A recent development in the Fifth Circuit is its interpretation of the "specific and unequivocal" standard articulated in *In re United Operating, LLC*.[1] This *specific and unequivocal* standard relates to the reservation of adversary and preference litigation post-plan confirmation in Chapter 11 reorganization. According to Judge Jeff Bohm in the Southern District of Texas, the Fifth Circuit standard for reservation of these adversary actions requires three specific and unequivocal steps. The plan must expressly (and specifically) state:

(1) The putative defendant(s),

(2) The basis on which the putative defendant(s) will be sued, and

(3) That the suit will definitely be filed post-confirmation.

The Fifth Circuit, in an opinion issued by Chief Justice Edith Jones, determined that the debtor did not preserve its standing to bring misappropriation claims or other adversary actions because the plan of reorganization did not *specifically and unequivocally* reserve the claims pre-confirmation. The Fifth Circuit made this determination notwithstanding the fact that it is not in the text of Section 1123 (b)(3)(B) of the Bankruptcy Code[2]. Therefore, the debtor and/or the litigation trustee lack standing post-confirmation to bring any litigation action not *specifically and unequivocally* reserved within the plan. The Fifth Circuit has effectively created a "bright-line" test.

In response to the Fifth Circuit precedent, two bankruptcy decisions out of the Northern District of Texas, written by Judge Barbra Houser and Judge Michael Lynn respectively, have raised concerns that the "bright-line" test articulated in *United Operating* can lead to unjust results.

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

2 11 U. S. C. § 1123 (b)(3)(B).

In *In re Manchester, Inc.*, Judge Houser stated "This judge respectfully urges the 5th circuit to reconsider the *United Operating* holding because such a holding works a severe injustice under the facts of the present case."[3] The injustice was that the bankruptcy estate lost its ability to pursue common law claims that would ultimately benefit the creditors of the estate.

Additionally, in *In re Tex. Wyo. Drilling, Inc*,[4] Judge Lynn expressed his concerns about the test: "The bright line test rule announced by the 5th Circuit in *United Operating* operates to cause injustice to creditors in many cases though it was intended to operate for their benefit." He continued, "Taken to its logical conclusion, *United Operating* would seem to require that counterclaims and affirmative defenses, to say nothing of claims identified through discovery (common law or statutory tort claims) after confirmation of the plan, be identified (specifically and unequivocally) in the plan or lost forever."

However, both judges determined that the "specific and unequivocal" standard did not require the debtors to *specifically and unequivocally* name each individual defendant in the litigation reservation language to preserve the post confirmation claims against them. A general identification of the defendants would therefore suffice.

Recently, in the Southern District of Texas, Judge Jeff Bohm disagreed with Judges Houser and Lynn in an opinion styled *In re MPF Holdings Inc. LLC*.[5] In *In re MPF Holdings*, Judge Bohm decided that a litigation trustee did not have standing to prosecute the adversary proceedings he had filed against various defendants post plan confirmation, because the actions were not

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3 In *In re Manchester, Inc.,* Judge Houser had to determine that the common law claims were not *specifically and unequivocally* reserved according to the Fifth Circuit standard, therefore, the litigation trustee did not have standing to bring those claims for the benefit of the creditors. *In re Manchester, Inc.*, 2009 Bankr. Lexis 2003 (Bankr. N. D. Tex. 2009). Although, she did determine that the preference claims had been properly reserved.

4 *See In re Tex. Wyo. Drilling, Inc.*, 422 B. R. 612 (Bankr. N. D. Tex. 2010).

5 *See In re MPF Holdings Inc. LLC*, 2011 WL 489597 (Bankr. S. D. Tex. 2011).

"specifically and unequivocally" reserved in the plan according to the Fifth Circuit's new standard.

