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Part I. Business Bankruptcy
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Preserving Claims for Postconfirmation Litigation

I. Introduction

Oops!

Prior to confirmation, you suffered the "slings and arrows"[1] of any debtor in possession's attorney, filing the petition, schedules and statement of financial affairs, weathering the first day pleadings and their attendant, and often acrimonious, hearings. With the patience of Job, you negotiated a cash collateral agreement with the lender(s) and dealt with the assumption/rejection issues of an interminable number of executory contracts and unexpired leases. Perhaps you had to request an extension of the exclusivity period more than once. Eventually, an exit strategy was devised, a disclosure statement approved and, at last, a plan of reorganization confirmed. Part of the plan involved the retention of causes of action. The proceeds of litigation would go towards paying the unsecured creditors.

Postconfirmation you begin drafting and filing complaints, initiating adversary proceedings for avoidable transfer and other assorted causes of action. And then you get it. Maybe you get more than one: a motion to dismiss for the failure to preserve causes of action. How did that happen? You had a retention section in the plan (and the disclosure statement for that matter). It was towards the back, with all of the other miscellaneous boiler-plate looking provisions. You may not have spent a great deal of time thinking about it and just "cut and pasted" a comparable provision from another plan into this one.

Postconfirmation litigation can be a considerable source of funds and is often used as a bargaining chip with unsecured creditors. If the debtor does not correctly preserve its causes of action, those assets are thrown away. It is comparable to buying an expensive meal and then not eating it. Plan proponents need to be careful when trying to retain causes of action postconfirmation. If they aren't, they will inevitably suffer that "oops moment" when their failure to give this the consideration it deserves is brought to their attention with a motion to dismiss. This article explores these issues.

II. The Res Judicata Effect of a Confirmation Order

The effect of confirmation of a plan of reorganization and confirmation order on a bankruptcy estate is governed by § 1141.[2] The doctrine of res judicata bars a party from relitigating claims that were or could have been asserted in an earlier proceeding.[3] Under res judicata, a final judgment on the merits bars further claims by parties or those in privity with them based on the same cause of action.[4] This doctrine protects litigants from the "expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."[5] It is fully applicable to bankruptcy court decisions, and final orders issued by a bankruptcy court.[6] Res judicata has been held to be applicable to financing orders, claims allowance orders, and confirmation orders.[7]

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The finality of interests aspects of res judicata are very important in the context of bankruptcy where numerous claims and interests are amassed, objected to, determined, and released.[8] In bankruptcy, the court asks itself whether an independent judgment in a separate proceeding would "impair, destroy, challenge, or invalidate the enforceability or effectiveness of the reorganization plan."[9] The confirmation order binds the debtor and its creditors whether or not they accepted the confirmed plan and, therefore, it has a preclusive impact.[10] Res judicata bars not only the actual parties to an earlier bankruptcy proceeding from later bringing suits which should have been brought in the context of that proceeding, but also those in privity with those parties.[11] Confirmation of a Chapter 11 plan has res judicata effect with respect to causes of action that became assets of the Chapter 11 estate.[12]

For res judicata to apply, four factors must be present: (a) the parties must be identical in both suits; (b) the prior judgment must have been rendered by a court of competent jurisdiction; (c) there must be a final judgment on the merits; and (d) the same cause of action must be involved in both lawsuits.[13] If these elements are established, then the judgment or decree upon the merits in the first action is an absolute bar to the later lawsuit.[14]

Res judicata is related to, although analytically different from, collateral estoppel.[15] Collateral estoppel bars the relitigation in a different cause of action involving a party to a cause of action where an issue is actually and necessarily determined by a court of competent jurisdiction.[16] Issue preclusion, or collateral estoppel, promotes the interest of judicial economy by treating specific issues of fact or law that are validly or necessarily determined between two parties as final and conclusive.[17] It applies if another court has already provided a trustworthy determination of a particular issue of fact or law because a party that has already litigated that issue should not be given another chance to attack that determination in a second suit.[18]

Collateral estoppel is only applicable if the following four factors are present: (a) the issue is identical to the one decided in the first action; (b) the issue is actually litigated in the first action; (c) resolution of the issue was essential to a final judgment in the first action; and (d) a party against whom estoppel is invoked had a full and fair opportunity to litigate the issue in the first action.[19] Some courts have added an extra requirement that there be no special circumstance that would make it unfair to apply the doctrine. This last, extra, requirement has been cited in cases where issue preclusion has been employed offensively, and so this requirement arguably only applies in those cases.[20] Besides these historical factors, the Fifth Circuit also requires the presence of certain other "safe guards" before issue preclusion can apply, which include: (a) the facts and legal standards used to assess them must be the same in both proceedings; (b) the quality or extensiveness of the procedure followed by the two courts must not be so different as to require a new determination of the issues; and (c) the issue at stake must have been critical, necessary, and integral to the prior judgment.[21]

The basic concept of res judicata and collateral estoppel "is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies."[22] A fundamental requirement of both res judicata and collateral estoppel is the presence of a judgment.[23]

The party seeking to establish that the doctrine of res judicata applies has the burden of proving all of its elements. That party also carries the burden of establishing that no exception to res judicata exists. Doubts are resolved against preclusion.[24]

It is beyond dispute that a bankruptcy court's order confirming a plan of reorganization constitutes a final judgment on the merits and is to be given preclusive effect under the doctrine of res judicata.[25] A confirmation order is a final judgment on the merits concerning the issues addressed in the plan of reorganization.[26]

III. The Statutory Basis for Claims Preservation

Courts recognize that an exception exists to the general rule that a confirmed Chapter 11 plan of reorganization precludes a debtor or a related party from advancing claims that were or should have been brought during the Chapter 11 case. Res judicata will not apply where a claim is expressly reserved by the litigant in the earlier bankruptcy proceeding.[27] The scope of the preclusive effect is limited by the content of the plan and the confirmation order.[28]

This exception to the res judicata effect of a confirmation order can only come about if there is a reservation of something. Plans with no retention provisions at all will not suffice to protect the claim from the binding effect of the plan.[29] Attempts to manufacture a reservation by relying on other plan provisions, such as those related to the reservation of jurisdiction or the appointment of an estate representative, are doomed to failure.[30] On the one hand, if the debtor expressly reserves a cause of action in the plan, that cause of action is excepted from the operation of res judicata; but, on the other hand, the failure of a plan to provide for the retention and enforcement of a claim by a debtor results in the loss of that claim.[31]

Section 1123 distinguishes between what a plan must include, in § 1123(a), and what a plan may include, in § 1123(b).[32] The power of retention is codified in § 1123(b)(3), which states that 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.[33] While this provision of the Bankruptcy Code allows a plan to provide for the retention and enforcement by the debtor of any claim or interest belonging to the debtor or the estate, the plan must contain an adequate retention provision.[34] Although § 1123(b)(3) is not exactly an express disclosure or notice provision, it has been looked upon by some courts as serving a notice and disclosure function.[35] The debtor, by including a § 1123(b)(3) retention section in its plan, is disclosing and giving notice of its intent to reserve to the estate certain claims for postconfirmation enforcement. The disclosure and notice given by this type of a provision is directed at the estate's creditors, not the potential defendants on the reserved claims.

> Creditors have the right to know of any potential causes of action that might enlarge the estateand that could be used to increase payment to the creditors. Even if, as the [Debtors] claim, they gave notice of such claims by indicating in their disclosure that the availability of such claims was being investigated, the creditors are entitled to know if the debtor intends to pursue preferences in post-confirmation actions. Compliance with § 1123(b) gives notice of that intent. Only then are creditors in a position to seek a share of any such recoveries, contingent though they may be, and to have the mechanics of the preference-sharing spelled out in the plan. Creditors are in no position to do so if they are not on notice that the debtor retains the power to pursue recovery.[36]

Section 1123(b)(3) protects the estate from the loss of potential assets. It is not meant to protect defendants from unexpected lawsuits. The language necessary to satisfy this provision of the Bankruptcy Code must be measured in the context of each case and the particular claims at issue: did the reservation allow creditors to identify and evaluate the assets potentially available for distribution.[37] This Bankruptcy Code section is crucial to creditors in their evaluation of likely distributions under a chapter 11 plan and it is important to creditors who may become defendants in a later postconfirmation action by the debtor.[38]

While § 1123(b)(3) states that a debtor is entitled to retain any claim belonging to the debtor or the estate, that statute is silent on what language the debtor must use in order to accomplish that result.[39]

IV. Claims Preservation Provisions

A. Blanket Claims Preservation Provisions

Under the law today, there are two categories of "rights reservations" in Chapter 11 plans. First are "blanket" reservations, containing broad language purporting to grant postconfirmation entities powers to pursue any and all claims which could have

