Penn State Environmental Law Review

Volume 19 | Number 1 Article 3

1-1-2011

Searching for a Right to Payment: Defining the Scope of Bankruptcy Code Sec. 101(5)(B) under RCRA and Other Statutes Not Providing Express Rights to Payment

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Searching for a "Right to Payment": Defining the Scope of Bankruptcy Code § 101(5)(B) Under RCRA and Other Statutes Not Providing Express "Rights to Payment"

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I. INTRODUCTION

Chapter 11 of the Bankruptcy Code[1] allows a debtor to obtain a discharge of various obligations in an attempt to reorganize and reemerge as a viable business.[2] Section 101(5)[3] defines the types of "claims" subject to the bankruptcy court's discharge power.[4] In addition to "rights to payment" under § 101(5)(A), § 101(5)(B) includes within the scope of dischargeable "claims" those equitable obligations (obligations arising

1. The Bankruptcy Code, or Code, refers to title 11 of the United States Code. 11 U.S.C. §§ 101-1532 (2006).
2. *See id.* § 1141(d).
3. All further references to statutory sections without more are references to the Bankruptcy Code.
4. 11 U.S.C. § 101(5)(B).

from causes of action[5] giving rise to an equitable remedy, such as an injunction) that could be satisfied by an alternative "right to payment."

Several courts, including the Seventh Circuit in *United States v. Apex Oil, Co.*,[6] have taken a restrictive view of the types of equitable remedies arising under environmental laws (specifically, environmental cleanup injunctions) that may be discharged. The *Apex* court determined that an injunction issued pursuant to the Resource Conservation and Recovery Act ("RCRA")[7] did not constitute a dischargeable "claim" because RCRA does not provide an alternative "right to payment."[8] Instead, the RCRA injunction rode through the bankruptcy and Apex's duty to cleanup in accordance with the injunction remained effective post-bankruptcy.[9] As a result, any plan of reorganization by Apex must contemplate the financial effects of the cleanup obligation and will likely result in a lower payout to creditors if the reorganization effort is to be successful. The *Apex* court rejected the broad holding of the Sixth Circuit in *United States v. Whizco*,[10] which concluded that an equitable remedy constitutes a "claim" under § 101(5)(B) to the extent the equitable remedy requires the debtor to spend money.[11]

The narrow approach advocated by the Seventh Circuit fails to recognize that other statutory frameworks, including the Comprehensive Environmental Response, Compensation and Liability Act ("CERLCA"),[12] overlap with RCRA. In many circumstances, CERCLA provides an alternative cause of action giving rise to a "right to payment."[13] The CERCLA cause of action can often be used to remedy the same pollution as an injunction imposed under RCRA.[14] It is generally agreed that equitable remedies available under CERCLA constitute dischargeable "claims" when the United States Environmental Protection Agency (EPA) has the right to clean up itself and seek

5. *See id.* The term "cause of action," although not generally used in the federal parlance, will be used throughout to avoid confusion between "claims" as defined in § 101(5) of the Bankruptcy Code and "claims" arising under other federal statutes, as that term is used under the relevant non-bankruptcy statute.

6. United States v. Apex Oil Co., 579 F.3d 734 (7th Cir. 2009).

7. 42 U.S.C. §§ 6901-6992 (2006).

8. *Apex*, 579 F.3d at 739.

9. *See id.* at 738.

10. United States v. Whizco, Inc., 841 F.2d 147 (6th Cir. 1988).

11. *Apex*, 579 F.3d at 738 (rejecting *Whizco*, 841 F.2d 147).

12. 42 U.S.C. §§ 6901-6992.

13. *See* 42 U.S.C. § 9607(a) (providing a cause of action for EPA to recover reimbursement of clean-up costs).

14. This is supported by the underlying facts in *Apex*, where the EPA could have pursued a remedy under either RCRA or CERCLA.

reimbursement.[15] The right to reimbursement is seen as a "right to payment" under the language of § 101(5)(B).[16] Yet, under *Apex*, when a debtor is called upon to remedy the same pollution pursuant to the equitable remedy provided by RCRA, the remedy avoids classification as a dischargeable "claim" simply because RCRA does not provide an alternative "right to payment" within its statutory framework ("*Apex* Approach").[17]

The Sixth Circuit's decision in *United States v. Whizco*[18] takes the definition of "claim" to the other extreme. *Whizco* holds that any equitable remedy is a "claim" to the extent that it requires a debtor to expend money to comply ("*Whizco* Approach").[19] The *Whizco* Approach may take the "claim" definition further than the language of § 101(5)(B) will allow.[20] This definition would encompass not only those equitable remedies that require payment of money to the holder of the equitable remedy, but also an unrelated third party.[21] Additionally, the *Whizco* Approach changes the focus of the statute from the point-of-view of the purported claimholder to the point-of-view of the debtor. In other words, the approach taken in *Whizco* would not attempt to determine if the purported claimholder has a "right to payment." Instead, the *Whizco* Approach looks at when the *debtor* must expend money.[22]

This article suggests that § 101(5)(B) was intended to discharge any legal or equitable right that can be assigned a monetary value using some defined method of valuation. The defined method for valuing the equitable remedy could come from a statute or a common law theory, as long as it is intended to remedy the same wrong as the equitable remedy.

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15. *See, e.g.*, *In re* CMC Heartland Partners (*CMC Heartland I*), 966 F.2d 1143, 1146 (7th Cir. 1992) (explaining that to the extent [CERCLA] §§ 106 and 107 [42 U.S.C. §§ 9606-07] require a person to pay money today because of acts before or during the reorganization proceedings, CERCLA creates a "claim" in bankruptcy); United States v. LTV Corp. (*In re* Chateaugay Corp.), 1008 (2d Cir. 1991) (explaining that an injunction that imposes obligation "solely" as an alternative to payment is a claim, but "if the order, no matter how phrased, requires LTV to take any action that ends or ameliorates current pollution, such an order is not a "claim"); *In re* Nat'l Gypsum Co., 139 B.R. 397, 405-06 (Bankr. N.D. Tex. 1992); LAWRENCE R. AHERN, III & DARLENE T. MARSH, ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY § 3:15 (Tom Loughlin et. al. eds., Thomson West 2010) (2009).

16. *See, e.g., CMC Heartland I*, 966 F.2d at 1146; *In re* Chateaugay Corp., 944 F.2d at 1008; *In re* Nat'l Gypsum Co., 139 B.R. at 405-06; AHERN & MARSH, *supra* note 15, at § 3:15.

17. A full discussion of the scope of the *Apex* Approach and the analysis applied by the court is provided *infra* Part III.C.163.

18. United States v. Whizco, Inc., 841 F.2d 147 (6th Cir. 1988).

19. *Id.* at 150-151. A full discussion of the scope of the *Whizco* Approach and the analysis applied by the court is provided *infra* Part III.C.2.6369

20. *See* AHERN & MARSH, *supra* note 15, at § 3:16.

21. *See* United States v. Apex Oil, 579 F.3d 734, 738 (7th Cir. 2009); *id.*

22. *Whizco*, 841 F.2d. at 150-51.

Consistent with that purpose, an injunction under RCRA is a "claim" if some other theory of law, often CERCLA, can be used to determine the monetary value of the RCRA claim ("Proposed Approach").[23] The Proposed Approach avoids the arbitrary distinction created by the *Apex* decision between equitable remedies arising under RCRA and CERCLA, which will be satisfied out of the same limited financial resources and, which may be directed at remedying the exact same pollution. Additionally, unlike under the *Whizco* Approach, only those equitable remedies that can be valued using some defined cause of action, intended to remedy the same wrongful actions or inactions of the debtor, will be included within the scope of "claim" under § 101(5)(B).

Section II of this article covers a brief overview of two relevant environmental statutes and the scope and history of § 101(5). Section III suggests that § 101(5)(B) lends itself to at least two reasonable interpretations, so the statute must be analyzed in light of the language, history, and purpose of the provision. In order to understand the implication of extrinsic evidence on each of the possible interpretations, Section IV provides an analysis of the application of each interpretation to environmental laws. Further support for the Proposed Approach is provided in Section V, which discusses Supreme Court precedent, the legislative history, and relevant policy considerations. Section VI briefly explains how the Proposed Approach consistently applies to other situations which commonly give rise to issues involving the application of § 101(5)(B). These other situations involve injunctive relief related to covenants not to compete, specific performance and constructive trusts. This article comes to the conclusion that, consistent with Supreme Court precedent and bankruptcy policy, "claim" should include any equitable remedy for which there is an alternative "right to payment" intended to remedy the same wrong, despite the statutory or common law source of the cause of action providing the "right to payment."

II. BACKGROUND

A. Brief Overview of Environmental Laws

A number of examples and cases discussed below require a general understanding of the purpose and structure of two environmental statutes giving rise to inconsistent interpretations of § 101(5)(B). This section provides a brief background of the federal environmental statutes at the

23. A full discussion of the scope of the Proposed Approach and the analysis applied by the court is provided *infra* Part III.C.3.63

center of the issue. Many states have environmental statutes modeled on these federal laws that raise the same issues.[24]

In 1976, Congress enacted the Resource Conservation Recovery Act ("RCRA")[25] to "reduce generation of hazardous waste and to ensure proper treatment, storage, and disposal of waste which is nonetheless generated so as to minimize present and future threat to human health and [the] environment."[26] "[U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment," the EPA may issue an administrative order or seek an injunction under RCRA requiring a potentially responsible party ("PRP")[27] to clean up.[28] However, importantly, RCRA does not provide the EPA with any ability to seek a money judgment against PRPs, nor does RCRA provide the EPA with the right to clean up and seek money reimbursement from PRPs.[29]

A few years after the enactment of RCRA, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[30] "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination."[31] CERCLA attempts to achieve the goal of timely cleanup by allowing the EPA[32] to act in the event that "there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance."[33] In the event of a release

24. *See, e.g.,* Ohio v. Kovacs, 469 U.S. 274 (1985); Torwico Elecs., Inc. v. N.J. Dep't Envtl. Prot. (*In re* Torwico Elecs., Inc.), 8 F.3d 146, 150 (3d Cir. 1993).

25. 42 U.S.C. §§ 6901-6992 (2006).

26. *See* Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996).

27. *See* 42 U.S.C. § 9607(a). Potentially responsible party is not defined in RCRA or CERCLA. The term is typically used to indicate parties that fall into the four types of parties that may be held responsible under CERCLA: "1) present owners and operators, 2) owners and operators at the time of the disposal of hazardous substances, 3) generators of hazardous substances, and 4) transporters of hazardous substances," ADAM P. STROCHAK ET. AL., ENVIRONMENTAL ISSUES IN BANKRUPTCY CASES 4 (Alan N. Resnick & Henry J. Sommer eds., LexisNexis 2009) (2009), but will often include many of the same parties liable under RCRA.

28. 42 U.S.C. § 6973(a).

29. *See, e.g.,* United States v. Apex Oil, 579 F.3d 734, 736 (7th Cir. 2009).

30. 42 U.S.C. §§ 9601-9675 (2006).

31. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S.Ct. 1870, 1874 (2009) (citing Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996)) (internal quotations omitted).

32. CERCLA empowers the President to act. Presidential powers under CERCLA were delegated to the Administrator of the EPA by Exec. Order No. 12580, 52 Fed. Reg. 2,923 (Jan. 23, 1987) (codified at 3 C.F.R., 1987 comp.).

33. 42 U.S.C. § 9606(a).

or threatened release of this type, the EPA has two options.[34] The EPA may: 1) issue an administrative order or seek an injunction compelling the debtor to end the release or threatened release,[35] or 2) the EPA may use money from the Superfund[36] to end the release or threatened release and then seek reimbursement from the PRPs.[37] Liability under CERCLA is strict, joint and several amongst PRPs.[38]

According to the EPA, "[g]enerally, cleanups conducted solely under RCRA corrective action or CERCLA response authority will substantively satisfy the requirements of both programs."[39] The EPA may act under either statutory scheme in the event of an imminent hazard.[40] Additionally, CERCLA governs many of the same substances as RCRA.[41] The definition of "hazardous substance" in CERCLA lists several specific categories of regulated substances in 42 U.S.C. § 9601(14)(A)-(F), including "hazardous wastes" under RCRA.[42] Although RCRA "solid wastes" are not themselves included within the definition of "hazardous substances" under CERCLA, "solid wastes" may be brought within CERCLA's regulatory authority if they also contain "hazardous substances,"[43] among other possibilities.

Unlike RCRA, which regulates many petroleum-based products,[44] CERCLA specifically excludes regulation of "petroleum, including crude oil or any fraction thereof" unless otherwise specifically included within the categories in 42 U.S.C. § 9601(14)(A)-(F).[45] However, pursuant to

34. *See id.* §§ 9606(a), 9607(a).

35. *Id.* § 9606(a).

36. This refers to the fund of $8.5 billion that was created under 42 U.S.C. § 9611(a). The fund was created to help the EPA fund governmental response costs. 42 U.S.C. § 9611(a)(1) (2006).

37. *Id.* § 9607(a). Potentially responsible party is not defined in CERCLA. The term is typically used to indicate parties that fall into the four types of parties that may be held responsible under CERCLA: "1) present owners and operators, 2) owners and operators at the time of the disposal of hazardous substances, 3) generators of hazardous substances, and 4) transporters of hazardous substances."; STROCHAK ET. AL., *supra* note 27, at 4.

38. STROCHAK ET. AL., *supra* note 27, at 4.

39. CERCLA: THE HAZARDOUS WASTE CLEANUP PROGRAM VI-13, http://www.epa.gov/osw/inforesources/pubs/orientat/rom62.pdf (last visited Nov. 12, 2010).

40. *Id.* at VI-9.

41. *See id.* at VI-10.

42. 42 U.S.C. § 9601(14)(C) (2006).

43. RCRA governs solid and hazardous wastes. 42 U.S.C. § 7003(a), *repealed by* Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2843 (codified as amended in scattered sections of 26 U.S.C.); *see also* CERCLA: THE HAZARDOUS WASTE CLEANUP PROGRAM, *supra* note 39, at VI-10.

44. *See* Charles de Saillan, *The Use of Imminent Hazard Provisions of Environmental Laws to Compel Cleanup at Federal Facilities*, 27 STAN. ENVTL. L.J. 43, 151 (2008).

45. 42 U.S.C. § 9601(14).

the EPA's power to promulgate regulated substances under 42 U.S.C. § 9601(14)(A), many petroleum-based substances are brought back within the scope of CERCLA.[46] These substances are subject to CERCLA regulation notwithstanding the statute's general exclusion of petroleum related substances.[47]

Despite differences in regulated substances, the imminent hazard provisions in RCRA and CERCLA are similar.[48] The imminent hazard provisions of both statutes are interpreted fairly broadly.[49] Courts do not require an emergency situation to find an "imminent and substantial endangerment."[50] Additionally, the use of the word "may" indicates that the endangerment need not be certain.[51] Further, "endangerment" has been interpreted as meaning that no harm needs to have actually occurred for the EPA to take action.[52] As long as a substance falls under the regulatory framework of both CERCLA and RCRA, the EPA can proceed under either statute if there is a chance that an imminent and substantial endangerment exists. The end result is that in many circumstances, CERCLA and RCRA provide viable alternative remedies for effectuating the cleanup of any given release or threatened release.[53]

B. Section 101(5)(B)—Statute and History

The Bankruptcy Code[54] provides for the discharge of virtually all "debts," limited only by the discharge provision of each bankruptcy chapter[55] and the general provision in § 523.[56] "Debt" is defined by the

46. *See, e.g.*, 40 C.F.R. § 302.4 (2009) (providing a list of substances, including petroleum-based substances which the EPA has brought back within the regulatory structure of CERCLA).

47. *See, e.g.*, 42 U.S.C. § 9601(14); 40 C.F.R. § 302.4.

48. *See* CERCLA: THE HAZARDOUS WASTE CLEANUP PROGRAM, *supra* note 37, at VI-13 ("[A]uthority under CERCLA § 106 is essentially the same [as under RCRA § 7003], except that CERCLA's authority to force abatement of an imminent or substantial danger to public health or the environment is limited to hazardous substance releases.").

49. de Saillan, *supra* note 44, at 111.

50. *See* B.F. Goodrich Co. v. Murtha, 697 F. Supp. 89, 96 (D. Conn. 1988), *aff'd*, 958 F.2d 1192 (2d Cir. 1992) (CERCLA)); *id.* (citing Dague v. City of Burlington, 935 F.2d 1343, 1355-56 (2d Cir. 1991) (RCRA)).

51. STROCHAK ET. AL., *supra* note 27, at 5.

52. de Saillan, *supra* note 44, at 111-114.

53. CERCLA: THE HAZARDOUS WASTE CLEANUP PROGRAM, *supra* note 39, at VI-13.

54. 11 U.S.C. §§ 101-1532 (2006).

55. *See id.* §§ 727, 1141(d), 1128 and 1328. Chapter 15 does not have a discharge provision because it simply provides for recognition of foreign proceedings.

