

STETSON BUSINESS LAW REVIEW

CO-MANAGER FRAUD SHOULD NOT BE DISCHARGEABLE: WHY THE FIDUCIARY DUTIES OF FLA. STAT. §605.04091 SHOULD MEET THE ELEVENTH CIRCUIT'S TEST FOR FIDUCIARY CAPACITY EXCEPTION

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I. INTRODUCTION

The Eleventh Circuit, in its *In re Forrest* decision, was asked to determine whether a produce buyer acting as a trustee under the Perishable Agricultural Commodities Act (“PACA”) met the Fiduciary Capacity Exception to bankruptcy discharge under 11 U.S.C. § 523(a)(4).¹ The court ultimately held that the debts incurred by the produce buyer, though acting as a trustee under PACA, were not exempted from bankruptcy discharge under § 523(a)(4).²

In this holding, the Eleventh Circuit adopted a three-part test to determine whether a debtor was acting in a fiduciary capacity under 11 U.S.C. § 523(a)(4). First, there must be both a relationship that includes a trustee, and an identifiable trust res held for the benefit of a beneficiary or beneficiaries.³ Second, that relationship must create a technical trust.⁴ Third, the debtor must have been acting in a fiduciary capacity prior to and through the act of fraud or defalcation.⁵

The three-part test established by *In re Forrest* may have large implications for limited liability company (“LLC”) managers in Florida due to the fiduciary duties of loyalty and care established by Fla. Stat. § 605.04091. If the statute does not satisfy the Fiduciary Capacity Exception under 11 U.S.C. § 523(a)(4), this could not only discourage the formation of new LLCs, but also impact the operation of current LLCs in the state of Florida. New business

¹ Spring Valley Produce, Inc. v. Forrest (*In re Forrest*), 47 F. 4th 1229, 1234 (11th Cir. 2022).

² *Id.* at 1247.

³ *Id.* at 1234.

⁴ *Id.*

⁵ *Id.*

owners could be discouraged from forming new LLCs if they are informed that a co-manager could commit fraud or defalcation against the LLC, and have the debt discharged if they were to file for personal bankruptcy protection. Current managers of LLCs face potential increased risk in the event a co-manager has or does engage in fraud or defalcation.⁶ Additionally, this could establish a legal loophole that promotes fraud since managers of an LLC can commit fraud or defalcation and have the debts discharged in a later bankruptcy proceeding.

Under the Eleventh Circuit’s newly established test for the Fiduciary Capacity Exception, bankruptcy courts in Florida should recognize the statutory fiduciary duties set forth in Florida Statute § 605.04091 as ones that satisfy the requirements of a fiduciary duty set forth under 11 U.S.C. § 523(a)(4). This will give co-managers, among other victims, greater protections if a co-manager commits fraud against the LLC.

Following Part I, this Introduction, Part II provides a historical overview of the formation and interpretation of the Fiduciary Capacity Exception, including how the circuits agree or split over some of the elements of the Fiduciary Capacity Exception. This overview will also discuss the history of Florida LLC laws, and how other jurisdictions have interpreted similar LLC statutes in the context of the Fiduciary Capacity Exception. Part III provides a discussion as to

⁶ Managers of LLCs already face potential heightened risk for any fraud committed by a co-manager against a third party. Imputation of liability for a debt obtained by fraud is not limited to the wrongdoer. *Field v. Mans*, 516 U.S. 59, 73-75 (1995). In 2023, the Supreme Court held that a “fraudster’s” legal partner or agent are also barred from discharging a debt obtained by fraud, even if they are an innocent party to the fraud itself. *Bartenwerfer v. Buckley*, 598 U.S. 69, 83 (2023). This makes it even more imperative to establish protections for co-managers of LLCs.

why Florida Statute § 605.04091 should meet the Eleventh Circuit’s three-prong test based on the historical context. This includes an analysis of each prong of the test in relation to the Florida LLC statute. This also includes a discussion of why Florida Statute § 605.04091 should satisfy the test based on public policy. Finally, Part IV concludes the discussion of why Florida Statute § 605.04091 meets the Eleventh Circuit’s three-prong test and the potential legal and economic impacts.

II. HISTORICAL CONTEXT

A. The Fiduciary Capacity Exception

In Chapter 7 bankruptcy cases, a debtor’s pre-bankruptcy debts are dischargeable.⁷ This general rule has narrow exceptions to discharge set forth in 11 U.S.C. § 523.⁸ One specific exception to discharge, and the main focus of this article, is that a debtor may not discharge a debt acquired through “fraud or defalcation while acting in a fiduciary capacity.”⁹ This exception is also known as the Fiduciary Capacity Exception.¹⁰

The Fiduciary Capacity Exception is different from the fraud exception under 11 U.S.C. § 523(a)(2)(A).¹¹ Under § 523(a)(2)(A), a debt is not dischargeable if it was obtained by “false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or

⁷ 11 U.S.C. § 727; discharge is defined as releasing a debtor from personal liability for prebankruptcy debts. *See* “discharge in bankruptcy” BLACK’S LAW DICTIONARY (12th ed. 2024).

⁸ *See generally* 11 U.S.C. § 523.

⁹ 11 U.S.C. § 523(a)(4).

¹⁰ *Id.*

¹¹ 11 U.S.C. § 523(a)(2)(A).

an insider's financial condition.”¹² To establish actual fraud under § 523(a)(2)(A), the creditor needs to show justifiable reliance by the creditor and intent by the debtor to commit fraud.¹³ In contrast, § 523(a)(4) is satisfied when a debtor commits fraud or defalcation¹⁴ while acting in a

¹² *Id.*

¹³ To prove actual fraud under § 523(a)(2)(A), a creditor must establish: (1) a false representation was made by the debtor; (2) the debtor made the representation with the intent to deceive the creditor; (3) the creditor justifiably relied on the debtor's representations; and (4) as a result of the representation, the creditor suffered damages. *In re Harris*, 3 F.4th 1339, 1344–45 (11th Cir. 2021).

¹⁴ The Supreme Court has held that defalcation also has a state mind requirement involving knowledge of or gross recklessness in respect to the improper nature of the relevant fiduciary behavior. *Bullock v. BankChampaign, N.A.*, 133 S.Ct. 1754, 1757 (2013) For purposes of 11 U.S.C. § 523(a)(4), defalcation involves behavior “(i) where the conduct at issue involves bad faith, moral turpitude, or other immoral conduct; (ii) intentional conduct that the fiduciary knows is improper; and (iii) reckless conduct of the kind that the criminal law often treats as the equivalent of intentional.” *Caitlin Energy, Inc. v. Rachel (In re Rachel)*, 527 B.R. 529, (Bankr. N.D. GA. 2015); *Bullock*, 133 S.Ct. at 1759. The Supreme Court has further held that willful blindness to a substantial and unjustifiable risk satisfies the state of mind requirement. *Id.* at 1756.

fiduciary capacity.¹⁵ In other words, to make the debt non-dischargeable in cases where the debtor was acting in a fiduciary duty, a creditor must prove both fiduciary capacity and either fraud or defalcation.¹⁶

While fraud under § 523(a)(4) requires someone acting as a fiduciary to commit the fraud, it otherwise does not differ from actual fraud under § 523(a)(2)(A).¹⁷ Due to the similar requirements of the two exceptions, the presence of fraud allows a practitioner to plead both exceptions concurrently. The *In re Forrest* test focuses solely on the fiduciary capacity component of § 523(a)(4),¹⁸ thus potentially making the two exceptions more distinguishable. Practitioners, who now have a test for fiduciary capacity, may favor arguing § 523(a)(4) over § 523(a)(2)(A) depending on the facts of the case.

The fiduciary capacity under § 523(a)(4) does require a technical trust.¹⁹ It is important to note that § 523(a)(4) does not include the terms “trust” or technical trust” nor provides a standard on how the terms are to be interpreted.²⁰ As it will be seen in this section, what constitutes a “technical trust” under the fiduciary capacity requirement of § 523(a)(4) has been heavily

¹⁵ 11 U.S.C. § 523(a)(4). In addition to “trust” and “technical trust”, the Bankruptcy Code does not define “fraud” or “defalcation.” *See* 11 U.S.C § 101. These terms are often left to be defined through judicial interpretation.

