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Broadening the Estate by Avoiding Specificity of Retained Claims- §1123(b)(3)(B)

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Broadening the Estate by Avoiding Specificity of Retained Claims- §1123(b)(3)(B)*

Blair Barton

Abstract

Section 1123(b)(3)(B) of the Bankruptcy Code permits chapter 11 debtors to retain claims and interests post-confirmation through the plan of reorganization. This section promotes the maximization of the bankruptcy estate, which in turn increases distributions to creditors. While plan confirmation under §1141 typically has a res judicata effect, binding all parties and blocking potential causes of action, §1123(b)(3)(B) provides an exception. The broad language of §1123(b)(3)(B), however, provides minimal guidance as to how specific reservations must be in order to successfully retain causes of action. Courts fluctuate between allowing extremely broad claims reservations and requiring either categorical reservations or the explicit reservation of individual claims. Courts have even considered the sufficiency of claims reservations contained in disclosure statements, including when the reservations are not necessarily addressed in the plan. This Note analyzes the various methods courts employ in the application of §1123(b)(3)(B), and it proposes a compromise that promotes both the finality of plan confirmation as well as the maximization of the bankruptcy estate.

KEYWORDS: Bankruptcy, Regulation, Estate, Creditors

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ABSTRACT

Section 1123(b)(3)(B) of the Bankruptcy Code permits chapter 11 debtors to retain claims and interests post-confirmation through the plan of reorganization. This section promotes the maximization of the bankruptcy estate, which in turn increases distributions to creditors. While plan confirmation under § 1141 typically has a res judicata effect, binding all parties and blocking potential causes of action, § 1123(b)(3)(B) provides an exception. The broad language of § 1123(b)(3)(B), however, provides minimal guidance as to how specific reservations must be in order to successfully retain causes of action. Courts fluctuate between allowing extremely broad claims reservations and requiring either categorical reservations or the explicit reservation of individual claims. Courts have even considered the sufficiency of claims reservations contained in disclosure statements, including when the reservations are not necessarily addressed in the plan. This Note analyzes the various methods courts employ in the application of § 1123(b)(3)(B), and it proposes a compromise that promotes both the finality of plan confirmation as well as the maximization of the bankruptcy estate.

TABLE OF CONTENTS

INTRODUCTION 232
I. THE DISCRETIONARY PROVISION FOR CLAIM RETENTION UNDER § 1123(B)(3)(B): AN EXCEPTION TO THE RES JUDICATA EFFECT OF PLAN CONFIRMATION 237
A. CONFIRMATION OF A PLAN OF REORGANIZATION UNDER § 1141 238
1. The Res Judicata Effect of Plan Confirmation 238

* J.D., Fordham University School of Law, 2014; B.A., University of California, San Diego, 2007.

2. An Exception to Res Judicata in Bankruptcy 241
B. CLAIM RETENTION UNDER § 1123(B)(3)(B) 243
1. The Purpose and Method Behind Retaining Claims 243
2. Standing to Pursue Retained Claims and the Extent of These Powers 246
C. THE TYPES OF CLAIMS WHICH CAN BE RETAINED 249
D. THE TRUSTEE'S POWERTO SETTLE OR ADJUST ESTATE CLAIMS AND INTERESTS 251
II. NAVIGATING §1123(B)(3)(B) TO DETERMINE THE SUFFICIENCY OF CLAIM RESERVATIONS 252
A. GENERAL "BLANKET" RESERVATIONS IN PLANS OF REORGANIZATION 253
B. SPECIFIC RESERVATIONS IN PLANS OF REORGANIZATION 254
1. Categorical Reservations 255
2. Reservations of Individual Claims 260
C. RESERVATIONSIN DISCLOSURE STATEMENTS........................... 261
III. STANDARDIZING THE APPROACH TO ANALYZING POST-CONFIRMATION CLAIM RETENTION 264
A. THE ROLE OF § 1123(B)(3)(B) IN MAXIMIZING ESTATE VALUE 265
B. INTERPRETING THE LANGUAGE OF § 1123(B)(3)(B) TO BROADEN THE ESTATE 266
1. Categorically Avoiding Unnecessary Specificity 267
2. Compromising Finality with Claim Retention 269
CONCLUSION... 271

INTRODUCTION

Congress designed chapter 11 bankruptcy to enable a business to restructure itself so that it might continue to operate in its normal course despite present or impending insolvency.[1] Chapter 11 balances the countervailing interests of debtors and creditors by allowing debtors to reorganize their businesses, while simultaneously repaying their debts

1. *See* H.R. REP. No. 95-595, at 220 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179 ("The purpose of a business reorganization case . . . is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap.").

by providing reasonable distributions to their creditors.[2] It seeks to maximize the value of the bankruptcy estate by providing a mechanism for debtors to form new contractual relationships with creditors—relationships that endure after the debtor emerges from bankruptcy—through the plan of reorganization.[3] If successful, chapter 11 permits a business to discharge its debts[4] and emerge from bankruptcy, rehabilitated and able to continue as a going concern.[5]

As chapter 11 practice has evolved, businesses have increasingly used its provisions as restructuring tools prior to actual insolvency.[6] As

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2. Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 51 (2008); *see* Lucian Arye Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775, 776 (1964).

3. Peter C. Blain, Michael D. Jankowski & Bret M. Harper, *State Law Offers an Alternative to Chapter 11*, NAT'L L.J., Nov. 29, 2010, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202475325560&State_law_offers_an_alternative_to_Chapter_11.

4. *See* Chapter 11: Reorganization Under the Bankruptcy Code, UNITED STATES COURTS, *available at* http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter11.aspx ("Section 1141(d)(1) generally provides that confirmation of a plan discharges a debtor from any debt that arose before the date of confirmation. After the plan is confirmed, the debtor is required to make plan payments and is bound by the provisions of the plan of reorganization. The confirmed plan creates new contractual rights, replacing or superseding pre-bankruptcy contracts.").

5. *See* N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984) ("[T]he policy of chapter 11 is to permit successful rehabilitation of debtors."); *see also* Christopher R. Kaup & J. Daryl Dorsey, *Chapter 11 Bankruptcy: A Primer*, 28 GPSolo 5 (2011), *available at* http://www.americanbar.org/publications/gp_solo/2011/july_august/chapter_11_bankruptcy_primer.html. Ultimately, chapter 11 provides businesses with an alternative to chapter 7 liquidation. Chapter 7 provides for the liquidation of the debtor's assets and the distribution of the proceeds to the creditors, whereas chapter 11 allows for the rehabilitation of a financially distressed debtor. Donald Lee Rome, *The New Bankruptcy Act and the Commercial Lender*, 96 BANKING L.J. 389, 390 (1979). Management generally enters into chapter 11 cases with the desire to revitalize their business, through plan confirmation and the repayment of creditors. *Information for Prospective Creditor Committee Members on Chapter 11 Cases*, THE UNITED STATES DEPARTMENT OF JUSTICE, *available at* http://www.justice.gov/ust/eo/private_trustee/library/chapter11/docs/credcom.pdf. Where a firm has a large number of secured creditors, chapter 11 may provide greater efficiency, while also enabling the firm to successfully reorganize and emerge from bankruptcy. Arturo Bris, Ivo Welch & Ning Zhu, *The Costs of Bankruptcy: Chapter 7 Liquidation Versus Chapter 11 Reorganization*, 61 J. FIN. 1253, 1261 (2006).

6. Corporations use bankruptcy as a means to restructure their finances for a variety of operational reasons. Chapter 11 provides a means for debtors to reorganize their businesses by selling off money-losing divisions or readjusting the debt levels of an otherwise operationally sound business. *See* ELIZABETH WARREN, Chapter 11:

such, businesses often enter bankruptcy with a plan already in place, allowing bankruptcy proceedings to progress rapidly in order to expedite the rehabilitation of the debtor.[7] Financially distressed businesses[8] endeavor to settle their debts and emerge from chapter 11 as quickly as possible.[9] Plans of reorganization provide the means through which debtors may discharge their debts and resume their respective business activities. Through plan confirmation, debtors effectively bind the estate[10] while also improving their potential for success post-filing.[11] As such, it is crucial that courts aggressively seek to maximize the bankruptcy estate prior to plan confirmation in order to ensure its finality.[12]

REORGANIZING AMERICAN BUSINESSES 4–5 (2008). Chapter 11 does not explicitly require insolvency prior to bankruptcy, and companies may file a bankruptcy petition under this chapter when facing tort liabilities, adverse outcomes in litigation, or in anticipation of liquidity issues. *See* JONES DAY, COMPARISON OF CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE WITH THE SYSTEM OF ADMINISTRATION IN THE UNITED KINGDOM, THE RESCUE PROCEDURE IN FRANCE, INSOLVENCY PROCEEDINGS IN GERMANY, AND EXTRAORDINARY ADMINISTRATION FOR LARGE INSOLVENT COMPANIES IN ITALY 49, 51 (2007), *available at* http://www.jonesday.com/files/Publication /1ec093d4-66fb-42a6-8115be0694c59443/Presentation/PublicationAttachment/ e5b46572-7aeb-4c34-ab2e bee2f8f3d3c2/Comparison%20of%20Chapter%2011%20 (A4).pdf.

7. Gerald P. Buccino & Steven M. Golub, *Reflecting on Business Bankruptcies from the Pre-Code Era into the New Millennium*, 18-JAN AM. BANKR. INST. J. 36, 37 (Jan. 2000) ("[T]ransaction-minded professionals began to view chapter 11 as a means for rapidly effectuating a financial restructuring, similar to an exchange offer outside the bankruptcy context.").

8. *See* sources cited *supra* note 6, discussing the sources of financial distress which may encourage a solvent business to file for bankruptcy.

9. Michelle Campbell & Todd Brents, *Expedited Chapter 11s: Case Administration Workplan and Key Considerations*, 29-OCT AM. BANKR. INST. J. 24, 76 (Oct. 2010).

10. *See* Eubanks v. F.D.I.C., 977 F.2d 166, 170–71 (5th Cir. 1992) (holding that plan confirmation is res judicata and binding upon all parties that might have a claim or interest against the estate).

11. *See* Anne Lawton, *Chapter 11 Triage: Diagnosing A Debtor's Prospects for Success* 15 (Mar. 7, 2012), *available at* http://works.bepress.com/anne_lawton/1 ("A traditional measure of success is the emergence of a debtor from chapter 11 with a feasible plan."). Under this study, plan confirmation was analyzed as a measure of success of chapter 11 cases, and only one third of the studied cases met this criteria to qualify as successful. *Id.* at 17.

12. *See infra* Part I.A. Although plan confirmation generally binds the estate, following confirmation, courts retain the authority to "issue any other order necessary

Filing a chapter 11 petition commences a bankruptcy case, which creates a bankruptcy estate.[13] Congress intended the bankruptcy estate to include an expansive range of property and interests.[14] The current Bankruptcy Code (the "Code")[15] greatly expanded the types of property within the scope of the estate and, therefore, within the jurisdiction of bankruptcy courts.[16] Successful reorganization requires that the bankruptcy estate be broad in order to account for all creditors' claims as well as the implicit costs of chapter 11.[17] The ability of a debtor to effectively fulfill its obligations in bankruptcy necessarily depends on the assets available to the estate.[18] To this end, the bankruptcy estate includes both the available assets of the debtor as well as those claims of the debtor that existed prior to filing.[19] Various provisions of the Code

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to administer the estate." FED. R. BANKR. P. 3020(d); *see* 11 U.S.C. § 1129(a)(7)(ii) (2012) (requiring that in a plan of reorganization, holders of impaired claims receive at least as much as they would if the debtor had rather liquidated under chapter 7).

13. Westmoreland Human Opportunities, Inc. v. Walsh, 246 F.3d 233, 241 (3d Cir. 2001) (describing the breadth of the bankruptcy estate and how it comes into existence).

14. *See* United States v. Whiting Pools, Inc., 462 U.S. 198, 204 (1983) ("Both the congressional goal of encouraging reorganizations and Congress' choice of methods to protect secured creditors suggest that Congress intended a broad range of property to be included in the estate.").

15. Title 11 of the United States Codes contains the relevant bankruptcy provision, and all references to Code provisions will refer to Title 11 unless otherwise noted.

16. Lee R. Bogdanoff, *The Purchase and Sale of Assets in Reorganization Cases—of Interest and Principal, of Principles and Interests*, 47 BUS. LAW. 1367, 1373–74 (1992). The Code significantly expanded the types of property to be included in the estate from the very limited provisions contained in the prior Bankruptcy Act. *Id.* The Code further broadened the scope of the bankruptcy estate by expanding bankruptcy courts' jurisdiction beyond the confines of property within the debtor's possession at the time of filing. *Id.* at 1376.

17. 11 U.S.C. § 1129. Chapter 11 entails fees and expenses which frequently reach exceedingly high numbers. *See* Nancy B. Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. BUS. & TECH. L. 117, 119 (2012) ("Professional fees are big business, especially in large chapter 11 cases.").

