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Plan Drafting Requirements Pursuant to § 1123(b)(3)(B) Tackled

Pursuant to § 1123(b)(3)(B),¹ the terms of a chapter 11 plan confer standing to the debtor or to a litigation trustee to retain and to enforce claims or interests. The inclusion of sufficient claims retention language further provides a bankruptcy court with subject-matter jurisdiction post-confirmation over the preserved pre-confirmation claims.² On Nov. 14, 2012, following direct appeal from the U.S. Bankruptcy Court for the Southern District of Texas, the Fifth Circuit in *In re MPF Holdings US LLC*³ issued a decision concerning the drafting specificity required under § 1123(b)(3)(B).

The Fifth Circuit previously held in *In re United Operating LLC*⁴ that in order to effectively preserve a pre-confirmation cause of action, the plan's language must "expressly retain the right to pursue the cause of action," and the plan must be "specific and unequivocal" with regard thereto. One of the underlying rationales is that creditors must clearly understand their rights and liabilities as set forth in the plan to fairly consider their vote for or against confirmation.⁵ *United Operating* stands for the proposition that a chapter 11 plan must expressly describe not only what kind of pre-confirmation claims and causes of actions will be pursued post-confirmation, but also must specifically and definitively identify who will be pursued.⁶

Subsequent to the decision set forth in *United Operating*, two bankruptcy courts within the Northern District of Texas subsequently held that the failure to specifically identify the defendants to be sued was not insufficient because of the express language preserving pursuit of § 547 claims in the plan.⁷ The two Texas bankruptcy courts based their decision, in part, on a citation in *United Operating* to *In re Ice Cream Liquidation Inc.*, a case from the U.S. Bankruptcy Court for the District of Connecticut, which permitted the generic identification of defen-

dants in a plan as providing fair notice under Rule 8 of the Federal Rules of Civil Procedure.⁸

Factual and Procedural Background Summary: MPF

The consolidated debtors were in the business of building massive, mobile offshore drilling vessels.⁹ Cost overruns forced the debtors to seek chapter 11 relief. The MPF bankruptcy court noted that the plan language was "heavily negotiated" by counsel for numerous parties including the debtor and the unsecured creditors' committee.¹⁰

The consolidated debtors submitted an amended disclosure statement and amended joint reorganization plan (the "plan"), which contained language both releasing and preserving preconfirmation claims.¹¹ The plan provided for the appointment of a litigation trustee to oversee a post-confirmation litigation trust.¹² Following confirmation, the litigation trustee filed a number of preference lawsuits against several defendants.¹³

In response, one of the preference defendants filed an amended motion for an order enforcing the terms of the confirmation order (the "enforcement motion"), to which several other preference defendants joined.¹⁴ The litigation trustee filed a response, and a series of briefs and replies were filed.¹⁵ On Dec. 17, 2010, a hearing was held on the enforcement motion, during which certain exhibits were submitted and oral arguments made.¹⁶ Additional briefing was provided by the parties post-hearing. On Jan. 6, 2011, Hon. Jeff Bohm first issued an oral ruling on the enforcement motion, finding that the plan provisions related to pre-confirmation claim reservation were insufficient in light of the stringent "bright line" Fifth Circuit drafting requirements set forth in *United Operating*, and as a result, the litigation trustee lacked standing to prosecute the preference actions.¹⁷



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1 Unless expressly noted, all citation references are directed to the Bankruptcy Code as found in title 11 of the U.S. Code.

2 *In re MPF Holdings US LLC*, 444 B.R. 719, 724 (Bankr. S.D. Tex. 2011). This is an amended memorandum opinion from the U.S. Bankruptcy Court for the Southern District of Texas addressing the grounds for the bankruptcy court's certification of direct appeal to the Fifth Circuit from its initial opinion set forth in *In re MPF Holdings US LLC*, 443 B.R. 736 (Bankr. S.D. Tex. 2011). The opinions should be read in tandem as both provide significant insight, research and information relative to this issue. Given the length of the decisions, only an overview can be provided in this article.

3 *In re MPF Holdings US LLC*, 2012 U.S. App. LEXIS 23383 (5th Cir. Tex. Nov. 14, 2012).

4 *In re United Operating LLC*, 540 F.3d 351, 355 (5th Cir. 2008).

5 *MPF Holdings*, 443 B.R. at 741.

6 *Id.* at 741.

7 *In re Manchester Inc.*, 2009 Bankr. LEXIS 2003 *13-14 (Bankr. N.D. Tex. 2009), and *In re Texas Wyoming Drilling Inc.*, 422 B.R. 612 (Bankr. N.D. Tex. 2010) (*Texas Wyoming* decision was later decided by Fifth Circuit after MPF bankruptcy court issued order on appeal).

8 *In re Manchester Inc.*, 2009 Bankr. LEXIS 2003 *13-14, 2009 WL 2243592 at *5 (Bankr. N.D. Tex. 2009), and *In re Texas Wyoming Drilling Inc.*, 422 B.R. 612, 625 (Bankr. N.D. Tex. 2010) (referring to *In re United Ice Cream Liquidation Inc.*, 319 B.R. 324, 337 (Bankr. D. Conn. 2005)).