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been pursued by the debtor in possession or an appointed case trustee preconfirmation.[40] The majority courts that have looked at this issue have held that for this exception to res judicata to apply, the plan reservation cannot be a blanket reservation, which is considered to be insufficient. A general reservation of rights does not suffice to avoid res judicata.[41]

> [The] blanket reservation was of little value to the bankruptcy court and the other parties to the bankruptcy proceeding because it did not enable the value of [the] claims to be taken into account in the disposition of the debtor's estate. Significantly, it neither names SSD nor states factual bases for the reserved claims ... [the] blanket reservation does not defeat application of *res judicata* to its claims against SSD.[42]

In the case of *Browning v. Levy*,[43] the Sixth Circuit entered a seminal ruling on blanket reservations. There, after confirmation of a Chapter 11 plan, the successor to the debtor ("NW") intervened as a plaintiff in a lawsuit against the debtor's majority shareholder. NW then joined the law firm Squires, Sanders & Dempsey ("SSD") as a defendant asserting causes of action for legal malpractice and breach of duty arising from SSD's representation of the debtor's majority shareholder before bankruptcy. SSD raised confirmation as a bar to the breach of duty and malpractice claims. The reorganized debtor responded that it had reserved the claims against SSD in an "omnibus reservation of rights" provision in the disclosure statement that accompanied the confirmed plan which read: "In accordance with § 1123(b) of the Bankruptcy Code, the company shall retain and may enforce any claims, rights, and causes of action that the debtor or its bankruptcy estate may hold against any person or entity, including, without limitation, claims and causes of action arising under §§ 542, 543, 544, 547, 548, 550 or 553 of the Bankruptcy Code." The Sixth Circuit found this reservation of rights to be a blanket one and, consequently, unenforceable.[44]

In *Micro-Time*,[45] the case in issue was a malpractice action against certain attorneys who were the lawyers for the Chapter 11 trustee. The preservation language in that case was at least as general as the wording rejected in *Browning v. Levy*: "all causes of action which the debtor may choose to institute shall be vested in the debtor." Without any mention of § 1123(b)(3), the Sixth Circuit held that the quoted language did not expressly reserve the claim to any such lawsuit.

Similarly, in *D & K*, the Seventh Circuit ruled that a prepetition breach of contract action against a bank was not preserved by a plan that stated "the dispersing agent ... shall enforce all causes of action existing in favor of the debtor."[46]

B. Categorical Claims Preservation Provisions

The second type of a preservation provision is a specific reservation in which a plan identifies the type of actions to be reserved by Bankruptcy Code sections or other clearly defining wording.[47] These cases stand for the proposition that plan provisions that identify causes of action by type or category are not blanket reservations and can be effectively used to avoid the bar of res judicata.[48]

There is logic behind allowing categorical reservation of rights provisions. Large Chapter 11 liquidation bankruptcy cases usually end up with the filing of hundreds of preference actions. In these types of cases, unless the debtor's business was sold as a going concern with the purchaser insisting on eliminating or limiting preference actions in order to not disturb its business relationship with vendors and suppliers, the prosecution of preference actions will normally be given to a liquidating trustee or administrator whose appointment will usually be selected by the creditors' committee. That representative will also be responsible for the claims resolution process. These functions are expensive and time consuming, frequently taking many months, if not years, after a plan has been confirmed. This is usually not done by the debtor or by the creditors' committee during plan negotiations and confirmation. It is typically postponed until a later time.[49]

In fact, in large Chapter 11 cases, the investigation and litigation of all potential avoidance actions to final judgment can possibly take a number of years. To force the debtor to remain in bankruptcy until a determination is made on what transfers represent

viable preference actions would be harmful both to the debtor and its creditors by slowing down the reorganization process. That is why in many large Chapter 11 cases, the plan of reorganization or liquidation is confirmed before the debtor or the debtor's representative has undertaken a detailed investigation of preference actions.

In large Chapter 11 cases, there can be up to thousands of transactions within the ninety (90) day look-back period and a substantial amount of time and effort is necessary to investigate those transactions and their potential defenses. Due to these circumstances, it is not inappropriate to postpone this undertaking until the plan of reorganization is confirmed.[50] It is both impractical and unnecessary for a disclosure statement and/or plan to list each and every possible defendant against which a debtor or its representative may bring an avoidance action.[51] In fact, no such specificity exists in § 1123(b)(3)(B), and there is nothing in that provision to even suggest or imply that a plan must specifically identify each and every claim or interest belonging to the debtor that may be subject to retention and enforcement.[52]

Besides being numerous, potential preference actions can require extensive accounting and prefiling preparation by the debtor or trustee. For example, in the *Kmart* bankruptcy case, potential preference actions totaled approximately $6 billion.[53]

However, a debtor needs to be careful in how it drafts its categorical reservation provision. If such a provision is not worded correctly, the debtor's postconfirmation ability to litigate claims will be lost. This is illustrated by the case of *In re Ice Cream Liquidation, Inc.*,[54] where a Chapter 11 debtor in possession brought an adversary proceeding subsequent to planned confirmation, to set aside an alleged improper setoffs and preferential transfers and to compel turnover of the estate's property. The court ruled that where the debtor's confirmed plan, despite specifically reserving the debtor's right to pursue preference and fraudulent transfer claims postconfirmation, made no mention either of a turnover statute or of the debtor's continuing right to seek turnover of estate assets, only referring in a general way to the debtor's right to liquidate estate property and to exercise powers and duties conferred on it by operation of law, the plan did not preserve the right to pursue such turnover claims postconfirmation, although the debtor was not barred, by the res judicata affect of its confirmed plan, from pursuing preference claims because the language in the debtor's confirmed plan was sufficient to preserve the debtor's right to pursue preference claims postconfirmation.

C. Preserving One Cause of Action Against a Party Does Not Preserve All Causes of Action Against That Party

The proper preservation of one cause of action against a party does not preserve all causes of action against that party. This was discussed in *In re Western Integrated Networks, LLC*,[55] where the trustee of a liquidating trust established under a debtor's confirmed Chapter 11 plan brought an adversary proceeding to compel turnover and to avoid certain transfers. The defendant counterclaimed for declaratory relief. On a motion to dismiss, the court held that the trustee did have standing to pursue post-confirmation claims to satisfy transfers under preference or fraudulent transfer provisions of the Bankruptcy Code, where the plan specifically reserved the right of the liquidating trustee to commence adversary proceedings to enforce any claim or interest belonging to the debtors, including any claim or interest arising under preference or fraudulent transfer statutes (the plan preserved causes of action under §§ 547 to 551); but the reservation of rights language in the plan did not sufficiently reserve the right to bring a turnover or strong arm claim, and accordingly the claim for turnover could not be pursued once the Bankruptcy Court confirmed the Chapter 11 plan. There was a specific finding that claims for turnover under §§ 542 and 544 were not specifically reserved in the debtor's Chapter 11 plan and the court held that the argument that §§ 542 and 544 claims should survive confirmation was unpersuasive.[56]

A similar ruling was handed down in the case of *In re Ice Cream Liquidation, Inc.*,[57] where the confirmed plan preserved the right to prosecute claims under §§ 544, 547, 548, and 550, but did not preserve any turnover causes of action under § 542. Postconfirmation, an adversary proceeding was filed to set aside certain alleged improper setoffs and preferential transfers and to compel the turnover of estate property. Although the court determined that the language in the confirmed plan was sufficient to preserve the debtor's right to pursue preference claims postconfirmation and that the debtor was not barred by res judicata from doing that, the court also held that where that plan made no mention of either the turnover statute or the debtor's continuing

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right to seek turnover of estate assets, only referring in a general way to the debtor's right to liquidate estate property and to exercise powers and duties conferred on it by operation of law, the plan did not preserve the right to pursue such turnover claims postconfirmation.[58]

D. Naming a Party as a Potential Defendant in the Plan for Preserved Causes of Action Does Not Entitle the Debtor to Sue That Party Postconfirmation for Unpreserved Causes of Action

A case that directly speaks to this issue is *In re A.P. Liquidating Co.*,[59] where after the Chapter 11 plan was confirmed, the creditors' committee and liquidating agent brought a cause of action against a creditor of the estate, Qwest Communications Corp. ("Qwest"), for breach of contract that allegedly led to the debtor's bankruptcy, and fraud. The plan had a very general claims reservation provision that attempted to preserve any and all of the debtor's claims. The plan also contained language describing the dispute with Qwest and stating that if that matter could not be settled, then an adversary proceeding would be filed against Qwest postconfirmation.[60] Despite this language, the claims against Qwest were dismissed because even though Qwest was specifically mentioned as a possible defendant, the claims against Qwest that were filed postconfirmation were not preserved in the confirmed plan.