18. *See* Douglas Baird, Arturo Bris & Ning Zhu, *The Dynamics of Large and Small chapter 11 Cases: An Empirical Study* 4–10 (2005), *available at* http://faculty.gsm.ucdavis.edu/~nzhu/papers/priority.pdf (explaining how distributions of estate assets are divided amongst the various classes of creditors in chapter 11 cases).

19. *In re* FitzSimmons, 725 F.2d 1208, 1210 (9th Cir. 1984) ("The scope of the estate is broad: it includes, with two minor exceptions, 'all legal or equitable interests of the debtor in property as of the commencement of the case.'") (quoting 11 U.S.C. § 541(a)(1)). The scope of the bankruptcy estate extends to those current interests and property owned by the debtor, as well as all other interests, regardless of their

provide a statutory basis to ensure this maximization of the estate.[20] Broadly, chapter 11 endeavors to ensure that the commencement of the case preserves, rather than diminishes, the assets available for distribution to creditors.[21] Accordingly, at commencement, § 362 automatically stays all actions against the estate at the filing of the order for relief.[22] Section 541(a)(1) then provides that the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."[23] The estate formed encompasses all of the debtor's claims against others, as well as the debtor's interests in property, whether they are full ownership, merely possessory, or even in the custody of third parties.[24] Sections 362 and 541 operate in tandem to aggregate estate property by protecting it from piecemeal dismantling by creditors and by providing for the most inclusive estate.[25]

Section 1123(b)(3)(B) builds upon these sections to further include those claims of the debtor existing prior to the filing of the bankruptcy petition as estate property.[26] This provision implicates traditional aspects of litigation such as notice[27] and res judicata.[28] Section 1123(b)(3)(B) provides a potential exception to the binding nature of

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conditional, future, speculative or equitable nature. *See In re* Anders, 151 B.R. 543, 545 (Bankr. D. Nev. 1993).

20. *See* 11 U.S.C. § 103(a) ("Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title.").

21. Bogdanoff, *supra* note 16, at 1375.

22. 11 U.S.C. § 362.

23. 11 U.S.C. § 541(a)(1) .

24. WARREN, *supra* note 6, at 39.

25. 5 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 541.01, at 541.01–.10 (16th ed. 2013).

26. 11 U.S.C. § 1123(b)(3)(B).

27. Allowing or disallowing the retention of claims under section 1123(b)(3)(B) can have serious implications for impacted creditors, requiring sufficient notice. *See* Ralph E. Avery, *Chapter 11 Bankruptcy and Principles of Res Judicata*, 102 COM. L.J. 257, 280 (1997) ("Formal notice or actual knowledge of specific important events in the reorganization process is necessary to foreclose claimants whose identity is known to or reasonably ascertainable by the debtor."); *see also* Spicer v. Laguna Madre Oil & Gas II, LLC (*In re* Tex. Wyo. Drilling, Inc.), 422 B.R. 612, 625 (Bankr. N.D. Tex. 2010), *aff'd*, 647 F.3d (5th Cir. 2011) ("[C]reditors must be able to view a proposed plan and properly evaluate the creditors' benefits and potential liabilities . . . .").

28. *See infra* Part I.

plan confirmation to ensure the maximum retention of estate property through plan confirmation.[29]

Maximizing the bankruptcy estate serves the interests of both creditors and debtors. Chapter 11 reorganizations are structured to enhance the ability of creditors and equity holders to recover value from a bankrupt enterprise.[30] Increasing the available funds helps ensure that creditors can receive a reasonable return and enhances the potential for the successful restructuring and rehabilitation of the debtor.[31] Chapter 11 ultimately provides businesses with an opportunity to survive by putting the success of the entire group—including the debtor, the debtor's employees, creditors, and other interested parties—above the rights of individual creditors.[32]

This Note examines the role that plan confirmation plays in defining the scope of assets to be included in commercial chapter 11 bankruptcy estates, with particular reference to claim retention under § 1123(b)(3)(B). Part I analyzes the effects of res judicata and provides a contextual basis for requiring finality in the confirmation of chapter 11 plans of reorganization. It reviews the background and provides a substantive overview of the statutory requirements of plan confirmation. Part I then identifies the role that § 1123(b)(3)(B) serves within this statutory scheme to promote the general purposes of chapter 11. Part II provides an analysis of the competing ways in which courts interpret and apply § 1123(b)(3)(B). It examines how courts apply § 1123(b)(3)(B) in determining whether or not plans successfully retain claims and the rationale behind these decisions. Part II also considers whether claims may be successfully retained throughdisclosure statements. Finally, Part III discusses the potential weaknesses of requiring explicit reservations of claims. It suggests a method for allowing general categorical reservations of claims, while still providing a reasonable level of certainty to creditors and potential defendants of claims retained post-confirmation.

I. THE DISCRETIONARY PROVISION FOR CLAIM RETENTION UNDER § 1123(B)(3)(B): AN EXCEPTION TO THE RES JUDICATA EFFECT OF

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29. *See infra* Part I.A.2.

30. Bogdanoff, *supra* note 16, at 1369.

31. *See* Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 51 (2008) ("Chapter 11 strikes a balance between a debtor's interest in reorganizing and restructuring its debts and the creditors' interest in maximizing the value of the bankruptcy estate.").

32. WARREN, *supra* note 6, at 15–16.

PLAN CONFIRMATION

The policy behind res judicata is to avoid the "cost and vexation" of duplicative litigation.[33] The general design and purpose of bankruptcy serves similar purposes, providing a fresh start, which releases both the debtor and the interested parties from pre-petition debts and obligations.[34] Under chapter 11, corporate debtors realize the res judicata effects of bankruptcy through the discharge represented by plan confirmation.[35]

A. CONFIRMATION OF A PLAN OF REORGANIZATION UNDER § 1141

A successful chapter 11 case culminates with the confirmation of a plan of reorganization under § 1141.[36] Plan confirmation generally provides the effects of res judicata in the bankruptcy context, though § 1123(b)(3)(B) functions as an exception.[37] Section 1123(b)(3)(B) enables debtors to continue maximizing the value of the estate beyond plan confirmation through the retention of claims.[38]

1. The Res Judicata Effect of Plan Confirmation

The doctrine of res judicata has traditionally received great deference from courts.[39] Res judicata specifically refers to claim

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33. Allen v. McCurry, 449 U.S. 90, 94 (1980) ("[R]es judicata . . . relieve(s) parties of the cost and vexation of multiple lawsuits, conserve(s) judicial resources, and, by preventing inconsistent decisions, encourage(s) reliance on adjudication.").

34. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (noting that the discharge of indebtedness and debtor's fresh start are primary purposes of bankruptcy).

35. *See* Eubanks v. F.D.I.C., 977 F.2d 166, 170 (5th Cir. 1992) ("It has long been recognized that a bankruptcy court's order confirming a plan of reorganization is given the same effect as a district court's judgment on the merits for claim preclusion purposes.").

36. *See supra* note 11 and accompanying text.

37. *See infra* Part I.A.2.

38. *See infra* notes 60-62 and accompanying text.

39. *See, e.g.*, Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) ("The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case."); Heiser v. Woodruff, 327 U.S. 726, 733 (1946) ("[W]e are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata, which is founded upon the generally recognized public policy that there must be some end to litigation . . . ."); Hart Steel Co. v. R.R. Supply Co., 244 U.S. 294, 299 (1917) (stating

VOLUME XIX 2013 NUMBER 1

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CORPORATE & FINANCIAL LAW

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preclusion, though courts have extended its application to include issue preclusion as well.[40] As a general matter, the Supreme Court has long held that res judicata precludes the future litigation of claims that have received binding resolutions.[41] More broadly, the basic policies underlying res judicata preclude the re-litigation of matters and permit courts to foreclose subsequent litigation on matters that were never actually litigated, but that should have been advanced in a prior suit.[42] Res judicata in essence provides finality to all interested parties.

The statutory goal of every chapter 11 bankruptcy case is the confirmation of a plan of reorganization.[43] Courts have substantial discretion in approving chapter 11 plans of reorganization, however, each plan must comply with the statutory requirements of the Code.[44]

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that res judicata is "a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts") (citation omitted).

40. Taylor v. Sturgell, 553 U.S. 880, 892 (2008) ("The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'").

41. *See, e.g.*, *Hart Steel Co.*, 244 U.S. at 299 ("[R]es judicata is not a mere matter of practice or procedure . . . . It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . . .") (citation omitted); *Moitie*, 452 U.S. at 398 ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.").

42. Brown v. Felsen, 442 U.S. 127, 131 (1979) ("Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."); *see* Barnett v. Stern, 909 F.2d 973, 978 (7th Cir. 1990) (explaining res judicata is applied where the prior and present litigation share "(1) an identity of the parties or their privies; (2) an identity of causes of action; and (3) a final judgment on the merits in the prior litigation"); *see generally*, 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4403 (2d ed. 1987) (discussing the background and purpose of the rules of res judicata).

43. 7 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 1129.01 (16th ed. 2013) ("Section 1129 of the Bankruptcy Code provides the requirements for such confirmation, containing Congress' minimum requirements for allowing an entity to discharge its unpaid debts and continue its operations."); *see In re* St. James Mech., Inc., 434 B.R. 54, 61 (Bankr. E.D.N.Y. 2010) ("Confirmation of a debtor's plan of reorganization is the seminal event in the chapter 11 bankruptcy process.").

44. W. HOMER DRAKE, JR. & CHRISTOPHER S. STRICKLAND, CHAPTER 11 REORGANIZATIONS § 1:1 (2d ed. 2012). Bankruptcy courts have the power and discretion to confirm plans of reorganization where they meet the general framework provided for in the bankruptcy code and are "acceptable and beneficial to a majority of

Section 1129(a)(11) lays out a feasibility standard, which requires that a plan of reorganization provide "reasonable assurance, probability or prospect of success."[45] Implicit within this standard is the requirement that the plan provide a method for the estate to satisfy claims made by creditors, as a plan cannot otherwise satisfy the section's basic terms.[46]

If a plan of reorganization meets all of the confirmation requirements carefully drawn out in § 1129,[47] then § 1141(a) binds all parties to its terms with preclusive effect.[48] For the purposes of res judicata, the confirmation of a plan of reorganization is analogous to a final decision on the merits.[49] While § 1141 is narrowly drafted, it has the effect of binding all parties under the plan upon confirmation.[50] Thus, all issues pertaining to the plan that could have been raised prior to confirmation are res judicata.[51]

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creditors . . . [that] may have a substantial voice in the ultimate plan that gains judicial approval." *Id.* (citing 11 U.S.C. §§ 1121–1129 (2012)).

45. BANKRUPTCY SERVICE, LAWYERS EDITION § 45:231 (2013). Section 1129(11) allows a court to confirm a plan only if it is not likely that confirmation will be followed by the debtor's liquidation, or "the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129. The feasibility standard does not require that the plan of reorganization guarantee success, it simply requires that it offer a reasonable assurance of success. Kane v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 843 F.2d 636, 649 (2d Cir. 1988).

46. *See* 11 U.S.C. § 1129(a)(9); *see also supra* note 45. If a plan cannot provide for the repayment of claims made against it, than its success is not reasonably assured. *See supra* note 4 and accompanying text.

47. 11 U.S.C. § 1129.

48. 11 U.S.C. § 1141(a) ("[T]he provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor."). The only exceptions to section 1141(a), found in (d)(2) and (d)(3), do not relate to section 1123(b)(3)(B) claim retention. 11 U.S.C. § 1141; *see* Fleet Nat'l Bank v. Gray (*In re* Bankvest Capital Corp.), 375 F.3d 51, 58 (1st Cir. 2004) ("Pursuant to Section 1141 of the Bankruptcy Code, the confirmation of a plan of reorganization . . . precludes parties from raising claims or issues that could have or should have been raised before confirmation but were not.").

49. Eubanks v. F.D.I.C., 977 F.2d 166, 170 (5th Cir. 1992) ("It has long been recognized that a bankruptcy court's order confirming a plan of reorganization is given the same effect as a district court's judgment on the merits for claim preclusion purposes.").

50. *See supra* note 48 and accompanying text.

51. *See* 5 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 1141.02 (16th ed. 2013) (stating that a confirmed plan binds "every entity that holds a

Plan confirmation provides a method of recovery for creditors,[52] while discharging the debtor from all debts that arose prior to plan confirmation.[53] Accordingly, this res judicata effect extends to all causes of action that became assets of the estate.[54] This finality, obtained through the confirmation of the plan of reorganization, reinforces the fundamental purpose of chapter 11 to rehabilitate troubled enterprises and discharge their debts.[55]

2. An Exception to Res Judicata in Bankruptcy

While res judicata reaches all areas of jurisprudence, including bankruptcy, there are certain exceptions. In 1979, the Supreme Court refused to apply res judicata in a bankruptcy case where the questions were not precisely at issue in previous litigation and were matters that Congress intended bankruptcy courts to resolve.[56] The Bankruptcy Code and Rules "balance the policies represented by res judicata against the need for the process of reorganization to be flexible enough to accommodate the vagaries of business operations" in chapter 11 cases.[57]

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claim or interest even though [it] is not scheduled, has not filed a claim, does not receive a distribution under the plan, or is not entitled to retain an interest under such plan").

