th Cir 1998).

57. 819 F2d 583, 588-89 (5th Cir 1987).

58. 324 BR 389 (Bankr MD Fla 2005).

59. 691 F2d at 253.

60. *Id.* (citations omitted).

61. *Id.* at 258 (discussion in dissent of bankruptcy judge's findings).

62. *See, e.g., People v Brown*, 239 Mich App 735, 610 NW2d 234, 239 (2000); *Joy Mgt Co v Detroit,* 138 Mich App 334, 340, 455 NW2d 55 (1990).

63. 97 Fed Appx 4 (2004).

64. In cases such as *In re Englund*, 20 BR 957 (Bankr ED Mich 1982); *In re Little*, 163 BR 497 (Bankr ED Mich 1994); and *In re Collins*, 266 BR 123 (ND Ohio 2000), the issue was not reached because the debtor was a sole proprietor, personally entered into the contract, and personally received payment. In other cases such as *In re Crane*, 154 BR 60 (Bankr ED Mich 1993); *In re Hickey*, 1999 WL 33313133 (ED Mich 1999); and *In re Kriegish*, 275 BR 839 (ED Mich 2002), there was no distinction made between the debtor and the business entity which had entered into the contract. In the first group of cases, the question was not reached. In the second group of cases, it was not addressed.

65. *Franzone v Ernst*, 06-4803 (unpublished bench opinion, Bankr ED Mich, Sept 25, 2006).

66. *Conquest Construction Co v Cicero*, 06-4852 (Opinion Denying Defendant's Motion for Reconsideration, etc., unpublished, Bankr ED Mich, Nov 30, 2006).

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