56. Section 523 of the Bankruptcy Code lists nineteen types of debts which are not discharged by bankruptcy, limited by the discharge provision of the applicable chapter. For example, § 523 prevents discharge of certain tax debts, debts owing for money obtained through the perpetration of fraud, and domestic support obligations. *See id.* § 523.

Code as "liability on a claim."[57] Because the discharge provisions speak in terms of "debts" discharged and "debt" is defined as "liability on a claim," the meaning of "claim" is central to understanding the scope of a discharge.

"Claim" is defined broadly, as follows:

> **(5)** The term "claim" means—
>
> > **(A)** right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> >
> > **(B)** right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.[58]

The scope of the types of debts susceptible to discharge under the nation's first long-standing bankruptcy statute, enacted in 1898, was much more restrictive than the scope of dischargeable "claims" under the current Bankruptcy Code. Section 63 of the Bankruptcy Act of 1898[59] contained an exhaustive list of obligations considered "debts." Only those obligations falling within the narrow, enumerated types of "debts" in Section 63 could be discharged in bankruptcy. Section 63 did not provide any ability to discharge obligations arising from a cause of action for an equitable remedy.[60]

The legislative history of current § 101(5), which defines the term "claim," indicates Congress' intent to drastically enlarge the scope of debts that could be dealt with in bankruptcy under the new Bankruptcy Code.[61] The original version of the bill, H.R. 6, provided a definition of "claim" which included all rights to payment and any "right to an equitable remedy for breach of performance if such breach *does not* give rise to a right to payment, whether or not such right is reduced to judgment, fixed, contingent, matured, unmatured, disputed, or undisputed."[62] The definition in H.R. 6 included obligations requiring

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57. 11 U.S.C. § 101(12).
58. *Id.* § 101(5).
59. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898).
60. United States v. Whizco, Inc., 841 F.2d 147 (6th Cir. 1988).
61. *See* Johnson v. Home State Bank, 501 U.S. 78, 83 (1991) ("Congress intended . . . to adopt the broadest available definition of 'claim.'"); *see also* S. REP. NO. 95-989, at 21-22 (1978); H.R. REP. NO. 95-595, at 309 (1977).
62. H.R. 6, 95th Cong. § 101(4)(B) (1st Sess. 1977) (emphasis added).

payment of money as well as all obligations that were purely equitable in nature and did not give their holder a right to receive payment.[63]

Prior to the enactment of the Bankruptcy Act of 1978, Congress amended what would become § 101(5)(B) to the current definition of "claim," with a slightly more narrow scope than the original H.R. 6.[64] The House and Senate reports for the enacted version of the bill indicate that Congress expected an interpretation of the term "claim" that would allow all legal obligations of the debtor to be disposed of in bankruptcy.[65] Additionally, under the enacted version of § 101(4)(B) (now § 101(5)(B)),[66] only rights to equitable remedies that arise from a "breach of performance," where the "breach" also gives rise to a "right to payment," constitute "claims."[67] This change excluded from the definition of "claim" those equitable remedies awarded for breaches of performance where no alternative "right to payment" existed.[68]

The enacted definition of "claim" was still intended to be extremely broad.[69] However, the legislative history does not provide much illuminating information on the intended scope of § 101(5)(B). The sparse legislative history on the enacted definition of "claim" only provides an example of one type of situation the changed language would affect.[70] In some states, if a plaintiff seeking specific performance is denied the equitable remedy of specific performance, he or she may be awarded money damages instead.[71] There are no examples of rights to equitable remedies that do not constitute "claims," nor is there any

63. *See* AHERN & MARSH, *supra* note 15, at § 3:10.

64. *Compare* H.R. 6, 95th Cong. § 101(4)(B) (1st Sess. 1977) *with* 11 U.S.C. § 101(5) (2006). *See also* 124 CONG. REC. S17,406 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini); 124 CONG. REC. H11,090 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards).

65. S. REP. NO. 95-989, at 21-22 (1978); H.R. REP. NO. 95-595, at 309 (1977).

66. Section 101(4) of the Bankruptcy Code was redesignated § 101(5) by Pub. L. 101-647 (1990). For consistency and ease to the reader, the provision may be referred to as § 101(5)(B), even if it was designated § 101(4)(B) at the time of the decision in a particular case or article.

67. *See* 11 U.S.C. § 101(5)(B) ("(5) The term "claim" means- (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured."); *see also* 124 CONG. REC. S17,406 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini); 124 CONG. REC. H11,090 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards).

68. *See* AHERN & MARSH, *supra* note 15, at § 3:10.

69. *See, e.g.,* Johnson v. Home State Bank, 501 U.S. 78, 83 (1991).

70. *See* 124 CONG. REC. S17,406 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini); 124 CONG. REC. H11,090 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards).

71. *See* 124 CONG. REC. S17,406 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini); 124 CONG. REC. H11,090 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards).

further explanation of how to apply the language of the statute to the specific performance example.[72]

Although no authority exists on the issue, the change in language from the H.R. 6 version to the enacted version suggests that Congress wanted to exclude from the scope of "claim" those equitable remedies that could only be complied with by requiring a party to act in a certain manner. Congress did, however, want to include equitable remedies for which money could be substituted within the definition of "claim" under the Code. To get a better idea of the scope Congress intended to give the defined term "claim," it is necessary to look at the meaning of the key phrases "right to an equitable remedy," "right to payment" and "breach of performance."

III. THE LANGUAGE OF § 101(5)(B)

The Supreme Court has recognized a "fundamental canon that statutory interpretation begins with the language of the statute itself."[73] If the meaning of the statute is clear from its language, the sole function of courts is to apply the language as written unless application would lead to an absurd result.[74] However, if the words of a statute are ambiguous, then the court may look to extrinsic evidence of the meaning of the statutory language.[75] A statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses.[76] In the event that a statute is capable of two or more different meanings, the interpretation that furthers the goals and legislative history of the statute as a whole should be chosen.[77]

Section 101(5)(B) defines "claim" to include any:

> right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

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72. Rederford v. U.S. Airways, Inc., 589 F.3d 30, 36 (1st Cir. 2009).

73. Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 557-58 (1990) (citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985)).

74. *See* United States v. Ron Pair Enters., 489 U.S. 235, 241-42 (1989); *In re* Kaiser Aluminum Corp., 456 F.3d 328, 330 (3d Cir. 2006) ("A basic principle of statutory construction is that we should avoid a statutory interpretation that leads to absurd results.").

75. *See* Exxon Mobil Corp. v. Allapattah Serv., Inc., 545 U.S. 546, 568 (2005).

76. *See generally* United Bank of Iowa v. Indep. Inputs (*In re* W. Iowa Limestone, Inc.), 538 F.3d 858 (8th Cir. 2008).

77. *See, e.g.*, Brodie v. Schmutz (*In re* Venture Mortg. Fund, L.P.), 282 F.3d 185, 188 (2d Cir. 2002).

A plain reading of § 101(5)(B) indicates that any "right to an equitable remedy," which can alternatively be satisfied by a "right to payment" arising from the same "breach of performance," constitutes a "claim" and is thus subject to discharge in bankruptcy.[78] As the Supreme Court has noted,[79] the key phrases in § 101(5)(B) ("'equitable remedy,' 'breach of performance,' and 'right to payment'") are not defined in the Code."[80] The Seventh Circuit has suggested that the Supreme Court's note in *Ohio v. Kovacs* that these three phrases were not defined in the Code must have meant that the phrases were ambiguous.[81] However, as pointed out by the dissent in *In re Udell*, simply because phrases in a provision are not defined does not mean that the provision as a whole is ambiguous.[82]

A. The "Right to an Equitable Remedy"

The Supreme Court considered the meaning of the phrase "right to an equitable remedy" in *Ohio v. Kovacs*.[83] The Court found that there was "little doubt" that the State of Ohio held a "right to an equitable remedy" under a state law providing injunctive relief requiring a debtor to clean up pollution.[84] In *Kovacs*, the State's "right to an equitable remedy" had simply been reduced to judgment already.[85]

Although the *Kovacs* decision is sufficient for purposes of determining whether a RCRA or CERCLA injunction falls within the meaning of "right to an equitable remedy," it is useful to note that courts have interpreted the meaning of "equitable remedy" consistently with the typical legal definition of the phrase.[86] Ballentine's Legal Dictionary defines "equitable remedy" as "[a] remedy available in equity rather than

78. Rederford v. U.S. Airways, Inc., 589 F.3d 30, 36 (1st Cir. 2009).
79. *See* Ohio v. Kovacs, 469 U.S. 274, 280 (1985).
80. *Id.*
81. *See In re* Udell, 18 F.3d 403, 406-07 (7th Cir. 1994).
82. *See id.* at 411, n.2 (Flaum, J., dissenting) (citing Conn. Nat. Bank v. Germain, 503 U.S. 249, 252-54 (1992); Corning v. Brennan, 417 U.S. 188, 201 (1974).
83. *Kovacs*, 469 U.S. 274.
84. *Id.* at 278.
85. *Id.* at 279.
86. *See, e.g., id.* at 279-80 ("There is little doubt that the State had the right to an equitable remedy under state law and that the right has been reduced to judgment in the form of an injunction ordering the cleanup."); Rederford v. U.S. Airways, Inc., 589 F.3d 30, 37 (1st Cir. 2009) (explaining that reinstatement under Title VII is an equitable remedy for purposes of § 101(5)(B)); *In re* Nickels Midway Pier, LLC, 255 Fed. Appx. 633 (3d Cir. 2007) (finding specific performance is an "equitable remedy" for purposes of § 101(5)(B)); Tekinsight.Com v. Stylesite Mktg., Inc. (*In re* Stylesite Mktg., Inc.), 253 B.R. 503, 507 (Bankr. S.D.N.Y. 2000) (citing *In re* Omegas Grp., Inc., 16 F.3d 1443, 1449 (6th Cir. 1994)) (explaining that a "constructive trust is an equitable remedy"); CRS Steam, Inc. v. Eng'g Res., Inc. (*In re* CRS Steam, Inc.), 225 B.R. 833, 840 (Bankr. D. Mass. 1998).

law; generally relief other than money damages."[87] Historically, equitable remedies were not available unless the remedy at law was considered insufficient, but with the convergence of courts of equity and courts of law, courts are much more willing to provide the complete remedy, whether it is an equitable remedy or monetary remedy.[88]

Further, it is important to recognize that under §101(5)(B), whether a right is "reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured" does not affect its status as a "*right* to an equitable remedy."[89]

B. The "Right to Payment"

Section 101(5)(A) also states the required "right to payment" for purposes of § 101(5)(B). On several occasions, the Supreme Court has held that a "right to payment [under §101(5)(A)] is nothing more nor less than an enforceable obligation."[90] Usually, the "right to payment" is an enforceable obligation arising under state law.[91] However, the "right to payment" may arise from an enforceable federal obligation as well.[92] As § 101(5)(A) explains, a "right to payment" is no less of a "*right* to payment" just because the right is "unliquidated, contingent, unmatured

87. BALLENTINE'S LEGAL DICTIONARY AND THESAURUS, 218 (1995).

88. *See, e.g.*, Maids Int'l, Inc. v. Ward (*In re* Ward), 194 B.R. 703, 711-12 (Bankr. D. Mass. 1996) (citing Douglas Laycock, *The Death of the Irreparable Injury Rule,* 103 HARV. L. REV. 687 (1990)) (discussing the history of availability of equitable remedies, the decrease in importance of the "no adequate remedy at law" rule, and the general availability of equitable remedies even when damages are available but not the most "certain, prompt, complete, and efficient" remedy).

89. 11 U.S.C. § 101(5)(B) (2006) (emphasis added); *accord In re* Skorich, 482 F.3d 21, 25 (1st Cir. 2007).

90. *See, e.g.,* Cohen v. de la Cruz, 523 U.S. 213, 218 (1998) (citing Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 559 (1990)) (finding that treble damages awarded under a New Jersey state statute constituted an "enforceable obligation" under New Jersey law, and therefore constituted a "right to payment"). *See also* F.C.C. v. NextWave Pers. Commc'ns Inc., 537 U.S. 293, 302-03 (2003) (internal quotations and citation omitted).

91. Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 450 (2007).

92. *See In re* Nat'l Gypsum Co., 139 B.R. 397, 405 (Bankr. N.D. Tex. 1992) (explaining that an analysis of non-bankruptcy law is required to determine whether a "claim" exists under § 101(5)); *accord* Rederford v. U.S. Airways, Inc., 589 F.3d 30, 37 (1st Cir. 2009) (explaining that a right to payment arises out of Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act); *In re* CMC Heartland Partners (*CMC Heartland I*), 966 F.2d 1143, 1146 (7th Cir. 1992) (iterating that to the extent [CERCLA] §§ 106 and 107 [42 U.S.C. §§ 9606-07] require a person to pay money today because of acts before or during the reorganization proceedings, CERCLA creates a "claim" in bankruptcy); United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1004 (2d Cir. 1991) (discussing possibility of a right to payment arising under CERCLA).

or disputed."[93] Likewise, the creditors' intention not to enforce the "right to payment" makes it no less of a "right to payment."[94] As long as a party holds a monetary obligation that is enforceable under federal or state law, even if contingent, the party holds a "right to payment" for purposes of § 101(5)(A).[95] This same definition holds for purposes of determining when a "claim" exists under § 101(5)(B).[96] It is the *right* to the payment, not a party's intention to enforce the right that converts an equitable remedy to a "claim" under § 101(5)(B).[97]

A split in authority exists regarding the proper method for determining when a "right to payment" arises for bankruptcy purposes.[98] Courts disagree on whether a missing element of a cause of action is simply a contingency for purposes of § 101(5), or whether all elements must be completed before a "right to payment," and thus a "claim," exists.[99] These differences in interpretation affect when a "claim" arises for purposes of § 101(5).[100] However, the differing interpretations do not affect the more fundamental question of whether the completed cause of

93. 11 U.S.C. § 101(5)(A).

94. *In re* Kilpatrick, 160 B.R. 560, 567 (Bankr. E.D. Mich. 1993) (" [T]he text of § 101(5)(B) strongly implies that such a party's intentions vis-a-vis enforcement of a payment right are irrelevant to the determination of whether that party holds a claim."); *In re* Chateaugay Corp., 112 B.R. 513, 523 (Bankr. S.D.N.Y. 1990), *aff'd,* 944 F.2d 997 (2d Cir. 1991) ("Thus, where a creditor has the option of converting an injunction into a right to monetary compensation, as the EPA can do here if it performs the cleanup because of a PRP's failure to do so, such an obligation must be regarded as a dischargeable claim."). On appeal, the Second Circuit agreed with the bankruptcy court stating that "[a]n injunction that does no more than impose an obligation entirely as an alternative to a payment right is dischargeable." *In re* Chateaugay Corp., 944 F.2d 997, 1008 (2d Cir. 1991).

95. *See In re* Kilpatrick, 160 B.R. at 567.

96. *See* Irizarry v. Schmidt (*In re* Irizarry), 171 B.R. 874, 878 (B.A.P. 9th Cir. 1994) (looking at whether a "right to payment" existed under the § 101(5)(A) definition in determining whether an equitable remedy was a claim under § 101(5)(B)).

97. 11 U.S.C. § 101(5)(B) (emphasis added); *accord* Ford v. Skorich (*In re* Skorich), 482 F.3d 21, 25 (1st Cir. 2007).

98. *See, e.g.,* Wongco v. Federated Dep't Stores, Inc. (*In re* R.H. Macy & Co., Inc.), 283 B.R. 140 (Bankr. S.D. N.Y. 2002); Antonino v. Kenny (*In re* Antonino), 241 B.R. 883 (Bankr. N.D. Ill. 1999); *see also In re* Chateaugay, 944 F.2d at 1009 (determining when a "right to payment" arises under CERCLA statute and thus creates a "claim" for bankruptcy purposes).

99. *See* Cal. Dep't of Health Servs. v. Jensen (*In re* Jensen), 995 F.2d 925, 929 (9th Cir. 1993) (don't need all elements to be present for a claim to arise, which would mean the EPA would not yet have authority to act when the obligations became "claims"); *In re* Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 974 F.2d 775 (7th Cir. 1992); *In re* Nat'l Gypsum Co., 139 B.R. 397, 405 (Bankr. N.D. Tex. 1992) (obligation need not be ripe, so long as all the acts giving rise to CERCLA liabilities have occurred). *But see* United States v. Union Scrap Iron & Metal, 123 B.R. 831, 835 (Bankr. D. Minn. 1990) ("all the elements necessary to give rise to a legal obligation under the relative substantive non-bankruptcy law" must occur before a right to payment under 101(5)(A) arises).