52. *See* Rosemary E. Williams, *Confirmation of Plan of Reorganization by Business Entity Under Section 1129 of the Bankruptcy Code*, 94 AM. JUR. *Proof of Facts* 3d 1, I. §2 (2013) (stating that the purpose of a plan, as viewed by creditors, is "to distribute the assets of a debtor entity to creditors in full satisfaction (although not often in full payment) of the prepetition debts of and interests in the debtor entity").

53. 11 U.S.C. § 1141.

54. *See* Elk Horn Coal Co. v. Conveyor Mfg. & Supply, Inc. (*In re* Pen Holdings, Inc.), 316 B.R. 495, 498 (Bankr. M.D. Tenn. 2004).

55. Mark G. Douglas, *Unscrambling the Egg or Redividing the Pie? Revoking a Chapter 11 Plan Confirmation Order*, J. BANKR. L. 2006.10-5 (2006); *see* Retired Pilots Ass'n of U.S. Airways, Inc. v. US Airways Grp., Inc. (*In re* US Airways Grp., Inc.), 369 F.3d 806, 810 (4th Cir. 2004) (explaining that parties rely on plans of reorganization once a confirmation order has been consummated).

56. Brown v. Felsen, 442 U.S. 127, 138 (1979) (finding an exception to res judicata where a debt was previously reduced to judgment in state court, but allowing new evidence to be submitted in front of the bankruptcy court where "neither the interests served by res judicata . . . nor the policies of the Bankruptcy Act would be well served by foreclosing" its submission).

57. Avery, *supra* note 27, at 258. To view chapter 11 cases as litigation, they must at least be viewed as nontraditional litigation because they involve both the resolution of past events as well as a "resolution capable of accommodating future events and the shifting interests of a multiplicity of parties." *Id.*

Although plan confirmation functions as a final judgment on the merits with regards to matters addressed in the plan of reorganization,[58] § 1123(b)(3)(B) provides for a statutory exception to the binding nature of plan confirmation on preexisting claims.[59]

Section 1123 of the Code provides a broad overview of the contents of a plan of reorganization. More specifically, § 1123(b)(3)(B) provides debtors—or their representatives—with standing to bring claims that the debtor reserves in the plan, but not those that have not been so reserved.[60] This section states that a chapter 11 plan of reorganization *may* provide for "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any . . . claim or interest"[61] belonging to the debtor or the estate.[62] Generally, the estate of the debtor ceases to exist after plan confirmation, which then terminates the jurisdiction of the bankruptcy court.[63] Section 1123(b)(3)(B), however, provides an opportunity for the continued maximization of estate assets post-confirmation.[64]

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58. *See supra* notes 48-49; *see also* Cohen v. TIC Fin. Sys. (*In re* Ampace Corp.), 279 B.R. 145, 155 (Bankr. D. Del. 2002).

59. Robert C. Folland & Andrew L. Turscak, Jr., *Preserving Estate Claims Post-Confirmation: A Need for Uniformity from the Circuit Courts*, 27-MAR AM. BANKR. INST. J. 14, 75 (2008). Res judicata applies to all areas of jurisprudence, but as applied to bankruptcy, "even where a claim would otherwise be barred by res judicata, Code §1123(b)(3)(B) may offer the plaintiff an escape hatch," allowing for the retention of any claim or interest. *Id.*

60. Compton v. Anderson (*In re* MPF Holdings US LLC), 701 F.3d 449, 454 (5th Cir. 2012).

61. 11 U.S.C. § 1123(b)(3)(B) (2012); *see MPF Holdings*, 701 F.3d at 453 ("Section 1123(b)(3) . . . allows a debtor to retain causes of action possessed by the bankruptcy estate by providing for the retention of such claims in its reorganization plan.").

62. 11 U.S.C. § 1123(b)(3)(A) (allowing for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate").

63. Norwest Equip. Fin., Inc. v. Nath (*In re* D & P P'ship), 91 F.3d 1072, 1074 (8th Cir. 1996). Although the estate may technically cease to exist following plan confirmation, "the debtor remains a debtor until the [T]itle 11 case has been closed pursuant to 11 U.S.C. § 350(a), and the bankruptcy court normally retains jurisdiction." Joseph J. Wielebinski & J. David Leamon, *Post-Confirmation Issues: How To Fix What You Did Not Fix at Confirmation*, BUS. BANKR. COURSE 1, 2 (2003), *available at* http://www.munsch.com/files/1117724_1.pdf.

64. *See* 11 U.S.C. 1123(b)(3)(B); *see also* Spicer v. Laguna Madre Oil & Gas II, LLC (*In re* Tex. Wyo. Drilling, Inc.), 647 F.3d 547, 552 (5th Cir. 2011) ("[A]fter confirmation of a plan, the ability of the debtor to enforce a claim once held by the

Counter to the general policy behind res judicata, chapter 11 risks abandoning claims that have not actually received a final adjudication, outside that finality which plan confirmation provides.[65] Potential defendants and courts may carefully scrutinize the explicit language of the plan of reorganization and the disclosure statement in order to use res judicata as a defense to pursuing causes of action post-confirmation.[66] While § 1123(b)(3)(B) may benefit debtors and/or creditors as a class by allowing for the reservation of certain claims, it also benefits the potential defendants of reserved claims by providing notice.[67]

B. CLAIM RETENTION UNDER § 1123(B)(3)(B)

The language of § 1123(b) establishes what a plan *may* contain, which is in contrast to the language of § 1123(a), which establishes what a plan *must* contain.[68] Section 1123(b), however, operates subject to subsection (a). While § 1123(b)(3)(B) provides the general framework under which pre-existing claims may be retained as estate property,[69] it is §1123(a)(5)(A) that requires a plan of reorganization adequately provides for the plan's implementation, such as through the "retention by the debtor of all or any of the property of the estate."[70]

1. The Purpose and Method Behind Retaining Claims

Section 1123(b)(3)(B) allows debtors to retain causes of action to pursue post plan confirmation.[71] It explicitly provides that any such claims or interests of the debtor, or the estate, may be retained through the plan of reorganization,[72] and it further leaves open the possibility for

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estate is limited to that which has been retained in the [bankruptcy] plan.") (citing 11 U.S.C. § 1123(b)(3)(B)).

65. *See* Eubanks v. F.D.I.C., 977 F.2d 166, 170–71 (5th Cir. 1992).

66. Wielebinski & Leamon, *supra* note 63, at 8.

67. Harstad v. First Am. Bank, 39 F.3d 898, 903 (8th Cir.1994).

68. COLLIER PAMPHLET EDITION, BANKRUPTCY CODE PART I 896 (Alan N. Resnick & Henry J. Sommer eds., 2013) [hereinafter COLLIER PAMPHLET PART I]; *see* Cohen v. TIC Fin. Sys. (*In re* Ampace Corp.), 279 B.R. 145, 158 (Bankr. D. Del. 2002) ("[Section] 1123 distinguishes between what a plan must include and what a plan may include.").

69. 11 U.S.C. § 1123(b)(3)(B) (2012).

70. 11 U.S.C. § 1123(a)(5)(A).

71. 11 U.S.C. § 1123(b)(3)(B).

72. 11 U.S.C. § 1123(b)(3).

claims to be retained in the disclosure statement.[73] It is, however, unclear how explicit the claim reservation must be to be enforceable.[74]

Notice requirements represent a fundamental aspect of due process,[75] and notice underlies many aspects of bankruptcy case administration.[76] The required disclosure of retained claims notifies creditors and potential defendants regarding causes of action the debtor intends to pursue post-confirmation.[77] Creditors may rely on the reservations made under § 1123(b)(3)(B) when evaluating potential distributions available under a proposed chapter 11 plan.[78] Additionally, those creditors who might be defendants may also rely on such reservations to determine both their potential distributions as well as their potential liabilities.[79] This notice requirement benefits both the

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73. *See infra* Part II.C., *see also* 11 U.S.C. § 1125. Courts have broad discretion to determine the adequacy of information contained in disclosure statements. S. REP. NO. 95-989, at 120 (1978). Section 1125 governs the content of post-petition disclosure according to the specific case circumstances; its legislative notes provide that courts have judicial discretion regarding the content of disclosure statements, as long as it is "of a kind and in sufficient detail that a reasonable and typical investor can make an informed judgment about the plan." *Id*. at 120-122.

74. *See infra* Part II.

75. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). At a minimum, due process requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*

76. *See* 11 U.S.C. § 342(a) ("There shall be given such notice as is appropriate, including notice to any holder of a community claim, of an order for relief in a case under this title.").

77. Where a disclosure statement lists a party the debtor intends to bring an adversary proceeding against, proper notice may be a substantial component in the court's determination of whether or not the claim may be pursued. *See* Steel Drum Co. v. Liberty Mut. Ins. Co (*In re* Goodman Bros. Steel Drum Co.), 247 B.R. 604, 608 (Bankr. E.D.N.Y. 2000). The Federal Rules of Bankruptcy specifically require creditors and parties in interest receive a certain level of notice regarding the consideration of the disclosure statement and confirmation of the plan of reorganization. FED. R. BANKR. P. 3017. As such, section 1123(b)(3)(B) has been described as "fundamentally a notice provision." *In re* Bleu Room Experience, Inc., 304 B.R. 309, 314 (Bankr. E.D. Mich. 2004).

78. *See* Spicer v. Laguna Madre Oil & Gas II, LLC (*In re* Tex. Wyo. Drilling, Inc.), 422 B.R. 612, 625 (Bankr. N.D. Tex. 2010), *aff'd*, 647 F.3d (5th Cir. 2011) ("[C]reditors must be able to view a proposed plan and properly evaluate the creditors' benefits and potential liabilities . . . .").

79. Official Comm. of Unsecured Creditors of Crowley, Milner & Co. v. Callahan (*In re* Crowley, Milner & Co.), 299 B.R. 830, 851 (Bankr. E.D. Mich. 2003).

estate's creditors as a collective body, as well as the individual potential defendants.[80] Debtors must comply with the statutory requirements of § 1123(b)(3)(B)—giving general notice of the debtors' intention to retain claims under the provision—because creditors are unable to seek their fair share of the recovery without sufficient notice of available assets.[81]

Section 1123's legislative history provides a background for its general purpose, but it provides only minimal guidance regarding what level of disclosure is sufficient to successfully retain claims.[82] While some courts permit general blanket, or categorical reservations of claims, other courts require a more demanding, specific and unequivocal reservation.[83] Due to the absence of a clear standard regarding how

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80. *Compare* Kmart Corp. v. Intercraft Co. (*In re* Kmart Corp.), 310 B.R. 107, 120 (Bankr. N.D. Ill. 2004) ("The disclosure and notice afforded by a section 1123(b)(3) retention provision, however, is directed towards the estate's creditors, not the potential defendants on the reserved claims.") *and* Elk Horn Coal Co. v. Conveyor Mfg. & Supply, Inc. (*In re* Pen Holdings, Inc.), 316 B.R. 495, 501 (Bankr. M.D. Tenn. 2004) ("[I]t is notice to creditors generally that there are assets yet to be liquidated that are being preserved for prosecution by the reorganized debtor or its designee."), *with* Harstad v. First Am. Bank, 39 F.3d 898, 903 (8th Cir. 1994) ("Creditors have the right to know of any potential causes of action that might enlarge the estate—and that could be used to increase payment to the creditors.") *and* P.A. Bergner & Co. v. Bank One, Milwaukee, N.A. (*In re* P.A. Bergner & Co.), 140 F.3d 1111, 1117 (7th Cir. 1998) (allowing a retained claim to remain partly on the basis that the defendant had sufficient notice).

81. *Harstad*, 39 F.3d at 903.

82. DENNIS J. CONNOLLY, DAVID A. LANDER, & TIMOTHY M. LUPINACCI, 2012 NORTON BANKRUPTCY LAW SEMINAR MATERIALS: PREFERENCE LITIGATION 80 (2012), *available at* http://www.nortoninstitutes.org/2012SeminarMaterials/12-Preference Litigation/M12-PreferenceLitigationTOC.html. The legislative history notes that section 1123 was derived from the former section 216 of chapter X of the Bankruptcy Act. *Id*. The legislative history of section 216 simply indicates that "its aim was to make possible the formulation and consummation of a plan before completion of the investigation and prosecution of causes of action." *Id*. (citing *Pen Holdings*, 316 B.R. at 499) (internal quotations omitted). Congress adopted chapter X to provide increased protection to creditors and enhance their ability to participate in corporate reorganization proceedings, and subsequently, "[p]reservation of a debtor's causes of action for the benefit of creditors was the goal of the liberalization of language in 1978." *Pen Holdings*, 316 B.R. at 499–500.