¹⁶ 11 U.S.C. § 523(a)(4).

¹⁷ *Dakota Steel, Inc. v. Dakota (In re Dakota)*, 284 B.R. 711, 723 (Bkrcty. N.D. Cal., 2002).

¹⁸ *See generally In re Forrest*, 47 F.4th 1229.

¹⁹ *Id.* at 1234.

²⁰ *See* 11 U.S.C. § 523(a)(4).

debated by the circuit courts. The Eleventh Circuit determined that it was necessary to establish its three-prong test for fiduciary capacity because neither previous case law²¹ nor the current bankruptcy code clearly define fiduciary capacity or what constitutes a technical trust under the guise of § 523(a)(4).²²

1. Early Supreme Court Cases

Critical Supreme Court cases created the foundation for interpreting what satisfies the fiduciary capacity requirement of the Fiduciary Capacity Exception.²³ Specifically, three cases were cited by the Eleventh Circuit as the foundational cases that established the technical trust and timing requirements of fiduciary capacity, which can be seen in prongs two and three of the Eleventh Circuit test.²⁴

In the first case, *Chapman v. Forsyth*, the Supreme Court was asked to determine whether a “factor,”²⁵ who owed his principal money from a sale of goods, was acting in a fiduciary capacity.²⁶ The *Chapman* court determined that the factor was not acting in a fiduciary

²¹ The Eleventh Circuit specifically examined previous Supreme Court rulings along with prior Eleventh Circuit and former Fifth Circuit cases. *In re Forrest*, 47 F.4th at 1236-39.

²² *In re Forrest*, 47 F.4th at 1241.

²³ *Id.* at 1236–37.

²⁴ *Id.* at 1236-38.

²⁵ A factor is defined as “[a]n agent who is employed to sell property for the principal and who possesses or controls the property.” *See factor*; BLACK’S LAW DICTIONARY (12th ed. 2024).

²⁶ *Chapman v. Forsyth*, 43 U.S. 202, 206-07 (1844).

capacity.²⁷ The Court held that while the factor was acting in a position of trust, not all positions of trust create the necessary fiduciary capacity for a debt to be denied discharge under § 523(a)(4).²⁸ The Court was concerned that allowing a debt from any position of trust to be denied discharge would open the door to difficulties in limiting the Fiduciary Capacity Exception’s application and “[s]uch a construction would have left but few debts on which the law could operate.”²⁹ The Court emphasized that “[i]n almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust.”³⁰ However, the Court clarified that the trusts it was referring to were “not cases of implied but special trusts.”³¹ As a result, the Supreme Court specifically held that the Fiduciary Capacity Exception applies to technical trusts,³² and not to trusts implied by contract.³³

In subsequent cases, the Supreme Court rendered decisions that focused on the timing requirement of the Fiduciary Capacity Exception. In *Upshur v. Briscoe*, the Court focused on

²⁷ *Id.* at 208.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ A trust implied by contract is a type of constructive/resulting trust which are remedies imposed by equity when the intention of a trust is not expressed, but inferred via the operation of law. *See* “*Constructive trust*” and “*Resulting trust*”, BLACK’S LAW DICTIONARY (12th ed. 2024).

§ 523(a)(4)'s "while acting in" language and whether this means the debt needs to occur after the debtor was acting in a fiduciary capacity.³⁴ The Court concluded that the exception applies only to a debt created by the debtor who was "already a fiduciary when the debt was created."³⁵

The Court revisited the issue of the technical trust requirement in *Davis v. Aetna Acceptance Co.*³⁶ In *Davis*, the creditor held a chattel mortgage in automobiles sold by the debtor.³⁷ The debtor owed a debt to the creditor after selling one of the cars and failing to remit payment.³⁸ The Court rejected the notion that a debtor becoming a "trustee *ex maleficio*"³⁹ creates a fiduciary duty.⁴⁰ The *Davis* Court instead reemphasized that the debtor must have already been acting in a fiduciary capacity when the debt was created.⁴¹ Additionally, the Court further emphasized the idea from *Chapman* that the Fiduciary Capacity Exception applies to

³⁴ *Upshur v. Briscoe*, 138 U.S. 365, 378 (1891).

³⁵ *Id.*

³⁶ *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934).

³⁷ *Davis*, 293 U.S. at 330.

³⁸ *Id.*

³⁹ Trustee *ex maleficio* is defined as "[s]omeone who is guilty of wrongful or fraudulent conduct and is held by equity to the duty of a trustee, in relation to the subject matter, to prevent him or her from profiting from the wrongdoing." See *Trustee Ex Maleficio*, BLACK'S LAW DICTIONARY (12th ed. 2024).

⁴⁰ *Davis*, 293 U.S. at 333.

⁴¹ *Id.*

trusts in the “strict and narrow” sense, or in other words, the technical sense.⁴² However, the Court did not clearly define what constitutes a trust in the “technical sense,” opening the door for the lower circuits to define it.

2. Circuit Courts’ Interpretations

While the Supreme Court provided some guidance on the Fiduciary Capacity Exception, many terms and ideas were left undefined. Most importantly, the Supreme Court never clearly defined what constitutes a technical trust.⁴³ The circuit courts, as a result, are split on the meaning of technical trust in the context of fiduciary capacity.⁴⁴ Consequently, there is disagreement among the circuits on what trust-type obligations are required for a technical trust under the Fiduciary Capacity Exception.⁴⁵

⁴² *Id.*

⁴³ Jonathon S. Byington, *Fiduciary Capacity and the Bankruptcy Discharge*, 24 AM. BANKR. INST. L. REV. 1, 13 (2016).

⁴⁴ *Id.* at 20.

⁴⁵ *Id.* at 14.

i. Circuit Agreements

There have been some agreements among the circuits regarding the meaning of fiduciary capacity.⁴⁶ In fact, most circuits agree that if a trustee⁴⁷ is acting under an express trust,⁴⁸ then that creates the requisite fiduciary capacity.⁴⁹ Most circuits also agree that the technical trust required for fiduciary capacity can be created in many different ways.⁵⁰ The First, Fifth, Eighth, and Ninth Circuits agree that a technical trust can be established through state common law or state statute, and have developed similar tests for analyzing state statutes in this context.⁵¹

⁴⁶ *Id.* at 15–20.

⁴⁷ A trustee is a person “who stands in a fiduciary or confidential relation to another”. *See Trustee*, BLACK’S LAW DICTIONARY 12th ed. 2024).

⁴⁸ An express trust is a trust that “has been intentionally and deliberately created, as when any one gives away property to another but at the same time declares that such property shall be held or applied in a particular way for the benefit of some person or persons other than the formal donee...” *Express Trust*, BLACK’S LAW DICTIONARY (12th ed. 2024) (quoting Augustine Birrell, *THE DUTIES AND LIABILITIES OF TRUSTEES* 6–7 (1896).

⁴⁹ Byington, *supra* note 43, at 18.

⁵⁰ *Id.* at 19.

⁵¹ *Id.* at 19–20; *See e.g.* Texas Lottery Comm'n v. Tran (*In re Tran*), 151 F.3d 339, 342–43 (5th Cir. 1998); Arvest Mortg. Co. v. Nail (*In re Nail*), 680 F.3d 1036, 1040 (8th Cir. 2012); Blyler v. Hemmeter (*In re Hemmeter*), 242 F.3d 1186, 1190 (9th Cir. 2001); *In re Fahey*, 482 B.R. 678, 688 (B.A.P. 1st Cir. 2012); Reshetar Sys., Inc. v. Thompson (*In re Thompson*), 686 F.3d 940, 944 (8th Cir. 2012); Lovell v. Stanifer, (*In re Stanifer*), 236 B.R. 709, 718 (B.A.P. 9th Cir. 1999).