9 Factual background is also set forth in *In re MPF Holdings US LLC*, 2012 U.S. App. LEXIS 23383 (Nov. 14, 2012).

10 *MPF Holdings*, 443 B.R. at 738.

11 *Id.* at 740.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* at 756.

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Three Approaches: How Much Detail Is Enough?

The *MPF* bankruptcy court noted in its initial opinion¹⁸ that courts differ with regard to how much detail is sufficient.¹⁹ Some courts have found that “broad, categorical” language is enough (the “broad approach”).²⁰ Courts utilizing the broad approach generally do so by pointing to the lack of any specificity requirement in § 1123(b)(3)(B). These courts take the position that while there may be “some logic in requiring ‘specific and unequivocal language,’”²¹ a “categorical reservation avoids the *res judicata* bar.”²²

Other courts consider the particular facts and circumstances of the case relative to the particular claims at issue (the “context-specific approach”).²³ These courts note that § 1123(b)(3)(B) is broad enough to “encompass situations where a debtor is trying to reserve a potential future claim about which the party has no notice and the subset of claims that have already been filed (and are thus a matter of public record) but that remain unresolved.”²⁴ These courts note that

§ 1123(b)(3)(B) is designed to “protect the estate from loss of potential assets” and “not to protect defendants from unexpected lawsuits.”²⁵

The third approach, adopted in the Fifth, Sixth and Tenth Circuits, requires precise drafting in order to preserve pre-confirmation claims for post-confirmation pursuit (the “detailed approach”).²⁶ *United Operating LLC* is an example of the detailed approach.²⁷

In *United Operating*, the Fifth Circuit held that in order to effectively retain pre-confirmation causes of action, a plan must be “specific and unequivocal.” In other words, the retention must be expressly set forth in the plan and must be detailed beyond a broad or ambiguous description.²⁸ Judge Bohm in *MPF* notes that the detailed approach serves the important purpose of allowing creditors to “determine whether a proposed plan resolves matters satisfactorily before they approve it; absent specific and unequivocal retention in the language in the plan, creditors lack sufficient information regarding their benefits and potential liabilities to cast an intelligent vote.”²⁹

18 See fn. 2, *infra*.

19 445 B.R. at 741.

20 *Id.* at 740 (citing to *In re P.A. Bergner & Co.*, 140 F.3d 1111, 1117 (7th Cir. 1998); *In re Kmart Corp.*, 310 B.R. 107, 124 (Bankr. N.D. Ill. 2004); *In re Weidel*, 208 B.R. 848, 853 (Bankr. M.D.N.C. 1997)).

21 *In re Kmart Corp.*, 310 B.R. 107, 124 (Bankr. N.D. Ill. 2004).

22 *In re Weidel*, 208 B.R. 848, 853 (Bankr. M.D.N.C. 1997).

23 See, e.g., *In re Pen Holdings Inc.*, 316 B.R. 495, 504 (Bankr. M.D. Tenn. 2004).

24 *In re Pen Holdings Inc.*, 316 B.R. 495, 503-4 (Bankr. M.D. Tenn. 2004) (citing to *In re P.A. Bergner & Co.*, 140 F.3d 1111, 1114 (7th Cir. 1998)).

25 *Pen Holdings*, 316 B.R. at 504.

26 *MPF Holdings*, 443 B.R. at 741.

27 *In re United Operating LLC*, 540 F.3d 351 (5th Cir. 2008).

28 *MPF Holdings*, 443 B.R. at 741 (citing to *In re Nat'l Benevolent Ass'n of the Christian Church*, 333 Fed. Appx. 822, 826 (5th Cir. 2009) (holding that plan provision was ambiguous and therefore insufficient to preserve action)).

29 *MPF Holdings*, 443 B.R. at 741 (quoting *In re Nat'l Benevolent Ass'n of the Christian Church*, 333 Fed. Appx. 822, 826 (5th Cir. 2009) (unpublished decision citing to *In re Paramount Plastics Inc.*, 172 B.R. 331, 334 (Bankr. W.D. Wash. 1994))).

The *MPF* bankruptcy court understood but disagreed with the analysis rendered by the two other Texas bankruptcy courts that concluded that the failure to identify the potential litigants can meet the Fifth Circuit's "specific and unequivocal" test. The *MPF* court concluded instead that the plan must specifically state the legal basis for the suit and identify the litigants. The "reservation provision must set forth the legal basis for the suit" and state that the "defendants *will be sued*—not that they *may be sued* or *could be sued* or *might be sued*."³⁰

Put differently, the *MPF* bankruptcy court held that a plan must specifically set forth "(1) the name of the putative defendant; (2) the basis on which the putative will be sued; and (3) that the suit will definitely be filed following confirmation."³¹ The language must be so "'Shermanesque' that anyone reading the plan knows that the defendant will be sued and why."³²

Ultimately, the *MPF* court concluded that the language in the plan at issue was sufficiently "specific" because it identified the names of the putative defendants, the addresses of those individuals and entities, and the amounts paid within the 90 days prior to the case. However, the plan was not "unequivocal" because of an apparent ambiguity relative to whether the claims actually did exist as a result of plan language referencing "all causes of Action, including but not limited to (i) any Avoidance Action *that may exist*."³³

The language communicated indefiniteness. The *MPF* court noted that the indefinite language impeded "creditors from knowing precisely what causes of action are being preserved for, and will be prosecuted by, the litigation trustee, and, therefore, from knowing with certainty whether they will be sued, and on what grounds."³⁴ The *MPF* court noted additional examples in the plan that were similarly equivocal. As a result, the court dismissed every adversary action filed by the litigation trustee.