83. At the 86th Annual National Conference of Bankruptcy Judges, practitioners discussed the relative requirements for preserving causes of action under section 1123(b)(3)(B), as well as the risks and benefits of general, categorical, and specific reservations. While there seemed to be no clear consensus regarding which method provided the best chance for successful claim retention, the overall importance of carefully drafting plan documents was made clear. Jay Horowitz, *National Conference*

specific claim retention must be,[84] courts and practitioners must independently navigate the uncertain language of § 1123(b)(3)(B) to ensure that claims are properly retained post-confirmation.[85]

2. Standing to Pursue Retained Claims and the Extent of These Powers

The ability to pursue claims retained under § 1123(b)(3)(B) lies with either the debtor-in-possession,[86] the trustee,[87] or a representative[88]

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of Bankruptcy Judges: Individual Ch. 11s, Jurisdiction, Mortgages Are Hot Topics at Judges' Conference, 24 BNA BANKR. L. REP. 1420 (2012).

84. *In re* Bleu Room Experience, Inc., 304 B.R. 309, 314 (Bankr. E.D. Mich. 2004).

85. Courts have broad discretion to evaluate section 1123(b)(3)(B) claims as the provision is "not jurisdictional in nature but rather provides authority for the post-confirmation pursuit of claims." David R. Hurst, Laurie A. Krepto & Simon E. Fraser, *The Scope of Post-Confirmation Bankruptcy Court Jurisdiction*, ABI COMM. NEWSLETTER, 2008, at 13; *see* Susan E. Trent, *Plan Drafting Requirements Pursuant to S 1123(b)(3)(b) Tackled*, 32-FEB AM. BANKR. INST. J. 16, 16 ("The inclusion of sufficient claims retention language further provides a bankruptcy court with subject-matter jurisdiction post-confirmation over the preserved pre-confirmation claims."). As there is currently no safe-harbor within the various standards applied to section 1123(b)(3)(B), "[p]lan proponents should carefully consider how much disclosure is enough to preserve causes of action for post-confirmation litigation . . . disclosure will be analyzed on a case-by-case basis." Robin Bicket White, *Retaining Preference Actions in Plans of Reorganization - How Much Disclosure is Enough?*, FROST, BROWN, TODD LLC, *available at* http://www.frostbrowntodd.com/resources-1567.html (last visited Sept. 13, 2013). Debtors and courts must ultimately balance these uncertainties as to what is specifically necessary to successfully retain and enforce claims.

86. 8B C.J.S. *Bankruptcy* § 1131 (2013) (explaining that a chapter 11 debtor becomes a debtor-in-possession "once the bankruptcy petition is filed[,] and [it] is an entity that is legally distinct from the original debtor . . . . [U]nder the Bankruptcy Code, a debtor in possession has most of the rights, duties, and powers of the chapter 11 trustee").

87. Pursuant to section 1104, the court shall order the appointment of a trustee "[a]t any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing . . . ." 11 U.S.C. § 1104 (2012). However, the Code's ultimate aim is to protect creditors, thus its policies are flexible, and it is within a court's discretion to determine if there is cause to appoint a trustee. Comm. of Dalkon Shield Claimants v. A.H. Robins Co., 828 F.2d 239, 242 (4th Cir. 1987).

88. In order for a party, who is neither the debtor nor the trustee, to be a representative for the purposes of enforcing a section 1123(b)(3)(B) claim, the party must establish "(1) that it has been appointed [and] (2) that it is a representative of the

appointed for such purpose.[89] Debtors-in-possession and trustees perform the same functions in chapter 11 cases.[90] Insofar as any representative of the estate exercises his or her powers in dealing with retained claims, he or she has a fiduciary obligation to ensure both the successful rehabilitation of the bankruptcy estate and a reasonable return to creditors.[91]

Debtors-in-possession have the ability to pursue claims following the filing of a chapter 11 petition. Unless a trustee is appointed,[92] the

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estate." Retail Mktg. Co. v. King (*In re* Mako, Inc.), 985 F.2d 1052, 1054 (10th Cir. 1993) (citation omitted).

89. 11 U.S.C. § 1123(b)(3)(B) (2012).

90. *See* Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (*In re* Cybergenics Corp.), 226 F.3d 237, 243 (3d Cir. 2000) (explaining that because a debtor-in-possession has the powers and duties of a trustee, "[t]he terms 'trustee' and 'debtor in possession,' as used in the Bankruptcy Code, are thus essentially interchangeable").

91. *See e.g.*, United States v. Aldrich (*In re* Rigden), 795 F.2d 727, 730 (9th Cir. 1986) (holding that a representative of a bankruptcy estate "has a fiduciary obligation to conserve the assets of the estate and to maximize distribution to creditors" in pursuing retained claims); *Cybergenics Corp.*, 226 F.3d at 243 ("A paramount duty of a trustee or debtor in possession in a bankruptcy case is to act on behalf of the bankruptcy estate, that is, for the benefit of the creditors."); *Mako*, Inc., 985 F.2d at 1054 (noting that in order for a party, who is neither the debtor nor the trustee, to be a representative for the purposes of enforcing a § 1123(b)(3)(B) claim, the party must establish "(1) that it has been appointed; [and] (2) that it is a representative of the estate") (citation omitted).

92. Ice Cream Liquidation, Inc. v. Coolbrands Int'l, Inc. (*In re* Ice Cream Liquidation, Inc.), 319 B.R. 324, 333 (Bankr. D. Conn. 2005) ("[I]f no trustee is appointed, during the chapter 11 case prior to plan confirmation the debtor enjoys the status of debtor in possession with all the relevant powers of a trustee."). By allowing the debtor to become a debtor-in-possession following the filing of the bankruptcy petition, chapter 11 enables the debtor to retain management and control of the bankrupt entity's business operations, barring proof that the appointment of a trustee is warranted. *See* 8B C.J.S. *Bankruptcy* § 1131 (2013); *see also In re* Adelphia Commc'ns Corp., 336 B.R. 610, 655 (Bankr. S.D.N.Y. 2006), *aff'd*, 342 B.R. 122 (S.D.N.Y. 2006) ("[T]here is a strong presumption that the debtor should be permitted to remain in possession absent a showing of need for the appointment of a trustee."). Additionally, chapter 11 reserves to the debtor the exclusive right to file a plan of reorganization for the first 120 days after filing an order for relief, both allowing the debtor the opportunity to present a plan that will enable it to emerge from bankruptcy reorganized and providing an acceptable return to creditors. 11 U.S.C. § 1121(b); Karen Gross & Patricia Redmond, *In Defense of Debtor Exclusivity: Assessing Four of the 1994 Amendments to the Bankruptcy Code*, 69 AM. BANKR. L.J. 287, 291 (1995) ("[E]xclusivity is perceived to encourage rehabilitation by empowering the debtor to control its own destiny . . . . [Thus] the exclusive right to file a plan can be seen as the debtor's chip in the reorganization game.").

debtor-in-possession serves as the bankruptcy estate's legal representative after the commencement of the case.[93] Absent a trustee, the Code grants a debtor-in-possession many of the rights and powers of a trustee and permits the debtor-in-possession to perform all of a trustee's duties and functions.[94] Generally, when a plan is confirmed, the estate ceases to exist and the debtor's trustee powers expire because the debtor-in-possession loses the possession that granted him the ability to exercise the claims power of a trustee.[95] A debtor, however, may still pursue those claims that have been properly reserved in the plan of reorganization.[96]

In a case where a trustee is appointed, the debtor may reserve the power to pursue claims for the trustee, who will then pursue the claims following plan confirmation in lieu of the debtor.[97] Under § 323(b),

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93. Smart World Techs., LLC v. Juno Online Servs., Inc. (*In re* Smart World Techs., LLC), 423 F.3d 166, 174 (2d Cir. 2005) ("[T]he debtor-in-possession's role [is] legal representative of the bankruptcy estate, [as] set forth in 11 U.S.C. § 323(a). As legal representative, the debtor-in-possession has the power to sue and be sued on the estate's behalf.") (footnote omitted). Large chapter 11 reorganizations rarely involve the appointment of a trustee, so the debtor generally fills this role. *See* Stephen J. Lubben, *Bankruptcy Venue and the Delaware Solyndra Ruling*, N.Y. TIMES, Oct. 19, 2011, http://dealbook.nytimes.com/2011/10/19/bankruptcy-venue-and-the-delaware-solyndra-ruling/ (defending the rarity of appointing trustees in big chapter 11 cases by explaining that such appointment often results in conversion to chapter 7, which results in "basically nothing for [] unsecured creditors"); *see In* re Sharon Steel Corp., 871 F.2d 1217, 1225 (3d Cir. 1989) ("It is settled that appointment of a trustee should be the exception, rather than the rule.").

94. 11 U.S.C. § 1107 ("[A] debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title . . . ."); FED. R. BANKR. P. 9001(11) ("'Trustee' includes a debtor in possession in a [C]hapter 11 case."). This power, however, is subject to the powers of any later-appointed trustee or court-prescribed limitations. 11 U.S.C. § 1107.

95. Dynasty Oil & Gas, LLC v. Citizens Bank (*In re* United Operating, LLC), 540 F.3d 351, 355 (5th Cir. 2008); *see* 11 U.S.C. § 1141(b) ("Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."); Compton v. Anderson (*In re* MPF Holdings US LLC), 701 F.3d 449, 453 (5th Cir. 2012) ("In general, when a chapter 11 reorganization plan is confirmed by the bankruptcy court, the debtor losses [sic] its debtor-in-possession status and with it, standing to pursue the estate's claims.").

96. *MPF Holdings*, 701 F.3d at 454 (Debtors have standing after the plan is confirmed "to bring claims that the debtor reserved in the reorganization plan[,] but [they] will not have standing to bring claims that were not reserved in the plan.").

97. *Id.* at 453.

trustees have the ability to sue third parties for the benefit of the estate throughout the duration of a chapter 11 case.[98] This power may extend beyond the confirmation of a plan of reorganization, allowing the trustee to pursue claims retained in the plan under § 1123(b)(3)(B).[99]

C. THE TYPES OF CLAIMS WHICH CAN BE RETAINED

Section 1123(b)(3)(B) allows for post-confirmation pursuit and enforcement of claims when the recovery will benefit the estate and the debtor has appropriately reserved the cause of action.[100] The statutory language of § 1123(b)(3)(B) explicitly includes all claims and interests.[101] The types of claims potentially retained[102] may include: (1) lender liability,[103] (2) malpractice,[104] and (3) breach of contract claims.[105] Section 1123(b)(3)(B) does not confine claim retention to certain categories of claims, but rather provides a general means for debtors to

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98. 11 U.S.C. § 323. The provision does not contain any durational limitations. *Id.*; *see also supra* note 20.

99. *See* Syndicate Exch. Corp. v. Duffy (*In re* Pro Greens, Inc.), 297 B.R. 850, 856 (Bankr. M.D. Fla. 2003) ("A reorganization trustee, post-confirmation, may pursue claims, including avoidance actions against third parties, on behalf of the estate if the confirmed plan and order of confirmation so provides.").

100. COLLIER PAMPHLET PART I, *supra* note 68, at 898.

101. 11 U.S.C. § 1123(b)(3)(B).

102. Whether claim retention is successful or unsuccessful will depend on the court's interpretation and application of §1123(b)(3)(B). *See infra* Part II for a discussion of the various methods employed by courts.

103. *See, e.g.*, Sanders Confectionery Prods., Inc. v. Heller Fin., Inc., 973 F.2d 474, 482 (6th Cir. 1992); Sure-Snap Corp. v. State St. Bank & Trust Co., 948 F.2d 869, 877 (2nd Cir. 1991).

104. *See* Nat'l Benevolent Ass'n of the Christian Church (Disciples of Christ) v. Weil, Gotshal & Manges, LLP (*In re* Nat'l Benevolent Ass'n of the Christian Church (Disciples of Christ)), 333 F. App'x 822, 827 (5th Cir. 2009).

105. In *Envirodyne Industries, Inc. v. Conn. Mutual Life Co. (In re Envirodyne Industries, Inc.)*, a breach of contract claim valued at $100 million, that was not explicitly reserved was under dispute. 174 B.R. 986, 991 (Bankr. N.D. Ill. 1994). Although the issues could technically have been litigated prior to confirmation, Envirodyne argued that such litigation was impossible due to the rapid progression of the bankruptcy proceedings. *Id.* The court noted that it might have been "better policy" if an action of such magnitude were disclosed in the disclosure statement, but found that the failure to reserve the action was not fatal. *Id.* The court, however, did not reference section 1123 or any potential reservations in the plan of reorganization, rather it relied on section 546(a)(1) and the presence of only minimal damage to the defendants due to the late filing of suit. *Id.*; *see also* discussion *supra* notes 71-72 and accompanying text.

provide for the continued maximization of the estate post-confirmation.[106]

The Code explicitly permits trustees—and thus debtors-in-possession[107]—to pursue certain claims for the benefit of the estate.[108] Section 1123(b)(3)(B) provides a statutory basis under which debtors and trustees can retain and enforce these claims post-confirmation.[109] The claims retained under § 1123(b)(3)(B) often include avoidance actions,[110] which are explicitly referenced in chapter 5 of the Code.[111] Litigating all preference actions prior to plan confirmation may be either impractical or impossible,[112] so avoidance actions involving preferences, as described in § 547(b), [113] are commonly retained using §

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106. 11 U.S.C. § 1123(b)(3)(B).