However, even if the state law grants fiduciary duties, it does not automatically satisfy the requirements of § 523(a)(4).⁵² Thus, there remains a circuit split over what the proper analysis entails.⁵³

ii. Circuit Split

At least four approaches have been developed by the appellate circuits to determine fiduciary capacity. The Ninth and Tenth Circuits have taken a restrictive approach that focuses on traditional express trust elements: a trust res,⁵⁴ a trustee, and appropriate timing of the fiduciary obligations.⁵⁵ The source of the express trust elements appears to be flexible as the circuits have determined the existence of the elements in a variety of professional contexts.⁵⁶ For example, the Ninth Circuit has held that a trust was created by statute when there is a defined trust res, fiduciary duties and that the trust was imposed prior to the wrong from which the debt arose.⁵⁷ In *In re Munton*, the Bankruptcy Appellate Panel (“BAP”) ⁵⁸ of the Ninth Circuit analyzed whether

⁵² See 11 U.S.C. § 523(a)(4).

⁵³ Byington, *supra* note 43, at 4.

⁵⁴ Trust res, or corpus, is “[t]he property for which a trustee is responsible.” See *Corpus* BLACK’S LAW DICTIONARY (12th ed. 2024).

⁵⁵ Byington, *supra* note 43, at 22.

⁵⁶ *Id.*

⁵⁷ T&D Moravits & Co. v. Munton (*In re Munton*), 352 B.R. 707, 715 (B.A.P. 9th Cir. 2006).

⁵⁸ The Bankruptcy Appellate Panel is a group of up to three judges that hear appeals in bankruptcy cases under the supervision of the Court of Appeals. Kristina Forbes, *Bankruptcy*

a Texas Construction Fund Statute created a fiduciary relationship.⁵⁹ The court determined that there was a trust res in the form of construction payments made to a contractor.⁶⁰ It also determined that fiduciary duties were established by “prohibiting the intentional use or retention of the trust funds without first paying all obligations owed to the beneficiaries.”⁶¹ The BAP also found that the statute imposed the trust relationship prior to any wrongful conduct.⁶² Therefore, the court held that the Texas statute created a fiduciary relationship.⁶³

The Second Circuit has taken a broad approach, focusing on “the class of relationships in which a special trust is bestowed” on a party.⁶⁴ For example, the Second Circuit held that an attorney-client relationship constitutes a fiduciary capacity for the purposes of § 523(a)(4) because it is “one of the highest fiduciary duties imposed by law.”⁶⁵ Consequently, under this

Appellate Panel, CONSUMER L. MAG. (Nov. 12, 2013).

<https://consumerlawmagazine.com/bankruptcy-appellate-panel/>.

⁵⁹ *See In re Munton*, 352 B.R. at 711.

⁶⁰ *Id.* at 715.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Byington*, *supra* note 43, at 23; *see also* *Andy Warhol Found. for Visual Arts v. Hayes (In re Hayes)*, 183 F.3d 162, 169 (2d Cir. 1999).

⁶⁵ *In re Hayes*, 183 F.3d at 168.

approach, there is less emphasis on the legal relationship of the trustee and whether they hold property on behalf of a beneficiary (the trust res requirement).⁶⁶

The Fourth and Fifth Circuits have focused their determination of fiduciary capacity on control and trust-like duties.⁶⁷ The Fourth Circuit has held that a debtor was acting in a fiduciary capacity since they had control of the “day-to-day operations of a corporation.”⁶⁸ The Fifth Circuit has focused on trust-like duties, specifically the amount of control the fiduciary has over the beneficiary’s property.⁶⁹ For example, the Fifth Circuit has found a heightened duty of care in contexts involving the management of limited partnership.⁷⁰

The Seventh Circuit has looked to whether the debtor was put in an ascendant position, or a position of power or influence, based on their knowledge or power.⁷¹ For example, the Seventh Circuit has held that a fiduciary capacity exists when the fiduciary ascended into a higher position.⁷² In *In re Frain*, a Chief Operating Officer of a corporation filed for personal bankruptcy protection.⁷³ The debtor and two of his creditors were shareholders of the same

⁶⁶ See generally *Id.* at 167–68.

⁶⁷ Byington, *supra* note 43, at 20, 24–25.

⁶⁸ *Id.* at 24; *Airlines Reporting Corp. v. Ellison (In re Ellison)*, 296 F.3d 266, 269 (4th Cir. 2002).

⁶⁹ *Texas Lottery Comm’n v. Tran (In re Tran)*, 151 F.3d 339, 345 (5th Cir. 1998).

⁷⁰ Byington, *supra* note 43, at 24; *FNFS, Ltd. v. Harwood (In re Harwood)*, 637 F.3d 615, 622 (5th Cir. 2011).

⁷¹ See *In re Frain*, 230 F.3d 1014, 1017 (7th Cir. 2000).

⁷² *Id.* at 1019.

⁷³ *Id.* at 1015.

corporation.⁷⁴ The two creditors argued that certain debts owed by the debtor were non-dischargeable under § 523(a)(4) due to his position of authority.⁷⁵ The debtor held 50% of the shares of the corporation, could not be removed for cause without his own consent, made all of the decisions in the ordinary course of business, and all major company decisions required his approval.⁷⁶ The Seventh Circuit determined that this created a special duty due to the increased knowledge and power the debtor acquired from his higher position.⁷⁷ Therefore, the Seventh Circuit held the debtor was acting in a fiduciary capacity because of his position of power and influence in the company.⁷⁸ These differing approaches demonstrate that there is no uniformity among the circuits on the application of the Fiduciary Capacity Exception.

iii. Formation of the Eleventh Circuit Test

As previously mentioned, the Eleventh Circuit created a test for the application of the Fiduciary Capacity Exception in its recent *In re Forrest* decision.⁷⁹ The creation of this test was in response to the remaining questions following the previous Supreme Court decisions and the resulting circuit split.⁸⁰

⁷⁴ *Id.* at 1016.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1018.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *See generally* Spring Valley Produce, Inc. v. Forrest (*In re Forrest*), 47 F. 4th 1229, 1234 (11th Cir. 2022).

⁸⁰ *Id.* at 1236.

a. Requirement of a Trustee, an Identifiable Trust Res, and a Beneficiary

Similar to the restrictive approach of the Ninth and Tenth Circuits, the Eleventh Circuit focused on the existence of a trustee, an identifiable trust res, and a beneficiary.⁸¹ The Eleventh Circuit indicated that these elements can be established through state statute,⁸² however, the court emphasized that the same analysis should equally apply to trusts created by contract and express trusts.⁸³

The Eleventh Circuit emphasized that the existence of a trustee, an identifiable trust res, and a beneficiary are all required elements based on its own previous case law.⁸⁴ Historically, the court has generally held that a trustee, an identifiable trust res, and a beneficiary exist if the state statute requires the fiduciary to hold trust property for the benefit of a beneficiary.⁸⁵ For example, in *In re Fernandez-Rocha*, the Eleventh Circuit held that a doctor was not acting in a fiduciary capacity because the relevant statute did not require the placement of funds into trust for the benefit of the patients.⁸⁶ The state statute required the doctor to maintain an escrow account for the sole purpose of demonstrating financial responsibility rather than giving the third party patients a property right to the funds.⁸⁷ Since the funds were not being held for the benefit of a

⁸¹ *Id.* at 1247.

⁸² *Id.* at 1238.

⁸³ *Id.* at 1241.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1238.

⁸⁶ *Guerra v. Fernandez-Rocha*, (*In re Fernandez-Rocha*), 451 F.3d 813, 815–16 (11th Cir. 2006).