100. AHERN & MARSH, *supra* note 15, at § 3:5.

action falls within the definition of "claim" under the Bankruptcy Code at all.[101] Because we are concerned with determining whether certain equitable remedies can constitute claims in the first place, we will leave the other question, involving when the claim arises, for another day.[102]

C. *The "Breach of Performance"*

The third operative phrase in the § 101(5)(B) definition of "claim" is "breach of performance." The Supreme Court has weighed in on the meaning of "breach of performance," but decided only a narrow issue regarding the meaning of this phrase. The Court found that a "breach of performance" can arise from violation of a statute, in addition to breach of a contract.[103]

Although not part of its holding, other portions of the Supreme Court's *Kovacs* decision implicitly bear on the interpretation of "breach of performance" in § 101(5)(B). In *Kovacs*, the Supreme Court held that Ohio had converted its equitable remedy under an environmental statute (an injunction) into a "right to payment" by appointing a receiver to liquidate the debtor's assets and pay for compliance with the requirements of the cleanup injunction.[104] Ohio appointed the receiver pursuant to a general receiver statute.[105] In other words, in *Kovacs*, the "right to payment" arose from the fact that the State obtained appointment of a receiver, *not* because the original "breach" gave rise to a statutory or common law "right to payment." This holding seems to be at odds with the text of § 101(5)(B), which "clearly requires that the breach, not the equitable remedy, give rise to a right to payment."[106]

Perhaps the best explanation is that the *Kovacs* decision provides a narrow, additional basis for including rights to equitable remedies within the definition of "claim," under the unique facts in that case. This is the conclusion reached by the Seventh Circuit in *In re Udell*.[107] The court in *Udell* wrestled with the *Kovacs* decision and concluded that a "right to an equitable remedy" can be a "claim" if it falls into one of two categories. First, if the "breach" giving rise to the "right to an equitable remedy" also gives rise to an "'alternative' right to payment," the "right to an

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101. *Id.*
102. For more reading on the timing issue, *see id.* at §§ 3:19-3:33.
103. *See* Ohio v. Kovacs, 469 U.S. 274, 279 (1985).
104. *Id.* at 283.
105. *See* AHERN & MARSH, *supra* note 15, at § 3:16 (discussing the receiver statute, OHIO REV. CODE § 2735.01 (1985), at issue in the case).
106. Maids Int'l, Inc. v. Ward (*In re* Ward), 194 B.R. 703, 713-14 (Bankr. D. Mass. 1996); *accord* Glass v. Prein, 3 S.W.3d 135, 139 n. 6 (Tex. App. 1999).
107. *In re* Udell, 18 F.3d 403 (7th Cir. 1994).

equitable remedy" is a "claim."[108] This is the definition in the text of § 101(5)(B). Additionally, the *Udell* decision suggests that if a "right to payment" arises "with respect to" the equitable remedy, it will be a claim.[109] The court did not expound upon when a "right to payment" arises "with respect to" an equitable remedy." Instead, the *Udell* court simply found that the test was not met under the facts of the case.[110] This second class of "claims," where the "right to payment" arises "with respect to" the equitable remedy, seems to be the *Udell* court's response to the narrow expansion of the definition of "claim" under the *Kovacs* decision.

The additional scope of "claim" discussed in the *Kovacs* and *Udell* cases can be left aside for now because this expansion only becomes relevant after the text of § 101(5)(B) has been fully analyzed. With that in mind, the text of the statute requires that the "breach of performance" must give rise to the "right to an equitable remedy," and that "such breach" must also give rise to the "right to payment" before the "right to an equitable remedy" is a "claim" under § 101(5)(B).[111] In light of this requirement, the phrase "breach of performance" is critical to an understanding of § 101(5)(B).

Three circuits have considered whether an injunction arising under an environmental statute, like RCRA, which does not provide a "right to payment," falls within the scope of "claim."[112] The results of these decisions, while not directly discussing the "breach," bear on the interpretation of the phrase "breach of performance." The relative strengths and weaknesses of each will be discussed, leading to a discussion of how the Proposed Approach attempts to minimize the weaknesses of the other approaches.

As an initial matter, however, the phrase "breach of performance" suggests that: 1) there must be some performance required by the debtor and 2) the debtor must breach the required performance. A court must first identify the "performance" required of the debtor. Then the court can determine if the debtor has breached the required performance.

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108. *See id.* at 408 (finding the "necessary relationship" between a right to payment and a right to an equitable remedy where the right to payment is an "alternative" to the right to an equitable remedy).

109. *Id.* at 407.

110. *See id.* at 409.

111. *See* 11 U.S.C. § 101(5)(B) (2006); *In re* Ward, 194 B.R. at 713-714; *Glass*, 3 S.W. 3d at 139 n. 6.

112. This number is somewhat misleading. The Sixth and Seventh Circuits have dealt with these types of statutes. The Third Circuit decided *In re* Torwico Elecs., Inc., 8 F.3d 146 (3d Cir. 1993), where the court based its decision on the alleged fact that no right to payment existed. However, the statute at issue in *Torwico* did provide an alternative right to payment. This will be discussed further, *see infra* Part III.C.4.

1. *United States v. Apex Oil*—the "*Apex* Approach"

The Seventh Circuit recently held, in *Apex*, that a cleanup injunction issued pursuant to RCRA did not constitute a claim under § 101(5)(B) because RCRA did not include a cause of action providing money damages, i.e. a "right to payment."[113] The *Apex* court recognized that the government's cleanup injunction, issued under RCRA, was an equitable remedy for purposes of § 101(5)(B).[114] However, it seems that neither party argued that CERCLA provided a "right to payment" for the debtor's "breach." Because no one argued that the court should look at CERCLA for an alternative "right to payment," the *Apex* court ignored CERCLA as a source of the alternative "right to payment." Additionally, the Seventh Circuit ignored the debtor's argument that the Clean Water Act or the Oil Pollution Liability Act might provide an alternative.[115] The court determined that RCRA only provided a "right to an equitable remedy," and not a "right [of the plaintiff] to payment" for the debtor's "breach."[116] As a result, the RCRA injunction did not constitute a § 101(5)(B) "claim."[117]

In the *Apex* case, the EPA claimed that Apex was liable for cleanup under RCRA as a successor to Clark Oil & Refinery Co. ("Clark"), which filed for Chapter 11 relief in 1987.[118] Clark emerged from bankruptcy as the reorganized entity Apex Oil, Co. ("Apex") under a plan of reorganization that was confirmed in 1990.[119] Prior to the Clark bankruptcy, the EPA had been investigating possible contamination caused by Clark on property adjacent to one of Clark's refining plants.[120] However, the EPA did not file a proof of claim in the Clark bankruptcy regarding the pollution of the property at issue in the case.[121] Although neither Clark nor Apex had ever owned the contaminated property, the EPA brought an action against Apex under RCRA some fifteen years

113. United States v. Apex Oil Co., 579 F.3d 734, 738 (7th Cir. 2009).
114. *Id.* at 736.
115. *See* Brief and Attached Appendix of Defendant-Appellant Apex Oil Co., Inc. at 34-35, United States v. Apex Oil, Co., 579 F.3d 734 (7th Cir. 2009) (No. 08-3433), 2009 WL 927822 (arguing that the Clean Water Act and Oil Pollution Liability Act gave the EPA the right to clean up and seek reimbursement from Apex).
116. *Apex*, 579 F.3d at 736-37.
117. *Id.* at 737 (insertion in original).
118. Petition for a Writ of Certiorari at 5, United States v. Apex Oil Co., 579 F.3d 734 (7th Cir. 2009) (No. 09-1023), 2010 U.S. S. Ct. Briefs LEXIS 350, *cert. denied*, 79 U.S.L.W. 3195 (2010).
119. *Id.*
120. *Id.*
121. *Id.*

after the Clark bankruptcy, asserting liability based on Apex's status as a successor to the potentially responsible party, Clark.[122]

Apex asserted that the RCRA injunction could only be complied with by expenditure of money.[123] Attempting to mirror the argument accepted by the Supreme Court in *Ohio v. Kovacs*, Apex claimed that because it had never, and currently did not, own or have access to the contaminated property, the company could only comply with the order by hiring someone to do the cleanup at a substantial cost.[124] Consistent with the Sixth Circuit's interpretation of *Kovacs*,[125] Apex suggested that the injunctive order was a "claim" that had been discharged in the prior Clark bankruptcy because the only means of compliance with the order was expenditure of money.[126] The Seventh Circuit rejected this argument, finding that the cost to Apex was not a "right [of the plaintiff] to payment" under § 101(5)(B).[127]

Because a CERCLA claim was seemingly not presented as a viable alternative "right to payment," the court used an unnecessarily narrow interpretation of the scope of § 101(5)(B). In *Apex*, the equitable remedy was the RCRA injunction.[128] In terms of the two-step inquiry discussed above, the *Apex* court viewed the required "performance" as Apex's continual compliance with the provisions of RCRA as a whole. The "breach," then, would occur when Apex violated the statute.[129] So far, this is in conformity with the statute.[130] Namely, the RCRA injunction (the equitable remedy) was for violation (the breach) of a duty to comply with the provisions of RCRA (the required performance).

The problem with the *Apex* decision involves the court's search for an alternative "right to payment" to convert the RCRA injunction into a "claim" under § 101(5)(B). According to § 101(5)(B), the "breach" must also give rise to the "right to payment" for the relevant "right to an equitable remedy" to constitute a "claim." The *Apex* court determined that since RCRA did not provide a "right to payment," no alternative

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122. *Id.* at 6-8.

123. Petition for a Writ of Certiorari at 8, United States v. Apex Oil Co., 579 F.3d 734 (7th Cir. 2009) (No. 09-1023), 2010 U.S. S. Ct. Briefs LEXIS 350, *cert. denied*, 79 U.S.L.W. 3195 (2010).

124. *Id.*

125. For a further discussion of the Sixth Circuit's decision in United States v. Whizco, Inc., 841 F.2d 147 (6th Cir. 1988), *see infra* Part III.C.2.

126. *Apex*, 579 F.3d at 737-38.

127. *Id.* at 737 (insertion in original).

128. *Id.* at 737-38 (RCRA is basis of EPA's equitable claim).

129. *See* United States v. Apex Oil Co., 438 F. Supp. 2d 948, 950 (S.D. Ill. 2006), *aff'd*, 579 F.3d 734 (7th Cir. 2009) ("The government here seeks an equitable remedy for Defendant's alleged breach of a statute.").

130. *See* 11 U.S.C. § 101(5)(B) (2006).

right to payment existed.[131] However, it is not important whether the *statute* provides an alternative "right to payment." What is important is whether the "*breach*" gives rise to a "right to payment."[132] In *Apex*, the "breach" was the violation of RCRA; that is, the "breach" was the debtor's release or threatened release of some substance.[133] Confining the search for a "right to payment" to the RCRA statute was too narrow, because, as discussed further below, CERCLA, or some other statute, may provide an alternative "right to payment" to remedy the same "*breach*"—discharge of regulated substances by the debtor.[134] If legally sufficient, that "right to payment" should have converted the RCRA injunction to a "claim" under § 101(5)(B).

2. *United States v. Whizco*—The "*Whizco* Approach"

The *Apex* court rejected the approach taken by the Sixth Circuit in *United States v. Whizco* without any substantial analysis.[135] Other commentators have also suggested that the *Whizco* interpretation does not conform to the language of § 101(5)(B).[136] In *Whizco*, the Sixth Circuit purported to apply the *Kovacs* rule and held that an injunction under the Surface Mining Control and Reclamation Act of 1977 ("Mining Act") was a claim to the extent that the injunction required the debtor to expend money to comply.[137] The court applied a substance over form approach and determined that, although the injunction, in form, sought to require the debtor to clean up, in substance, the state just sought money with which to perform the cleanup.[138] Because the Mining Act, like RCRA, provides only injunctive relief and does not include a provision allowing money damages,[139] it is relevant to the RCRA analysis.

In *Whizco*, Whizco and its sole shareholder Mr. Leuking filed for Chapter 11 relief.[140] The debtors later converted the case to a Chapter 7 liquidation after the United States filed a complaint alleging that the debtor had failed to comply with the Mining Act.[141] The United States

131. *See Apex*, 579 F.3d at 736-37.
132. Maids Int'l, Inc. v. Ward (*In re* Ward), 194 B.R. 703, 713-14 (Bankr. D. Mass. 1996); *accord* Glass v. Prein, 3 S.W.3d 135, 139 n. 6 (Tex. App. 1999).
133. *See* Complaint at 9-13, United States v. Apex Oil Co., 438 F. Supp. 2d 948 (S.D. Ill. 2006) (No. 05-CV-242-DRH), 2005 U.S. Dist. Ct. Pleadings LEXIS 14481.
134. *See infra* Part IV.B.3.
135. United States v. Whizco, Inc., 841 F.2d 147 (6th Cir. 1988).
136. *See, e.g.*, AHERN & MARSH, *supra* note 15, at § 3:16.
137. *Whizco*, 841 F.2d at 150-51.
138. *Id.*; *accord* AHERN & MARSH, *supra* note 15, at § 3:16.
139. *Whizco*, 841 F.2d at 148; *see also* AHERN & MARSH, *supra* note 15, at § 3:16.
140. *Whizco*, 841 F.2d at 148.
141. *See id.*; 30 U.S.C. § 1201-1328 (2006)

sought injunctive relief preventing the debtors from mining coal anywhere in the U.S. until they remedied the violations of the Mining Act.[142] Under the Mining Act, the Attorney General could file an "action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order."[143] However, similar to RCRA, and unlike the EPA's rights under CERCLA, the Mining Act did not allow the U.S. to reclaim the mine and then seek money reimbursement.[144]

The Sixth Circuit held that the injunction constituted a "claim" under § 101(5)(B) to the extent that the injunction did not require the debtor to perform personally, but instead required the debtor to expend money.[145] Thus, Mr. Leuking's obligation under the cleanup injunction, which would have required him to hire a third party to reclaim the mine, was a dischargeable "claim."[146] The *Whizco* court relied, as did the district court, on a portion of the Supreme Court's *Kovacs* decision in finding that the reclamation obligation constituted a claim.[147]

The *Whizco* court quoted from the portion of the Supreme Court's *Kovacs* decision that stated:

> *Ohio is essentially trying to obtain a money payment from Kovacs.* The impact of its attempt to realize upon Kovacs' income or property cannot be concealed by legerdemain or linguistic gymnastics. Kovacs cannot personally clean up the waste he wrongfully released into Ohio waters. He cannot perform the affirmative obligation properly imposed upon him by the State court *except by paying money or transferring over his own financial resources. The State of Ohio has acknowledged this by its steadfast pursuit of payment as an alternative to personal performance.*[148]

Finding that the United States, in substance, was seeking money as an alternative to personal performance of Mr. Leuking, the *Whizco* court held that the cleanup injunction was a dischargeable claim in the *Whizco* bankruptcy to the extent the injunction required Mr. Leuking to spend money.[149]

As mentioned above, the *Whizco* decision does not fit the strict language of § 101(5)(B). In order to fall within the language of

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142. *Whizco*, 841 F.2d at 148.
143. *Id.* (citing 30 U.S.C. § 1271).
144. *Id.*
145. *Id.* at 150-51.
146. *Id.*
147. *Id.* at 149 (quoting Ohio v. Kovacs, 469 U.S. 274, 282 (1985)).
148. *Whizco*, 841 F.2d at 149 (quoting *Kovacs*, 469 U.S. at 282) (emphasis in *Whizco* opinion).
149. *Id.* at 150-51.

§ 101(5)(B), a "right to payment" must exist. There was no evidence in *Whizco* that the United States had a "right to payment."[150] Neither party provided a statutory or common law theory upon which the United States could base a "right to payment."

Because the facts of *Whizco* do not give rise to a "claim" under the language of § 101(5)(B), the court must have been making its decision under the narrowly expanded rule in *Kovacs*, as evidenced by the above quote. Unfortunately, the *Whizco* decision seems to go further than the *Kovacs* decision will allow.

The *Kovacs* decision,[151] along with § 101(5)(B), suggests that the holder of the "right to an equitable remedy" must also have a "right to payment" from the debtor.[152] The "right to payment" must be held by the *holder of the equitable right*, not some other third party.[153]

Additionally, the *Whizco* decision turns the phrase "right to payment" into "requirement to expend money," such that an equitable remedy constitutes a claim if the debtor could satisfy the equitable remedy by spending money instead. This changes the inquiry from the perspective of the creditor, focused on "a right to payment" or a "right to an equitable remedy," to the perspective of the debtor, focused on the requirement that the debtor spend money. This is opposed to both § 101(5)(B) and the *Kovacs* decision, which view the issue from the perspective of the creditor.[154] This is one of the inconsistencies which the Proposed Approach, discussed below, attempts to correct.

Further, in *Kovacs*, the Court held that Ohio had a "right to payment" after it used a receiver statute to take control of Mr. Kovacs' assets.[155] The *Kovacs* Court explicitly stated that it was not deciding what the legal consequences would have been had Mr. Kovacs filed for bankruptcy prior to the appointment of a receiver.[156] Since no receiver had been appointed in *Whizco*, the court's decision cannot rely upon the *Kovacs* rule.