107. Dynasty Oil & Gas, LLC v. Citizens Bank (*In re* United Operating, LLC), 540 F.3d 351, 355 (5th Cir. 2008); *see* 11 U.S.C. § 1141(b) ("Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."); Compton v. Anderson (*In re* MPF Holdings US LLC), 701 F.3d 449, 453 (5th Cir. 2012) ("In general, when a chapter 11 reorganization plan is confirmed by the bankruptcy court, the debtor losses [sic] its debtor-in-possession status and with it, standing to pursue the estate's claims.").

108. *See infra* note 111 and accompanying text.

109. § 1123(b)(3)(B) (A plan may provide for "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest").

110. For a brief overview of avoidance actions, see John D. Ayer, Michael Bernstein & Jonathan Friedland, *Overview of Avoidance Actions*, 23-MAR AM. BANKR. INST. J. 26 (2004).

111. The Code provides explicit limits on avoiding powers, both protecting vulnerable creditors and potential defendants and providing a reasonable level of finality and notice. Section 546 prescribes limitations on the time under which an action may be commenced under sections 544, 545, 547, 548, or 553, along with other explicit limitations. 11 U.S.C. § 546. Section 551 supports the expansive nature of the estate provided for under section 541 by automatically preserving any property of the estate from avoided transfers for the benefit of the estate. 11 U.S.C. § 551.

112. Elk Horn Coal Co. v. Conveyor Mfg. & Supply, Inc. (*In re* Pen Holdings, Inc.), 316 B.R. 495, 498–99 (Bankr. M.D. Tenn. 2004).

113. 11 U.S.C. § 547(b). Preference claims, a type of avoidance action, allow a trustee to recover money, property, or lien rights that were the subject of a preferential transfer, but the law is strict and a trustee must prove the six elements in section 547(b) before recovery. Harlin DeWayne Hale & Andrew G. Edson, *Preferences in Bankruptcy Cases, or Do I Really Have to Give the Money Back?*, 60-FEB FED. LAW. 66 (2013). Allowing trustees to bring preference claims protects the estate against preferential treatment of certain creditors, to the detriment of others, where the

1123(b)(3)(B).[114] Plans of reorganization may also seek to retain claims involving actions under § 548 for the avoidance of fraudulent transfers and other obligations incurred by the debtor,[115] as well as actions to recover setoffs under §553(b)(1).[116] By allowing for post-confirmation pursuit of these claims, § 1123(b)(3)(B) broadens the scope of the powers provided for by chapter 5 of the Code in order to maximize the estate.[117]

D. THE TRUSTEE'S POWER TO SETTLE OR ADJUST ESTATE CLAIMS AND INTERESTS

In addition to the power to retain claims under § 1123(b)(3)(B), debtors-in-possession and trustees also have the separate ability to adjust and settle claims.[118] While the fiduciary duties that the debtor-in-possession and the trustee owe to the creditors and shareholders necessarily limit these abilities,[119] both parties have exceptionally broad discretion in exercising their settlement powers.[120]

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recipients of such transfers receive more than they otherwise might. 11 U.S.C. § 547(b)(5).

114. The impractical nature of litigating all preference actions prior to plan confirmation necessitates the right of a reorganized debtor to overcome the res judicata effect of confirmation and reserve the right to bring such actions post confirmation. *Pen Holdings*, 316 B.R. at 498–99; *see* Kmart Corp. v. Intercraft Co. (*In re* Kmart Corp.), 310 B.R. 107, 119 (Bankr. N.D. Ill. 2004).

115. 11 U.S.C. § 548. Allowing the retention of fraudulent transfer claims enables the trustee to assist in "avoid[ing] fraud and self-dealing by a debtor at the expense of the estate's creditors." United States v. Sims (*In re* Feiler), 218 F.3d 948, 955 (9th Cir. 2000).

116. 11 U.S.C. § 553(b)(1); *see* Braniff Airways, Inc. v. Exxon Co. (*In re* Braniff Airways, Inc.), 814 F.2d 1030, 1040 (5th Cir. 1987) ("If section 553(b) is applicable, pre-petition setoffs within the 90 day period before filing that improve the creditor's position can be recovered by the trustee.").

117. *See infra* Part II.

118. FED. R. BANKR. P. 9019 ("[T]he court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.").

119. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 355 (1985).

120. *See, e.g.*, Shaia v. Three Rivers Woods, Inc. (*In re* Three Rivers Woods, Inc.), No. 98-38685, 2001 WL 720620, at *5–7 (Bankr. E.D. Va. Mar. 20, 2001). The trustee brought a motion to compromise a claim in a chapter 7 case, and a hearing was held to determine whether the settlement was reasonable, as "a compromise or settlement will most likely gain approval if it is both fair and equitable, as well as representative of the

Allowing debtors-in-possession and trustees to waive and settle claims enables them to exercise their judgment for the benefit of the estate.[121] Claims, including those explicitly retained under § 1123(b)(3)(B), may be settled under § 1123(b)(3)(A).[122] Debtors-in-possession and trustees have broad power to settle matters, and courts generally defer to their judgment where it conceivably benefits the estate.[123]

II. NAVIGATING § 1123(B)(3)(B) TO DETERMINE THE SUFFICIENCY OF CLAIM RESERVATIONS

While courts vary in their precise interpretations of § 1123(b)(3)(B), a clear split exists as to whether general or categorical, reservations of claims will suffice, or whether even more express reservations are required.[124] Courts have broad discretion to permit very general claim reservations in plans of reorganization and disclosure statements under the broad language of § 1123(b)(3)(B).[125] There is no direct statutory requirement for explicit or individual reservation of claims in order to pursue such claims post-confirmation.[126] Courts must then rely on wavering standards when determining whether to permit the retention of claims under particular circumstances, and these determinations have a lasting impact due to the res judicata effect of plan confirmation.

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best interests of the estate as a whole." *Id.* at 6 (internal quotations omitted). A court has even gone as far as to interpret the permissive language in Rule 9019 to allow a trustee discretion over whether or not to seek court approval of a settlement. *See In re* Dalen, 259 B.R. 586, 598–99 (Bankr. W.D. Mich. 2001).

121. *See supra* note 91 and accompanying text.

122. 11 U.S.C. § 1123(b)(3)(A)-(B) (2012).

123. *See* W. HOMER DRAKE, JR. & CHRISTOPHER S. STRICKLAND, CHAPTER 11 REORGANIZATIONS § 12:21 (2d ed., 2012) (explaining that "[a] settlement generally will be approved if it falls within the zone or range of reasonableness, allows the debtor to concentrate on running the business, avoids significant expenses and inconvenience of suit, is otherwise fair and equitable in its terms, and serves the interests of equity securities holders generally").

124. *Compare* discussion Part II.A. *with* discussion *infra* Part II.B.

125. *See infra* Part II.A.

126. *See* 11 U.S.C. § 1123(b)(3)(B).

A. GENERAL "BLANKET" RESERVATIONS IN PLANS OF REORGANIZATION

The most generous view regarding the reservation of claims under § 1123(b)(3)(B) allows for blanket reservations.[127] These broad, all-encompassing reservations enable debtors to simply reserve all claims, which may add significant value to the estate by allowing for maximum claim retention.[128] Allowing blanket reservations of debtors' right to pursue claims also expedites the confirmation process.[129] Requiring debtors to identify and catalogue the specific claims to be retained post-confirmation would require that debtors evaluate all claims filed against the debtor and the debtor's estate, in order to decide whether to pursue, reserve, or abandon any claims prior to starting the process of plan confirmation.[130] Although blanket reservations relieve debtors of this burden, courts rarely permit such broad reservations of causes of action in either the plan or the disclosure statement.[131]

JP Morgan Trust Co. v. Mid-America Pipeline Co. provides a prime example of why courts might permit general claim reservations.[132] The plan of reorganization granted the trustee "exclusive right to 'enforce any and all **present or future** Litigation Claims' . . . **whether known or unknown,** that the Debtors, the Estates, or the Bankruptcy Committees may hold or assert against any non-Debtor Entity."[133] Based on this blanket reservation, the trustee sought to retain, for the

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127. *See infra* Part II.B. for a discussion of alternative views.

128. *See* JP Morgan Trust Co. v. Mid-Am. Pipeline Co., 413 F. Supp. 2d 1244, 1281 (D. Kan. 2006).

129. Cohen v. TIC Fin. Sys. (*In re* Ampace Corp.), 279 B.R. 145, 159 (Bankr. D. Del. 2002) (explaining that requiring debtors to determine all possible actions to be preserved before confirmation would slow down the reorganization process to the detriment of both creditors and debtors); *see also* Amarex Inc. v. Marathon Oil Co. (*In re* Amarex, Inc.), 74 B.R. 378, 380 (Bankr. W.D. Okla. 1987), *aff'd*, 88 B.R. 362 (W.D. Okla. 1988) (". . . §1123(b)(3)(B) serves the useful function of allowing confirmation of a plan before possible claims against others have been fully investigated and pursued.").

130. *In re* Weidel, 208 B.R. 848, 853 (Bankr. M.D.N.C. 1997) (requiring debtors to catalog all objections to claims in the plan of reorganization or disclosure statement "would be lengthy, would seriously delay the proposal of a plan as well as confirmation, and would eat into the debtor's exclusivity period").

131. *See* discussion *infra* Part III.B.

132. *Mid-Am. Pipeline*, 413 F. Supp. 2d. at 1280–81.

133. *Id.* at 1278. The plan of reorganization further defined 'Litigation Claims' as all "claims, rights, causes of action, defenses, counterclaims, suits or proceedings, whether in law or in equity." *Id.*

benefit of the estate, a non-bankruptcy claim for the termination of a lease, valued at potentially $30 million.[134]

The defendants opposed the reservation of the claim under § 1123(b)(3)(B) as lacking sufficient specificity.[135] They argued that while general reservations may preserve "garden variety preference or avoidance action[s]," they should not suffice to reserve a claim of this magnitude.[136] The court, however, did not find merit in this distinction.[137] The district court broadly held that the purpose of § 1123(b)(3)(B) is at least partly to provide notice to creditors regarding potential funds that could increase the estate and thus the distributions to creditors.[138]

Blanket reservations, such as the one found in this plan of reorganization, provide sufficient notice to creditors and defendants alike.[139] Courts may enforce such broad reservations in order to promote the maximization of the bankruptcy estate.[140] Due to the res judicata effect of plan confirmation,[141] permitting such broad claims reservations offers debtors the widest latitude to pursue claims post-confirmation for the benefit of the estate.[142]

B. Specific Reservations in Plans of Reorganization

The majority of courts faced with deciding whether retained claims may be enforced pursuant to § 1123(b)(3)(B) have found that a more express reservation of such claims in the plan of reorganization is required.[143] Some of these courts interpret this to require simply that the debtor disclose categories of claims the debtor intends to retain, while other courts require disclosure of the particular claims.

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134. *Id.* at 1280–81. The defendants terminated a lease for the use of a pipeline for transporting natural gas to a refinery owned by the debtor. *Id.* at 1254.

135. *Id.* at 1280.

136. *Id.* at 1280–81.

137. *Id.* at 1281.

138. *Id.*

139. *See id.*

140. *See supra* note 14 and accompanying text.

141. *See supra* Part I.A.1.

142. *See* discussion *infra* Part II.B.

143. Tracar, S.A. v. Silverman (*In re* Am. Preferred Prescription, Inc.), 266 B.R. 273, 277 (E.D.N.Y. 2000) (explaining that a majority of courts have held "the plan must expressly reserve the right to pursue *that particular claim* post-confirmation and that a blanket reservation allowing for an objection to *any claim* is insufficient").

1. Categorical Reservations

No clear standard exists as to what exactly is required to enforce claims reservations, but many courts find categorical claims reservations to be sufficient. While not as narrow as individual reservations of claims,[144] categorical reservations still narrow the scope of allowed claims by requiring extra foresight from debtors and necessitating more specificity than blanket claims reservations.[145] Allowing for the reservation of categories of claims provides notice to those potential defendants who might want to object to the plan's reservation prior to confirmation,[146] while still enabling debtors to maximize the estate through § 1123(b)(3)(B) claim retention.[147] Categorical reservations promote bankruptcy's goal of ensuring that all similarly situated creditors are treated alike, and they help ensure that recoveries from retained causes of action serve to benefit creditors, and more specifically unsecured creditors.[148]

In *In re P.A. Bergner & Co.*, the Seventh Circuit supported this balancing of the general goals of bankruptcy with the rights of creditors and the need to maximize the bankruptcy estate.[149] The court held that

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144. *See infra* Part II.B.2.