⁸⁷ *Id.*

beneficiary, the court held the statute did not contain the requisite elements to qualify as a fiduciary capacity.⁸⁸

Alternatively, the Eleventh Circuit, as part of the former Fifth Circuit, held in *Carey Lumber* that a debtor was acting in a fiduciary capacity because the statute defined a trust res when it required the fiduciary to hold funds in trust for the payment of lien claims.⁸⁹ The statute in *Carey Lumber* required funds received under a mortgage, for the purpose of construction or remodeling any structure, to be held as trust funds, by the mortgagor, for the payment of all valid lienable claims.⁹⁰ This established a fiduciary capacity since the funds were set aside for the benefit of the beneficiary.⁹¹

b. Requirement of Sufficient Trust-Like Duties to Establish a Technical Trust

After determining the existence of a trustee, an identifiable trust res, and a beneficiary from the statute, the Eleventh Circuit determined that the next step is to evaluate whether there are sufficient trust-like duties, either expressed or established by statute, that create a technical trust.⁹² In making this prong of the test, the Eleventh Circuit further examined its own caselaw to clarify the meaning of a technical trust.⁹³

⁸⁸ *Id.*

⁸⁹ *See generally* *Carey Lumber Co. v. Bell*, 615 F.2d 370 (5th Cir. 1980).

⁹⁰ *Carey Lumber*, 615 F.2d at 373 n.2.

⁹¹ *Id.*

⁹² *See generally* *In re Forrest*, 47 F.4th at 1232.

⁹³ *Id.* at 1239.

The Eleventh Circuit previously held that trusts created through statute could create technical trusts based on the specific duties established by the statute.⁹⁴ Importantly, in *Quaif v. Johnson*, the Eleventh Circuit rejected the notion that the segregation of funds is always necessary for a technical trust to exist, though it is strong evidence that one exists.⁹⁵ Alternatively, the Eleventh Circuit held in *Carey Lumber* that a statute that prohibits the use of trust funds for a non-trust purpose, even if it does not impose a duty to segregate trust assets, is sufficient to establish a technical trust.⁹⁶ This is similar to the Fifth Circuit which has previously emphasized the importance of the duty to refrain from using trust funds for non-trust purposes.⁹⁷ In sum, under the Eleventh Circuit test, a technical trust created by statute must have the trust-like duties of either “the dut[y] to segregate trust assets or the duty to refrain from using trust assets for a non-trust purpose.”⁹⁸

⁹⁴ *Id.* at 1238–39.

⁹⁵ *In re Forrest* 47 F.4th at 1240; *Quaif v. Johnson*, 4 F.3d 950, 954 (11th Cir. 1993) (holding a Georgia statute requiring insurance agents to both hold insurance premium payments in a separate amount and not commingle the premiums with personal funds was sufficient to create a technical trust) ; *see also In re Cross*, 666 F.2d 873 (5th Cir. Unit B 1982); *In re Angelle*, 610 F.2d 1335 (5th Cir. 1980).

⁹⁶ *In re Forrest*, 47 F.4th at 1240; *see Carey Lumber*, 615 F.2d at 376.

⁹⁷ *Texas Lottery Comm’n v. Tran (In re Tran)*, 151 F.3d 339, 343–44 (5th Cir. 1998).

⁹⁸ *In re Forrest*, 47 F.4th at 1239.

c. Timing Requirement

The third prong of the *In re Forrest* test is that the debtor must be acting in the fiduciary capacity before the fraud or defalcation occurred.⁹⁹ The Eleventh Circuit added this requirement to remain consistent with the Supreme Court’s ruling in *Davis* and the Eleventh Circuit’s own ruling in *Quaif*, where both require that the fiduciary capacity must exist prior to the act of fraud or defalcation.¹⁰⁰

d. Holding in *In re Forrest*

In *In re Forrest*, the Eleventh Circuit had to decide whether the Perishable Agricultural Commodities Act (“PACA”) created the required fiduciary capacity for § 523(a)(4).¹⁰¹ PACA states that “[A]ny receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction.”¹⁰² Using the three-prong test, the Eleventh Circuit held that PACA met the first prong of the test because it established a trustee, beneficiary and a trust res; however, it failed the second prong because the statute did not establish the necessary trust-like duties.¹⁰³ Specifically, the statute does not

⁹⁹ *Id.* at 1239.

¹⁰⁰ *See In re Forrest*, 47 F.4th at 1241; *Davis v. Aetna Acceptance Co.*, 293 U.S 328, 333 (1934); *Quaif*, 4 F.3d at 953.

¹⁰¹ *See generally In re Forrest*, 47 F.4th at 1234.

¹⁰² *Id.* at 1242; 7 U.S.C. § 499e(c)(2).

¹⁰³ *In re Forrest*, 47 F.4th at 1242–43.

explicitly state that funds must be segregated, as emphasized in *Quaif*, nor is there a duty to not use trust assets for non-trust purposes as emphasized in *Carey Lumber*.¹⁰⁴

B. Formation of the Florida LLC Statute

As of April 29, 2026, there are 2.8 million active limited liability companies in the state of Florida.¹⁰⁵ When forming LLCs, parties often have either operating agreements that rely heavily on default rules found in statutes or no formal operating agreement altogether.¹⁰⁶ Additionally, many LLCs do not update their agreements as the business evolves or circumstances change, making it necessary for default rules to fill in any gaps.¹⁰⁷ There is a fear that limiting or eliminating default fiduciary duties will produce significant economic and societal costs.¹⁰⁸ For example, limiting fiduciary duties could lead to more fraudulent, dishonest, and irresponsible business management.¹⁰⁹

¹⁰⁴ *Id.* at 1243; *see Quaif*, 4 F.3d at 954; *see Carey Lumber*, 615 F.2d at 378.

¹⁰⁵ Florida Dep't of State, Division of Corporations, Yearly Statistics from 2014 Through Present (Apr. 29, 2026) <https://dos.fl.gov/sunbiz/about-us/yearly-statistics/>.

¹⁰⁶ Louis T.N. Conti, *Un-Cabined Fiduciary Duties in Florida LLCs: The Common Law and Equity Opens the Door to Expanded Liability and the Manifestly Unreasonable Standard*, 91 FLA. B.J. 32, 33-34 (2017).

¹⁰⁷ *See* Sandra K. Miller, *The Best of Both Worlds: Default Fiduciary Duties and Contractual Freedom in Alternative Business Entities*, 39 J. CORP. L. 295, 309 (2014).

¹⁰⁸ *Id.* at 316–17.

¹⁰⁹ *Id.*

In Florida, prior to 2013, the fiduciary obligations of managers of LLCs arose from common law.¹¹⁰ In 2013, Florida adopted the Florida Revised LLC Act based on the Uniform Limited Liability Company Act.¹¹¹ Twenty-four states and the District of Columbia have adopted some version of the Uniform Limited Liability Company Act.¹¹²

The Florida Revised LLC Act aimed to statutorily define duties of care and loyalty for LLCs.¹¹³ As a result, managers of LLCs, under Fla. Stat. § 605.04091, now have a statutory fiduciary duty of loyalty and care to the other managers¹¹⁴ of the LLC.¹¹⁵ This includes a duty to hold as trustee “any property, profit, or benefit derived by the manager.”¹¹⁶ The duty of care includes, among other things, a duty to refrain from engaging in willful or intentional

¹¹⁰ Conti, *supra* note 106, at 32.

¹¹¹ *Id.*

¹¹² The adopting states include: Washington, California, Arizona, Utah, Idaho, Montana, North Dakota, South Dakota, Nebraska, Wyoming, Minnesota, Iowa, Wisconsin, Illinois, Arkansas, Alabama, South Carolina, West Virginia, Pennsylvania, Hawaii, New Jersey, Vermont and Connecticut. *Limited Liability Company Act, Revised*, UNIFORM LAW COMMISSION, (2024), <https://www.uniformlaws.org/committees/community-home?CommunityKey=bbea059c-6853-4f45-b69b-7ca2e49cf740> (last accessed Apr. 29, 2026).

¹¹³ FLA. STAT. § 605.04091 (2015).

¹¹⁴ FLA. STAT. § 605.04091 also discusses member-based LLCs. For purposes of this article, the primary focus will be on multi-manager-based LLCs.

¹¹⁵ FLA. STAT. § 605.04091 (2015).