That case is to be contrasted with *In re TGX Corp.*,[61] where the reorganized debtor brought adversary proceedings against its former officers, directors, and related corporate entities to recover for their alleged breach of fiduciary duty, aiding and abetting such breaches, fraudulent transfers, fraud, conspiracy to defraud, breach of contract, and unjust enrichment. The plan preserved the debtor's right to pursue avoidable transfers, the NFG litigation and "any and all claims [of the debtor] against Paragon [its predecessors, successors, assigns or affiliated parties or entities]." The defendants argued that although the plan adequately preserved the debtor's ability to pursue Chapter 5 causes of action against them, the language regarding Paragon did not entitle the debtor to proceed with the non-Chapter 5 causes of action. The disclosure statement, however, referred to an examiner's report which detailed claims against many of the debtor's former insiders, directors, affiliates, and other related entities, and therefore the court ruled that the language in the plan regarding "any and all claims [of the debtor] against Paragon ..." included the non-Chapter 5 causes of action that were alleged. In essence, what happened in that case was that the debtor's plan specifically mentioned the defendants with respect to certain causes of action, but postconfirmation litigation involved additional causes of action not specified in the plan. The court ruled that this omission was cured by language in the disclosure statement.

V. Judicial Estoppel Prevents a Debtor from Pursuing Unpreserved Causes of Action Postconfirmation

Judicial estoppel, often called the doctrine against the assertion of inconsistent positions, is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that it previously asserted in the same or in a previous proceeding. It is not meant to eliminate all inconsistencies, however insignificant or inadvertent they may be. Instead, it is meant to prevent litigants from playing fast and loose with the judiciary.[62] This doctrine prevents a party from advancing inconsistent positions in order to gain an advantage in litigation.[63]

> Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contradictory position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.[64]

The fundamental reason for applying judicial estoppel is to protect the integrity of the judicial process by prohibiting parties from intentionally changing their position according to the circumstances of the moment.[65] This doctrine is employed in order to preserve the integrity of the judiciary by preventing a party from abusing the judicial process through "cynical gamesmanship."[66]

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Judicial estoppel is both a common law and an equitable doctrine which prevents a party from taking a position later in a legal proceeding that is inconsistent with a position that he took earlier in the same or a prior litigation,[67] and is invoked in order to prevent a party's self-contradiction.[68]

The purpose of judicial estoppel is to protect the integrity of the judicial process by preventing parties from playing "fast and loose" with the courts in order to suit the necessities of their own self-interests at that particular time,[69] and by preventing parties from improperly manipulating the machinery of the judicial system.[70] Judicial estoppel looks to the connection between the litigant and the judicial system while, on the other hand, equitable estoppel focuses on the relationship between the parties to the prior litigation.[71] Judicial estoppel is applied where a party intentionally self-contradicts itself as a way of obtaining an unfair advantage. In other words, when a party, after assuming one position in a legal proceeding, attempts to assume a contrary one later on, judicial estoppel is invoked to preclude that from happening. It applies whether the position first assumed was successful or not.[72]

The Bankruptcy Code imposes on debtors an express and affirmative obligation to disclose all assets, including contingent and unliquidated claims,[73] and this duty of disclosure is a continuing one, with the debtor being obligated to disclose all potential causes of action.[74] The debtor does not have to know each and every fact or even the legal basis for the cause of action. If the debtor has enough information before confirmation to believe that it may have a possible cause of action, then that cause of action is considered to be "known" and must be disclosed.[75]

The doctrine of judicial estoppel has been applied where a Chapter 11 debtor has failed to disclose a claim in its schedules or disclosure statement and the debtor then tries to litigate that claim after confirmation of its plan of reorganization.[76]

> The rationale for these decisions [applying the doctrine of judicial estoppel in reference to bankruptcy cases] is that the integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets. The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding ...[77]

Simply put, the duty of disclosure cannot be overemphasized.[78]

There are innumerable cases where debtors, or former debtors, have been precluded from pursuing claims about which they had knowledge but did not disclose them during their bankruptcy proceedings.[79] The courts will not allow a debtor to represent that no claims exist and then later assert undisclosed claims for its own benefit in a subsequent proceeding.[80]

The assertion of inconsistent positions does not automatically invoke the application of judicial estoppel unless there is the presence of intentional self-contradiction which is used as a way of obtaining an unfair advantage against a litigating opponent. Therefore, the doctrine of judicial estoppel does not apply when the prior position was taken because of a good faith mistake rather than as part of a plan to mislead the court.[81] For an inconsistent position to be enough to trigger judicial estoppel, it must be due to intentional wrongdoing. Judicial estoppel is considered to be an extraordinary remedy that is invoked when a party's inconsistent conduct would otherwise result in a miscarriage of justice. It is not intended to be a technical defense for litigants seeking to divert potentially meritorious claims. This is especially true when the alleged inconsistency is minor at best and there is no evidence of intent to manipulate or mislead the court. Judicial estoppel is not supposed to be a sword brandished by adversaries unless there is the presence of tactics which make it necessary to obtain substantial equity.[82]

For the most part, the invocation of judicial estoppel requires the presence of three factors: (a) the party to be estopped must have taken two positions that are irreconcilably inconsistent; (b) judicial estoppel is unwarranted unless the party changed her

position in bad faithi.e., with intent to play fast and loose with the court; and (c) a district court may not employ judicial estoppel unless it is tailored to address the harm identified and no lesser sanction would adequately remedy the damage done by the litigant's conduct.[83] In addition, as a result of undergoing an investigation of a judicial estoppel analysis, equity requires that a party that is going to be estopped be allotted a meaningful chance to explain why its position changed.[84]

In the Fifth Circuit, judicial estoppel has three requirements. First, a party will be judicially estopped only if its position is clearly inconsistent with a previous one taken. Second, the court must have acted on the previous position. Third, the party to be estopped must have acted intentionally, and not inadvertently.[85] Because judicial estoppel is meant to protect the judicial system, not the litigants, detrimental reliance by the opponent against whom judicial estoppel is applied is not required.[86]

There are a number of cases where courts have estopped a former debtor from pursuing litigation claims that it failed to identify in a prior bankruptcy case. In *Oneida Motor Freight, Inc. v. United Jersey Bank*,[87] the postconfirmation debtor was judicially estopped from asserting a breach of contract and fraudulent misrepresentation claims against a creditor bank. In *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*,[88] the debtor/franchisee was estopped from pursuing claims against its franchisor where the debtor failed to include those claims in its disclosure statement. In both of these cases, the debtors failed to timely raise claims even when they were aware of the pertinent facts and even after they had knowledge of their potential causes of action.

The difference between the principals of estoppel and res judicata is that estoppel is based upon the conduct of a party during the course of litigation while, on the other hand, preclusion follows from the fact of a judgment without a reference to any party's conduct.[89] Another example of estoppel is equitable estoppel, which prevents a party from asserting a claim or defense against another party who has detrimentally altered its position in reliance on the first party's misrepresentation or failure to disclose a material fact.[90]

These cases are to be contrasted with *In re Neptune World Wide Moving, Inc.*,[91] where the debtor's plan of reorganization preserved the ability of the debtor to object to proofs of claim; and prior to confirmation, the debtor did not object to the creditor's claim. Postconfirmation, the debtor objected to the creditor's claim and undertook discovery during which it found out that it had a claim for affirmative relief against the creditor and that the creditor had hidden this information from the debtor. In the claims objection process, a debtor cannot ask for affirmative relief in a claims objection but must instead file an adversary proceeding, which is what the debtor did. The creditor objected to this on the grounds of judicial and equitable estoppel because the debtor did not preserve the ability to seek affirmative relief from the creditor in its plan documents, but the court ruled that those documents don't apply when the creditor concealed matters from the debtor. Because of the concealment by the creditor, the debtor was not taking an inconsistent position and playing fast and loose with the court by seeking affirmative relief postconfirmation when its plan did not preserve its right to do so, which is a hallmark of judicial estoppel.

Similarly, in the case of *In re Worldwide Direct, Inc.*,[92] the liquidating trustee filed a motion to subordinate claims pursuant to § 510(b), based upon the sale and acquisition of stock. The claimants asserted that the liquidating trustee was precluded from subordinating their claims based upon res judicata. The confirmed plan reserved the right to object to claims, but did not specifically reserve the right to subordinate those claims. However, the disclosure statement advised that there may be claims that should be subordinated and that an investigation was ongoing. The court ruled in favor of the liquidating trustee holding that the plan's reservation of rights language in addition to the information contained in the disclosure statement gave the liquidating trustee the power to seek a subordination of the claims in issue.