145. *See supra* Part II.A.

146. Defendants of claims retained post-confirmation have multiple opportunities to object to such reservations prior to the binding effect of plan confirmation under section 1141(a). Defendants whom fail to object prior to confirmation are precluded from later objecting to the enforcement of the causes of action. Cohen v. TIC Fin. Sys. (*In re* Ampace Corp.), 279 B.R. 145, 160 (Bankr. D. Del. 2002).

147. Regardless of the stated purpose for allowing categorical reservations of claims under section 1123(b)(3)(B), courts that do so encourage claims that would otherwise be abandoned to be included as estate property. *See, e.g.*, Buckley v. Goldman, Sachs & Co., No. 02- 11497, 2005 WL 1206865 (D. Mass. May 20, 2005) (finding retention of cause of action permissible where plan language specifically referenced the intent to retain avoidance actions); Katz v. I.A. Alliance Corp. (*In re* I. Appel Corp.), 300 B.R. 564, 567–69 (S.D.N.Y. 2003), *aff'd*, 104 F. App'x 199 (2d Cir. 2004) (allowing the reservation of claims arising under the Code's recovery provisions); Temex Energy, Inc. v. Hastie & Kirschner (*In re* Amarex, Inc.), 96 B.R. 330, 333 (W.D. Okla. 1989) (permitting the general reservation of preference and fraudulent transfer actions in the plan); Texas Consumer Fin. Corp. v. First Nat'l City Bank, 365 F. Supp. 427, 432 (S.D.N.Y. 1973) (allowing reservation of preference actions where the plan specifically retained jurisdiction to pursue such actions).

148. *See* Retail Mktg. Co. v. King (*In re* Mako, Inc.), 985 F.2d 1052, 1054–56 (10th Cir. 1993).

149. P.A. Bergner & Co. v. Bank One, Milwaukee, N.A. (*In re* P.A. Bergner & Co.), 140 F.3d 1111 (7th Cir. 1998).

the language of § 1123(b)(3)(B) is sufficiently broad to allow for categorical reservation of claims, which are express in their categorization but do not specifically identify individual claims.[150] Here, the debtor commenced adversary proceedings to recover preferential payments in the amounts of $31,207,000 and $6,358,000.[151] The plan of reorganization explicitly retained avoidance and recovery actions, but it did not specifically identify the claims in question.[152]

The court held that plans need only retain claims of a given type and found that the actions were not barred.[153] The court went even further in emphasizing the importance of recovery to the estate, finding that the recovery action should be allowed even though it would not directly benefit creditors, but instead would benefit the reorganized entity.[154] Bankruptcy courts have subsequently relied on this case to find categorical reservations of claims sufficient,[155] promoting the wealth maximization of the estate for the benefit of all stakeholders.

The First and Tenth Circuits have similarly held that categorical reservations of claims satisfy the requirements of § 1123(b)(3)(B). In *In re Bankvest Capital Corp.*, the First Circuit expressly chose not to address whether §§ 1123 and 1141 operated together to give plan confirmation a res judicata effect, but the court still found that the plan properly retained the avoidance action at issue.[156] The language in the plan only generally authorized the liquidating supervisor to "investigate, prosecute and, if necessary, litigate, any Cause of Action," but the definition provided for "Cause of Action" expressly included avoidance actions.[157] The defendant argued that while the plan did reserve avoidance actions, it did not specifically reserve the avoidance action at issue.[158] The court, however, found the categorical reservation sufficient to preserve the representative of the bankruptcy estate's general right to

150. *Id.* at 1117.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 1118.
155. *See, e.g.*, Kmart Corp. v. Intercraft Co. (*In re* Kmart Corp.), 310 B.R. 107, 124 (Bankr. N.D. Ill. 2004).
156. Fleet Nat'l Bank v. Gray (*In re* Bankvest Capital Corp.), 375 F.3d 51, 59–60 (1st Cir. 2004).
157. *Id.* at 59.
158. *Id.* at 60.

bring avoidance actions.[159] The Tenth Circuit came to the same conclusion in *In re Mako*, finding categorical reservations of avoidance actions sufficient under § 1123(b)(3)(B), indicating to debtors that such categorical reservations may be sufficient to retain post-petition claims.[160]

In finding a general reservation of claims insufficient in *Harstad v. First American Bank*, the Eighth Circuit implied that a more express categorical reservation might have been sufficient.[161] The plan contained a "Continuing Jurisdiction" provision which provided that the bankruptcy court would retain jurisdiction over "all causes of actions [sic] between Debtors and any other party, including but not limited to any right of Debtors to recover assets pursuant to the provisions of the Code."[162] The court focused on the lack of sufficient notice to creditors, affirming the bankruptcy court's holding that the debtors lacked standing to pursue a claim due to insufficient reservation in the plan of reorganization.[163] The bankruptcy court focused its holding on the need for those subject to preference actions to be explicitly aware of this possibility in the plan in order to confirm the plan properly.[164] Highlighting the language of § 1123(b)(3)(B), the court explained that retention language must be clear and unequivocal.[165] The circuit court held that debtors should specifically reserve their right to pursue certain types of claims post-confirmation, as creditors are entitled to know the debtors' intention to pursue preference actions.[166] Although the court affirmed the bankruptcy court's holding, finding the blanket reservation insufficient, the court did not explain precisely what type of reservation would be sufficient.[167]

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159. *Id.*

160. Retail Mktg. Co. v. King (*In re* Mako, Inc.), 985 F.2d 1052, 1056 (10th Cir. 1993) (holding that the reservation of avoidance actions was sufficient to expressly reserve such a cause of action in the plan of reorganization).

161. Harstad v. First Am. Bank, 39 F.3d 898 (8th Cir. 1994).

162. *Id.* at 902.

163. *Id.* at 904.

164. Harstad v. First Am. Bank (*In re* Harstad), 155 B.R. 500, 509–10 (Bankr. D. Minn. 1993), *aff'd*, No. 4-90-869, 1994 WL 526013 (D. Minn. Jan. 20, 1994), *aff'd*, 39 F.3d 898 (8th Cir. 1994).

165. *Harstad*, 155 B.R. at 510. The court reasoned that "Congress specifically said: If a debtor wants to preserve what would normally be lost, its plan must provide for such retention. Congress knew how to provide a specific exception. Debtors must know how to invoke it." *Id.*

166. *Harstad*, 39 F.3d at 903.

167. *Id.*

The Fifth Circuit consistently identifies its standard as requiring "specific and unequivocal" claim reservations,[168] however, in practice, this seems to permit categorical reservations. The Fifth Circuit adopted this approach in *In re United Operating, LLC*.[169] The plan of reorganization in this case broadly retained "any and all claims arising under the Code," and it also more expressly reserved certain categories of claims covered under the Code.[170] The court held, however, that neither of these reservations was sufficient to retain the common-law claim at issue.[171] The court grounded its argument in bankruptcy's basic goal of settling all assets and liabilities of a debtor promptly and effectively.[172] The court did not state how unequivocal the reservation must be to satisfy this heightened standard and permit retention of the breach of contract claim.[173] The court, however, did cite to other cases finding categorical reservations sufficient.[174] While a specific and unequivocal standard sounds as if it would necessitate extremely detailed reservations, categorical reservations might still provide the debtor standing to pursue those claims owned by the estate prior to plan confirmation.

The Fifth Circuit subsequently held in *In re Texas Wyoming Drilling, Inc.*, that where a plan simply reserved "Avoidance Actions against pre-petition shareholders of TWD," it specifically and unequivocally retained the claims.[175] The court did not decide whether individual defendants must be identified.[176] Rather, it found the reservation, which included a class of prospective defendants, sufficient.[177] Although this reservation appears to be categorical, it

168. Dynasty Oil & Gas, LLC v. Citizens Bank (*In re* United Operating, LLC), 540 F.3d 351, 355 (5th Cir. 2008).
169. *Id.*
170. *Id.* at 356.
171. *Id.*
172. *Id.* at 355.
173. *Id*.
174. *Id.* It is unclear whether a reservation of "all common-law causes of action" would have been sufficient, or whether the debtor would have been required to more specifically retain all breach of contract claims.
175. Spicer v. Laguna Madre Oil & Gas II, LLC (*In re* Tex. Wyo. Drilling, Inc.), 647 F.3d 547, 552 (5th Cir. 2011).
176. *Id*.
177. *Id.*

provides more by naming a class of defendants.[178] It is unclear whether without this specific identification of defendants, a general reservation of avoidance actions would have been enforceable.[179]

Most recently, the Fifth Circuit somewhat clarified the application of its "specific and unequivocal" standard in *In re MPF Holdings US LLC*.[180] In reversing the bankruptcy court's ruling that the reservation language in the plan was too ambiguous, the court held that plan language that preserved all avoidance actions, except those individual actions explicitly abandoned, was sufficiently specific and unequivocal.[181] The language referenced categories of claims to be reserved, but it failed to specify any potential defendants.[182] While the court in effect held that claims reservations do not need to name potential defendants, the decision did not explicitly state this, nor did it reveal any bright line rule as to what exactly is required to meet the Fifth Circuit's "specific and unequivocal" standard.[183]

Delaying plan confirmation by requiring specific and unequivocal reservations of individual claims or defendants under § 1123(b)(3)(B) risks delaying creditors' recovery or inducing debtors to expedite plan confirmation by abandoning claims to the detriment of the estate.[184] Categorical reservations indicating the type or category of reserved claims provide sufficient notice that claims might be pursued post-

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178. *Id*. The Fifth Circuit did not clearly establish whether claims reservations must somehow identify potential defendants to satisfy the specific and unequivocal standard. *Compare* Moglia v. Keith (*In re* Manchester, Inc.), Adv. No. 09-3027, No. 08-30703, 2009 WL 2243592 (Bankr. N.D. Tex. July 16, 2009) (finding the reservation "specific and equivocal" even though it failed to list the names of potential defendants), *with In re* MPF Holding US LLC, 443 B.R. 736 (Bankr. S.D. Tex. 2011), *rev'd* Compton v. Anderson (*In re* MPF Holdings US LLC), 701 F.3d 449, 457 (5th Cir. 2012) (concluding rather that all potential defendants must be individually identified in the plan).

179. The court did not specifically address this matter in *In re* Tex. Wyo. Drilling, Inc., 647 F.3d 547 (5th Cir. 2011).

180. Compton v. Anderson (*In re* MPF Holdings US LLC), 701 F.3d 449, 457 (5th Cir. 2012) (holding reservation of claims in plans of reorganization must be sufficiently specific and unequivocal to be enforced).

181. *Id.* at 456–57.

182. *Id.* at 457.

183. *In re* MPF Holdings US LLC, 701 F.3d 449.

184. Katz v. I.A. Alliance Corp. (*In re* I. Appel Corp.), 300 B.R. 564, 569 (S.D.N.Y. 2003), *aff'd*, 104 F. App'x 199 (2d Cir. 2004). Delaying creditors' recovery and unnecessarily speeding up the plan confirmation process both undermine the Code's purpose of achieving "maximum distribution in the minimum time with all creditors of the same class sharing ratably." *Id.* (citation omitted).

confirmation.[185] Categorical reservations promote general judicial deference, and courts approving such claims reservations balance the need for specificity and finality with the goal of maximizing the bankruptcy estate for the benefit of both the creditor and debtor.[186]

2. Reservations of Individual Claims

Courts have also interpreted the res judicata effect of plan confirmation to require explicit reservations of individual claims.[187] Courts requiring such express reservations set a very high bar on debtors' ability to pursue pre-existing claims pursuant to § 1123(b)(3)(B).[188] In these cases, where a plan merely contains a general reservation or categorical reservations of claims, the plan of reorganization is binding and functions as res judicata, barring a debtor or trustee from bringing any individual actions which the plan does not expressly reserve.[189]

Just one year prior to its decision in *In re P.A. Bergner & Co.*,[190] the Seventh Circuit in effect held, without reference to § 1123, that reservations of claims in chapter 11 plans must be more specific than general or categorical reservations.[191] In *D & K Properties Crystal Lake v. Mutual Life Insurance Co. of New York,* the court decided whether a paragraph in the debtor's confirmed plan, permitting the disbursing agent to "enforce all causes of action existing in favor of the Debtor," was sufficient to avoid the defense of res judicata and allow the agent to

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185. Cohen v. TIC Fin. Sys. (*In re* Ampace Corp.), 279 B.R. 145, 160 (Bankr. D. Del. 2002) (allowing for the general reservation of avoidance actions). The court emphasized that where there is a general reservation of preference or avoidance actions, those creditors who might be subject to such a reserved claim are properly on notice that individual claims against them are being reserved. *Id.* at 161; *see also* Cooper v. Tech Data Corp. (*In re* Bridgeport Holdings, Inc.), 326 B.R. 312, 327 (Bankr. D. Del. 2005).