¹¹⁶ FLA. STAT. § 605.04091(2)(a) (2015).

misconduct.¹¹⁷ The duty of loyalty and care applies to the manager “in the conduct or winding up of the company’s activities and affairs.”¹¹⁸ While it is possible to alter or eliminate aspects of this duty of care through an operating agreement, any alteration may not be “manifestly unreasonable.”¹¹⁹

C. Recent Decisions regarding LLC statutes

1. *In re Antoniou*

In its *In re Antoniou* ruling, the Middle District of Florida held that the fiduciary duty created by Fla. Stat. § 605.04091 does not meet the Fiduciary Capacity Exception.¹²⁰ The court concluded that the fiduciary duties for managers of LLCs do not meet the Fiduciary Capacity Exception because the duty did not establish an express or technical trust.¹²¹ To support its holding, the court cited a 2012 trial court decision that found a lack of an express or technical trust due to a lack of a segregated res in a nearly identical older version of the statute.¹²² However, the trial court’s *Hemenway* decision was published ten years prior to *In re Forrest*.¹²³

¹¹⁷ UNIF. LTD. LIB. Co. ACT § 409; Fla. Stat. §605.04091(3) (2015).

¹¹⁸ FLA. STAT. § 605.04091(2)(a)(1) (2015).

¹¹⁹ FLA. STAT. § 605.0105 (4)(c)(1)–(4) (2015).

¹²⁰ *Romero v. Antoniou (In re Antoniou)*, 651 B.R. 315, 316 (Bankr. M.D. Fla. 2023).

¹²¹ *In re Antoniou*, 651 B.R. at 316.

¹²² *Hemenway v. Bartoletta*, No. 8:12-cv-2114-T-JSM, 2012 WL 4513073, *4 (M.D. Fla. Oct. 2, 2012) (held that the LLC statute did not impose the administration of an express trust or control of a segregated res; therefore, it did not create the necessary fiduciary capacity for § 523(a)(4)).

¹²³ *Id* at *1; *In re Forrest*, 47 F.4th at 1229.

While the lack of segregated trust res is certainly a factor in the overall analysis of whether a technical trust exists, the Eleventh Circuit has now held that only an identifiable trust res is necessary, and segregation of the identifiable trust res is not required for a technical trust to exist.¹²⁴ It is unclear if the trial court considered if other trust-like duties existed.

The *In re Antoniou* decision appears to be the first trial court decision after *In re Forrest* to interpret whether the fiduciary duties of Fla. Stat. § 605.04091 meet the Fiduciary Capacity Exception. The *In re Antoniou* decision was not appealed, therefore the Eleventh Circuit has not analyzed whether the fiduciary duties of Fla. Stat. § 605.04091 satisfy the three-prong test. If the test were fully applied, the statute would arguably meet the requirements based on the discussion in Part III, *infra*.

2. Other Florida Decisions

Since *In re Forrest* was decided, trial courts in Florida have applied the three-prong test to a variety of other statutes. For example, in *In re Godwin*, the Middle District of Florida determined whether the Employee Retirement and Income Security Act (“ERISA”) created the proper fiduciary duty.¹²⁵ Unlike PACA, ERISA “specifically requires a deemed fiduciary to ‘discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries’ and not ‘deal with the assets of the plan in his own interest or for his own account.’”¹²⁶ The *Godwin* court determined that the statute imposes the duty of using assets only

¹²⁴ See *In re Forrest*, 47 F.4th at 1229, 1234.

¹²⁵ *In re Godwin*, 651 B.R. 392 (M.D. Fla. 2023).

¹²⁶ *In re Godwin*, 651 B.R. at 397; 29 U.S.C. §§ 1104(a)(1), 1106(b)(1) (2022).

for trust purposes, even though it does not require segregation of assets.¹²⁷ The Middle District of Florida held that the statute created sufficient “trust-like duties” as required by the Eleventh Circuit, therefore qualifying under the Fiduciary Capacity Exception.¹²⁸

The Middle District of Florida did not reach the same conclusion in deciding *In re Hall*.¹²⁹ The *Hall* court was asked to determine if a trust fund doctrine under Virginia law satisfied the fiduciary capacity requirement.¹³⁰ The court found that the trust fund doctrine failed the second and third prongs of the *Forrest* test.¹³¹ The Middle District determined that Virginia common law does not establish specific trust-like duties on managers regarding the monies of an LLC.¹³² Therefore, the court found that the duties set by the doctrine do not create a technical trust as required by *In re Forrest*.¹³³ The court additionally held that the trust fund doctrine failed the third prong of the *In re Forrest* test.¹³⁴ Virginia law states that absent self-dealing by the directors, creditors hold no cause of action for breach of trust.¹³⁵ The court held that this requirement is “analogous to a constructive trust because it is ‘a trust that may arise in the future

¹²⁷ *In re Godwin*, 651 B.R. at 397–98.

¹²⁸ *Id.* at 398

¹²⁹ *In re Hall*, 651 B.R. 62 (Bankr. M.D. Fla. 2023).

¹³⁰ *Id.* at 70.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

if improper acts occur.”¹³⁶ Due to this distinction, the court determined that the trust fund doctrine does not meet the requirements of the *In re Forrest* test.¹³⁷

3. How Other Jurisdictions Have Interpreted Similar Statutes Within the Fiduciary Capacity Exception

Multiple states and circuits have analyzed whether their respective LLC or partnership statutes meet the requirements of the Fiduciary Capacity Exception. Similar to the circuit split regarding fiduciary capacity,¹³⁸ there also appears to be a split among the courts regarding LLC statutes with similar language, specifically those modeled after the Uniform Limited Liability Company Act.¹³⁹

For instance, the Middle District of Alabama, a court within the Eleventh Circuit,¹⁴⁰ had to determine whether the Alabama LLC state statute¹⁴¹ creates a fiduciary duty applicable for

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Byington, *supra* note 43, at 20–21.

¹³⁹ Uniform Law Commission, *supra* note 112.

¹⁴⁰ The Eleventh Circuit encompasses federal courts in the states of Alabama, Georgia, and Florida. *About the Court*, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT <https://www.ca11.uscourts.gov/about-court#:~:text=Established%20by%20Congress%20in%201981,of%20Alabama%2C%20Florida%20and%20Georgia.> (Last accessed Apr. 29, 2026).

¹⁴¹ Alabama is one of the states that has previously enacted the Uniform Limited Liability Company Act, first enacting the original version in 1998. Uniform Law Commission, *supra* note 112.

§ 523(a)(4).¹⁴² Similar to the Florida, Alabama’s Limited Liability Company Act imposes onto managers the duty of loyalty and care which includes: “‘hold[ing] as trustee for it any property, profit, or benefit derived . . . in the conduct . . . of the limited liability company's business[,]’ as well as ‘refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law.’”¹⁴³ The *Taylor* court also noted that operating agreements cannot unreasonably eliminate or reduce the duty of care or loyalty.¹⁴⁴ The court ultimately held that the duties of the trustee under the state statute created the required fiduciary relationship under § 523(a)(4).¹⁴⁵ More specifically, the court held that the duties of loyalty and care created the necessary trust-type obligations to create a technical trust.¹⁴⁶

Similarly, the Ninth Circuit has previously analyzed whether California state law regarding partnerships created the proper fiduciary duty.¹⁴⁷ At the time, the California partnership statute read:

“Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.”¹⁴⁸

¹⁴² *Kern v. Taylor*, (*In re Taylor*), 551 B.R. 506, 514 (M.D. Ala. 2016).

¹⁴³ *Id.* at 520; ALA. CODE §§ 10A-5-3.03 (2017) (formerly ALA. CODE §§ 10–12–21(f)(1) and (g)).

¹⁴⁴ *In re Taylor*, 551 B.R. at 520; ALA. CODE §§ 10A-5-3.03 (2017) (formerly ALA. CODE §§ 10–12–21(l)(1)–(3)).

¹⁴⁵ *In re Taylor*, 551 B.R. at 520.