VI. A Bankruptcy Court Lacks Postconfirmation Subject Matter Jurisdiction Over a Debtor's Unpreserved Claims

Plans almost uniformly contain a retention of jurisdiction provision, which are given effect as long as there is bankruptcy court jurisdiction to begin with. Neither the bankruptcy court nor the parties in interest are entitled to "write their own jurisdictional ticket." This means that subject matter jurisdiction "cannot be conferred by consent" of the parties.[93]

Where a court lacks subject matter jurisdiction over a particular dispute, a party is incapable of manufacturing it by an agreement even when that agreement is in a plan of reorganization.[94] Along these lines, if a court lacks jurisdiction over a dispute, it too cannot create that jurisdiction just by saying that it has jurisdiction in a confirmation order or other order.[95] Bankruptcy courts are only allowed to act in proceedings that are within their jurisdiction.[96] What this means is that if there is no jurisdiction under 28 U.S.C.A. § 157 or 1334, a retention of jurisdiction provision in a plan of reorganization or trust agreement does not matter. On the other hand, if the bankruptcy court does have jurisdiction, the retention of jurisdiction provision will be complied with by the court.[97]

Bankruptcy courts are courts that are given limited authority by Congress.[98] They are not considered to be Article III courts and are given their authority from federal statutes, not the Constitution.[99] Therefore, there are considerable limitations on what functions can be constitutionally delegated to bankruptcy courts.[100] A bankruptcy court's jurisdictional source is neither the Bankruptcy Code nor the specific provisions of a plan. Instead, it comes from 28 U.S.C.A. §§ 157 and 1334.[101]

Once a plan of reorganization is confirmed, the debtor is entitled to continue in its business affairs without further monitoring or approval from the bankruptcy court. The flip-side of this is that the debtor is also without the bankruptcy court's protection, and therefore cannot "come running to the bankruptcy judge every time something unpleasant happens."[102] As soon as a debtor's plan has been confirmed, the debtor's estate, along with its bankruptcy jurisdiction, no longer exists except for matters pertaining to the implementation or execution of the confirmed plan.[103] Once this happens, the previously broad swath of bankruptcy court jurisdiction is not needed to help with the administration of a debtor's estate because there is not an estate to reorganize anymore.[104]

A plan of reorganization is, in effect, a contract in its own right.[105] One judicial circuit has recently looked at the scope of postconfirmation jurisdiction in the case of *Craig's Stores*,[106] where after confirmation of its plan, the debtor sued its prepetition credit card servicer (a bank) under the parties' contract which had been assumed under the debtor's plan. Of significance, however, was the debtor's state law claim for damages against the bank which principally dealt with postconfirmation conduct between the parties. The debtor asserted that it could bring its postconfirmation claims against the bank in the bankruptcy court 18 months after confirmation because as long as a bankruptcy case remains open, jurisdiction exists if a dispute is related to the bankruptcy case under 28 U.S.C.A. § 1334(b).

The court disagreed and concluded that the bankruptcy court lacked jurisdiction because: (a) the claims principally dealt with postconfirmation relations between the parties; (b) there was no antagonism or claim pending between the parties as of the date of the reorganization; and (c) no facts or law deriving from the reorganization or the plan were necessary to the claim asserted by the debtor against the bank. The court specifically rejected the argument that jurisdiction existed just because the status of the contract with the bank would affect the distribution to creditors under the plan, noting that the same could be said of any other postconfirmation contractual relations.[107]

This circuit further honed its analysis of postconfirmation jurisdiction in the case of *U.S. Brass*,[108] by stating that 28 U.S.C.A. § 1334 does not expressly limit bankruptcy jurisdiction once plan confirmation occurs, but went on to say that several courts had adopted a broad "related to" test for the application of postconfirmation jurisdiction in disputes. Those courts found that a proceeding falls within the jurisdictional grant if it has a conceivable affect on the debtor's ability to consummate the plan; however, in the prior decision of *Craig's Stores*,[109] the court rejected that expansive view in favor of a "more exacting theory."

According to the court, after a debtor's reorganization plan has been confirmed, the debtor's estate and bankruptcy jurisdiction cease to exist other than for matters pertaining to the implementation or execution of the plan.

There are a number of cases which have held that where the plan and its accompanying confirmation order do not reserve or preserve the ability to pursue certain claims postconfirmation, the bankruptcy court no longer has jurisdiction over those claims.[110]

VII. Conclusion

Debtor's lawyers who treat the retention of causes of action provisions in a plan as an afterthought do so at their own risk. The failure to devote the necessary time and attention to preserving causes of action often leads to disappointment at the expense of those parties who are slated to receive the proceeds from that litigation. This comes at a time when there is no opportunity to cure the original mistake. Paying sufficient attention to this preconfirmation may well avoid that uncomfortable "oops moment" postconfirmation.

Research References:

Norton Bankr. L. & Prac. 2d §§ 95:1 to 95:5; 8 Norton Bankr. L. & Prac. 2d 11 U.S.C. § 1141; Bankruptcy Service, L Ed §§ 45:500 to 45:512

West's Key Number Digest, Bankruptcy 🔑3566 to 3568(2)

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Footnotes

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1 William Shakespeare (1564–1616), *Hamlet*, Act 3, Scene 1.

2 Section 1141 Effect of confirmation

> Except as provided in subsections (d)(2) and (d)(3) of this section, the 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, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

3 Brown v. Felsen, 442 U.S. 127, 131, 99 S. Ct. 2205, 60 L. Ed. 2d 767, 5 Bankr. Ct. Dec. (CRR) 226, 20 C.B.C. 273, 1 Collier Bankr. Cas. 2d (MB) 34, Bankr. L. Rep. (CCH) P 67122 (1979); In re Kmart Corp., 310 B.R. 107, 118, 43 Bankr. Ct. Dec. (CRR) 19, 52 Collier Bankr. Cas. 2d (MB) 52 (Bankr. N.D. Ill. 2004).

4 Montana v. U. S., 440 U.S. 147, 153 99 S. Ct. 97, 9730, 59 L. Ed. 2d 210, 25 Cont. Cas. Fed. (CCH) P 83034 (1979); In re Kmart Corp., 310 B.R. at 118.

5 Montana v. U. S., 440 U.S. at 153. In re Kmart Corp., 310 B.R. at 118; In re Ionosphere Clubs, Inc., 262 B.R. 604, 612, 37 Bankr. Ct. Dec. (CRR) 283 (Bankr. S.D. N.Y. 2001) ("Ionosphere"), citing Corbett v.

MacDonald Moving Services, Inc., 124 F.3d 8, 912, 31 Bankr. Ct. Dec. (CRR) 338 (2d Cir. 1997) ("Corbett"); and Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

6 In re Target Industries, Inc., 328 B.R. 99, 115–116 (Bankr. D. N.J. 2005) ("Target"), citing Katchen v. Landy, 382 U.S. 323, 334, 86 S. Ct. 467, 15 L. Ed. 2d 391, 9 Fed. R. Serv. 2d 38A.2, Case 6 (1966); In re Mariner Post-Acute Network, Inc., 267 B.R. 46, 52–53 (Bankr. D. Del. 2001) ("Mariner").

7 In re Target Industries, Inc., 328 B.R. at 115–116 citing Mariner, 267 B.R. at 52–53 (financing orders); Katchen v. Landy, 382 U.S. at 334 (claims orders); and Donaldson v. Bernstein, 104 F.3d 547, 554, 30 Bankr. Ct. Dec. (CRR) 242, Bankr. L. Rep. (CCH) P 77288 (3d Cir. 1997) (confirmation orders).

8 In re Ionosphere Clubs, Inc., 262 B.R. at 612 citing Corbett, 124 F.3d at 91.

9 In re Ionosphere Clubs, Inc., 262 B.R. at 612 citing Corbett, 124 F.3d at 91; and Sure-Snap Corp. v. State Street Bank and Trust Co., 948 F.2d 869, 875–876, Bankr. L. Rep. (CCH) P 74330 (2d Cir. 1991) ("Sure-Snap").