One additional, practical weakness of the *Whizco* Approach exists. The *Whizco* court held that a "right to an equitable remedy" is a

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150. AHERN & MARSH, *supra* note 15, at § 3:16.

151. *Kovacs*, 469 U.S. at 274 (1985).

152. *See* United States v. Apex Oil Co., 579 F.3d 734, 737 (7th Cir. 2009) and cases cited therein; *accord* AHERN & MARSH, *supra* note 15, at § 3:16.

153. *See Apex*, 579 F.3d at 737 and cases cited therein; *accord* AHERN & MARSH, *supra* note 15, at § 3:16.

154. 11 U.S.C. § 101(5)(B) (2006) (defining "claim" using the phrases "right to payment" and "right to an equitable remedy" of the claimholder); *Kovacs*, 469 U.S. at 274 (focusing on the government's actions and perspective when determining whether the State's actions had converted the right to an equitable remedy to a claim under § 101(5)(B)).

155. *Kovacs*, 469 U.S. at 283.

156. *Id.* at 284.

dischargeable "claim" to the extent it requires the debtor to spend money.[157] This could effectively discharge the obligation to convey land under a specific performance judgment, contrary to the sole example in the legislative history.[158] A specific performance decree requiring the debtor to transfer property will almost always require the debtor to spend some money, usually in the nature of recording fees and taxes. If the obligation to spend money on these costs is discharged in bankruptcy, an inconsistency occurs. The debtor is required to transfer the property, but not to spend money on the transfer fees to transfer the property. If the debtor has not paid the transfer fees at the time of filing a petition for bankruptcy (or at the time of confirmation of a plan in a chapter 11 case), the obligation to pay those transfer fees will be discharged, effectively discharging the debtor's obligation to convey the land.

The *Whizco* Approach fails to comply with either the language of the statute or the narrow additional scope of "claim" under *Kovacs*, where the holder of "right to an equitable remedy" has obtained a receiver to liquidate the debtor's property and perform the actions required by the equitable remedy. The addition of a practical problem with the approach casts doubt on the viability of the *Whizco* Approach.

3. The Proposed Approach

This article proposes an approach ("Proposed Approach") to interpretation of § 101(5)(B) that finds a "right to an equitable remedy" to be a "claim" if there is some common law or statutory theory which can be used to reduce the equitable right to a monetary value. The Proposed Approach views the wrongful actions, or inactions, of the debtor as the "breach." Under this Proposed Approach, if the wrongful actions of the debtor give rise to a "right to payment" and a "right to an equitable remedy," then the "right to an equitable remedy" is a "claim" under § 101(5)(B). It does not matter if the "right to payment" and the "right to an equitable remedy" arise under different theories of law. As long as both rights arise from the same wrongful action or inaction of the debtor, the right to the equitable remedy is a claim.

Keeping with the RCRA example, if the debtor causes a release or threatened release of some substance regulated by RCRA, then RCRA provides a "right to an equitable remedy."[159] RCRA does not provide a

157. United States v. Whizco, Inc., 841 F.2d 147, 150-51 (6th Cir. 1988).

158. *See* 124 CONG. REC. S33,992 (daily ed. Oct. 5, 1978) (statement of Sen. DeConcini); 124 Cong. Rec. H32,393 (daily ed. Sep. 28, 1978) (statement of Rep. Edwards).

159. *See* 42 U.S.C. § 6973(a) (2006).

"right to payment."[160] However, as discussed above, it is not the *statute* giving rise to the "right to an equitable remedy" that must give rise to the "right to payment."[161] Instead, it is the *breach*, the debtor's actions, which must give rise to the "right to payment." Thus, if some other theory of law, such as CERCLA, provides a "right to payment" for causing the same release or threatened release, then the RCRA injunction should constitute a claim under § 101(5)(B).

Under the Proposed Approach, if the debtor's wrongful actions or inactions give rise to both a "right to an equitable remedy" and a "right to payment," then the "right to an equitable remedy" is converted to a § 101(5)(B) "claim." As such, the "claim" may be discharged in bankruptcy regardless of the legal theories giving rise to the alternative remedies. As discussed further below, this is consistent with the narrowed definition of § 101(5)(B) enacted by Congress, which indicates that Congress did not intend all equitable remedies to be discharged, but only those equitable remedies that could be reduced to a money value.[162] Additionally, the Proposed Approach, unlike the *Whizco* Approach, keeps the focus on the perspective of the creditor, and not the debtor. The Proposed Approach does not affect treatment of equitable remedies in the narrow circumstances when a "claim" may not fit the exact definition of "claim" in § 101(5)(B), but still falls within the scope of the *Kovacs* rule. Before applying the various approaches to the environmental context, it is useful to explain how the Proposed Approach would apply generally in the contractual and statutory context. After all, a "breach of performance" can arise in the context of a contractual or a statutory dispute.[163]

a. The "Breach of Performance" in Contracts Cases

Determining what "performance" is required under a contract is generally fairly simple. A typical contractual provision requires the debtor to successfully complete some contractual duty.[164] It is the

160. *Whizco*, 841 F.2d at 149 n.2.

161. *See supra* Part III.C.1.

162. *See* CRS Steam, Inc. v. Eng'g Res., Inc. (*In re* CRS Steam, Inc.), 225 B.R. 833, 844 (Bankr. D. Mass. 1998); *see also* Rederford v. U.S. Airways, Inc., 589 F.3d 30, 36-37 (1st Cir. 2009) (focusing on the ability of the court to reduce an equitable remedy to a payment amount).

163. Ohio v. Kovacs, 469 U.S. 274, 278 (1985).

164. BLACK'S LAW DICTIONARY 1158 (Deluxe 7th ed. 1999) (defining performance as "[t]he successful completion of a contractual duty"). There is significant disagreement about the interpretation of § 101(5)(B) in the context of covenants not compete. As discussed *infra* Part VI.A., the dispute over whether an injunction enforcing a covenant not to compete falls within the scope of § 101(5)(B) is a result of differing views as to

completion of this contractual duty that can be viewed as the required "performance" by a party to the contract.[165] For example, in a land sale contract, the seller generally has a duty to convey the land to the buyer and to do so in accordance with the terms of the contract. Successful completion of this duty results in successful "performance." This successful completion of the contractual duty to convey the land will also be the required "performance" for purposes of § 101(5)(B).[166]

If the debtor acts in some way that is inconsistent with the duty required by the contract (e.g. by selling the property to someone else or not conveying the property at all), the debtor's actions or inaction constitute a "breach."[167] It is this "breach" that gives rise to remedies for breach of contract.[168] It follows, that this "breach," the improper actions by the debtor, must give rise to the "right to payment" to convert any "right to an equitable remedy" to a claim under § 101(5)(B).[169]

Kennedy v. Medicap Pharmacies, Inc.[170] provides an example of this concept. In *Kennedy*, the Kennedys' former employer, Medicap, filed an adversary proceeding in the Kennedy bankruptcy seeking a determination that the Kennedys' obligation to comply with a covenant not to compete would not be discharged.[171] In discussing the underlying facts of the case, the Sixth Circuit stated "[t]he Kennedys concede that they breached the covenant not to compete *by working in a pharmacy known as Kennedy Pharmacy at the same location as the Medicap Pharmacy*."[172] This statement suggests that it was the actions of the debtor, competing within a restricted area, which constituted the "breach."[173] In response to the "breach," Medicap sued, seeking a permanent injunction for breach of the contract not to compete.[174]

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whether the applicable state law provides a "right to payment" as an alternative to the injunctive remedy. The dispute does not involve statutory interpretation of §101(5)(B).

165. BLACK'S LAW DICTIONARY 1158 (Deluxe 7th ed. 1999).

166. 11 U.S.C. § 101(5)(B) (2006); *see also id.*

167. *See, e.g.*, Kennedy v. Medicap Pharmacies, Inc., 267 F.3d 493, 495-98 (6th Cir. 2001) (finding that defendants "concede that they breached the covenant not to compete *by working in a pharmacy known as Kennedy Pharmacy at the same location as the Medicap Pharmacy.*" (emphasis added)); *In re* CRS Steam, Inc., 225 B.R. at 836 (focusing on debtor's misappropriation of designs and failure to disclose as the "breach of performance" which gave rise to both a breach of contract claim and a trade secret claim).

168. *See* RESTATEMENT (SECOND) OF CONTRACTS § 236 cmt. a (1981) ("A breach may be one by non-performance (§ 235(2)), or by repudiation (§ 253), or by both (§ 243).").

169. Maids Int'l, Inc. v. Ward (*In re* Ward), 194 B.R. 703, 713-14 (Bankr. D. Mass. 1996); *accord* Glass v. Prcin, 3 S.W.3d 135, 139 n. 6 (Tex. App. 1999).

170. *Kennedy*, 267 F.3d 493 (6th Cir. 2001).

171. *Id.* at 495.

172. *Id.*

173. *See id.*

174. *Id.*

Putting this all together, we see that the required "performance" for purposes of § 101(5)(B) in a contractual situation is the successful completion of the duty or duties imposed on the debtor under the contract. A "breach" of the required performance occurs when the debtor acts, or fails to act, in a manner contrary to the successful completion of the contractual duty. Under § 101(5)(B), then, it is this "breach," the actions or inactions of the debtor, which must give rise to rights to both payment and an equitable remedy.[175] If both remedies exist, the "right to an equitable remedy," whether pursued or not,[176] is a "claim" under § 101(5)(B).

b. The "Breach of Performance" in Statutory Cases

The analysis becomes a little more difficult when the "breach of performance" relates to a statutory provision. This is because the requirements of a statute are generally couched in terms of prohibitions, e.g. companies must not release industrial cleaners into the environment, and because the term "performance" is not typically used in a statutory context. Analogizing from the contractual context, "performance" under a statute requires the debtor to comply with some statutory duty.[177] The duty under a statute is defined by the statute itself. As an example, we will focus on RCRA. Thus, "performance" by a debtor, for purposes of § 101(5)(B) in the RCRA context, requires the debtor to comply with RCRA's provisions.[178]

As in the contractual context, the "breach" of the statutory duty is the action or inaction by the debtor that violates a statutory duty.[179] For

175. 11 U.S.C. § 101(5)(B) (2006) ("right to an equitable remedy for *breach* of performance if such *breach* gives rise to a right to payment") (emphasis added).

176. *In re* Kilpatrick, 160 B.R. 560, 567 (Bankr. E.D. Mich. 1993) (stating that "the text of § 101(5)(B) strongly implies that such a party's intentions vis-a-vis enforcement of a payment right are irrelevant to the determination of whether that party holds a claim").

177. *See supra* Part II.C.3.a.

178. *See* Cox v. City of Dallas, Tex., 256 F.3d 281, 297 (5th Cir. 2001) ("[T]he RCRA creates, at the very least, a duty on the part of generators not to dispose of their waste in such a manner that it may present an imminent and substantial endangerment to health or the environment."); BLACK'S LAW DICTIONARY 1158 (Deluxe 7th ed. 1999) (defining performance as "[t]he successful completion of a contractual duty").

179. *See* CRS Steam, Inc. v. Eng'g Res., Inc. (*In re* CRS Steam, Inc.), 225 B.R. 833, 836 (Bank. D. Mass. 1998) (focusing on debtor's misappropriation of designs and failure to disclose as the "breach of performance" which gave rise to both a breach of contract claim and a trade secret claim); United States v. LTV Corp.(*In re* Chateaugay Corp.), 112 B.R. 513, 523 (S.D.N.Y. 1990), *aff'd,* 944 F.2d 997 (2d Cir. 1991) (focusing on debtors "conduct" of releasing pollutants when determining if a right to an injunction constituted a claim under § 101(5)(B)); *see also* Brief for Kathryn R. Heidt as Amici Curiae Supporting Petitioners at 14-16, *In re* Torwico Elecs., Inc. 8 F.3d 146, 150 (3d Cir. 1993) (suggesting that CERCLA remedies are an alternative sufficient to convert RCRA

example, the court in *In re CRS Steam* dealt with a violation of the Illinois Trade Secrets Act ("ITSA"). In *CRS Steam*, the court determined that the debtor's actions, involving the "'misappropriation' of a 'trade secret' by 'improper means' consisting of 'breach of a confidential relationship or other duty to maintain secrecy'" constituted the "breach of performance" under § 101(5)(B).[180]

Similarly, in the RCRA example, the actions by the debtor that are not in compliance with RCRA and result in a violation of some RCRA provision constitute the "breach." Namely, the release or threatened release of a regulated substance constitutes the breach. And, again, it is this "breach" that gives rise to liability under RCRA. Additionally, it is this "breach," the debtor's actions, that must give rise to rights to both payment and an equitable remedy to convert a "right to an equitable remedy" to a claim under § 101(5)(B).

4. The *Torwico* Case

For the sake of completeness, it bears mentioning that the Third Circuit has dealt with a similar issue under a statute similar in structure to RCRA. In *In re Torwico Electronics, Inc.*, the Third Circuit dealt with an injunction issued under a New Jersey law.[181] The *Torwico* court held that even though Torwico no longer owned or possessed the polluted property, the cleanup obligation imposed by an administrative order issued by the New Jersey Department of Environmental Protection and Energy (NJDEPE) was not a "claim" and was not discharged in Torwico's bankruptcy.[182]

In *Torwico*, Torwico rented property near the Jersey shore, but moved to a new location in 1985. Later, in 1989, Torwico filed for bankruptcy.[183] The NJDEPE failed to file proof of claim in the Torwico bankruptcy.[184] After the NJDEPE issued an administrative order, Torwico argued that the obligation fell within the definition of "claim" in the Bankruptcy Code, and was, therefore, dischargeable in the bankruptcy.[185] Torwico claimed that this was the exact scenario faced by the debtor in *Ohio v. Kovacs* and that the Supreme Court had determined

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remedies to claims under a plain meaning approach to § 101(5)(B)); AHERN & MARSH, *supra* note 15, at § 3:16 (suggesting an outcome consistent with this approach).

180. *In re* CRS Steam, 225 B.R. at 840.

181. *See In re* Torwico Elecs., Inc., 8 F.3d at 150; AHERN & MARSH, *supra* note 15, at § 3:16.

182. *See In re* Torwico Elecs., Inc., 8 F.3d at 151.

183. *Id.* at 147; AHERN & MARSH, *supra* note 15, at § 3:16.

184. *In re* Torwico Elecs., Inc., 8 F.3d at 147.

185. *Id.* at 148.

that this type of obligation was a dischargeable "claim."[186] After all, Torwico no longer owned or possessed the property and no longer had access to the property to perform the cleanup.[187] The only way that Torwico could effectuate the cleanup, as was the situation with Mr. Kovacs, would be to pay money to clean up the property.[188] The Third Circuit disagreed and found that obligations to clean up "run with the waste."[189] The court held that the NJDEPE was seeking an equitable remedy that was not a "repackaged" claim for damages, and the cleanup obligation was not a dischargeable "claim."[190]

The *Torwico* case was wrongly decided for a number of reasons. First, the situation in *Torwico* was nearly identical to the situation in *Kovacs*, and so the cleanup obligation should have been characterized as a claim under the rule in *Kovacs*.[191] Second, and more fundamentally, the NJDEPE did have an alternative right to payment.[192] The NJDEPE had the right to clean up and seek reimbursement.[193] Because the analysis in *Torwico* fails to recognize either of these inconsistencies, it will be mostly ignored as an unreasonable interpretation of the statute in the next discussion regarding the application of the various approaches in environmental cases.

IV. APPLICATION OF THE APPROCHES IN ENVIRONMENTAL CASES

Several of the previously discussed approaches arguably provide reasonable interpretations of § 101(5)(B). In order to choose among the various interpretations, it is necessary to more closely consider how Supreme Court precedent, as well as the legislative history and bankruptcy policy, weighs on the interpretation of § 101(5)(B). However, prior to considering extrinsic evidence, it is necessary to review how the *Apex* Approach, the *Whizco* Approach and the Proposed Approach apply to environmental causes of action under each of: 1) statutes like CERLCA, where a single statutory framework provides both a "right to payment" and a "right to an equitable remedy,"[194] and 2) statutes like RCRA, where the statutory framework only provides the

186. *Id.* at 149.
187. *See id.* at 151.
188. AHERN & MARSH, *supra* note 15, at § 3:16.
189. *In re* Torwico Elecs., Inc., 8 F.3d at 151.
190. *Id.*
191. AHERN & MARSH, *supra* note 15, at § 3:16.
192. Kathryn R. Heidt, *Undermining Bankruptcy Law and Policy: Torwico Electronics, Inc. v. New Jersey Department of Environmental Protection*, 56 U. PITT. L. REV. 627, 636 (1995).
193. *Id.*
194. *See, e.g.*, United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1008 (2d Cir. 1991).

"right to an equitable remedy"[195] and a court would be required to look elsewhere for any alternative "right to payment."