¹⁴⁶ *Id.*

¹⁴⁷ *Ragsdale v. Haller*, 780 F.2d 794, 796 (9th Cir. 1986).

¹⁴⁸ *Ragsdale*, 780 F.2d at 796.

Here, the court concluded that the statute made all partners trustees over the assets and extended the duties beyond the literal wording of the statute.¹⁴⁹ The court ultimately held that the statute met the fiduciary capacity meaning of § 523(a)(4).¹⁵⁰

Conversely, the Bankruptcy Court in the District of Idaho has held that the LLC state statute at the time did not meet the Fiduciary Capacity Exception.¹⁵¹ The court noted:

“Every member and manager must account *to the limited liability company* and hold as trustee for it any profit or benefit derived by that person without the consent of more than one-half (½) by number of the disinterested managers or members, or other persons participating in the management of the business or affairs of the limited liability company.”¹⁵²

The district court cited an Idaho Supreme Court case holding that while the Idaho LLC Act establishes a fiduciary duty of trust and loyalty, it does not deem the members of the LLC to be trustees of the LLC assets.¹⁵³ The court accordingly held that the LLC statute did not create the required fiduciary duty for § 523(a)(4).¹⁵⁴

III. FLORIDA STATUTE § 605.04091 SHOULD BE INTERPRETED TO MEET THE FIDUCIARY CAPACITY EXCEPTION

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 796-97 (this only worked because Ragsdale elevated his partnership status).

¹⁵¹ *Murray v. Woodman*, (*In re Woodman*), 451 B.R. 31, 40 (Bankr. D. Idaho 2011).

¹⁵² *In re Woodman*, 451 B.R. at 39–40 (emphasis added).

¹⁵³ *Bushi v. Sage Health Care, PLLC*, 203 P.3d 694, 699–700 (Idaho 2009).

¹⁵⁴ *In re Woodman*, 451 B.R. at 40.

As discussed in this section, Fla. Stat. § 605.04091 fits the Eleventh Circuit’s three-prong test for the Fiduciary Capacity Exception. Additionally, as a matter of public policy, Florida courts should interpret the statute to meet the fiduciary capacity requirement of § 523(a)(4).

A. Fla. Stat. § 605.04091 Meets the Three Prongs of the Eleventh Circuit Test

1. Fla. Stat. § 605.04091 Identifies a Relationship That Contains a Trustee and an Identifiable Trust Res Held For the Benefit of a Beneficiary.

The first prong requires a trustee who holds an identifiable trust res for the benefit of a beneficiary.¹⁵⁵ The Eleventh Circuit has held that state statutes satisfy the first prong when they clearly define a trustee, a trust res, and a beneficiary.¹⁵⁶ This requirement is satisfied by the language of Fla. Stat. § 605.04091 because it clearly defines a trustee, a trust res, and a beneficiary in the contexts of LLCs.

Under Florida law, each manger owes fiduciary duties of loyalty and care to the LLC.¹⁵⁷ The duty of loyalty requires accounting to the LLC and “holding as trustee for it any property, profit or benefit derived by the managers,”¹⁵⁸ thereby establishing a trustee and an identifiable trust res. Each manager’s fiduciary duty of loyalty and care,¹⁵⁹ makes the LLC and any other co-

¹⁵⁵ See *Spring Valley Produce, Inc. v. Forrest (In re Forrest)*, 47 F. 4th 1229, 1234 (11th Cir. 2022).

¹⁵⁶ *Id.* at 1234.

¹⁵⁷ FLA. STAT. §605.04091(1) (2025).

¹⁵⁸ FLA. STAT. §605.04091(2) (2025).

¹⁵⁹ FLA. STAT. §605.04091(1) (2025).

managers the beneficiaries. This is similar to the situation in *Carey Lumber*.¹⁶⁰ The statute in *Carey Lumber* required funds received under a mortgage to be held as trust funds, by the mortgager, for the payment of all valid lienable claims.¹⁶¹ All three elements were present since the contractor in *Carey Lumber* served as a trustee, the funds were the trust res, and the beneficiaries were those with valid lien claims.¹⁶²

A similar result was upheld with the *Ragsdale* court.¹⁶³ The former California partnership statute read:

“Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.”¹⁶⁴

The *Ragsdale* court ultimately held that the statute met the fiduciary capacity requirement because it made all partners trustees over the assets and extended their duties beyond the literal wording of the statute.¹⁶⁵ Since a trustee, trust res, and beneficiary are clearly defined in Fla. Stat. § 605.04091, the first prong of the *In re Forrest* test is satisfied.

¹⁶⁰ *Carey Lumber Co. v. Bell*, 615 F.2d 370, 373 (5th Cir. 1980).

¹⁶¹ *Id.* at 373 n.2.

¹⁶² *Id.* at 374–75.

¹⁶³ *Ragsdale v. Haller*, 780 F.2d 794, 797 (9th Cir. 1986).

¹⁶⁴ *Id.* at 796.

¹⁶⁵ *Id.* at 796-97.

2. Fla. Stat. § 605.04091 Imposes Sufficient Trust-Like Duties on the Trustee Sufficient to Establish a Technical Trust.

The second prong states: “The relationship must define sufficient trust-like duties imposed on the trustee with respect to the trust res and beneficiaries to create a ‘technical’ trust.”¹⁶⁶ Fla. Stat. § 605.04091 creates the necessary trust-like duties to create a technical trust.

In *Carey Lumber*¹⁶⁷ and *Quaif*,¹⁶⁸ the Eleventh Circuit previously determined that state statutes can impose trust-like duties to form a “technical” trust. Citing these cases, the court in *In re Forrest* noted that the trust-like duties that were sufficient consisted of the duty to segregate trust assets or the duty to refrain from using trust assets for a non-trust purpose.”¹⁶⁹ In other words, as long as Fla. Stat. § 605.04091 establishes either a duty to segregate funds or a duty to refrain from using trust funds for a non-trust purpose, it creates the necessary technical trust for the second prong of the *Forrest* test. Fla. Stat. § 605.04091(2)(a) states the duty of loyalty.

“Accounting to the limited liability company and holding as trustee for it any property, profit, or benefit derived by the manager or member, as applicable:

1. In the conduct or winding up of the company’s activities and affairs;
2. From the use by the member or manager of the company’s property; or
3. From the appropriation of a company opportunity;”¹⁷⁰

¹⁶⁶ *In re Forrest*, 47 F.4th at 1234.

¹⁶⁷ *Carey Lumber*, 615 F.2d at 375.

¹⁶⁸ *Quaif v. Johnson*, 4 F.3d 950, 954 (11th Cir. 1993).

¹⁶⁹ *In re Forrest*, 47 F.4th at 1239.

¹⁷⁰ FLA. STAT. §605.04091(2)(a) (2015).

In addition, under Fla. Stat. § 605.04091(3), a manager’s duty of care extends to refraining from, “engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or a knowing violation of law.”¹⁷¹

The Florida LLC statute establishes the requisite trust-like duties for the Fiduciary Capacity Exception, unlike the statutes at issue in the *In re Forrest* and *In re Hall* decisions.¹⁷² In both cases, the statute did not establish trust-like duties.¹⁷³ Specifically, there was no explicit duty for segregation or a duty to not use trust assets for non-trust related activities.¹⁷⁴ Fla. Stat. § 605.04091 does not require a manager of a Florida LLC to segregate trust assets (which is not a necessary trust-like duty).¹⁷⁵ This was the holdup for the Middle District in the *In re Antoniou* decision.¹⁷⁶ The *In re Antoniou* court held that because there was no segregated in res, the statute did not satisfy the requirements of § 523(a)(4).¹⁷⁷ However, the court did not discuss the issue of whether the statute created a duty to not use trust assets for non-trust related activities, which would create a technical trust based on *Carey Lumber and Quaif*.¹⁷⁸

¹⁷¹ FLA. STAT. §605.04091(3) (2015).