10 In re Ionosphere Clubs, Inc., 262 B.R. at 612. Sure-Snap Corp. v. State Street Bank and Trust Co., 948 F.2d at 873 (res judicata bars any attempt by parties to reorganization hearing to relitigate matters raised or that could have been raised). In re Target Industries, Inc., 328 B.R. at 117 ("it is a well accepted principal that a confirmation order is *res judicata* as to all issues decided or which could have been decided at the hearing on confirmation … this includes causes of action predicated on pre-confirmation activity that could have been raised prior to confirmation"); In re G-P Plastics, Inc., 320 B.R. 861, 864–865 (E.D. Mich. 2005) (a confirmed plan has the effect of a judgment by the district court and res judicata principals bar relitigation of any issues raised or that could have been raised in the confirmation proceedings); In re A.P. Liquidating Co., 283 B.R. 456, 459 (Bankr. E.D. Mich. 2002).

11 In re Crowley, Milner and Co., 299 B.R. 830, 844 (Bankr. E.D. Mich. 2003) ("Crowley"), citing Sanders Confectionery Products, Inc. v. Heller Financial, Inc., 973 F.2d 474, 481, Bankr. L. Rep. (CCH) P 74917, Fed. Sec. L. Rep. (CCH) P 96966, R.I.C.O. Bus. Disp. Guide (CCH) P 8063 (6th Cir. 1992); and Browning v. Levy, 283 F.3d 761, 772, 27 Employee Benefits Cas. (BNA) 1948, 2002 FED App. 0088P (6th Cir. 2002).

12 In re Pen Holdings, Inc., 316 B.R. 495, 498, 43 Bankr. Ct. Dec. (CRR) 214, 53 Collier Bankr. Cas. 2d (MB) 114 (Bankr. M.D. Tenn. 2004).

13 Brooks v. Raymond Dugat Co. L C, 336 F.3d 360, 362, 2003 A.M.C. 1728 (5th Cir. 2003); Mowbray v. Cameron County, Tex., 274 F.3d 269 282, 51 Fed. R. Serv. 3d 1031 (5th Cir. 2001); Cisco Systems, Inc. v. Alcatel USA, Inc., 301 F. Supp. 2d 599, 602 (E.D. Tex. 2004).

14 Cisco Systems, Inc. v. Alcatel USA, Inc., 301 F. Supp. 2d at 602.

15 In re Kmart Corp., 310 B.R. at 118, citing Adair v. Sherman, 230 F.3d 890, 893, 44 Collier Bankr. Cas. 2d (MB) 1072 (7th Cir. 2000) (citation omitted).

16 In re Kmart Corp., 310 B.R. at 118, citing Adair v. Sherman, 230 F.3d at 893.

17 MetraHealth Ins. Co. v. Drake, 68 F. Supp. 2d 752, 757 (E.D. Tex. 1999), citing U.S. v. Shanbaum, 10 F.3d 305, 311, 94-1 U.S. Tax Cas. (CCH) P 50032, 27 Fed. R. Serv. 3d 1221, 73 A.F.T.R.2d 94-571 (5th Cir. 1994).

18 MetraHealth Ins. Co. v. Drake, 68 F. Supp. 2d at 757, citing U.S. v. Shanbaum, 10 F.3d at 311.

19 Texas Instruments, Inc. v. Linear Technologies Corp., 182 F. Supp. 2d 580, 585 (E.D. Tex. 2002); Meador v. Oryx Energy Co., 87 F. Supp. 2d 658, 663–664 (E.D. Tex. 2000) ("Meador"), citing Winters v. Diamond Shamrock Chemical Co., 149 F.3d 387, 391 (5th Cir. 1998) ("Winters"); and U.S. v. Shanbaum, 10 F.3d

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at 311. Sport Supply Group, Inc. v. Columbia Cas. Co., 335 F.3d 453, 458 n. 4, 67 U.S.P.Q.2d 1225 (5th Cir. 2003).

20 Meador v. Oryx Energy Co., 87 F. Supp. 2d at 663–664 n. 2.

21 Meador v. Oryx Energy Co., 87 F. Supp. 2d at 663–664 n4, citing Winters v. Diamond Shamrock Chemical Co., 149 F.3d at 391 n3.

22 In re Kmart Corp., 310 B.R. at 119, citing Montana v. U. S., 440 U.S. at 153; and Southern Pac. R. Co. v. U.S., 168 U.S. 1, 48–49, 18 S. Ct. 18, 27, 42 L. Ed. 355 (1897).

23 In re Kmart Corp., 310 B.R. at 119.

24 In re Kmart Corp., 310 B.R. at 119, citing In re Associated Vintage Group, Inc., 283 B.R. 549, 565, 40 Bankr. Ct. Dec. (CRR) 84 (B.A.P. 9th Cir. 2002).

25 In re American Preferred Prescription, Inc., 266 B.R. 273, 277, 44 Collier Bankr. Cas. 2d (MB) 765 (E.D. N.Y. 2000), citing Stoll v. Gottlieb, 305 U.S. 165, 170–171, 59 S. Ct. 134, 83 L. Ed. 104 (1938); and Sure-Snap Corp. v. State Street Bank and Trust Co., 948 F.2d 869 at 872–873 (finding that order confirming plan of reorganization has preclusive effect under res judicata). See also, In re Justice Oaks II, Ltd., 898 F.2d 1544, 1550, 22 Collier Bankr. Cas. 2d (MB) 1304, Bankr. L. Rep. (CCH) P 73353 (11th Cir. 1990) ("This issue has been settled for some time: a bankruptcy court's order confirming a plan or reorganization is given the same effect as any district court's final judgment on the merits."); In re Friedberg, 1995 WL 733636 at *2 (S.D. N.Y. 1995) ("A confirmed bankruptcy reorganization plan constitutes a binding contractual arrangement under the doctrine of the law of the case. As such, a confirmed plan has preclusive effect under *res judicata* even against parties who opposed it.").

26 In re USN Communications, Inc., 280 B.R. 573, 586 (Bankr. D. Del. 2002), citing Eastern Minerals & Chemicals Co. v. Mahan, 225 F.3d 330, 336 n. 11, 44 Collier Bankr. Cas. 2d (MB) 1303 (3d Cir. 2000); Donaldson v. Bernstein, 104 F.3d at 554; In re Varat Enterprises, Inc., 81 F.3d 1310, 1315, 28 Bankr. Ct. Dec. (CRR) 1262 (4th Cir. 1996); In re Heritage Hotel Partnership I, 160 B.R. 374, 377, 24 Bankr. Ct. Dec. (CRR) 1519, 30 Collier Bankr. Cas. 2d (MB) 119, Bankr. L. Rep. (CCH) P 75620 (B.A.P. 9th Cir. 1993), aff'd, 59 F.3d 175 (9th Cir. 1995). *See also*, In re A.P. Liquidating Co., 283 B.R. at 459. In re Crowley, Milner and Co., 299 B.R. at 844; In re Hovis, 325 B.R. 158, 164 (Bankr. D. S.C. 2005); In re Pen Holdings, Inc., 316 B.R. at 498–499.

27 In re G-P Plastics, Inc., 320 B.R. at 867, citing In re Crowley, Milner and Co., 299 B.R. at 846; Browning v. Levy, 283 F.3d at 774; and In re Micro-Time Management Systems, Inc., 983 F.2d 1067, at *4 (6th Cir. 1993) ("Micro-Time").

28 In re Ionosphere Clubs, Inc., 262 B.R. at 612, citing In re Maxwell Communication Corp. plc by Homan, 93 F.3d 1036, 1044, 29 Bankr. Ct. Dec. (CRR) 788 (2d Cir. 1996); and In re Mickey's Enterprises, Inc., 165 B.R. 188, 193 (Bankr. W.D. Tex. 1994) ("The disclosure statement must give those creditors ... adequate notice of and information regarding the claims that the debtor as reorganized will be bringing against them under the plan. Failure to do so should generally result in the debtor being barred under the doctrine of res judicata").

29 In re Kmart Corp., 310 B.R. at 124.

30 In re Kmart Corp., 310 B.R. at 124. See also In re USN Communications, Inc., 280 B.R. at 588–589 ("Most courts hold that where a disclosure statement and/or plan of reorganization expressly reserves an action for later adjudication, res judicata does not apply"), citing D & K Properties Crystal Lake v. Mutual Life Ins. Co. of New York, 112 F.3d 257, 259–260, 37 Collier Bankr. Cas. 2d (MB) 1380, Bankr. L. Rep. (CCH) P 77400 (7th Cir. 1997) ("D&K"); In re Kelley, 199 B.R. 698, 704, 29 Bankr. Ct. Dec. (CRR) 769, Bankr. L. Rep. (CCH) P 77098 (B.A.P. 9th Cir. 1996) ("If a confirmed plan expressly reserves the right to litigate a specific cause of action after confirmation then res judicata does not apply."); In re American Preferred Prescription, Inc., 266 B.R. at 277 ("The case law, however, recognizes an exception to the res judicata bar where the

debtor has reserved the right to object to claims in a plan."); In re Crowley, Milner and Co., 299 B.R. at 846 ("The res judicata effects of a confirmation order may be avoided where the plan of reorganization expressly reserves the right to litigate certain claims"); In re Pen Holdings, Inc., 316 B.R. at 502; In re EXDS, Inc., 316 B.R. 817, 823, 43 Bankr. Ct. Dec. (CRR) 254 (Bankr. D. Del. 2004); In re Phoenix Restaurant Group, Inc., 316 B.R. 671, 689, 43 Bankr. Ct. Dec. (CRR) 256 (Bankr. M.D. Tenn. 2004) ("Preclusion can be prevented by providing in the plan for the preservation of avoidance actions.").