A. CERCLA Analysis Remains Unchanged Under All Approaches

The general treatment of equitable remedies arising under CERCLA will remain unaffected by application of the *Apex* Approach, the *Whizco* Approach, or the Proposed Approach. As discussed previously, courts generally agree that the "right to an equitable remedy" provided by CERCLA § 106(a)[196] constitutes a "claim," at least in circumstances where the EPA has the alternative right to clean up and seek reimbursement for its expenses under CERCLA § 107(a).[197] There is some disagreement about when the right to clean up and seek reimbursement under CERCLA § 107(a) arises.[198] However, the outcome of that dispute only affects the issue involving *when* a "claim" arises under § 101(5)(B), *not* the inclusion of the "right to an equitable remedy" under CERCLA § 106(a) within the Code's definition of "claim."[199]

Because enforcement of an injunction under CERCLA § 106(a) would require the debtor to expend money to clean up, a cause of action for an injunction under CERCLA § 106(a) constitutes a "claim" under the *Whizco* Approach.[200] Additionally, under the *Apex* Approach, a "right to an equitable remedy" arising under CERCLA § 106(a) would constitute a "claim" because the breach, violation of CERCLA § 106(a), also gives rise to a right to obtain the "right to payment" provided by CERCLA § 107(a).[201] Because both remedies are available as a result of the breach of CERCLA § 106(a), the "right to an equitable remedy" under § 106(a) constitutes a "claim."[202]

The same result occurs when the Proposed Approach is applied, but results from a different analysis. Once again, the Proposed Approach looks at the actions of the debtor that give rise to the "right to an equitable remedy" under CERCLA § 106(a). The relevant actions are the release or threatened release of a substance regulated by CERCLA. The Proposed Approach then asks if there is any other cause of action that provides a "right to payment" for those wrongful actions. CERCLA § 107(a) provides a "right to payment" to remedy the debtor's wrongful

195. United States v. Apex Oil Co., 579 F.3d 734, 736 (7th Cir. 2009).
196. 42 U.S.C. § 9607(a) (2006).
197. *Id.* § 9606(a); *see, e.g., In re* Chateaugay Corp., 944 F.2d at 1008.
198. AHERN & MARSH, *supra* note 15, at § 3:5.
199. *Id.*
200. *See* United States v. Whizco, Inc., 841 F.2d 147, 151 (6th Cir. 1988).
201. *Id.*
202. *See, e.g., In re* Chateaugay Corp., 944 F.2d at 1008.

actions, so the right to an equitable remedy under CERCLA § 106(a) constitutes a claim. The only difference between the *Apex* Approach and the Proposed Approach in the CERCLA context is that the Proposed Approach would allow the court to look for the "right to payment" outside the CERCLA statute even though that would generally be unnecessary because of the right to payment available under CERCLA § 107(a).[203]

B. The RCRA Analysis Differs Under the Various Approaches

1. RCRA Analysis Under the *Apex* Approach

As discussed above, the *Apex* court looked only within the text of RCRA in search of a "right to payment" which would convert the equitable remedy to a § 101(5)(B) "claim."[204] The court determined that no "right to payment" existed for what it perceived to be the "breach," i.e. violation of RCRA § 7003.[205] As a result, the cleanup injunction issued pursuant to RCRA did not constitute a "claim" which had been discharged in Clark's prior bankruptcy.[206] The *Apex* court did not even consider "rights to payment" that could have been pursued by the EPA under other environmental statutes, including CERCLA, the Oil Pollution Liability Act and the Clean Water Act.[207]

2. RCRA Analysis Under the *Whizco* Approach

Under the *Whizco* Approach a right to an injunction under RCRA constitutes a "claim" in almost all circumstances.[208] Certainly a debtor's obligation to clean up pollution under a RCRA injunction will be a "claim" where the debtor does not have control of the property, and can only effectuate the terms of the injunction by hiring someone to do the cleanup.[209] That is precisely what the Sixth Circuit held in *Whizco*.[210] There is no need to look for an alternative "right to payment" under RCRA, CERCLA, or any other statute or common law theory because

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203. Perhaps nuisance law or the Clean Water or Clean Air Acts would provide another means of recovering for the debtor's wrongful release of pollutants.

204. United States v. Apex Oil Co., 579 F.3d 734, 736 (7th Cir. 2009).

205. *Id.*

206. *Id.* at 736, 739.

207. EPA originally initiated an attempt to require Apex to clean-up the site under the authority of CERCLA and the Clean Water Act. Petition for a Writ of Certiorari at 6-7, United States v. Apex Oil Co., 579 F.3d 734 (7th Cir. 2009) (No. 09-1023), 2010 U.S. S. Ct. Briefs LEXIS 350, *cert. denied*, 79 U.S.L.W. 3195 (2010).

208. *See Apex*, 579 F.3d at 737.

209. United States v. Whizco, Inc., 841 F.2d 147, 151 (6th Cir. 1988).

210. *Id.*

the injunction is converted to a "claim" simply by virtue of the fact that the debtor must spend money to comply with the injunction.[211]

3. RCRA Analysis Under the Proposed Approach

The Proposed Approach brings a "right to an equitable remedy" within the scope of "claim" under § 101(5)(B) even if the "right to payment" arises under a different statute than the "right to an equitable remedy." However, the Proposed Approach does not go quite as far as the *Whizco* Approach and still requires that the "right to payment" be provided by some statutory or common law theory. This prevents the court from off-handedly devising a means of liquidating the alleged "claim."

For example, the debtor's violation of RCRA § 7003(a)[212] in *Apex* was a result of the debtor's actions of releasing pollutants, which resulted in an "imminent and substantial endangerment." Under the Proposed Approach, it is the action of the debtor in causing the release or threatened release of pollutants that constitutes the "breach." Viewing the debtor's actions or inactions as the "breach" allows a court to look to any cause of action intended to fully remedy the debtor's pollution.

As previously discussed, CERCLA generally provides a "right to payment"[213] that can be utilized to remedy pollution which is or may be causing "imminent and substantial endangerment." The EPA's course of conduct in the *Apex* case suggests a "right to payment" may have existed under CERCLA as a remedy for the pollution.[214] Prior to bringing the RCRA action to impose a cleanup order on Apex, the EPA threatened that if Apex did not clean up the pollution, they would institute a cleanup of the property and seek reimbursement from Apex under CERCLA and the Clean Water Act.[215] Possibly because the money remedies would constitute "claims" that would be deemed to have been discharged in Clark's prior bankruptcy,[216] the EPA refrained from pursuing its

211. *See id.*

212. United States v. Apex Oil Co., 579 F.3d 734, 739 (7th Cir. 2009).

213. EPA's reimbursement right under CERCLA § 107(a). 42 U.S.C. § 9607(a) (2006); *see* United States v. LTV Corp. *(In re* Chateaugay Corp.*)*, 944 F.2d 997, 1008 (2d Cir. 1991).

214. Petition for a Writ of Certiorari at 6-7, United States v. Apex Oil Co., 579 F.3d 734 (7th Cir. 2009) (No. 09-1023), 2010 U.S. S. Ct. Briefs LEXIS 350, *cert. denied*, 79 U.S.L.W. 3195 (2010).

215. *Id.*

216. *See, e.g., In re* Chateaugay Corp., 944 F.2d at 1008.

remedies under CERCLA and the Clean Water Act and instead instituted the action under RCRA to obtain an injunction.[217]

The EPA's RCRA claim required a showing of "imminent and substantial endangerment" to human health or to the environment caused by a release or threatened release of a "solid waste" or "hazardous waste."[218] In *Apex*, the EPA alleged that Clark disposed of "[g]asoline and other petroleum-based substances . . . [which] constitute 'hazardous wastes' or 'solid wastes' as those terms are defined at RCRA Sections 1004(5) and 1004(27)."[219] EPA requested an injunctive "order requiring Apex Oil to investigate and clean up the large plume of petroleum-based substances beneath [the polluted property]."[220] A plain reading of the EPA complaint suggests that the EPA is alleging a "right to an equitable remedy," an injunctive cleanup order under RCRA.[221]

Under CERCLA, the EPA would be required to make essentially the same showing of an "imminent and substantial endangerment" to human health or to the environment, but would have to show that the substances causing the endangerment constituted "hazardous substances" as defined in CERCLA.[222] If the EPA can show "imminent and substantial endangerment" in its RCRA case, it would also be able to do so in a CERCLA case.

Completing the CERCLA claim, all of the wastes that the EPA alleged were contaminating the polluted site at issue in *Apex* fall within the definition of "hazardous substance" in CERCLA even though they are petroleum based substances. Although CERCLA creates a so-called "petroleum exclusion," the exclusion does not apply to any byproducts of petroleum consumption that are otherwise specifically listed as "hazardous substances."[223] A table listing substances that are expressly deemed "hazardous substances" within the meaning of CERCLA is provided in 40 C.F.R. § 302.4. Table 302.4 includes all five substances alleged by the EPA's *Apex* complaint to be polluting the air and ground

217. Petition for a Writ of Certiorari at 6-8, United States v. Apex Oil Co., 579 F.3d 734 (7th Cir. 2009) (No. 09-1023), 2010 U.S. S. Ct. Briefs LEXIS 350, *cert. denied*, 79 U.S.L.W. 3195 (2010).

218. 42 U.S.C. § 6973(a).

219. Complaint at 1, United States v. Apex Oil, Co., 438 F. Supp. 2d 948 (S.D. Ill. Apr. 5, 2005) (No. OS-cv-242-DRH), 2005 U.S. Dist. Ct. Pleadings LEXIS 14481.

220. *Id.* at 2.

221. *See* Ohio v. Kovacs, 469 U.S. 274 (1985) (finding a cleanup injunction to be an equitable remedy covered by § 101(5)(B)).

222. 42 U.S.C. §§ 9606(a), 9607(a).

223. CERCLA § 101(14), 42 U.S.C. § 9601(14), discussed *supra* Part II.A.

at issue.[224] These substances include: benzene, toluene, ethyl benzene, xylenes and n-hexane.[225]

The inclusion of all of the substances in the *Apex* complaint within the scope of "hazardous substances" may create a viable "right to payment" under CERCLA.[226] Such an enforceable obligation would amount to a "right to payment" under § 101(5)(B), converting any RCRA injunctive remedy to a "claim" discharged in Clarks' prior bankruptcy. The fact that the EPA did not indicate any intention of enforcing the alternative right, again, should not have prevented the court from considering the alternative "*rights* to payment" which would convert the "right to an equitable remedy" to a claim.[227]

The Proposed Approach allows a court to look to CERCLA, as well as any other statute or common law cause of action, to determine if an alternative "right to payment" exists which arises from the "breach," i.e. the debtor's actions of releasing or causing the release of pollutants. In the end, the Proposed Approach requires application of the simple two-step process discussed above. When a plaintiff asserts an equitable remedy against the debtor, the court first looks at the actions of the

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224. 40 CFR § 302.4 (2010).

225. The table in 40 C.F.R. § 302.4 includes hexane with a CAS identification of 110–54–3. Hexane is the same as n-hexane or normal hexane, as opposed to several related to substances that are sometimes referred to under the blanket term "hexanes." U.S. ENVIRONMENTAL PROTECTION AGENCY, TOXICOLOGICAL REVIEW OF N-HEXANE 8 (2005), *available at* http://www.epa.gov/IRIS/toxreviews/0486tr.pdf (discussing n-hexane under the CAS #110-54-3 and noting that it is "also referred to as hexane").

226. *See* Brief for Appellant-Petitioner at 14, United States v. Apex Oil, Co., 579 F.3d 734 (7th Cir., Jan. 28, 2009) (No. 08-3433), 2009 U.S. 7th Cir. Briefs LEXIS 70 (*Apex* summed up the finding of the trial court in its Seventh Circuit brief by stating that the trial court determined that "a cleanup order under RCRA is not a 'claim' within the meaning of 11 U.S.C. §101(5)(B) of the Bankruptcy Code *unless* the operative statute (i.e., RCRA) also provides, in the alternative, for the direct imposition of a money judgment against the defendant."). Even if CERCLA did not apply, the court should have at least considered other possible alternative "rights to payment," such as causes of action under the Clean Water Act or the Oil Pollution Liability Act, which were argued by Apex. Brief of Appellee-Respondent at 19-20, United States v. Apex Oil, Co., 579 F.3d 734 (7th Cir., Mar. 20, 2009) (No. 08-3433), 2009 U.S. 7th Cir. Briefs LEXIS 91 (arguing that the Clean Water Act and Oil Pollution Liability Act gave the EPA the right to clean up and seek reimbursement from Apex).

227. *In re* Kilpatrick, 160 B.R. 560, 567 (Bankr. E.D. Mich. 1993) ("[T]he text of § 101(5)(B) strongly implies that such a party's intentions vis-a-vis enforcement of a payment right are irrelevant to the determination of whether that party holds a claim."); *In re* Chateaugay Corp., 112 B.R. 513, 523 (Bankr. S.D.N.Y. 1990), *aff'd,* 944 F.2d 997 (2d Cir. 1991) ("Thus, where a creditor has the option of converting an injunction into a right to monetary compensation, as the EPA can do here if it performs the cleanup because of a PRP's failure to do so, such an obligation must be regarded as a dischargeable claim."). On appeal, the Second Circuit agreed with the bankruptcy court stating that "[a]n injunction that does no more than impose an obligation entirely as an alternative to a payment right is dischargeable." *In re* Chateaugay Corp., 944 F.2d 997, 1008 (2d Cir. 1991).

debtor that the plaintiff alleges give it the "right to an equitable remedy." Next, the court determines if those same actions by the debtor also give rise to a cause of action providing a money damage remedy. If so, the plaintiff has asserted a "right to an equitable remedy" which can be satisfied by a "right to payment" and the equitable remedy constitutes a § 101(5)(B) claim which can be discharged in bankruptcy.

V. OTHER EVIDENCE WEIGHING ON THE INTERPRETATION OF § 101(5)(B)

A. Interpreting § 101(5)(B) in Light of Ohio v. Kovacs

The Supreme Court's decision in *Ohio v. Kovacs* bears on the meaning of §101(5)(B) slightly, but courts and commentators have recognized *Kovacs'* limited application in light of the strange facts of that case.[228] In *Kovacs*, the Supreme Court held that a cleanup injunction issued under an Ohio statute providing injunctive relief[229] had been converted to a claim when the State of Ohio attempted to essentially liquidate the injunction through the use of a general receiver statute.[230]

In *Kovacs*, Mr. Kovacs was ordered to clean up pollution that his company had created.[231] The State of Ohio also ordered Mr. Kovacs to pay $75,000 to compensate for injury to the State's wildlife.[232] When Mr. Kovacs did not comply with the order, the State of Ohio sought appointment of a receiver to have Mr. Kovacs' assets liquidated and have the proceeds of the liquidation applied to clean up the property.[233] After the receiver took possession of Mr. Kovacs' property, but before the receiver could liquidate the assets, Mr. Kovacs filed for bankruptcy.[234]

The Supreme Court determined that by appointing a receiver pursuant to state statute in an effort to obtain money that could be used to clean up the property, the State of Ohio had converted the equitable injunctive remedy into a "right to payment."[235] The *Kovacs* Court was

228. United States v. Whizco, Inc., 841 F.2d 147, 150 (6th Cir. 1988); AHERN & MARSH, *supra* note 15, at § 3:16.

229. *See* Ohio v. Kovacs, 469 U.S. 274, 276 (1985); OHIO REV. CODE ANN. § 6111 (West 2009); Brief for Petitioner at 4, *Kovacs*, 469 U.S. 274 (1985) (No. 83-1020), 1984 WL 565574.

230. *See* OHIO REV. CODE ANN. § 2735.01 (West 2009); Brief of Respondent at 9, *Kovacs*, 469 U.S. 274 (1985) (No. 83-1020), 1983 WL 486397.

231. *Kovacs*, 469 U.S. at 276.

232. *Id.*

233. *Id.*

234. *Id.* at 276.

235. *Id.* at 283.

careful to limit its holding to the facts of the case at bar.[236] In determining that the State of Ohio had a "right to payment" converting the injunctive remedy to a "claim," the Court focused on the fact that the State had dispossessed Kovacs, leaving Kovacs without the ability to perform the obligations imposed by the injunction.[237] Additionally, the Court noted that the State of Ohio did not dispute that all it wanted from Kovacs was money to pursue the cleanup effort.[238]

The *Kovacs* decision should be read as the exception, not the rule. The viability of the holding in that case is limited to the facts of the case, which were very unusual.[239] *Kovacs* indicates that there are collection efforts by a state that may convert an equitable right to a "right to payment," as recognized by the court in *Udell* and discussed above, but the efforts must leave the debtor unable to perform the obligations required by the injunction and must seek nothing more than money to allow the judgment creditor to perform the acts required by the injunction.[240]

1. *Kovacs* and the *Apex* Approach

Although the *Apex* Approach provides at least a plausible interpretation of § 101(5)(B), it, like the other possible interpretations, is not without its weaknesses. The *Apex* court's practical application does not align with the decision in *Ohio v. Kovacs*.