In *In re MPF* Judge Bohm determined that the Fifth Circuit standard for reservation of these adversary actions requires the aforementioned three steps. Unfortunately, the litigation trustee in the MPF case lacked standing because the reservation language in the plan fell short of the Fifth Circuit standard as defined in Judge Bohm's opinion. Prior to getting poured out summarily, the litigation trustee had identified about $25 million in preferences that he was going to pursue for the trust and the benefit of creditors.

Bound by precedent, Judge Bohm opines: "The 5th Circuit is telegraphing to debtor's attorneys (and necessarily to creditor committees and their lawyers) that they must devote more time prior to confirmation of a Chapter 11 bankruptcy plan to identifying those parties who will be sued and the (legal) basis of the suits. Plan proponents must then make specific and unequivocal disclosures of this information in the plan prior to sending ballots to those creditors who will be casting their votes." Judge Bohm admits that "[t]his will delay confirmation and increase administrative costs on the debtor's bankruptcy." However, he further opines that "The 5th Circuit seems to be suggesting that it is incumbent upon the debtor's bar to take the time and resources to do the investigation that the bar would have expected the post confirmation litigation trustee to perform."

In *In re United Operating*, the Fifth Circuit emphasized that, "the reservation of claims should be sufficient to give creditors proper notice to determine whether a proposed plan resolves matters satisfactorily before they vote to approve the plan. Absent specific and unequivocal retention language in the plan, creditors (inherently) lack sufficient information regarding their benefits and potential liabilities to cast and intelligent vote." **Do they really?** What if the claim is

against a third-party who is not a party to the reorganization? What about a patent dispute, trademark infringement, business tort, or a commercial trade secret claim? Does the debtor have to send a copy of the proposed plan to any future defendant, in advance, *specifically and unequivocally* identifying them as future litigation defendant although they have no vote on the plan? Maybe so, according to the analysis in *In re MPF*.

What happens if the plan discloses *specifically and unequivocally* that a claim against a particular defendant will be pursued but the action cannot or is not viable to purse after confirmation of the plan? What would the consequences be if the litigation trustee decides *not* to pursue a cause of action after the plan discloses that it *will* be pursued? What is the consequence to the debtor's attorney if a cause of action is not reserved because it was overlooked, or was not identified because the debtor's attorney is not familiar with litigation? What if a definitive decision cannot be made on whether to pursue a claim, because of the uncertainty of the expense involved in pursuing the case post-conformation? Is every case clear cut enough to know in advance whether or not it can be pursued, prior to send the ballots out for creditors to vote? Maybe yes – Maybe no.

Hopefully, the Fifth Circuit will clear all these questions up by taking *In re MPF* on appeal. Judge Bohm would seemingly agree, as he has already stated "The Court agrees that the *United Operating* test is a bright-line rule; the Court declines to comment on the correctness of this test and instead, will only apply it to the facts of the case at bar." I believe that is Judge Bohm's subtle way of broadcasting his disagreement with the bright-line standard while faithfully following it because it remains Fifth Circuit precedent … at the moment.

However, one thing is clear; if you are in the Fifth Circuit, you better develop a strategy to *specifically and unequivocally* identify what claims can and will be pursued and against whom;

and, you would be well-advised to do so prior to plan-confirmation. Unless the debtor's attorney wants to be on the hook for making definitive determinations about post-confirmation litigation, he must get the litigators involved early in the case—perhaps even pre-petition—to determine which causes of action can and will be pursued on behalf of the estate, in order to avoid losing them in post-confirmation.

Endnotes

11 U. S. C. § 1123 (b)(3)(B).
In re United Operating, LLC., 540 F. 3d 351 (5th Cir. 2008).
In re Manchester, Inc., 2009 Bankr.Lexis 2003 (Bankr. N. D. Tex. 2009).
In re Tex. Wyo. Drilling, Inc., 422 B. R. 612 (Bankr. N. D. Tex. 2010).
In re MPF Holdings Inc. LLC., 2011 WL 489597 (Bankr. S. D. Tex. 2011).