MPF Decision on Appeal to Fifth Circuit

The Fifth Circuit noted from the outset that the filing of a bankruptcy petition creates an estate that is comprised of "all legal and equitable interests of the debtor in property as of the commencement of the case."³⁵ A debtor in chapter 11 retains the powers of a bankruptcy trustee, including the ability to pursue claims.³⁶ However, when a chapter 11 plan is confirmed, the debtor loses its debtor-in-possession status and, therefore, its standing to pursue claims on behalf of the bankruptcy estate.³⁷

In reviewing the *MPF* bankruptcy court's decision, the Fifth Circuit held that while the language was equivocal, it was not true that any ambiguity in the reservation language always fails the specific and unequivocal test.³⁸ An "ambiguity *per se*" does not render a reservation equivocal.³⁹ Ambiguity can be resolved by the court using parol evidence.⁴⁰

Consistent therewith, the Fifth Circuit in *MPF* noted that in *Texas General Petroleum Corp.*, it found § 1123(b)(3)(B) standing where the reservation language was truly ambiguous but could be resolved through parol evidence.⁴¹ It also noted that it had previously held that "courts may consult the disclosure statement in addition to the plan to determine whether a post-confirmation debtor has standing."⁴² The Fifth Circuit noted that the decision in *Texas General Petroleum* is in "clear tension with a general rule that any ambiguity in the reservation language of a reorganization plan renders the reservation invalid."⁴³ The Fifth Circuit also stated that it did not decide in *Texas General Petroleum* "whether a debtor whose plans fails to identify any prospective defendants has standing to pursue post-confirmation claims against subsequently named defendants."⁴⁴

[T]he pragmatic conclusion seems to be that a practitioner should err on the side of drafting detailed plan provisions concerning what it will pursue against whom.

The Fifth Circuit also determined that the reservation language in *MPF* did not appear to be actually ambiguous.⁴⁵ Applying general contract rule principles, a "writing is not ambiguous unless it is reasonably susceptible to more than one meaning."⁴⁶ If there is only one reasonable interpretation, all things considered, it does not support a finding that the reservation is insufficiently specific and unequivocal.⁴⁷

Err Toward Specificity under § 1123(b)(3)(B)

Taking into consideration the three approaches, namely the broad approach, the context-specific approach and the detailed approach, as well as the reasoning of the Fifth Circuit in *MPF*, the pragmatic conclusion seems to be that a practitioner should err on the side of drafting detailed plan provisions concerning what pre-confirmation claims (identified by Code section) that it will pursue against whom. "Categorical" or "catch-all" provisions may be incorporated into the plan but likely should complement more detailed provisions.⁴⁸

A court, even one adopting the detailed approach, may consider parol evidence and context, as well as utilize general rules of contract interpretation, in considering the adequacy of the drafting. However, a plan proponent is far better off to draft, with particular care, unambiguous provisions describing in clear detail what pre-confirmation causes of action the debtor or a litigating trustee will pursue post-confirmation. Failing to do so increases the risk that a successful argument can be made that the plan-reservation language is insufficient, and therefore, claims will be dismissed for lack of standing and subject-matter jurisdiction resulting in the loss of potential assets of the estate. **abi**

30 *In re MPF Holdings US LLC*, 443 B.R. at 745-46 (discussing *Harstad v. First Am. Bank*, 39 F.3d 898 (8th Cir. 1994)).

31 443 B.R. at 747.

32 *Id.*

33 *Id.* at 749.

34 *Id.* at 750.

35 *In the Matter of MPF Holdings US LLC*, 701 F.3d 449, 453 (5th Cir. 2012).

36 *Id.*

37 *Id.* at 454.

38 *Id.* at 456.

39 *See id.*

40 *Id.*

41 701 F.3d at 456 (discussing *In re Texas Gen. Petroleum Corp.*, 52 F.3d 1330 (5th Cir. 1995)).

42 *Matter of MPF Holdings*, 701 F.3d at 454, n.3 (quoting *In re Texas Wyoming Drilling Inc.*, 647 F.3d 547, 550 (5th Cir. 2011)).

43 *Matter of MPF Holdings*, 701 F.3d at 457.

44 *Id.* at 455.

45 *Id.* at 456.

46 *Id.* at 457.

47 *Id.*

48 Conversely, it also seems logical to conclude that release language should be similarly precise to be clearly effective.