In *Kovacs*, the equitable remedy (the cleanup injunction) and "right to payment" (stemming from the receiver statute) arose under different statutes. The State of Ohio had an equitable remedy under Ohio's Water Supply-Sanitation-Ditches legislation.[241] This piece of Ohio legislation parallels the federal Clean Water Act. The "right to payment" arising from Ohio's appointment of a receiver and dispossession of Mr. Kovacs' property proceeded under a separate statute.[242] That statute provided "Special Remedies" that courts were permitted to order and the State of Ohio sought the appointment of the receiver under the general contempt

236. *See id.* at 276 (noting what the court had *not* decided); United States v. Whizco, Inc., 841 F.2d 147, 150 (6th Cir. 1988) (noting the "limited character" of the *Kovacs* decision).

237. *Kovacs*, 469 U.S. at 283.

238. *Id.*

239. *See id.* at 276 (1985) (noting what the court had *not* decided); *Whizco*, 841 F.2d at 150 (noting the "limited character" of the *Kovacs* decision).

240. *See, e.g., In re* Udell, 18 F.3d 403, 407-08 (7th Cir. 1994); *see generally Kovacs*, 469 U.S. 274.

241. *See* Ohio Rev. Code Ann. § 6111 (West 2009); Brief of Petitioner at 4, *Kovacs*, 469 U.S. 274 (1985) (No. 83-1020), 1984 WL 565574.

242. *See* OHIO REV. CODE ANN. § 2735.01; Brief of Respondent at 9, *Kovacs*, 469 U.S. 274 (1985) (No. 83-1020), 1983 WL 486397.

power of the court.[243] These two alternative remedies, one being equitable and one being monetary, came from different Ohio legislation.[244]

The willingness of the Supreme Court to look to a separate piece of legislation to locate a "right to payment" that converted the equitable remedy obtained under a clean water statute belies the practical effect of the *Apex* court's failure to look to other statutes for a "right to payment." Nothing in *Kovacs* suggests that courts should limit the scope of their search for an alternative "right to payment" to the same piece of legislation that also provided the "right to an equitable remedy." Indeed, the Supreme Court did not limit its scope of inquiry in this manner.[245]

2. *Kovacs* and the Proposed Approach

Like the *Apex* Approach, a weakness of the Proposed Approach is that it is difficult to reconcile with the *Kovacs* decision. In *Kovacs*, the "right to payment" did not arise from a separate cause of action that could have been brought instead of the cause of action providing the "right to an equitable remedy." In other words, the State of Ohio could not have sought to have a receiver appointed to marshal and liquidate Mr. Kovacs' assets without first obtaining the equitable remedy.[246] Only after the State proved that it had a "right to an equitable remedy" under the environmental laws would a "right to payment" arise under the State's receiver statutes.[247]

This is arguably inconsistent with the Proposed Approach. It is also arguably inconsistent with the language of § 101(5)(B) of the Code because the *Kovacs* decision suggests that a "right to payment" arising from the "right to the equitable remedy," rather than the "breach," can constitute a § 101(5)(B) claim.[248] However, the limited scope of the *Kovacs* decision must be recognized.[249] As discussed above,[250] the *Kovacs* decision can be viewed as a narrow expansion of the scope of § 101(5)(B). Just because the court in *Kovacs* found an equitable remedy

243. *See* OHIO REV. CODE ANN. § 2735.01 (Statutory chapter heading is "Courts-General Provisions- Special Remedies").

244. Petition for a Writ of Certiorari at 6-8, United States v. Apex Oil Co., 579 F.3d 734 (7th Cir. 2009) (No. 09-1023), 2010 U.S. S. Ct. Briefs LEXIS 350, *cert. denied*, 79 U.S.L.W. 3195 (2010).

245. *Id.*

246. *See* OHIO REV. CODE ANN. § 2735.01 (West 2009).

247. *See id.*

248. Maids Int'l, Inc. v. Ward (*In re* Ward), 194 B.R. 703, 713-14 (Bankr. D. Mass. 1996); *accord* Glass v. Prein, 3 S.W.3d 135, 139 n. 6 (Tex. App. 1999).

249. United States v. Whizco, Inc., 841 F.2d 147, 151 (6th Cir. 1988); AHERN & MARSH, *supra* note 15, at § 3:16.

250. *See supra* Part V.A.

to be a claim because a "right to payment" arose out of the "right to an equitable remedy" does not mean that the "right to payment" must always arise out of the "right to an equitable remedy." Instead, only in the unique and unusual circumstances faced by the *Kovacs* Court should courts deviate from the mandate of § 101(5)(B) that the "breach" give rise to both the "right to payment" and the "right to an equitable remedy." If facts similar to those in *Kovacs* present themselves, then the narrow additional grounds for deeming an injunction a "claim" should be applied.

3. *Kovacs* and the *Whizco* Approach

As discussed above,[251] the *Whizco* decision arguably comports with the decision in *Kovacs*. In *Whizco*, Mr. Leuking did not have the capacity to clean up the polluted site himself, and the only means of compliance would be to pay someone to do the clean up.[252] This arguably falls within the holding of *Kovacs*.[253]

However, the *Kovacs* Court specifically stated that it was not deciding whether a right to an equitable remedy would constitute a claim under § 101(5)(B) if the State of Ohio had not already appointed a receiver who had taken over control of Mr. Kovacs' property.[254] The *Whizco* decision arguably falls within the undecided area defined by the Court in *Kovacs*. Additionally, as previously discussed, *Whizco* changes the perspective of the inquiry from that of the creditor to the perspective of the debtor.[255] Further, unlike the situation in *Kovacs* where there was a statutory basis for the process of converting the equitable remedy to money for the cleanup, *Whizco* does not require this. Instead, the *Whizco* Approach might require bankruptcy courts to determine the value of the equitable remedy without reference to any process provided by statute or common law. These practical limitations of the *Whizco* Approach are some of the issues that the Proposed Approach attempts to remedy.

B. Statutory Interpretation of §101(5)(B)

Although each of the above approaches has its weaknesses, the *Apex* and Proposed Approaches both present reasonable interpretations of the statute.[256] Therefore, the meaning of the language of § 101(5)(B)

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251. *See supra* Part III.C.2.
252. *Whizco*, 841 F.2d at 150.
253. *See* Ohio v. Kovacs, 469 U.S. 274, 282-83 (1985).
254. *Id.* at 284-85.
255. *See supra* Part III.C.2.
256. Although *Whizco* arguably provides a viable interpretation in the situations in which the *Kovacs* rule applies, it dos not conform to the language of the statute in those

must be determined in light of the history and purpose of the provision and the Code as a whole.[257] This section considers each approach in light of the sparse legislative history and the purposes of the Bankruptcy Code.[258] Practical implications of the approaches are also considered.

C. *The Legislative History of § 101(5)(B)*

The legislative history of § 101(5) indicates that Congress intended an extremely expansive interpretation of the term "claim."[259] "In enacting this language [in § 101(5)], Congress gave the term claim the broadest available definition."[260] As discussed above, the legislative history of §101(5) suggests that the definition of claim was intended to "allow all legal obligations of the debtor, no matter how remote or contingent, [to] be able to be dealt with in the bankruptcy case."[261] Additionally, § 101(5)(B) was intended to "ensure[] that even the most uncertain and difficult to estimate claims can be adjudicated in the bankruptcy proceedings."[262]

In accordance with the desire of Congress to "adopt the broadest available definition of 'claim,'" the Supreme Court has taken an extremely inclusive, rather than an exclusive, approach to interpreting § 101(5).[263] In doing so, the Court noted the "expansive language" chosen by Congress and discussed in the legislative history.[264] Circuit, district, and bankruptcy courts should follow the lead of the Supreme Court and

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situations falling outside the scope of *Kovacs*. For this reason, the *Whizco* Approach will be commented on only briefly in the following discussion.

257. *See In re* Condor Ins. Ltd., 601 F.3d 319, 321-23 (5th Cir. 2010).

258. As discussed, the *Whizco* Approach is discussed briefly in the following analysis, however, it should be discounted as a possible approach because of its failure to comply with the language of § 101(5)(B).

259. *See* Johnson v. Home State Bank, 501 U.S. 78, 83 (1991) ("Congress intended . . . to adopt the broadest available definition of 'claim.'"); *see also* S. REP. NO. 989, at 21-22 (1978); H.R. REP. NO. 595, at 309 (1977).

260. Rederford v. U.S. Airways, Inc., 589 F.3d 30, 35-36 (2009) (internal quotations omitted); *see also Home State Bank*, 501 U.S. at 83 (discussing in the context of § 101(5)(A)); Pa. Dep't. of Pub. Welfare v. Davenport, 495 U.S. 552, 558 (1990) (discussing in the context of § 101(5)(A)).

261. S. REP. NO. 989, at 21-22 (1978); H.R. REP. NO. 595, at 309 (1977).

262. *Rederford*, 589 F.3d at 36 (internal quotations omitted).

263. *See Home State Bank*, 501 U.S. at 83 (extinguishment of debtor's personal liability on a mortgage in a chapter 7 proceeding did not prevent the remaining obligation owing bank from being a "claim" under § 101(5) in a subsequent Chapter 13); *Davenport*, 495 U.S. at 558 (holding that restitution obligations arising from state criminal statute constituted "debt" (debt being "coextensive" with the term claim) that could be discharged in Chapter 13 proceeding); Ohio v. Kovacs, 469 U.S. 274, 280 (1985) (affirming Circuit Court's decision that state's equitable remedy under a statutory provision not providing an alternative right to payment "had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy").

264. *Davenport*, 495 U.S. at 558.

interpret § 101(5)(B) in a manner which discharges as many rights to equitable remedies as possible in bankruptcy, rather than letting those obligations survive bankruptcy and be dealt with outside the bankruptcy process. However, as noted by the court in *In re Bennett*,[265] despite how "broad [it is], the definition of claim is not without limits" and any interpretation must still comply with the text of § 101(5)(B)[266] unless the expanded *Kovacs* rule is clearly applicable.

By only looking at alternative monetary remedies contained within the same statute as the "right to an equitable remedy," the *Apex* Approach takes an exclusive interpretation of the term "claim" in conflict with the legislative history.[267] This is exhibited by the language and result of the Seventh Circuit's opinion in *Apex*.[268] The *Apex* court focused on the debtor's "limited right to the discharge of equitable claims"[269] and refused to include an equitable remedy that could have been fully remedied by a "right to payment" provided by another statute.[270] The restrictive result of the *Apex* decision did not conform to the broad interpretation of "claim" suggested by the legislative history and, instead, left in place a $150 million obligation of the debtor.[271] On the other hand, the Proposed Approach gives the statute the expansive interpretation required by the legislative history without ignoring the language of the statute and takes a view similar to the First Circuit's recent decision in *Rederford v. U.S. Airways, Inc.*[272]

In conformity with the legislative history's call for a broad interpretation of the definition of "claim," the *Rederford* court found that including equitable remedies that could be reduced to payment within the scope of "claim" under § 101(5)(B) "ensures that even the most uncertain and difficult to estimate claims can be adjudicated in the bankruptcy proceedings."[273] However, the court recognized that "[w]hen the equitable relief sought cannot give rise to a payment, but requires non-monetary action by a debtor, different considerations come into play," and the equitable relief cannot be liquidated and prioritized.[274]

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265. 175 B.R. 181 (Bankr. E.D. Pa.1994).

266. *Id.* at 183.

267. *See* S. REP. NO. 989, at 21-22 (1978); H.R. REP. NO. 595, at 309 (1977); *see also Home State Bank,* 501 U.S. at 83 ("Congress intended . . . to adopt the broadest available definition of 'claim.'").

268. United States v. Apex Oil, 579 F.3d 734 (7th Cir. 2009).

269. *Id.* at 737.

270. *Id.*

271. *Id.* at 736.

272. 589 F.3d 30, 36 (1st Cir. 2009) (noting that equitable remedies that cannot be reduced to payment are not claims).

273. *Id.* (internal quotations omitted).

274. *Id.* (internal quotations omitted). It is well to note that the *Rederford* court does not discuss what these other considerations are.

Like the *Rederford* court, the Proposed Approach liquidates all equitable remedies that can be reduced to payment. This is done by looking for any cause of action providing a "right to payment" that arises from the same wrongful actions of the debtor. If such a cause of action exists, the equitable remedy is capable of reduction to payment and constitutes a "claim" under § 101(5)(B). However, at the same time, the Proposed Approach (unlike the *Whizco* Approach) recognizes that § 101(5)(B) is not limitless and cannot be used to discharge equitable remedies that cannot be reduced to payment.[275]

D. Bankruptcy Policy

It is important to first note that bankruptcy policy provides the proper area of inquiry, rather than policy rooted in the area of law providing the "right to an equitable remedy." Certainly "[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[276] However, many laws attempt to promote policies that directly conflict with bankruptcy policies.[277]

Bankruptcy laws are intended to promote a number of policies by providing the debtor with a discharge of all debts, subject to limited exceptions.[278] Environmental laws that attempt to hold polluting parties responsible for the cost to clean up hazardous waste often promote policies that conflict with the bankruptcy policies.[279] These competing interests are generally resolved in favor of promoting bankruptcy policy because bankruptcy law is intended to be a comprehensive scheme which overrides many other federal and state laws that would otherwise apply.[280] In conformity with this principle, bankruptcy policy should

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275. *See id.* (noting that there are some situations when equitable remedies should not be treated as claims and should not be reduced to a monetary value).

276. F.C.C. v. NextWave Personal Commc'ns Inc., 537 U.S. 293, 304 (2003) (quoting J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 143-144 (2001)).

277. United States v. LTV Corp. *(In re* Chateaugay Corp.*)*, 944 F.2d 997, 1002 (2d Cir. 1991) ("We agree that the Bankruptcy Code and CERCLA point toward competing objectives.").

278. *Id.*

279. *Id.*

280. *See, e.g.*, MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d Cir. 2006) (explaining that in the event of a conflict, a court can properly conclude that "Congress intended to override the Arbitration Act's general policy favoring the enforcement of arbitration agreements."); U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n, Inc., (*In re* U.S. Lines, Inc.*)*, 197 F.3d 631, 640 (2d Cir. 1999) (affirming bankruptcy court decision to stay arbitration under the Arbitration Act in order to promote Bankruptcy Code's centralization policy); *id.* (analyzing bankruptcy as opposed to environmental law policies in the event of a conflict).

prevail over conflicting policies when interpreting § 101(5)(B). Because bankruptcy policies are of primary importance in interpreting § 101(5)(B), it is necessary to determine what bankruptcy policies are relevant to the statute's interpretation and how the alternative approaches conform to the relevant policies.

1. Relevant Bankruptcy Policies

The expansive definition of "claim" suggested by the legislative history and Supreme Court precedent is intended to include "even the most 'uncertain and difficult to estimate' claims."[281] This definition serves several important purposes, especially in the context of Chapter 11 reorganizations.[282] First, an expansive definition of dischargeable "claim" serves to discharge as many rights to equitable remedies as possible so that a company or individual can effectively reorganize their financial affairs.[283] Introducing uncertainty as to whether equitable remedies capable of being reduced to payment constitute claims would hinder a debtor's ability to reorganize and be successful.[284] The expansive definition also serves a closely related policy; the policy of providing the debtor with finality of the bankruptcy proceedings so that the debtor may have a "fresh start."[285] Last, the expansive definition helps to ensure equal distributions to similarly situated creditors.[286] A creditor could obtain "what amounts to priority over all other creditors" if rights to equitable remedies that could have been reduced to payment in bankruptcy were not discharged in a bankruptcy.[287]

281. Rederford v. U.S. Airways, Inc., 589 F.3d 30, 36 (1st Cir. 2009).
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*; *see also* Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363-64 (2006) (describing that a "critical feature" of bankruptcy proceeding is debtor's "fresh start" by releasing him, her, or it from further liability for old debts).
286. *See Katz*, 546 U.S. at 364 (2006) (explaining that one of the "critical features" of a bankruptcy proceeding is equal distribution among creditors.); *see also Rederford*, 589 F.3d at 36.
287. *Rederford*, 589 F.3d at 36. As discussed further *infra*, allowing the creditor's claim to survive the bankruptcy as a non-claim means the creditor would be able to have the equitable obligation performed in full, rather than settling for a pro-rata distribution on a claim like other creditors in the bankruptcy.