31 In re Bleu Room Experience, Inc., 304 B.R. 309, 313–314, 42 Bankr. Ct. Dec. (CRR) 152 (Bankr. E.D. Mich. 2004), citing In re Crowley, Milner and Co., 299 B.R. at 844; and Harstad v. First American Bank, 39 F.3d 898, 902–903, 26 Bankr. Ct. Dec. (CRR) 310, 32 Collier Bankr. Cas. 2d (MB) 542, Bankr. L. Rep. (CCH) P 76185 (8th Cir. 1994).

32 In re USN Communications, Inc., 280 B.R. at 590.

33 In re Phoenix Restaurant Group, Inc., 316 B.R. at 689. See also, In re Crowley, Milner and Co., 299 B.R. at 846.

34 In re Western Integrated Networks, LLC, 329 B.R. 334, 340 (Bankr. D. Colo. 2005).

35 In re Kmart Corp., 310 B.R. at 120, citing Harstad v. First American Bank, 39 F.3d at 903.

36 Harstad v. First American Bank, 39 F.3d at 902. In re Pen Holdings, Inc., 316 B.R. at 500–501 ("The notice at issue in § 1123(b)(3) is not notice to potential defendants, it 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.").

37 In re Pen Holdings, Inc., 316 B.R. at 504.

38 In re Crowley, Milner and Co., 299 B.R. at 851.

39 Section 1123(b)(3). In re Kmart Corp., 310 B.R. at 120.

40 In re Western Integrated Networks, LLC, 329 B.R. at 338, citing In re Weidel, 208 B.R. 848, 853 (Bankr. M.D. N.C. 1997) (approving plan provisions containing a general reservation of the right to object to claims).

41 In re American Preferred Prescription, Inc., 266 B.R. at 277–278; In re Kelley, 199 B.R. at 704 ("If a confirmed plan expressly reserves the right to litigate a specific cause of action after confirmation, then res judicata does not apply ... even a blanket reservation by the debtor reserving all causes of action which the debtor may choose to institute has been held insufficient to prevent the application of res judicata to a specific action."); D&K Properties Crystal Lake v. Mutual Life Ins. Co. of New York, 1996 WL 224517, at *4 (N.D. Ill. 1996), aff'd, 112 F.3d 257, 37 Collier Bankr. Cas. 2d (MB) 1380, Bankr. L. Rep. (CCH) P 77400 (7th Cir. 1997) (a blanket reservation of rights is insufficient to overcome the res judicata bar to the institution of a postconfirmation lawsuit imposed by a confirmed bankruptcy plan); In re Pen Holdings, Inc., 316 B.R. at 502.

42 Browning v. Levy, 283 F.3d at 775.

43 Browning v. Levy, 283 F.3d at 769.

44 Browning v. Levy, 283 F.3d at 775.

45 In re Micro-Time Management Systems, Inc., 983 F.2d at 1067.

46 D & K Properties Crystal Lake v. Mutual Life Ins. Co. of New York, 112 F.3d at 259 ("The problem in Micro-Time, as in this case, was not that the reservation was not in writing, but that the claim sought to be reserved was not identified in the reservation. The identification must not only be expressed, but also the claim must be specific. A blanket reservation that seeks to reserve all causes of action reserves nothing."). See also, In re Crowley, Milner and Co., 299 B.R. at 849–850 (reservation of rights clause in confirmed Chapter 11 plan,

reserving to creditors' committees the right to pursue any and all present or future rights, claims or causes of action against any person that arose before or after the commencement date was not sufficiently specific to reserve the right to pursue a breach of fiduciary duty claim against the debtor's former chief executive officer, based upon the former chief executive officer's conduct prior to the commencement of the bankruptcy case and allegedly failing to properly implement and maintain reliable inventory accounting system); In re G-P Plastics, Inc., 320 B.R. at 867–868 (blanket reservation of rights in confirmed Chapter 11 plan, providing that reorganized debtor would retain all causes of action which debtor or debtor in possession could have brought under the Bankruptcy Code, including causes of action under Chapter 5 of the Bankruptcy Code, was insufficient to preserve, from res judicata effect of plan confirmation order, preference, fraudulent transfer, conversion and other state law claims asserted against a creditor).

47 In re Western Integrated Networks, LLC, 329 B.R. at 338, citing In re Mako, Inc., 985 F.2d 1052, 1055, 23 Bankr. Ct. Dec. (CRR) 1658, Bankr. L. Rep. (CCH) P 75147 (10th Cir. 1993).

48 Matter of P.A. Bergner & Co., 140 F.3d 1111, 32 Bankr. Ct. Dec. (CRR) 536, Bankr. L. Rep. (CCH) P 77688, 35 U.C.C. Rep. Serv. 2d 373 (7th Cir. 1998) ("Bergner") (plan that abandoned any avoidance or recovery actions under § 547, other than any such actions that may be pending on the effective date of the plan preserved preference action pending at confirmation), cert. denied, 525 U.S. 964, 119 S.Ct. 409, 142 L.Ed.2d 332 (1998); In re Kmart Corp., 310 B.R. at 120 (categorical retention provision provided all the notice to which the defendants as creditors were entitled under § 1123(b)(3)(B), concerning preservation of the instant preference actions); In re USN Communications, Inc., 280 B.R. at 573 ("plan provisions that the liquidating trust will have the exclusive right to enforce any and all causes of action … including … all avoidance powers pursuant to § 547 was sufficient to preserve preference actions under § 1123(b)(3)"); In re Ampace Corp., 279 B.R. 145, 48 Collier Bankr. Cas. 2d (MB) 1343 (Bankr. D. Del. 2002) (a general reservation in a plan of reorganization indicating the type or category of claims to be preserved should be sufficiently specific to provide creditors with notice that their claims may be challenged postconfirmation); In re Amarex, Inc., 74 B.R. 378, 381, 15 Bankr. Ct. Dec. (CRR) 1299, Bankr. L. Rep. (CCH) P 71823 (Bankr. W.D. Okla. 1987), order aff'd, 88 B.R. 362 (W.D. Okla. 1988) (§ 1123(b)(3) satisfied when the disclosure statement and plan said preference actions begun after confirmation passed to the postconfirmation successor in interest); In re Pen Holdings, Inc., 316 B.R. at 504–505 (language in debtor's confirmed Chapter 11 plan, expressly including avoidance actions among retained causes of action that the reorganized Chapter 11 debtor could pursue postconfirmation, and further defining avoidance actions to include all preference claims under the preference provision of the Bankruptcy Code, was sufficient, just barely, to preserve preference claims from res judicata effect of plan confirmation order).

49 In re Bridgeport Holdings, Inc., 326 B.R. 312, 325, 54 Collier Bankr. Cas. 2d (MB) 803 (Bankr. D. Del. 2005), opinion amended, 54 Collier Bankr. Cas. 2d (MB) 1279, 2005 WL 1943535 (Bankr. D. Del. 2005) and as amended, (Aug. 12, 2005).

50 In re USN Communications, Inc., 280 B.R. at 591.

51 In re USN Communications, Inc., 280 B.R. at 591.

52 In re USN Communications, Inc., 280 B.R. at 591, citing Matter of P.A. Bergner & Co., 140 F.3d at 1117.

53 In re Kmart Corp., 310 B.R. at 107; In re Pen Holdings, Inc., 316 B.R. at 504.

54 In re Ice Cream Liquidation, Inc., 319 B.R. 324, 44 Bankr. Ct. Dec. (CRR) 47, 53 Collier Bankr. Cas. 2d (MB) 1490 (Bankr. D. Conn. 2005).