186. *See supra* notes 57-59 and accompanying text.

187. *See, e.g.*, cases cited *infra* notes 190-197.

188. *See, e.g.*, cases cited *infra* notes 190-197.

189. Eric W. Anderson, *Can the Disclosure Statement Supplement the Plan to Preserve Estate Claims?*, 30-OCT AM. BANKR. INST. J. 26, 84 (2011).

190. P.A. Bergner & Co. v. Bank One, Milwaukee, N.A. (*In re* P.A. Bergner & Co.), 140 F.3d 1111, 1117 (7th Cir. 1998).

191. *See* D & K Props. Crystal Lake v. Mut. Life Ins. Co., 112 F.3d 257 (7th Cir. 1997).

pursue a bad faith breach of contract claim.[192] The court held that to reserve individual claims, the claims must be expressly and specifically identified in the plan.[193] The court focused its holding on the purpose of finality in a confirmed plan, finding that general reservations function to reserve nothing.[194]

Similarly, in *In re Kelley*, the Ninth Circuit Bankruptcy Appellate Panel emphasized that the policy of the Code prefers the debtor disclose all potential causes of action in its finding that the claims at issue were not effectively reserved in the confirmed plan.[195] The case involved the debtor's potential reservation of counterclaims against claims of creditors that the debtor had expressly disclosed in its plan.[196] While the plan disclosed the claims of the creditors, there was no explicit reservation of the counterclaims to permit the debtor to pursue those causes of action post-confirmation.[197] The court held that res judicata does not apply where a confirmed plan expressly reserves the right to litigate a specific cause of action post-confirmation.[198] Since, however, the debtor did not expressly reserve the counterclaims, they could not be pursued.[199]

In practice, few courts strictly require explicit reservations of individual causes of action. Courts, however, may still find debtors and trustees to be barred from bringing actions that are not individually reserved pursuant to the broad language of §§ 1123 and 1141.[200] In the absence of any clear standard permitting less exacting claims reservations, the interpretation of particular claims reservations remains uncertain.

C. Reservations in Disclosure Statements

The Bankruptcy Code and Rules provide for the filing of a disclosure statement to supplement the plan of reorganization, unless the

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192. *Id.* at 260.

193. *Id.* at 261. The court favorably cited *In re* Kelley, which required individual claims be identified in order to be retained. *Id.* at 261; *see also* Kelley v. S. Bay Bank (*In re* Kelley), 199 B.R. 698, 703–04 (B.A.P. 9th Cir. 1996).

194. *D & K Props.*, 112 F.3d at 261.

195. *Kelley*, 199 B.R. at 703.

196. *Id.* at 704.

197. *Id.*

198. *Id.*

199. *Id.*

200. *See, e.g.*, cases cited *supra* notes 190-197.

debtor intends the plan itself to provide adequate information.[201] Under § 1125(a)(1), the disclosure statement should provide such adequate information as is required for an investor to make an informed judgment regarding the plan.[202] Debtors may choose to reserve claims in their disclosure statements, regardless of whether they are also reserved in the plan, but it is unclear whether these reservations will be enforceable under § 1123(b)(3)(B).[203]

Where a plan of reorganization does not provide sufficient grounds for supporting the enforcement of post-confirmation causes of action, courts may look to the disclosure statement to determine whether to permit claim retention.[204] Courts differ in their view as to whether such reservation in a disclosure statement is necessary or sufficient,[205] and accordingly in the specificity required in order for such reservations to be enforceable.[206] Ultimately, the language in § 1123(b)(3)(B) neither explicitly nor implicitly addresses whether claims may also be preserved in the disclosure statement nor the level of specificity which would be required.[207]

The Sixth Circuit addressed the potential inclusion of claims reservations in a disclosure statement in *Browning v. Levy.*[208] In

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201. FED. R. BANKR. P. 3016:

> In a chapter . . . 11 case, a disclosure statement under § 1125 of the Code or evidence showing compliance with § 1126(b) shall be filed with the plan or within a time fixed by the court, unless the plan is intended to provide adequate information under § 1125(f)(1). If the plan is intended to provide adequate information under § 1125(f)(1), it shall be so designated and Rule 3017.1 shall apply as if the plan is a disclosure statement.

202. 11 U.S.C. § 1125(a)(1) (2012).

203. *See, e.g.*, Browning v. Levy, 283 F.3d 761 (6th Cir. 2002).

204. Spicer v. Laguna Madre Oil & Gas II, LLC (*In re* Tex. Wyo. Drilling, Inc.), 647 F.3d 547, 550 (5th Cir. 2011) ("[C]ourts routinely consult the disclosure statement in deciding whether res judicata and judicial estoppel apply.").

205. In *In re Kelley*, the court held that that "if the debtor fails to mention the cause of action in either his schedules, disclosure statement, or plan, then he will be precluded from asserting it post-confirmation." 199 B.R. 698, 704 (B.A.P. 9th Cir. 1996). By using the word either, the court again implies that if sufficient, a claims reservation in a disclosure statement might be acceptable, even in the absence of such a reservation in the plan of reorganization.

206. *See, e.g.*, Ice Cream Liquidation, Inc. v. Coolbrands Int'l, Inc. (*In re* Ice Cream Liquidation, Inc.), 319 B.R. 324 (Bankr. D. Conn. 2005); *Browning*, 283 F.3d 761.

207. 11 U.S.C. § 1123(b)(3)(B); *see also* Spicer v. Laguna Madre Oil & Gas II, LLC (*In re* Tex. Wyo. Drilling, Inc.), 647 F.3d 547, 551 (5th Cir. 2011).

208. *Browning*, 283 F.3d at 774.

Browning, the plan of reorganization failed to reserve the claim at issue; however, the disclosure statement provided for a blanket reservation of rights.[209] The court broadly held that a general reservation of rights in a disclosure statement is not sufficient to avoid the res judicata effect of plan confirmation.[210] The court left open the possibility that a more express reservation in the disclosure statement, despite no reservation in the plan, might be sufficient to allow for the enforcement of reserved claims.[211]

Furthermore, where a plan does not retain post-confirmation claims, courts may permit claim retention in the disclosure statement to supplement the plan. For instance, in *In re Ice Cream Liquidation, Inc.*, the court found that a disclosure statement can sufficiently put creditors on notice regarding potential post-confirmation preference actions.[212] Denying a debtor the ability to pursue claims properly retained in the disclosure statement, but not in the plan, serves only to provide a windfall to the potential defendants at the expense of both the debtor and the creditors.[213]

Claim reservations included in disclosure statements may also serve to cure insufficient reservations in plans. While, as a general matter, the Fifth Circuit requires specific and unequivocal reservations of claims to permit retention,[214] it has allowed the disclosure statement to provide such reservation.[215] In *In re Texas Wyoming Drilling, Inc.*, the Fifth Circuit held that where the plan generally reserved avoidance actions and the disclosure statement further reserved the right to retain avoidance actions against specified prospective defendants, the specific and unequivocal standard was met.[216] The disclosure statement may

209. *Id.*

210. *Id.*

211. *See id.*

212. Ice Cream Liquidation, Inc. v. Coolbrands Int'l, Inc. (*In re* Ice Cream Liquidation, Inc.), 319 B.R. 324, 337 (Bankr. D. Conn. 2005).

213. Appeal of SWR, Inc., 12-1 BCA P 34988 (A.S.B.C.A.), ASBCA No. 56708, 2012 WL 1075711, at *6–7 (Armed Services Bd. Of Contract Appeals Mar. 19, 2012).

214. *See supra* notes 168-183 and accompanying text. Though, as previously discussed, it is unclear precisely what "specific and unequivocal" requires.

215. Spicer v. Laguna Madre Oil & Gas II, LLC (*In re* Tex. Wyo. Drilling, Inc.), 647 F.3d 547 (5th Cir. 2011).

216. *Id.* at 552. The court in *Goldin Assocs., L.L.C. v. Donaldson, Lufkin & Jenrette Securities Corp*. held that a debtor's general reservation of claims in the plan of reorganization should be read in conjunction with the disclosure statement. No. 00-8688, 2004 WL 1119652, at *3 (S.D.N.Y. May 20, 2004). Thus, a more specific reservation of claims in the disclosure statement may permit pursuing such actions,

thus supplement the plan to provide added specificity and adequate information to creditors.

While apparent that the language in § 1123(b)(3)(B) provides minimal guidance as to what is required to properly reserve claims in a plan of reorganization,[217] the language does explicitly confine claim reservations to those made within the plan.[218] Section 1123(b)(3)(B) provides that a *plan* may provide for the retention of claims, but nowhere in its language does it reference the ability to retain claims in disclosure statements.[219] Still, courts may look to disclosure statements to cure insufficient reservations of claims in the plan, or more broadly, to support such reservation where the plan entirely lacks any reservation.

III. STANDARDIZING THE APPROACH TO ANALYZING POST-CONFIRMATION CLAIM RETENTION

Plan confirmation effectively releases claims, having a res judicata effect in chapter 11, in the absence of the exception provided for by § 1123(b)(3)(B).[220] The current standard, or lack thereof, for determining whether or not claims may be retained post confirmation leaves bankruptcy courts largely on their own to determine what standard to apply,[221] and practitioners are left to guess as to how much specificity is sufficient when drafting plans of reorganization.[222] Without a clear standard, plan proponents risk abandoning claims and estate property

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where an otherwise insufficient blanket reservation in the plan would not. Basic contract law also supports reading and interpreting the disclosure statement and the plan as a whole, considering their unified execution and intertwined subject matter. *See* Kroblin Refrigerated Xpress, Inc. v. Pitterich, 805 F.2d 96, 107 (3d Cir. 1986).

217. *See supra* Part II.

218. *See* 11 U.S.C. § 1123.

219. 11 U.S.C. § 1123; *see also Tex. Wyo. Drilling*, 647 F.3d at 551 ("§ 1123(b)(3)(B) does not explicitly or implicitly address whether claims may also be preserved in the disclosure statement."). Only in rare cases, where a literal interpretation would forsake the drafters' intent, should courts step outside of the plain meaning of statutes. *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989).

220. *See supra* Part I.A.

221. *See* Envirodyne Indus., Inc. v. Conn. Mut. Life Co. (*In re* Envirodyne Indus., Inc.), 174 B.R. 986 (Bankr. N.D. Ill. 1994).

222. *See supra* Part II.B.

depending both on the specificity in the drafting of their plan documents and the standard applied by the court in evaluating them.[223]

A. THE ROLE OF § 1123(B)(3)(B) IN MAXIMIZING ESTATE VALUE

As debtors increasingly use chapter 11 as a tool to financially restructure companies, it also comes under criticisms for the low returns received by unsecured creditors.[224] Claim retention under § 1123(b)(3)(B) provides a means to enhance the scope of the bankruptcy estate and potentially increase the distributions to creditors.[225] Maximizing the estate for the general benefit of creditors supports a broad allowance of retained claims, which categorical reservations in the plan of reorganization provide.[226] Since plan confirmation is the goal of chapter 11 cases,[227] enabling creditors to rely on such broad reservations has the potential to encourage creditors to approve plans where outstanding causes of action belonging to the debtor might increase the potential distributions.[228]

The Code explicitly provides for an expansive estate after debtors file an order for relief under chapter 11.[229] While the language of § 1123(b)(3)(B) fails to provide an explicit standard for determining the permissiveness of retained claims,[230] other parts of § 1123 aid in its interpretation. As a general matter, § 1123(b)'s provisions are subject to subsection (a)'s provisions.[231] Section 1123(a)(5)(A), in particular, provides that "a plan shall provide adequate means for the plan's implementation, such as retention by the debtor of all or any part of the

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223. *See supra* Part II.B-C.

224. Theodore Eisenberg & Stefan Sundgren, *Is Chapter 11 Too Favorable to Debtors? Evidence from Abroad*, 82 CORNELL L. REV. 1532, 1533 (1997).

225. *See supra* note 80 and accompanying text. When creditors evaluate a plan of reorganization, prior to voting on it, they analyze the potential distributions it provides.

226. *See supra* Part II.B.1.

227. *See supra* note 43 and accompanying text.

228. *See supra* notes 132-134 and accompanying text. The ability to rely on broad reservations enables debtors to confirm plans of reorganization without the fear of abandoning potentially large claims, and subsequently diminishing their relative distributions.

229. *See supra* notes 16-20 and accompanying text.

230. *See supra* Part II.