2. Promote Reorganization when Possible

The Bankruptcy Code attempts to promote the Congressional goal of encouraging reorganization when possible.[288] Congress hoped that promoting reorganization would allow reorganized companies to continue to provide jobs, pay creditors in the future, and become profitable and benefit future equity holders.[289] The goal of promoting reorganization is accomplished by liquidating claims in bankruptcy so that the debtor will know where it stands and may determine if an effective reorganization is possible.[290]

The *Apex* Approach's narrow interpretation of § 101(5)(B) results in post-bankruptcy survival of rights to equitable remedies that could threaten a debtor's ability to reorganize. By failing to look for alternative "rights to payment" in statutes other than the statute giving rise to the "right to an equitable remedy," this approach allows equitable rights that could be reduced to payment to survive the bankruptcy.[291] Even the smallest obligation arising from an equitable remedy requiring the post-bankruptcy expenditure of money by a reorganized debtor could prevent the debtor from being able to propose a feasible plan and reorganize effectively. However, the cost of compliance with equitable remedies that may survive bankruptcy under the *Apex* Approach can be staggering. In the *Apex* case, the EPA estimated that the cost of the environmental cleanup obligation to be $150 million.[292] Astronomical cleanup costs like the one in dispute in *Apex* are not unusual.[293] Certainly obligations arising from equitable remedies which will cost debtors millions of dollars riding through a bankruptcy could substantially hamper a debtor's ability to reorganize.[294]

Arguably the *Whizco* Approach best promotes the policy of encouraging reorganizations because it is the broadest of the three

288. Braunstein v. McCabe, 571 F.3d 108, 116 (1st Cir. 2009) (discussing the "congressional goal of encouraging reorganizations") (citing United States v. Whiting Pools, Inc., 462 U.S. 198, 205, 207-08 (1983)).

289. *Whiting Pools*, 462 U.S. at 203.

290. *See Rederford*, 589 F.3d at 36 (noting the negative repercussions of failure to liquidate claims in bankruptcy on debtor's ability to effectively reorganize).

291. *See supra* Part IV.B.3.

292. *See* United States v. Apex Oil Co., 579 F.3d 734, 736 (7th Cir. 2009).

293. *See* KATHERINE N. PROBST ET AL., SUPERFUND'S FUTURE: WHAT WILL IT COST? A REPORT TO CONGRESS 87 (2001) (explaining that the average cleanup cost of a National Priority List (NPL) "mega" site was estimated in 2001 at approximately $140,000,000, and the average cleanup cost of an NPL "non-mega" site was estimated at $12,000,000).

294. *See* United States v. LTV Corp. *(In re* Chateaugay Corp.*)*, 944 F.2d 997, 1002 (2d Cir. 1991) (discussing the possibility that a "claim" by the EPA could result in a debtor having to abandon reorganization efforts in favor of liquidation proceedings) (citing THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 51 (1986)).

approaches. However, the *Whizco* Approach does so by ignoring the statutory language and allowing courts to reduce rights to equitable remedies to monetary values without any statutory or common law guidance.

The Proposed Approach promotes the effective reorganization of debtors by allowing a debtor to discharge as many equitable remedies as possible while still adhering to the language of § 101(5)(B). The Proposed Approach does not liquidate all rights to equitable remedies, which would be contrary to the plain language of § 101(5)(B). However, the Proposed Approach leaves in place only those equitable remedies which cannot be reduced to payment using some structured approach provided by statute or common law.

3. Finality and "Fresh Start"

Closely intertwined with the goal of promoting reorganizations is the goal of providing a debtor with a "fresh start."[295] Congress' attempt to create a broad definition of "claim" also serves the purpose of providing debtors in bankruptcy with assurance that they will not be called upon to answer on pre-bankruptcy debts after they receive a discharge in bankruptcy.[296] A reorganized debtor may move forward pursuant to its plan of reorganization and not be worried that efforts to become a profitable business will be hampered by pre-confirmation[297] obligations and rights to equitable remedies.[298] A "fresh start" also allows an individual debtor or owner of a liquidating business to go forward without worrying about past debts negating future gains.[299]

The *Apex* Approach can hinder a debtor's ability to move forward and pursue a "fresh start" because it allows rights to equitable remedies with substantial monetary values, reducable to payment in bankruptcy, to survive the bankruptcy.[300] Despite what the cost of the obligations arising from equitable remedies that survive the bankruptcy may be, the obligations prevent "the honest but unfortunate debtor" from obtaining "a new opportunity in life with a clear field for future effort, unhampered

295. Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 366-367 (2007) ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'") (quoting Grogan v. Garner, 498 U.S. 279, 286-87 (1991)).

296. *See, e.g.*, Rederford v. U.S. Airways, Inc., 589 F.3d 30, 36 (1st Cir. 2009).

297. In a Chapter 7 proceeding, the relevant inquiry involves determining whether a "claim" arose pre- or post-order for relief. 11 U.S.C. § 727(b) (2006).

298. *Rederford*, 589 F.3d at 36.

299. *See Marrama* , 549 U.S. at 366-67 (2007) (discussing the Chapter 7 and 13 processes and how "the principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'") (quoting *Grogan*, 498 U.S. at 286-87).

300. *See supra* Part IV.B.3.

by the pressure and discouragement of preexisting debt."[301] Instead, a plaintiff can wait and assert costly equitable remedies after the debtor emerges from bankruptcy.[302]

On the other hand, the Proposed Approach attempts to minimize both the equitable remedies that can survive bankruptcy and the burden of pre-confirmation obligations the debtor must deal with after bankruptcy. Here again, the Proposed Approach attempts to remedy the overbroad *Whizco* rule. The Proposed Approach allows some rights to equitable remedies to ride through the bankruptcy, but leaves only those rights that cannot be liquidated in a structured manner. By minimizing the number of equitable remedies that ride through, the Proposed Approach attempts to balance the financial burden on the debtor, while allowing the holder of an equitable remedy to enjoy the nonfinancial benefit of her or his bargain.

4. Equal Treatment Among Similarly Situated Creditors

Another major purpose of the expansive definition of "claim" in § 101(5)(B) is to ensure equal treatment of similarly situated creditors.[303] This is done by ensuring that all creditors are paid through the bankruptcy, rather than having some receive partial payments on their debts while allowing others to receive full payment on their debts outside bankruptcy.[304] The *Apex* Approach allows some creditors to achieve a priority over others. The Proposed Approach avoids this result by disallowing creditors from seeking favorable treatment by picking and choosing between alternative statutory structures providing differing remedies for the same wrongful actions.

For example, in the environmental context, assume the debtor previously owned land and was responsible for hazardous wastes seeping into the ground water at those locations. The EPA may obtain an injunction under RCRA where "the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment."[305] Additionally, under CERCLA, and possibly

301. *Grogan*, 498 U.S. at 286 (1991) (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)).

302. *See, e.g.*, United States v. Apex Oil Co., 579 F.3d 734 (7th Cir. 2009) (equitable remedy asserted many years after Apex had emerged from bankruptcy).

303. *Rederford*, 589 F.3d at 36; *see also* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 364 (2006) (explaining that one of the "critical features" of a bankruptcy proceeding is equal distribution among creditors).

304. *Rederford*, 589 F.3d at 36 (allowing equitable remedies that could be reduced to payment in bankruptcy to survive post-bankruptcy gives holders of those remedies what amounts to priority over all other creditors).

305. 42 U.S.C. § 6973(a) (2006).

other statutes, the EPA has the right to an injunction,[306] or the option to clean up the pollution and seek reimbursement,[307] in the event "there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance."[308] Because the requirements for liability under RCRA and CERCLA overlap greatly, the EPA is in a unique position.[309] Where the EPA has the right to an injunction under both statutes, the EPA would also have the right to clean up the pollution and obtain reimbursement of the cleanup costs from the debtor, a "right to payment."[310]

Under the *Apex* Approach, this example provides a clear picture of the advantage the EPA may obtain over other creditors. An obligation arising under CERCLA, whether seeking an injunction or reimbursement, can constitute a "claim" against the debtor and may be discharged in bankruptcy.[311] However, under the *Apex* Approach, an obligation arising from violation of RCRA is not a "claim," and not discharged by bankruptcy.[312] Thus, in the event the EPA expects the debtor to liquidate under Chapter 7 of the Bankruptcy Code, it will proceed under CERCLA. This will allow the EPA to have a "claim" in the debtor's bankruptcy and allow the EPA to share *pro rata* with other unsecured creditors in the pot of money created by liquidation of the debtor's assets.[313]

On the other hand, if the EPA expects the debtor to reorganize, it will proceed under RCRA. Because the RCRA equitable remedy is not a "claim," it will not be discharged and will survive the bankruptcy

306. *Id.* § 9606(a).
307. *Id.* § 9607(a).
308. *Id.* § 9606(a).
309. *Id.* §§ 6973(a), 9606(a).
310. *See* 42 U.S.C. § 9607.
311. *See, e.g., In re* CMC Heartland Partners (*CMC Heartland I*), 966 F.2d 1143, 1146 (7th Cir. 1992) (explaining that to the extent [CERCLA] §§ 106 and 107 [42 U.S.C. §§ 9606-07] require a person to pay money today because of acts before or during the reorganization proceedings, CERCLA creates a "claim" in bankruptcy); United States v. LTV Corp. *(In re* Chateaugay Corp.*)*, 944 F.2d 997, 1005 (2d Cir. 1991). As discussed previously, when the "right to payment," and thus, the "claim" arises causes controversy. Some courts say that all four elements of the CERCLA claim must be present, while others suggest that a missing element just constitutes a contingency. This, however, only effects the timing issue when the "claim" arises, and not whether a certain type of obligation falls within the § 101(5)(B) definition of "claim." For a discussion on the timing issue, see Signature Combs, Inc. v. United States, 253 F.Supp.2d 1028, 1033 (W.D. Tenn. 2003).
312. *See* United States v. Apex Oil Co., 579 F.3d 734, 737-38 (7th Cir. 2009) (holding that a RCRA obligation is not a debt or claim and therefore not discharged).
313. *See* 11 U.S.C. § 726(a)(2) (2006) (providing for distribution to unsecured creditors in liquidation).

unaffected, requiring the debtor to pay the full amount of compliance with the equitable remedy. Further, the EPA claims, and at least one court has agreed, that it may maintain a cause of action under RCRA and CERCLA at the same time.[314] If this is true, the EPA would be able to bring actions under RCRA and CERCLA, and then wait and see which action to pursue after a debtor has determined if it will be able to reorganize. Maintaining both actions and then choosing based on the best recovery for the EPA results in the EPA nearly always benefiting to the detriment of other creditors.[315]

Under the Proposed Approach, the EPA will not have the ability to create an advantage for itself by deciding when to have a "claim" and when not to. Instead, the debtor would have the ability to have the RCRA injunction discharged if the same wrongful actions by the debtor also gave rise to a cause of action under CERCLA. The Proposed Approach looks at the wrongful actions of the debtor that gave rise to the injunctive relief under RCRA. If the debtor's wrongful actions also gave rise to a "right to payment" under CERCLA intended to compensate for the same wrong, the equitable remedy provided by RCRA would constitute a "claim" under § 101(5)(B).[316] The EPA would have to settle for a set treatment for the "right to an equitable remedy" that it holds *pro rata* payment with unsecured creditors.[317] In the event that the debtor's actions giving rise to the RCRA injunctive relief do not also give rise to a cause of action giving the EPA a "right to payment," then, as the *Rederford* court recognized, "the bankruptcy court will not be able to liquidate it and so cannot readily prioritize it relative to other claims."[318]

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314. *See* United States v. Reilly Tar & Chem. Corp., 546 F.Supp 1100, 1111 (D. Minn 1982); STROCHAK, *supra* note 27, at 101.

315. In the event of a Chapter 7, the EPA would be able to take part in the pro rata distribution, reducing the amount available for other creditors. At the same time the EPA can maintain the ability to avoid "claim" status should the debtor later determine that a reorganization is possible. In the event of a Chapter 11, the EPA would be able to file a proof of claim for potential CERCLA remedies, while maintaining the ability to dismiss the CERCLA claim and pursue the RCRA claim. Dismissing the CERCLA claim would allow the EPA to obtain non-claim status on its RCRA claim, payable in post-bankruptcy dollars, reducing the amount that the debtor will be able to disburse to its creditors if it is to be able to reorganize successfully.

316. Tekinsight.Com v. Stylesite Mktg., Inc. (*In re* Stylesite Mktg., Inc.), 253 B.R. 503, 511 (Bankr. S.D.N.Y. 2000) (reasoning that an alternative right to payment made equitable remedy a claim even though plaintiff might recover different amount under the alternative remedies because they each fully satisfied the plaintiff's claim).

317. This ignores the possibility of any fines imposed for post-petition, which could be classified as administrative expenses. *See* 42 U.S.C. § 6973(b) (2006).

318. Rederford v. U.S. Airways, Inc., 589 F.3d 30, 36 (1st Cir. 2009); *see infra* Part V.F. The practical implications of attempting to estimate the value of a "right to an equitable remedy" where no "right to payment" exists are discussed further.

E. Environmental Policy

As discussed above, bankruptcy policy provides the proper inquiry in the event of a conflict between bankruptcy policy and policy goals promoted by other areas of law. However, it is worth noting that the Proposed Approach, to some extent, furthers both bankruptcy policy *and* environmental law policy goals in its treatment of environmental obligations under RCRA and CERCLA. Both CERCLA and RCRA are concerned, at least in part, with ensuring timely cleanup of environmental pollutants so that risk to human health and the environmental can be reduced.[319]

The goal of timely cleanup is promoted by providing a consistent treatment for the EPA for environmental obligations under RCRA and CERCLA. If the EPA can obtain preferable treatment in a polluter's bankruptcy case by choosing whether to pursue cleanup obligations under CERCLA or RCRA, the EPA will have every incentive to postpone the cleanup obligations until the polluter decides whether it will reorganize or liquidate in its bankruptcy.[320] Not only does this run contrary to the goal of timely cleanup, but it may result in further contamination that could have been prevented by prompt cleanup. In some instances, the further contamination could even lead to further risks to human health and the environment.

As noted by Ahern and Marsh in their treatise on environmental obligations in bankruptcy, approaches like the *Apex* Approach encourage the EPA to postpone cleanup efforts.[321] Because initiating a cleanup effort may convert the obligation to a claim, the EPA is encouraged to order a potentially responsible party to clean up and then wait.[322] This may avoid classification of the obligation as a "claim," which may prevent the "fresh start" and effective reorganization that the Bankruptcy

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319. *See* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S.Ct. 1870, 1874 (2009) (CERCLA is intended "to promote the "'timely cleanup of hazardous waste sites.'") (citing Meghrig v. KFC Western, 516 U.S. 479, 483 (1996)); *Meghrig,* 516 U.S. at 483 (RCRA is intended to "minimize present and future threat to human health and environment.").

320. As discussed *supra* Part V.D.4., EPA will want to wait and see if a reorganization will be a viable option. If reorganization is possible, EPA will pursue clean-up under RCRA and have a non-dischargeable non-claim. If it becomes clear that liquidation is inevitable, EPA will pursue clean-up under CERCLA so that it will have a "claim" and at least receive a pro rata dividend with other creditors.

321. AHERN & MARSH, *supra* note 15, at § 3:15; *see also In re* Goodwin, 163 B.R. 825, 831 (Bankr. D. Id. 1993) (explaining that the decision of whether to seek an injunction or reimbursement should be motivated by the desire to promote the public welfare, not by the desire to make sure the debtor bears the financial burden).

322. AHERN & MARSH, *supra* note 15, at § 3:15.

Code is intended to promote.[323] Further, this delay approach is directly contrary to the primary goal CERCLA seeks to achieve—"timely cleanup of hazardous waste sites."[324]

While the Proposed Approach does not fully promote the environmental goal of holding liable those responsible for pollution,[325] it does not necessarily completely defeat this goal either. Since owners of the property are jointly and severally liable with operators, disposers, treaters, and transporters of the contaminants,[326] discharge of liability by one PRP will not necessarily leave the EPA without options to recover.

F Other Practical Considerations

The Proposed Approach also makes sense in light of the bankruptcy court's duty to estimate claims for allowances. Section 502(c)(2) requires the bankruptcy court to estimate "any right to payment arising from a right to an equitable remedy for breach of performance." However, § 502(c)(2) does not provide a procedure for estimating rights to equitable remedies. The Proposed Approach provides the missing procedure by allowing the court to use a legislatively approved procedure, or the procedure provided by some other cause of action intended to remedy the same wrongful actions or inactions of the debtor. Instead of legislating its own procedure as the *Whizco* Approach would require courts to do in many situations, the bankruptcy court borrows the procedure provided by Congress in the cause of action providing the "right to payment."

Two courts have recognized this logical solution. The bankruptcy court in *In re CRS Steam, Inc.* found that "[w]hen [a cause of action providing for a right to payment] is present, the court can compute the 'payment' due and thereby assign a dollar amount to the remedy, treating it like any other claim."[327] The *Rederford* court also acknowledged this logical solution when it recognized that "[i]f no monetary alternative exists for an equitable remedy, the bankruptcy court will not be able to liquidate it and so cannot readily prioritize it relative to other claims."[328]

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323. For more on relevant bankruptcy policies, *see supra* Part V.D.

324. *See* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S.Ct. 1870, 1874 (2009) (CERCLA intended "to promote the "'timely cleanup of hazardous waste sites.'") (citing Meghrig v. KFC Western, 516 U.S. 479, 483 (1996)).

325. *Id.*

326. 42 U.S.C. § 9607(a) (2006).