55 In re Western Integrated Networks, LLC, 322 B.R. 156 (Bankr. D. Colo. 2005).

56 In re Western Integrated Networks, LLC, 322 B.R. at 162.

57 In re Ice Cream Liquidation, Inc., 319 B.R. at 324.

58 In re Ice Cream Liquidation, Inc., 319 B.R. at 333 ("The Court concludes that the Plan is lacking the requisite provision and that the Debtor lacks standing to bring the § 542(b) Counts. The Plan makes no mention of Bankruptcy Code § 542 turnover actions, actions to recover accounts receivable or the invalidation of setoffs, although Plan § 5.2 specifically mentions §§ 544, 547, 548 and 550").

59 In re A.P. Liquidating Co., 283 B.R. 456 (Bankr. E.D. Mich. 2002).

60 In re A.P. Liquidating Co., 283 B.R. at 460 ("Second, the plaintiffs also rely on the following language in the plan: Qwest is claiming a security interest in the assets of the Debtor. Debtor contends that Qwest's security interest, if any, is limited to a purchase money security interest in the right of use of optical transmission capacity on the Qwest system. Debtor and Qwest are attempting to reach a negotiated settlement of their differences, but, failing that, Debtor will commence an adversary proceeding to determine the matter").

61 In re TGX Corp., 168 B.R. 122, 25 Bankr. Ct. Dec. (CRR) 1153 (W.D. La. 1994).

62 In re EXDS, Inc., 316 B.R. at 824, citing In re Chambers Development Co., Inc., 148 F.3d 214, 229 (3d Cir. 1998).

63 In re Target Industries, Inc., 328 B.R.at 119, citing Whiting v. Krassner, 391 F.3d 540, 544 (3d Cir. 2004), cert. denied, 545 U.S. 1131, 125 S. Ct. 2938, 162 L. Ed. 2d 871 (2005).

64 Davis v. Wakelee, 156 U.S. 680, 689, 15 S. Ct. 555, 39 L. Ed. 578 (1895).

65 New Hampshire v. Maine, 532 U.S. 742, 749–750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). See also, In re Target Industries, Inc., 328 B.R. at 119–120.

66 In re Phoenix Restaurant Group, Inc., 316 B.R. at 690, citing Browning v. Levy, 283 F.3d at 776; and Teledyne Industries, Inc. v. N.L.R.B., 911 F.2d 1214, 1218, 135 L.R.R.M. (BNA) 2274, 116 Lab. Cas. (CCH) P 10278 (6th Cir. 1990).

67 In re Breauxsaus, 304 B.R. 273, 278 (Bankr. N.D. Miss. 2003); Youngblood Group v. Lufkin Federal Sav. and Loan Ass'n, 932 F. Supp. 859, 868 (E.D. Tex. 1996) ("Youngblood"); In re Coastal Plains, Inc., 179 F.3d 197, 205, Bankr. L. Rep. (CCH) P 77947 (5th Cir. 1999) ("Coastal Plains").

68 In re Superior Crewboats, Inc., 374 F.3d 330, 334, 43 Bankr. Ct. Dec. (CRR) 56, 53 Collier Bankr. Cas. 2d (MB) 753, Bankr. L. Rep. (CCH) P 80116, 2004 A.M.C. 1767 (5th Cir. 2004) ("Superior Crewboats") ("[g]enerally, judicial estoppel is invoked where "intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice."); PSA, Inc. v. Puerto Rico Telephone Co., 336 F. Supp. 2d 173, 177 (D.P.R. 2004) ("PSA") ("[s]aid doctrine bars a party who successfully urges a particular position in a legal proceeding from subsequently taking a contrary position ..."); Data General Corp. v. Johnson, 78 F.3d 1556, 1565, 40 Cont. Cas. Fed. (CCH) P 76943 (Fed. Cir. 1996) ("The doctrine of judicial estoppel is that where a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have changed."); In re Coastal Plains, Inc., 179 F.3d at 205 n.1 and 2.

69 In re Coastal Plains, Inc., 179 F.3d at 205, citing U.S. v. McCaskey, 9 F.3d 368, 379 (5th Cir. 1993) (purpose of doctrine is "to protect the integrity of the judicial process and to prevent unfair and manipulative use of the court system by litigants"); In re Superior Crewboats, Inc., 374 F.3d at 334. Youngblood Group v. Lufkin Federal Sav. and Loan Ass'n, 932 F. Supp. at 868; In re USinternetworking, Inc., 310 B.R. 274, 281, 43 Bankr. Ct. Dec. (CRR) 30, 53 Collier Bankr. Cas. 2d (MB) 595 (Bankr. D. Md. 2004).

70 PSA, Inc. v. Puerto Rico Telephone Co., 336 F. Supp. 2d at 177, citing Alternative System Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 33 (1st Cir. 2004).

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71 In re Hoffman, 99 B.R. 929, 935, 19 Bankr. Ct. Dec. (CRR) 337 (N.D. Iowa 1989); Youngblood Group v. Lufkin Federal Sav. and Loan Ass'n, 932 F. Supp. at 868; In re Breauxsaus, 304 B.R. at 278.

72 In re Coastal Plains, Inc., 179 F.3d at 206, citing Scarano v. Central R. Co. of N. J., 203 F.2d 510, 513, 23 Lab. Cas. (CCH) P 67540 (3d Cir. 1953); Taylor v. Food World, Inc., 133 F.3d 1419, 1422 (11th Cir. 1998) ("Judicial estoppel is applied to the calculated assertion of divergent sworn positions ... and is designed to prevent parties from making a mockery of justice by inconsistent pleadings."); In re Hoffman, 99 B.R. at 935.

73 Section 521(1) ("The debtor shall file (1) a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs."); In re Coastal Plains, Inc., 179 F.3d at 208; In re USinternetworking, Inc., 310 B.R. at 282; In re Superior Crewboats, Inc., 374 F.3d at 335.

74 In re Coastal Plains, Inc., 179 F.3d at 208; In re USinternetworking, Inc., 310 B.R. at 282; Youngblood Group v. Lufkin Federal Sav. and Loan Ass'n, 932 F. Supp. at 867.

75 In re Coastal Plains, Inc., 179 F.3d at 208, citing Youngblood Group v. Lufkin Federal Sav. and Loan Ass'n, 932 F. Supp. at 867; and In re Envirodyne Industries, Inc., 183 B.R. 812, 821 n.17 (Bankr. N.D. Ill. 1995) ("Any claim with potential must be disclosed, even if it is contingent, dependent, or conditional."); PSA, Inc. v. Puerto Rico Telephone Co., 336 F. Supp. 2d at 178, citing Hay v. First Interstate Bank of Kalispell, N.A., 978 F.2d 555, 557, Bankr. L. Rep. (CCH) P 75009 (9th Cir. 1992).

76 In re Hovis, 325 B.R. 158, 165 (Bankr. D. S.C. 2005), citing Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 17 Bankr. Ct. Dec. (CRR) 1272, Bankr. L. Rep. (CCH) P 72329 (3d Cir. 1988) ("Oneida"); Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570, 571–572, Bankr. L. Rep. (CCH) P 75211, 1993-1 Trade Cas. (CCH) P 70178 (1st Cir. 1993); and Monroe County Oil Co., Inc. v. Amoco Oil Co., 75 B.R. 158, 162 (S.D. Ind. 1987).

77 In re USinternetworking, Inc., 310 B.R. at 282, citing Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp, 337 F.3d 314, 321–323, 41 Bankr. Ct. Dec. (CRR) 183, 50 Collier Bankr. Cas. 2d (MB) 1211, Bankr. L. Rep. (CCH) P 78900 (3d Cir. 2003); In re Coastal Plains, Inc., 179 F.3d at 208, citing Rosenshein v. Kleban, 918 F. Supp. 98, 104 (S.D. N.Y. 1996); and Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362, 28 Bankr. Ct. Dec. (CRR) 1178 (3d Cir. 1996) ("Disclosure requirements are crucial to the effective functioning of the federal bankruptcy system.").

78 In re Coastal Plains, Inc., 179 F.3d at 208, citing Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414.

79 In re Coastal Plains, Inc., 179 F.3d at 208–209; Youngblood Group v. Lufkin Federal Sav. and Loan Ass'n, 932 F. Supp. at 868; In re Superior Crewboats, Inc., 374 F.3d at 334–335; In re Bilstat, Inc., 314 B.R. 603, 609–610 (Bankr. S.D. Tex. 2004); In re USinternetworking, Inc., 310 B.R. at 281–282; In re Hovis, 325 B.R. at 163–164.

80 In re Ice Cream Liquidation, Inc., 319 B.R. at 339, citing Rosenshein v. Kleban, 918 F. Supp. 98, 104 (S.D. N.Y. 1996).