¹⁷² See generally *In re Forrest*, 47 F.4th at 1229; *Nutrien Ag Solutions, Inc. v. Hall*, (*In re Hall*), 651 B.R. 62, 70 (Bankr. M.D. Fla. 2023).

¹⁷³ *In re Forrest*, 47 F.4th at 1243; *In re Hall*, 651 B.R. at 70.

¹⁷⁴ *In re Forrest*, 47 F.4th at 1243; *In re Hall*, 651 B.R. at 70.

¹⁷⁵ *In re Forrest*, 47 F.4th at 1240; *Quaif v. Johnson*, 4 F.3d 950, 954 (11th Cir.1993).

¹⁷⁶ *In re Antoniou*, 651 B.R. at 316.

¹⁷⁷ *Id.*

¹⁷⁸ See *Quaif*, 4 F.3d at 954; *Carey Lumber*, 615 F.2d at 371.

Fla. Stat. § 605.04091 does require a manager to refrain from using trust assets for a non-trust purpose. The duty of loyalty expressly requires that from the appropriation of a company opportunity, a manager has the obligation to hold any property, profit, or benefit derived.¹⁷⁹ The duty of care requires that a manager has to refrain from misconduct which presumably would include using trust assets for a non-trust purpose.¹⁸⁰ Therefore, this trust-like duty would be sufficient to create a technical trust as required by *In re Forrest*.¹⁸¹

Persuasively, the Alabama Bankruptcy Court, a court within the Eleventh Circuit¹⁸², previously determined that Alabama’s LLC statute created a requisite statutory trust to satisfy § 523(a)(4) because the Alabama law imposes upon managers of an LLC duties of loyalty and care.¹⁸³ Further, the duties under Alabama law are exactly the same duties found in Fla. Stat. § 605.04091(2)(a) as they are both modeled after the Uniform Limited Liability Company Act.¹⁸⁴ Alabama law also requires a duty of loyalty which includes an “account[ing] to the limited liability company and ... hold[ing] as trustee for it any property, profit, or benefit derived ... in the conduct ... of the limited liability company’s business[,]” as well as “refraining from engaging in grossly

¹⁷⁹ FLA. STAT. § 605.04091(2)(a).

¹⁸⁰ FLA. STAT. § 605.04091(2)(a)(1)–(3).

¹⁸¹ *In re Forrest*, 47 F.4th at 1244.

¹⁸² U.S. Court of Appeals for the Eleventh Circuit, *supra* note 140.

¹⁸³ *In re Taylor*, 551 B.R. at 520.

¹⁸⁴ Uniform Law Commission, *supra* note 113.

negligent or reckless conduct, intentional misconduct, or a knowing violation of the law.”¹⁸⁵ This holding is extremely persuasive as to how the courts should treat the nearly identical Florida LLC statute.¹⁸⁶ Based on this similarity, § 605.04091 meets the second prong of the *In re Forrest* test.

3. Fla. Stat. § 605.04091 Establishes a Fiduciary Capacity that Exists Prior to a Potential Act of Fraud or Defalcation.

The third prong states: “[T]he debtor must be acting in a fiduciary capacity before the act of fraud or defalcation creating the debt.”¹⁸⁷ The language of Fla. Stat. § 605.04091 again satisfies this requirement. Florida adopted the Florida Revised LLC Act, to not only create a statutory duty of care and loyalty among LLC managers, but also to create default rules for LLCs.¹⁸⁸ As previously mentioned, the default rules are designed to decrease the chances of fraud and to deter unlawful business management.¹⁸⁹ Through its implementation of the LLC Act, the Florida legislature intended for the statute to apply to all facets of the business operation, not just when fraud will occur.¹⁹⁰ The statutory language supports this intention.¹⁹¹

¹⁸⁵ *In re Taylor*, 551 B.R. at 520; ALA. Code §§ 10A-5-3.03 (formerly ALA. Code §§ 10-12-21(f)(1) and (g)).

¹⁸⁶ FLA. STAT. § 605.04091 (2015).

¹⁸⁷ *In re Forrest*, 47 F.4th at 1241.

¹⁸⁸ *See generally* Miller, *supra* note 104.

¹⁸⁹ Miller, *supra* note 107 at 298–301.

¹⁹⁰ *See generally* Miller, *supra* note 107 at 309.

¹⁹¹ FLA. STAT. §605.04091 (2)(a)(1) (2015).

Fla. Stat. § 605.04091(2)(a)(1) states that the duty of loyalty and care applies “[I]n the conduct or winding up of the company’s activities and affairs.”¹⁹² By specifically including the language “in the conduct” and “winding up”, the statute seemingly attempts to create a fiduciary duty for all stages of a business operation. A finding that this statute meets the timing requirement would be consistent with the holdings of *Davis* and *Upshur*. The Supreme Court previously held that the debtor must have already been acting in a fiduciary capacity when the debt was created.¹⁹³ This statute accomplishes just that. The statute implies that the trust-like duties a manager must abide by begin as soon as the LLC is formed and last until dissolution. Accordingly, the manager remains subject to these duties at all times, regardless of when the fraud or defalcation occurs. Therefore, the language of Fla. Stat. § 605.04091 fits the third and final prong of the *Forrest* test.

B. As a Matter of Public Policy

While Fla. Stat. § 605.04091 should qualify under the Fiduciary Capacity Exception of § 523(a)(4) by the *In re Forrest* test, the statute should also qualify as a matter of public policy. As of January 2026, there are 2.6 million active limited liability companies in the state of Florida.¹⁹⁴ If Fla. Stat § 605.04091 does not satisfy the Fiduciary Capacity Exception, this could result in negative economic and societal impacts for many Floridians and their businesses.

One potential negative impact is that business owners may be discouraged from registering and operating multi-manager LLCs in the state of Florida and instead may choose to do business in states with greater protections. LLC managers in Florida would be in a situation

¹⁹² *Id.*

¹⁹³ *Davis*, 293 U.S. at 333.

¹⁹⁴ Florida Dep’t of State, Division of Corporations, *supra* note 105.

where the debt based on fraud or defalcation would be dischargeable. In other words, the debtor can commit fraud or defalcation, and the debtor remains protected from having to pay back the debt since it would be dischargeable.

LLC managers already face heightened risk of liability due to *Bartenwerfer*.¹⁹⁵ Under this decision, LLC co-managers already face risk of imputed liability for fraud committed by a co-manager against a third party and would be barred from discharging this debt in a bankruptcy proceeding.¹⁹⁶

There could be even further risk for LLC managers if Fla. Stat. § 605.04091 does not meet the Fiduciary Capacity Exception. LLC managers would likely fear that a co-manager could commit fraud or defalcation against the LLC and have the debt discharged if they were to file bankruptcy. This legal loophole could encourage managers to engage in reckless or willful misconduct, something that Fla. Stat. § 605.04091 is presumably designed to prevent. As previously mentioned, many LLCs either operate without a formal operating agreement or have an operating agreement that relies heavily on the default rules of the state.¹⁹⁷ The managers of these LLCs may face increased risk because there is now a legal loophole for fraudsters. This leaves managers without a remedy should a co-manager commit fraud and then file for bankruptcy.

¹⁹⁵ *Bartenwerfer*, 598 U.S. at 83 (holding that a “fraudster’s” legal partner or agent are also barred from discharging a debt obtained by fraud, even if they are an innocent party to the fraud itself).

¹⁹⁶ *Id.* at 83.

¹⁹⁷ Miller, *supra* note 107 at 298–301.

If the LLC statute meets the Fiduciary Capacity Exception, LLC managers in Florida would have at least some measure of comfort. Even if the managers work under an operating agreement that attempts to contract around the statutory duties, those changes cannot be “manifestly unreasonable.”¹⁹⁸ Other courts within the Eleventh Circuit recognize the importance of making sure the statutory duties of loyalty and care cannot be changed as easily in contracts, as seen with the *Taylor* court.¹⁹⁹ The *Taylor* court, which held a nearly identical statute to Fla. Stat. § 605.04091, met the Fiduciary Capacity Exception, also made note of the significance that operating agreements cannot unreasonably eliminate or reduce the duty of care or loyalty.²⁰⁰ This further emphasizes that as a matter of public policy, Fla. Stat. § 605.04091 should meet the *In re Forrest* test.