327. *See* CRS Steam, Inc. v. Eng'g Res., Inc. (*In re* CRS Steam, Inc.), 225 B.R. 833, 841 (Bankr. D. Mass. 1998); *see also* Rederford v. U.S. Airways, Inc., 589 F.3d 30, 36-37 (1st Cir. 2009) (focusing on the ability of the court to reduce an equitable remedy to a payment amount).

328. *Rederford*, 589 F.3d at 36.

In accordance with the bankruptcy court's duty to estimate claims under § 502(c), the term "claim" under § 101(5)(B) should be read to include "rights to equitable remedies" whenever there is an alternative cause of action providing a "right to payment" for the same "breach of performance." Application of the Proposed Approach reaches this result.

The *Apex* Approach, on the other hand, refuses to estimate the value of "equitable remedies" which could easily be determined using another defined cause of action.[329] Likewise, the *Whizco* Approach fails in this regard because it does not even require that the bankruptcy court use a legislatively provided procedure. Instead, bankruptcy courts applying the *Whizco* Approach would have to essentially legislate their own methods of calculating the value of equitable remedies where there is no congressional procedure provided.

As seen throughout the discussion of the meaning of § 101(5)(B), both the *Apex* Approach and the Proposed Approach provide viable interpretations of § 101(5)(B). In determining whether the *Apex* Approach or the Proposed Approach should be adopted, the legislative history, bankruptcy and environmental policy, and practical considerations favor the Proposed Approach. For this reason, the Proposed Approach should be adopted and courts should reduce rights to equitable remedies to payment whenever Congress, or state law, has provided a "right to payment" that remedies the wrongful actions or inactions of the debtor.

VI. APPLYING THE PROPOSED APPROACH IN OTHER CONTEXTS

While much of this paper has been dedicated to treatment of environmental obligations in bankruptcy, in order to be a viable approach to interpreting § 101(5)(B), the Proposed Approach must work in other contexts as well. Below is a discussion of cases involving covenants not to compete, another situation where the interpretation of § 101(5)(B) often gives rise to disputes and how the Proposed Approach applies to obtain the proper outcome. Additionally, this section briefly discusses application of § 101(5)(B) to specific performance and constructive trust remedies.

A. Covenants Not to Compete

Considerable litigation arises requiring courts to determine whether injunctive obligations for breach of performance of a covenant not to

329. *See supra* Part IV.B.3.

compete constitute "claims."[330] Generally, courts look to state law when determining if the "breach" giving rise to a "right to an equitable remedy" (usually an injunction) also gives rise to a "right to payment."[331] This interpretation of state law is where most of the dispute exists. Historically, injunctive relief was only available if there was an inadequate remedy at law, i.e. money damages could not compensate the plaintiff.[332] Some courts take the view that, if an injunction was awarded, the money damages must not have been an adequate remedy at law.[333] In that event, no "right to payment" is available to convert the equitable remedy of an injunction to a § 101(5)(B) "claim."[334] Other courts determine that the claimant in a breach of covenant not to compete case can choose to plead money damages, even if he or she would have been entitled to an injunction if it were sought.[335] Several bankruptcy courts have also found that injunctions for breach of a covenant not to compete are not "claims" because compliance with the injunction does not require the expenditure of money,[336] but each of these cases suffers from the same fault as the *Whizco* Approach; the interpretation does not comply with the language of § 101(5)(B). Additionally, the cases do not fall within the narrow expansion of the definition of "claim" provided by the *Kovacs* decision.

The result of these cases does not change under the Proposed Approach. The outcome, as it should, will still depend on the proper interpretation of state law.[337] Under the Proposed Approach, the court

330. *See, e.g.,* Kennedy v. Medicap Pharmacies, Inc., 267 F.3d 493, 495-98 (6th Cir. 2001); *In re* Reppond, 238 B.R. 442, 443 (Bankr. E.D. Ark. 1999); R.J. Carbone Co. v. Nyren *(In re* Nyren*)*, 187 B.R. 424, 425 (Bankr. D. Conn. 1995); *In re* Printronics, Inc., 189 B.R. 995, 1001 (Bankr. N.D. Fla. 1995); *In re* Hughes, 166 B.R. 103, 106 (Bankr. S.D. Ohio 1994); May v. Charles Booher & Assocs. *(In re* May*)*, 141 B.R. 940, 944 (Bankr. S.D. Ohio 1992); Oseen v. Walker *(In re* Oseen*)*, 133 B.R. 527 (Bankr. D. Idaho 1991); *In re* Peltz, 55 B.R. 336, 338 (Bankr. M.D. Fla. 1985); Carstens Health Indus. v. Cooper *(In re* Cooper*)*, 47 B.R. 842, 845 (Bankr. W.D. Mo. 1985); *In re* Cox, 53 B.R. 829, 832 (Bankr. M.D. Fla. 1985).

331. *See In re* Udell, 18 F.3d 403, 408 (7th Cir. 1994).

332. Potwora v. Dillon, 386 F.2d 74, 77 (2d Cir. 1966).

333. *See, e.g., In re* Reppond, 238 B.R. at 443; *In re* Printronics, Inc., 189 B.R. at 1001; *In re* Oseen, 133 B.R. at 527; *In re* Cox, 53 B.R. at 832.

334. *See In re* Reppond, 238 B.R. at 443; *In re* Printronics, Inc., 189 B.R. at 1001; *In re* Oseen, 133 B.R. at 527; *In re* Cox, 53 B.R. at 832.

335. Maids Int'l, Inc. v. Ward (*In re* Ward), 194 B.R. 703, 713-14 (Bankr. D. Mass. 1996); *In re* Kilpatrick, 160 B.R. 560, 564 (Bankr. E.D. Mich. 1993).

336. R.J. Carbone Co. v. Nyren *(In re* Nyren*)*, 187 B.R. 424, 425 (Bankr. D. Conn. 1995); *In re* Hughes, 166 B.R. 103, 106 (Bankr. S.D. Ohio 1994); May v. Charles Booher & Assoc. *(In re* May*)*, 141 B.R. 940, 944 (Bankr. S.D. Ohio 1992); *In re* Peltz, 55 B.R. 336, 338 (Bankr. M.D. Fla. 1985); Carstens Health Indus. v. Cooper *(In re* Cooper*)*, 47 B.R. 842, 845 (Bankr. W.D. Mo. 1985).

337. *See, e.g., In re* Udell, 18 F.3d 403, 408 (7th Cir. 1994); Creator's Way Associated Labels, Inc. v. Mitchell *(In re* Mitchell), 249 B.R. 55, 59 (Bankr. S.D.N.Y.

first looks to find out the actions or inactions of the debtor that constitute the "breach of performance." In the covenant not to compete cases, this "breach of performance" will be the debtor's act of competing against its prior employer, or the debtor's act of threatening to compete against the prior employer. The court would next focus on the remedies that are available to the employer. In almost all cases an injunctive remedy will be available.[338] Availability of an injunctive remedy means the employer has a "right to an equitable remedy."[339] In some states, where the claimant-employer may choose damages instead,[340] the breach also gives rise to a "right to payment," whether or not the employer pursues the damages remedy.[341] In these states, the presence of a "right to an equitable remedy," and a "right to payment" arising from the same "breach of performance" would convert the "right to an equitable" remedy into a claim.

On the other hand, if state law does not give the employer an alternative "right to payment" in the event of a breach of performance, but *only* allows an injunction for breach, the right to the equitable remedy of injunction would not be a claim.[342] In these states, however, a debtor or claimant may look to other theories of law as well. If, for instance, the same actions or inactions by the debtor, competing against one's employer in violation of a covenant not to compete, also gives rise to a tort claim, then this could constitute the alternative "right to payment" necessary to convert the "right to an equitable remedy" into a claim. To determine if the tort claim converts the right to the equitable remedy into a claim, the court will simply be required to determine if the

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2000); Tekinsight.Com v. Stylesite Mktg., Inc. (*In re* Stylesite Mktg., Inc.), 253 B.R. 503, 511 (Bankr. S.D.N.Y. 2000).

338. *See* 2 LOUIS ALTMAN & MARIA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADE & MONOPOLIES § 16:22 (4th Ed.) (Westlaw 2010).

339. *See, e.g.*, Ohio v. Kovacs, 469 U.S. 274, 279-80 (1985) ("[T]here is little doubt that the State had the right to an equitable remedy under state law and that the right has been reduced to judgment in the form of an injunction ordering the cleanup."); *In re* Nickels Midway Pier, LLC, 255 Fed. Appx. 633 (3d Cir. 2007) (stating that specific performance is an "equitable remedy" for purposes of § 101(5)(B)).

340. *See, e.g.*, *In re* Ward, 194 B.R. at 711-12; *In re* Kilpatrick, 160 B.R. at 565.

341. *In re* Kilpatrick, 160 B.R. at 567 ("[*A*]*vailability* of an alternative right to payment is determinative, not whether the nondebtor has demonstrated (or expressed) any inclination to enforce that right.").

342. *See, e.g.*, Kennedy v. Medicap Pharmacies, Inc., 267 F.3d 493, 495 (6th Cir. 2001) ("The Kennedys concede that they breached the covenant not to compete *by working in a pharmacy known as Kennedy Pharmacy at the same location as the Medicap Pharmacy*.").

tort claim is intended to fully remedy the plaintiff for the wrongful actions or inactions of the debtor.[343]

Although different treatment in different states may seem unfair, courts generally agree that the existence of a "right to payment" is a matter of state law.[344] Section 101(5)(B) is not the only situation in which Congress has determined that state law policies should trump uniformity in the bankruptcy process. For instance, individual debtors may also have different exemptions depending on their state of residence.[345] Additionally, the differing results are consistent with the legislative history's suggestion that the same "right to an equitable" remedy may be a "claim" in one state and a non-claim in another state.[346]

B. Specific Performance

The legislative history provides an example of the types of situations that § 101(5)(B) was intended to deal with.[347] This example deals with rights to specific performance.[348] The legislative history suggests that if state law provides the equitable remedy of specific performance, with an alternative right to payment "in the event performance is refused," then the right to specific performance would constitute a "claim."[349]

This outcome is consistent with the Proposed Approach which would ask the two ever-important questions: 1) is there a "right to an equitable remedy?" and if so, 2) is there an alternative "right to payment" that can rectify the same wrongful conduct of the debtor? In the event that both types of "rights" exist, the "right to an equitable remedy" of specific performance is a claim under § 101(5)(B). Again, although a distinction based solely on a difference in state law may seem unfair, this

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343. *See* Tekinsight.Com v. Stylesite Mktg., Inc. (*In re* Stylesite Mktg., Inc.), 253 B.R. 503, 511 (Bankr. S.D.N.Y. 2000); *see also* Rederford v. U.S. Airways, Inc., 589 F.3d 30, 36 (1st Cir. 2009).

344. Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 451 (2007).

345. *See* 11 U.S.C. § 522(b) (2006).

346. *See* 124 CONG. REC. S33,992 (daily ed. Oct. 5, 1978) (statement of Sen. DeConcini); 124 CONG. REC. H32,393 (daily ed. Sep. 28, 1978) (statement of Rep. Edwards).

347. *See* 124 CONG. REC. S33,992 (daily ed. Oct. 5, 1978) (statement of Sen. DeConcini); 124 CONG. REC. H32,393 (daily ed. Sep. 28, 1978) (statement of Rep. Edwards).

348. *See* 124 CONG. REC. S33,992 (daily ed. Oct. 5, 1978) (statement of Sen. DeConcini); 124 CONG. REC. H32,393 (daily ed. Sep. 28, 1978) (statement of Rep. Edwards).

349. *See* 124 CONG. REC. S33,992 (daily ed. Oct. 5, 1978) (statement of Sen. DeConcini); 124 CONG. REC. H32,393 (daily ed. Sep. 28, 1978) (statement of Rep. Edwards).

outcome is exactly what is dictated by the text of § 101(5)(B) and its legislative history.[350] Additionally, as discussed immediately above, there are several other instances in which the Bankruptcy Code treats debtors differently depending on the law of the state in which they reside.[351] In the 2005 amendments to the Bankruptcy Code, a provision was even enacted to prevent debtors from taking advantage of some of these exact types of distinctions.[352] In some instances, Congress has decided that policy considerations require slightly differing treatments among debtors in different states.

C. *Constructive Trusts*

One final context in which application of § 101(5)(B) gives rise to problems involves constructive trusts. However, as the court in *In re CRS Steam*[353] noted, courts rarely look to the definition of "claim" when determining treatment of the constructive trusts in bankruptcy.[354] Instead, the courts focus on "the nature of the claimant's rights in the property prior to its transfer to him" and whether the subject property is property of the estate at all.[355] However, as the court in *CRS Steam* recognized, whether or not the property is property of the estate, a claimant's right to the equitable remedy of constructive trust may nonetheless give rise to a "claim" under § 101(5)(B).[356]

Consistent with the result in *CRS Steam*, and the more recent case of *In re Stylesite Marketing, Inc.*,[357] the Proposed Approach treats rights to

350. *See* 124 CONG. REC. S33,992 (daily ed. Oct. 5, 1978) (statement of Sen. DeConcini); 124 CONG. REC. H32,393 (daily ed. Sep. 28, 1978) (statement of Rep. Edwards).

351. *See, e.g.*, 11 U.S.C. § 522(b)(1) (2006) (allowing debtor to exempt property from creditors under either the federal exemptions in § 522(d) or under state law, which will differ depending on the state of the debtor's residence).

352. *See id.* § 522(3)(A) (determining where the debtor resides for purposes of determining exemptions based on duration of residence in the period leading up to the filing of the bankruptcy petition, rather than the location of the debtor's residence on the petition date).

353. CRS Steam, Inc. v. Eng'g Res., Inc. (*In re* CRS Steam, Inc.), 225 B.R. 833 (Bankr. D. Mass. 1998).

354. *Id.* at 838-39, 842 (citing several cases taking this approach); *see also In re* Lucas, 300 B.R. 526 (B.A.P. 10th Cir. 2003) (example of case that ignores the § 101(5)(B) issue).

355. *In re* CRS Steam, Inc., 225 B.R. at 837. This opinion provides an excellent discussion of the disputes involving treatment of constructive trusts in bankruptcy. For further reading on the treatment of constructive trusts in bankruptcy, *see* Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297 (1989).

356. *In re* CRS Steam, Inc., 225 B.R. at 842.

357. 253 B.R. 503 (Bankr. S.D.N.Y. 2000).

constructive trusts as "claims" under § 101(5)(B) in many situations.[358] A constructive trust is an equitable remedy.[359] Under the two-step Proposed Approach, the court must determine what "breach" gives rise to the equitable remedy of a constructive trust. The Proposed Approach, like the court in *CRS Steam*, would view that the debtors' wrongful actions, which gave rise to the right to the constructive trust, as the "breach of performance" for purposes of § 101(5)(B).[360] In *CRS Steam,* the debtor's "breach" was the act of misappropriating trade secrets, which resulted in violation of the Illinois Trade Secrets Act (ITSA).[361]

Step two of the Proposed Approach looks for any other cause of action which would provide a full remedy for the same wrongful conduct of the debtor. The *CRS Steam* court determined that such a remedy existed.[362] Instead of seeking the constructive trust remedy, the claimant could have sought money damages of $372,000.[363] Under the Proposed Approach, as in the *CRS Steam* case, this money damage remedy converts the right to a constructive trust to a "claim" under § 101(5)(B).

VII. CONCLUSION

The interpretation of § 101(5)(B) has given rise to much confusion over the years. However, the confusion can be overcome. When analyzing the text of § 101(5)(B) to determine if a certain type of obligation is a claim, courts should determine what actions or inactions by the debtor constituted the "breach of performance" under the statute, contract, or other obligation. Then the court can determine the remedies available for the debtor's conduct, whether they are of a statutory or common law theory of origin. If a "right to payment" exists which enables the court to put a value on an available "right to an equitable remedy," the right to the equitable remedy is a § 101(5)(B) "claim." Courts should also remember that the question of *if* a certain type of

358. *Id.* at 511; *see also In re* CRS Steam, Inc., 225 B.R. at 842; a*ccord* XL/Datacomp, Inc. v. Wilson (*In re* Omegas Group, Inc.), 16 F.3d 1443 (6th Cir. 1994) (designating constructive trust right as a "claim" without analysis); 5 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS AND TRUSTEES § 481.2 (4th ed. 1989).

359. *In re* CRS Steam, Inc., 225 B.R. at 840 (stating that a "constructive trust is equitable remedy for unjust enrichment").

360. *Id.* (explaining that the breach was debtor's "misappropriation" of a "trade secret" by "improper means" consisting of "breach of a confidential relationship or other duty to maintain secrecy. ").

361. *Id.*

362. *Id.* at 837, 840 (The court recognized that in this case, debtor could have sought money damages of $372,000, and also recognized that, generally, in constructive trust cases, "[a claimant] may elect between obtaining the property itself or a money judgment for its value.").

363. *Id.* at 840.

obligation constitutes a "claim" *must* be separated from the question of *when* a "claim" arises.