81 In re EXDS, Inc., 316 B.R. at 825, citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d at 362.

82 In re EXDS, Inc., 316 B.R. at 825, citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d at 365.

83 In re Target Industries, Inc., 328 B.R. at 120, citing Montrose Medical Group Participating Savings Plan v. Bulger, 243 F.3d 773, 779–780, 25 Employee Benefits Cas. (BNA) 2702 (3d Cir. 2001); and Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d at 414.

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84 In re Target Industries, Inc., 328 B.R. at 120, citing Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp, 337 F.3d 314, 320, 41 Bankr. Ct. Dec. (CRR) 183, 50 Collier Bankr. Cas. 2d (MB) 1211, Bankr. L. Rep. (CCH) P 78900 (3d Cir. 2003).

85 In re Superior Crewboats, Inc., 374 F.3d at 335; In re LJM2 Co-Investment, L.P., 327 B.R. 786, 791, 45 Bankr. Ct. Dec. (CRR) 31 (Bankr. N.D. Tex. 2005); In re Coastal Plains, Inc., 179 F.3d at 206–207.

86 In re Coastal Plains, Inc., 179 F.3d at 205; In re Superior Crewboats, Inc., 374 F.3d at 334; In re Bilstat, Inc., 314 B.R. at 608.

87 Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 17 Bankr. Ct. Dec. (CRR) 1272, Bankr. L. Rep. (CCH) P 72329 (3d Cir. 1988).

88 Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp, 337 F.3d at 316. See also, In re Bilstat, Inc., 314 B.R. at 603 (A Chapter 11 trustee brought an adversary proceeding to avoid a debtor's allegedly preferential transfers to a creditor, and the creditor moved for summary judgment on the theory that the trustee was judicially estopped from asserting such claims based upon the debtor's previous failure to disclosed them during the claims allowance and plan confirmation process. The court held that the trustee was judicially estopped from prosecuting the preference avoidance claim against the creditor, based on the debtor's nondisclosure of this potential cause of action during the claims allowance and plan confirmation process.); Youngblood Group v. Lufkin Federal Sav. and Loan Ass'n, 932 F. Supp. at 859; In re Superior Crewboats, Inc., 374 F.3d at 330 (Former Chapter 7 debtors brought cause of action to recover for personal injuries allegedly sustained prior to the commencement of their bankruptcy case. The court held that the debtors' failure to disclose a $2.5 million prepetition personal injury claim in their schedules was tantamount to a representation that no such claim existed and this representation was clearly inconsistent as required for the application of judicial estoppel with the debtors' later prosecution of this cause of action.); In re Hovis, 325 B.R. at 158 (Trustee of bankruptcy estate of corporate debtor that had entered into prepetition contract to purchase assets of business brought adversary proceeding to recover on state law breach of contract and tort theories. The court held that the debtor was barred, on judicial estoppel grounds, from pursuing a breach of contract claim that it had failed to disclose until after confirmation of its Chapter 11 plan of reorganization.); and In re USinternetworking, Inc., 310 B.R. at 274 (The debtor's failure to modify its schedule of assets to conform to its knowledge of the existence and amount of its breach of contract claim against customer while prosecuting its plan of reorganization to confirmation was inconsistent with the debtor's subsequent action to recover upon that claim after the confirmation order had become final. The failure of the debtor to disclose its breach of contract claim against the customer in its reorganization case was a failure to disclose a fact rather than a position of law. The debtor had intentionally, not inadvertently, failed to disclose the breach of contract claim.).

89 In re Kmart Corp., 310 B.R. at 119, citing In re Associated Vintage Group, Inc., 283 B.R. at 565.

90 In re Kmart Corp., 310 B.R. at 119, citing Kennedy v. U.S., 965 F.2d 413, 417, Unempl. Ins. Rep. (CCH) P 16643A, 92-1 U.S. Tax Cas. (CCH) P 50307, 70 A.F.T.R.2d 92-5032 (7th Cir. 1992); and Portmann v. U.S., 674 F.2d 1155, 1158 (7th Cir. 1982).

91 In re Neptune World Wide Moving, Inc., 111 B.R. 457 (Bankr. S.D. N.Y. 1990).

92 In re Worldwide Direct, Inc., 280 B.R. 819 (Bankr. D. Del. 2002).

93 In re Resorts Intern., Inc., 372 F.3d 154, 161, 43 Bankr. Ct. Dec. (CRR) 46 (3d Cir. 2004) ("Resorts"), citing Coffin v. Malvern Federal Sav. Bank, 90 F.3d 851, 854 (3d Cir. 1996).

94 In re Resorts Intern., Inc., 372 F.3d at 161, citing In re Continental Airlines, Inc., 236 B.R. 318, 323, 34 Bankr. Ct. Dec. (CRR) 728, 162 L.R.R.M. (BNA) 2780 (Bankr. D. Del. 1999), order aff'd, 2000 WL 1425751 (D. Del. 2000), judgment aff'd, 279 F.3d 226, 39 Bankr. Ct. Dec. (CRR) 8, 47 Collier Bankr. Cas. 2d (MB) 1151, 169 L.R.R.M. (BNA) 2257 (3d Cir. 2002).

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95 In re Resorts Intern., Inc., 372 F.3d at 161, citing In re Continental Airlines, Inc., 236 B.R. at 323; U.S. Trustee v. Gryphon at Stone Mansion, Inc., 216 B.R. 764, 769 (W.D. Pa. 1997), aff'd, 166 F.3d 552, 33 Bankr. Ct. Dec. (CRR) 1054, Bankr. L. Rep. (CCH) P 77884 (3d Cir. 1999) ("A retention of jurisdiction provision within a confirmed plan does not grant a bankruptcy court jurisdiction.").

96 In re Resorts Intern., Inc., 372 F.3d at 161, citing Donaldson v. Bernstein, 104 F.3d at 552.

97 In re Resorts Intern., Inc., 372 F.3d at 161.

98 In re Resorts Intern., Inc., 372 F.3d at 161, citing Board of Governors of Federal Reserve System v. MCorp Financial, Inc., 502 U.S. 32, 40, 112 S. Ct. 459, 116 L. Ed. 2d 358, 22 Bankr. Ct. Dec. (CRR) 508, 25 Collier Bankr. Cas. 2d (MB) 849, Bankr. L. Rep. (CCH) P 74295A (1991).

99 In re Resorts Intern., Inc., 372 F.3d at 161, citing Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60–87, 102 S. Ct. 2858, 73 L. Ed. 2d 598, 6 Collier Bankr. Cas. 2d (MB) 785, Bankr. L. Rep. (CCH) P 68698 (1982) (plurality opinion).

100 In re Resorts Intern., Inc., 372 F.3d at 161.

101 In re Resorts Intern., Inc., 372 F.3d at 161, citing In re U.S. Brass Corp., 301 F.3d 296, 303, 39 Bankr. Ct. Dec. (CRR) 251, 48 Collier Bankr. Cas. 2d (MB) 1173, Bankr. L. Rep. (CCH) P 78704 (5th Cir. 2002) ("U.S. Brass").

102 In re Craig's Stores of Texas, Inc., 266 F.3d 388, 390, 38 Bankr. Ct. Dec. (CRR) 146, Bankr. L. Rep. (CCH) P 78517 (5th Cir. 2001) ("Craig's Stores"), citing Pettibone Corp. v. Easley, 935 F.2d 120, 122, 21 Bankr. Ct. Dec. (CRR) 1326, 25 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) P 74033 (7th Cir. 1991).

103 In re Craig's Stores of Texas, Inc., 266 F.3d at 391, citing In re Fairfield Communities, Inc., 142 F.3d 1093, 1095, 32 Bankr. Ct. Dec. (CRR) 688 (8th Cir. 1998); and In re Johns-Manville Corp., 7 F.3d 32, 34 (2d Cir. 1993).

104 In re Craig's Stores of Texas, Inc., 266 F.3d at 390–391.

105 In re Coho Energy, Inc., 309 B.R. 217, 220, 42 Bankr. Ct. Dec. (CRR) 207 (Bankr. N.D. Tex. 2004), citing In re U.S. Brass Corp., 301 F.3d at 307; and U.S. v. Ramirez, 291 B.R. 386, 392, 47 Collier Bankr. Cas. 2d (MB) 1626 (N.D. Tex. 2002) (stating that a confirmed Chapter 11 plan constitutes a binding contract).

106 In re Craig's Stores of Texas, Inc., 266 F.3d at 388.

107 In re Craig's Stores of Texas, Inc., 266 F.3d at 390.

108 In re U.S. Brass Corp., 301 F.3d at 296.

109 In re Craig's Stores of Texas, Inc., 266 F.3d at 388.

110 In re Western Integrated Networks, LLC, 322 B.R. at 162–163. See also, In re Ice Cream Liquidation, Inc., 319 B.R. at 324.

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