If Fla. Stat. § 605.04091 does not meet the Fiduciary Capacity Exception, lawyers in Florida are put in a tough ethical position. Lawyers may be stuck between a rock and a hard place because they must properly advise clients regarding the formation of multi-manager LLCs and their associated fiduciary duties, yet also advise that if one were to commit fraud against the other, then that debt is dischargeable in bankruptcy.

If Fla. Stat. § 605.04091 does meet the requirements for the Fiduciary Capacity Exception, lawyers will have an established groundwork for the implications of a bankruptcy filing of a single manager in a multi-manager LLC. Further, bankruptcy practitioners may be better able to advise clients who are considering adversary proceedings against a co-manager who has filed for personal

¹⁹⁸ FLA. STAT. § 605.0105 (4)(c)(1)–(4).

¹⁹⁹ *In re Taylor*, 551 B.R. at 520.

²⁰⁰ *Id.* at 520; ALA. CODE §§ 10A-5-3.03 (2017) (formerly ALA. CODE §§ 10-12-21(1)(1)–(3)).

bankruptcy and committed fraud against the LLC. Additionally, this would give greater legal protection to managers of LLCs in the event there is fraud or defalcation committed by a co-manager.²⁰¹

C. Alternative Solutions

If Fla. Stat. § 605.04091 is ultimately found not to satisfy the Fiduciary Capacity Exception from § 523(a)(4), one alternative solution is for lawyers to advise clients, with either new or existing LLCs, to create operating agreements with greater protections. This is especially imperative for the LLCs that operate with no formal or a very generic operating agreement. Attorneys would need to inform clients of the risks of operating with a co-manager and draft operating agreements with necessary protective provisions. These protections may take the form of a fidelity bond²⁰² to protect the company from any misconduct. It could also mean that stricter policies are put in place to maintain proper accounting and record keeping, thus ensuring that any misconduct, even negligence, is detected early enough to avoid the stress of legal proceedings. This is important due to the inherent risk of any legal proceeding, not just a potential bankruptcy filing by a co-manager.

²⁰¹ While this article focuses primarily on managers of a LLC, the statutory duties and protections would also apply to members of the LLC who were impacted by the breach of fiduciary duty or defalcation. Fla. Stat. § 605.04091.

²⁰² Fidelity bond is defined as “A bond to indemnify an employer or business for loss due to embezzlement, larceny, or gross negligence by an employee or other person holding a position of trust” *See* “Fidelity Bond” BLACK’S LAW DICTIONARY (12th ed. 2024).

Another potential solution could be to encourage the formation of more single-manager LLCs. While single managers still owe a duty to the LLC, they would not bear the same risks that co-managers face. In a single-manager LLC, the manager does not need to worry about the risks of imputed liability or a co-manager committing fraud or defalcation against the LLC. Of course, single-manager LLCs bring a unique set of problems. Without extra oversight from an additional manager, the sole manager could be in position where they are at greater risk of legal troubles, such as piercing the corporate veil by co-mingling personal and company funds.

Historically, single-member LLCs in Florida do not have the same level of legal protection as multi-member LLCs. The Florida Supreme Court in 2010, while analyzing a now repealed statute, held that a debtor may have a court order them to surrender all right, title and interest to their single-member LLC to satisfy a judgment.²⁰³ Accordingly, encouraging single manager LLCs over multi-manager LLCs may be another alternative solution; however, it could come at a cost of greater legal risks than a single-manager may want to incur.

Another possibility would be to make the legal argument that any fraud committed by the co-manager would be barred from discharge under §523(a)(2)(A).²⁰⁴ In this situation, the co-manager would argue that the debt is non-dischargeable because it was acquired through actual fraud.²⁰⁵ However, this route presents its own unique set of challenges. First, this exception does not cover debts acquired through defalcation, as found in the Fiduciary Capacity Exception.²⁰⁶

²⁰³ *Olmstead v. F.T.C.*, 44 So.3d 76, 83 (Fla. 2010).

²⁰⁴ 11 U.S.C. § 523(a)(2)(A).

²⁰⁵ *Id.*

²⁰⁶ 11 U.S.C. § 523(a)(4).

The primary argument would then be that the debt was acquired through actual fraud, which requires a showing of reliance from the creditor and intent to defraud by the debtor.²⁰⁷ Depending on the facts of the specific situation, it may be very difficult to prove. However, by arguing § 523(a)(2)(A), co-managers once again run into the risk of imputed liability of fraud to third parties based on *Bartenwerfer*.²⁰⁸ Arguing § 523(a)(4) may be more appealing to the co-managers as it would limit liability only to those acting in a fiduciary capacity.

Other options could include drafting contractually heightened fiduciary obligations, establishing joint bank accounts that require multiple signatures, or requiring periodic third-party audits of LLC financial records. In sum, if Fla. Stat. § 605.04091 does not meet the requirements of the *In re Forrest* test, and therefore does not meet the Fiduciary Capacity Exception, then LLC managers need to consider alternative solutions in order to protect themselves and the LLC from acts of fraud or defalcation.

IV. CONCLUSION

The Eleventh Circuit has developed a new three prong test to determine if a debtor in a bankruptcy was acting in a fiduciary capacity within the meaning of § 523(a)(4). With this test, courts within the Eleventh Circuit can determine if fiduciary duties, whether expressed or granted by statute, create the necessary fiduciary capacity under § 523(a)(4). First, there must be both a relationship that contains a trustee, and an identifiable trust res held for the benefit of a beneficiary or beneficiaries. Second, that relationship must create a technical trust. Third, the

²⁰⁷ *In re Harris*, 3 F.4th at 1344–45.

²⁰⁸ *Bartenwerfer*, 598 U.S. at 83.

debtor must have been acting in a fiduciary capacity prior to and through the act of fraud or defalcation.

The Florida Legislature adopted Fla. Stat. § 605.04091 to protect managers of multi-manager limited liability companies by establishing duties of loyalty and care. The Eleventh Circuit has not yet determined if the relevant statutory duties Fla. Stat. § 605.04091 would satisfy the Fiduciary Capacity Exception test. However, as shown in this article, the fiduciary duties created by the Fla. Stat. § 605.04091 satisfy the Eleventh Circuit's new test. Fla. Stat. §605.04091 satisfies the first prong of the test because the statute identifies the trustee, beneficiaries and a trust res. Specifically, there is a duty of loyalty that includes holding as trustee any property, profit or benefit derived. The statute satisfies the second prong, the requirement of a technical trust, because it establishes a sufficient trust-like duty that the Eleventh Circuit has determined creates a technical trust. Specifically, the statute creates a duty to refrain from using trust assets for a non-trust purpose. Finally, the statute satisfies the third prong because the obligations of loyalty and care are in effect at the time of company formation, so regardless of when the fraud occurs it would be after the requisite fiduciary obligations exist.

By satisfying the three prongs of the Eleventh Circuit's test, co-managers of LLCs would have greater protection in the state of Florida to prevent a co-manager from discharging a debt acquired through fraud or defalcation against the LLC. Additionally, as a matter of public policy, there will be negative economic and societal impacts for many Floridians and their businesses should Fla. Stat. § 605.04091 not satisfy the Eleventh Circuit's test.

Until the Eleventh Circuit issues an opinion on this issue, there will continue to be risks for LLC managers if a co-manager commits fraud or defalcation and later declares personal bankruptcy. Specifically, there is a risk that co-managers could get any debt acquired through

fraud or defalcation discharged. This puts lawyers in a position where they must advise clients that a manager of a multi-manager limited liability company may commit fraud or defalcation and be able to obtain a discharge of the debt in a Florida bankruptcy court. All of these considerations in both the business and legal worlds potentially risk the continued formation and operation of LLCs in the state of Florida.