231. 11 U.S.C. § 1123(b) (2012); *see also* Blum v. Stenson, 465 U.S. 886, 896 (1984) ("Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language.").

property of the estate."[232] Under § 541, claims of the debtor are property of the bankruptcy estate,[233] and thus they should generally be retained by the debtor for the purposes of applying § 1123(b)(3)(B). Considering that there is no explicit requirement that debtors retain causes of action for the benefit of the estate,[234] and because the language of § 1123(b)(3)(B) *is* susceptible to a reading permitting broad reservations,[235] courts should interpret the provision within the general policies of bankruptcy.[236]

B. Interpreting the Language of § 1123(b)(3)(B) to Broaden the Estate

The permissive language of § 1123(b)(3)(B) provides that debtors *may* reserve causes of action.[237] Encouraging a broad interpretation of the language of § 1123(b)(3)(B) advances the goal of the bankruptcy code to protect creditors.[238] Further, it promotes the maximization of the bankruptcy estate by easing the burden on plan proponents in drafting enforceable statements of claim retention in their plan documents.[239] The language of § 1123(b)(3)(B) should be read broadly to support the maximum possible bankruptcy estate for the benefit of both creditors and debtors.[240]

While blanket reservations of all outstanding claims do support the maximization of the bankruptcy estate,[241] they provide insufficient notice, allowing debtors to retain any and all potential claims post-confirmation with mere boilerplate language.[242] Courts frequently address the sufficiency of notice in determining whether claims reservations are enforceable.[243] Where res judicata is implicated, notice

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232. 11 U.S.C. § 1123(a)(5)(A).
233. *See supra* notes 23-24 and accompanying text.
234. Section 1123(b)(3)(B) is written in permissive terms, using *may* as opposed to *shall*. 11 U.S.C. § 1123(b)(3)(B).
235. *See supra* Part II.A.
236. *See supra* notes 14-25 and accompanying text.
237. 11 U.S.C. § 1123(b)(3)(B).
238. *See infra* note 266.
239. *See supra* notes 129-130 and accompanying text.
240. *See supra* notes 2-5 and accompanying text.
241. JP Morgan Trust Co. v. Mid-Am. Pipeline Co., 413 F. Supp. 2d 1244, 1281 (D. Kan. 2006).
242. *See supra* Part I.A.
243. *See supra* notes 75-81.

provides an important judicial function.[244] General blanket reservations fail to meet minimal standards of providing notice to potential defendants, considering the finality that § 1141 is intended to provide upon the confirmation of a plan of reorganization.[245] Case law, however, provides little guidance beyond the fact that courts generally find blanket reservations impermissible under § 1123(b)(3)(B).[246]

1. Categorically Avoiding Unnecessary Specificity

Courts should adopt a more uniform, stringent requirement that debtors can rely on in drafting plan documents. Courts, however, should not go as far as requiring the cataloguing of individual claims or potential defendants to permit claim retention in a plan of reorganization, as it is ultimately unnecessary and may be prejudicial to the estate.[247] Requirements that plans reserve claims with "specific and unequivocal" language leaves open the possibility that courts will require more than simple categorical claim reservations.[248] The requirement that claim reservations be "specific and unequivocal" merely replaces an ambiguous statute, open to varying interpretations, with a slightly less ambiguous standard.[249] Allowing general categorical reservations, however, provides reasonable notice to creditors, while

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244. *See supra* note 27 and accompanying text.

245. *See supra* Part I.A.

246. *See supra* Part II.A.

247. Prior to the enactment of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), debtors were able to obtain nearly endless extensions of their exclusivity period "for cause" under section 1121 to file a plan of reorganization. *See* Jeffrey M. Schlerf, *BAPCPA's Impact on Exclusivity Is Hard to Gauge*, TURNAROUND MGMT. ASSOC. (July 1, 2007), http://www.turnaround.org/Publications/Articles.aspx?objectID=7797. The lack of limits on debtors' exclusivity period was criticized for resulting in unnecessary delays, and giving the debtors undue bargaining leverage to force, otherwise unwilling, creditors to settle. *Id.* Debtors' virtually unrestricted ability to obtain extensions to file a plan did, however, provides debtors with the extensive time it might require to catalogue every single claim intended to be retained under § 1123(b)(3)(B). BAPCA limited this ability by fixing the debtor's exclusivity period at 120 days under § 1121(b), with only the possibility of an extension up to 18 months with court approval. 11 U.S.C. § 1121(b)-(d); *see also* Paolo Manganelli, *The Evolution of the Italian and U.S. Bankruptcy Systems–A Comparative Analysis*, 5 J. BUS. & TECH. L. 237, 254 (2010).

248. *See supra* notes 177-179 and accompanying text.

249. *See supra* notes 171-173 and accompanying text.

also providing debtors reasonable guidelines under which to draft plans of reorganization.[250]

Allowing broad categorical reservations permits courts to take into account and balance the role of reserved claims against the need for finality upon plan confirmation.[251] The context of the reservation at issue should be examined to determine whether the particular reservation sufficiently reveals the potential assets available for distribution to creditors.[252] Courts are more than capable of determining whether a given claim fits into a certain category of reservations.[253] Where a debtor, for instance, retains all avoidance actions, courts can properly infer that the debtor intended to retain preference actions.[254] Additionally, holders of claims within those retained categories, and other interested parties, receive sufficient notice that plan confirmation will not alter the debtors' pre-existing right to enforce those causes of action.[255]

Moreover, regardless of whether courts permit claims to be retained under § 1123(b)(3)(B), other laws governing the claims will still apply to protect prospective defendants. The Code contains implicit protections for the causes of action that debtors frequently seek to retain post-confirmation.[256] Where a debtor generally retains avoidance actions, such as preference, fraudulent conveyance, or set-off actions, those sections' stringent requirements must still be met.[257] Furthermore, where retained claims are for causes of action outside of bankruptcy, such as personal injury or breach of contract claims, other defenses such as statute of limitations and the statute of frauds will still apply.[258]

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250. *See supra* notes 146-147 and accompanying text.

251. *See supra* Part II.B.1.

252. *See* Elk Horn Coal Co. v. Conveyor Mfg. & Supply, Inc. (*In re* Pen Holdings, Inc.), 316 B.R. 495, 504 (Bankr. M.D. Tenn. 2004).

253. *See supra* Part II.B.1. Where a debtor categorically retains "all avoidance actions," courts can conclude that the debtor intended to retain preference actions. Similarly, where a debtor retains "all contract actions," courts can reasonably infer that the debtor intended to retain causes of action for breach of contract.

254. *See supra* notes 149-153.

255. *See supra* note 75.

256. *See supra* note 111.

257. *See, e.g.*, *supra* note 113.

258. Section 558 of the Code reserves to the debtor all defenses available outside bankruptcy law. 11 U.S.C. § 558 (2012). As a matter of equity, defendants of claims brought by the debtor would not be barred from asserting appropriate defenses.

As such, specific and unequivocal reservations of these claims, beyond mere categorical reservations, are unnecessary.

2. Compromising Finality with Claim Retention

In order for the confirmation of a plan of reorganization to compromise a claim, the court must determine that it is both fair and equitable to the estate.[259] Under Federal Bankruptcy Rule 9019, for either a compromise or even a settlement of a claim to be approved, the court must authorize it after notice and hearing.[260] Debtors-in-possession and trustees even have broad discretion under the business judgment rule and fair and equitable standards to waive or release claims contained in a plan where it is in the best interest of the estate.[261] Since the rights of creditors may also be harmed by denying claim retention under § 1123(b)(3)(B),[262] courts should have to determine whether abandoning a claim for being improperly retained under § 1123(b)(3)(B) is fair and equitable.[263] Considering the individual treatment that compromises, settlements, and waivers of claims receive, it is both reasonable and manageable for claims retained categorically under § 1123(b)(3)(B) to receive similar treatment.[264]

Ultimately, allowing potentially significant claims to be disposed of because they were not sufficiently retained in the plan of reorganization betrays basic principles of the Code, and it denies creditors the right to seek the maximization of the estate through the enforcement of pre-

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259. In this determination, the court considers the: "(a) probability of success in litigation; (b) difficulties, if any, to be encountered in matter of collection; (c) complexity of litigation involved, and expense, inconvenience, and delay necessarily attending it; and (d) paramount interest of creditors and proper deference to their reasonable views." BANKRUPTCY SERVICE, LAWYERS EDITION § 44:158; JPMorgan Chase Bank v. Charter Commc'ns Operating LLC (*In re* Charter Commc'ns), 419 B.R. 221, 257 (Bankr. S.D.N.Y. 2009) ("Courts look to whether releases are in the estate's best interest, as well as the role they play in the Plan and the value the Plan brings to the estate.").

260. FED. R. BANKR. P. 9019.

261. *See* U.S. Bank. Nat'l Assoc. v. Wilmington Trust Co. (*In re* Spansion, Inc.), 426 B.R. 114 (Bankr. D. Del. 2010).

262. *See infra* Part I.A.

263. *See supra* notes 119-120 and accompanying text. If courts can make determinations of fairness and equitability in these scenarios, it seems reasonable they make them when deciding whether or not claims have been properly reserved.

264. *See infra* Part I.C.

existing claims post-confirmation.[265] The concept of the "creditor's bargain heuristic" has been advanced to promote the concept that bankruptcy should neither increase nor decrease those rights creditors would have bargained for pre-petition.[266] Overly restrictive claims reservations requirements may delay plan formation and confirmation by increasing the litigation prior to confirmation, subsequently reducing creditor recoveries.[267] Permitting broad claim retention under § 1123(b)(3)(B) supports a creditor-friendly approach to chapter 11 reorganizations.[268] Those creditors with legitimate claims against them are not losing the benefit of their bargain by having these claims enforced,[269] and the bankruptcy estate as a whole benefits through the maximization of estate property.[270]

Debtor corporations use chapter 11 to reorganize as going concerns, generating the income necessary to pay pre-petition creditors.[271] Having access to as large a pool of funds as possible when attempting to generally satisfy obligations to creditors greatly benefits debtors while reorganizing.[272] Foreclosing potentially retained claims by requiring

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265. Elk Horn Coal Co. v. Conveyor Mfg. & Supply, Inc. (*In re* Pen Holdings, Inc.), 316 B.R. 495, 504 (Bankr. M.D. Tenn. 2004) ("§ 1123(b)(3) protects the estate from loss of potential assets. It is not designed to protect defendants from unexpected lawsuits."). Although some of these claims may be against creditors with active claims, in the form of avoidance actions, this does not negate the need to actively pursue all monies owed to the debtor in favor of the creditors as a class.

266. WARREN, *supra* note 6, at 13. Scholars have gone as far as to argue that creditor protection is the exclusive rationale for bankruptcy. *See id.*; *see also* Robert E. Scott, *Through Bankruptcy With the Creditors' Bargain Heuristic*, 53 U. CHI. L. REV. 690, 694 (1986) ("The central premise underlying the creditors' bargain vision is that bankruptcy is a foreseeable risk that can be (and is) borne individually by the various claimants of any business enterprise, including secured and unsecured creditors, shareholders, and managers.").

267. Michael H. Goldstein, Res Judicata *Strikes Twice*, 21-OCT AM. BANKR. INST. J. 16, 41 (2002).

268. DENNIS J. CONNOLLY, DAVID A. LANDER, & TIMOTHY M. LUPINACCI, 2012 NORTON BANKRUPTCY LAW SEMINAR MATERIALS: PREFERENCE LITIGATION 81 (2012), *available at* http://www.nortoninstitutes.org/2012SeminarMaterials/12-Preference Litigation/M12-PreferenceLitigationTOC.html.

269. *See supra* notes 79-80 and accompanying text.

270. *See supra* notes 30-32 and accompanying text.

271. Official Comm. of Unsecured Creditors v. PSS S.S. Co. (*In re* Prudential Lines Inc.), 928 F.2d 565, 573 (2d Cir. 1991).

272. *See supra* notes 2-5 and accompanying text, *see also* Chapter 11: Reorganization Under the Bankruptcy Code, UNITED STATES COURTS, *available at*

explicit designations of such claims risks diminishing the size of the estate,[273] thereby reducing the funds available for distribution to creditors.[274] Permitting broad categorical claim retention under § 1123(b)(3)(B) rather serves to benefit both the debtor and the creditors as a whole by allowing for a more efficient plan confirmation.[275]

CONCLUSION

The language of § 1123(b)(3)(B) provides minimal guidance regarding the level of specificity required in order to retain claims post confirmation, through either the plan of reorganization or disclosure statement. Case law similarly fails to provide a clear standard or consistent guidance as to how to determine whether debtors sufficiently retain claims. Even those courts purporting to apply a certain standard vary in their application of those standards and their justifications for so applying them.

While the majority of courts require more than a blanket reservation of claims, there does not exist a uniform standard for applying § 1123(b)(3)(B). Courts should adopt a uniform standard—one that permits broad categorical reservations. Then, retained claims can be individually addressed to determine whether they fit appropriately within the categories of claims retained by the debtor. In the absence of such a standard, debtors are left unsure as to the specificity required in their chapter 11 filings, and potential defendants may or may not be on notice of those causes of action which may be brought against them.

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http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter11.aspx ("After the plan is confirmed, the debtor is required to make plan payments and is bound by the provisions of the plan of reorganization.").

273. *See supra* notes 132-138 and accompanying text. Failing to permit the retention of the claim at issue would have greatly diminished the size of the estate and the funds available for distribution.

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

275. *See supra* note 129 and accompanying text.