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Searching for a Definition of “Specific and Unequivocal”: An Update on the Application of *United Operating’s* Standard for the Retention of Causes of Action Under 11 U.S.C. § 1123(b)(3)

Panelists:

Mark W. Wege
King & Spalding, LLP

- and -

Darren Watts
Swanson, Martin & Bell, LLP

Co-Author:

Aaron J. Power
King & Spalding, LLP

Author contact information:

Mark W. Wege
King & Spalding, LLP
Houston, TX
mwege@kslaw.com

Darren Watts
Swanson, Martin & Bell, LLP
Chicago, IL
dwatts@smbtrials.com

Aaron Power
King & Spalding, LLP
Houston, TX
apower@kslaw.com

**Searching for a Definition of “Specific and Unequivocal”:
An Update on the Application of *United Operating’s*
Standard for the Retention of Causes of Action Under 11
U.S.C. § 1123(b)(3)**

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Panelists: Mark Wege, King & Spalding LLP, Houston, TX
Darren B. Watts, Swanson, Martin & Bell, LLP, Chicago, IL

Co-Author: Aaron Power, King & Spalding LLP, Houston, TX

Despite having the appeal of a facial “plain meaning,” the “specific and unequivocal” standard for retaining causes of action under 11 U.S.C. § 1123(b)(3) that was set forth three years ago by the Fifth Circuit in its decision in *United Operating* has proven to be less predictable and more complicated in practice.¹

By way of brief review, in *United Operating*, the Fifth Circuit adopted the following “specific and unequivocal” standard for the post-confirmation retention of causes in accordance with 11 U.S.C. § 1123(b)(3):

For a debtor to preserve a claim, “the plan must expressly retain the right to pursue such actions.” *In re Paramount Plastics, Inc.*, 172 B.R. 331, 333 (Bankr. W.D. Wash. 1994). The reservation must be “specific and unequivocal.” *Harstad v. First American Bank*, 39 F.3d 898, 902 (8th Cir. 1994); *see also In re Ice Cream Liquidation, Inc.*, 319 B.R. 324, 337-78 (Bankr. D. Conn. 2005) (holding that the plan’s categorical reservation of “preference” claims was sufficiently specific; plan need not itemize individual transfers that may be pursued as preferential).

United Operating, 540 F.3d at 355.

This “specific and unequivocal” standard was initially crafted to help protect *creditors* by increasing their knowledge (prior to voting on a plan) about the possible causes of action that were held and retained by an estate, the basis for those causes of action, and the parties against whom those causes of action would be pursued post-confirmation. Notwithstanding its well-intended purpose, the “specific and unequivocal” standard has been difficult to apply in practice, as evidenced by lower courts’ various conclusions about its meaning and application to the matters before them.² This murkiness has also provided defendants with fodder for challenging

¹ *Dynasty Oil & Gas, LLC v. Citizens Bank (In re United Operating, LLC)*, 540 F.3d 351 (5th Cir. 2008).

² As recently stated by the Honorable Bankruptcy Judge Bill Parker, “[t]he ‘specific and unequivocal’ reservation requirement regarding § 1123(b)(3)(B) is simple to understand in principle, but its application can be a bit more problematic.” *Blue Water Endeavors, LLC v. AC & Sons, Inc. (In re Blue Water Endeavors, LLC)*, Adv. No. 10-1015, 2011 Bankr. LEXIS 67 at *18-19 (Bankr. E.D. Tex. Jan. 6, 2011).

post-confirmation claims that seemingly do not comply with the requirements of this standard, thus possibly diminishing recovery on behalf of the creditors. In other words, the enlightening, pre-confirmation purpose of the “specific and unequivocal” standard can become a sharp edge for adversary defendants to use in an effort to cut away at such claims post-confirmation.

The purpose of this paper is to try to shed some light on the meaning of the “specific and unequivocal” standard that is set forth in *United Operating*. To that end, this paper shall begin with a review of the statutory foundation and precedent relied on by the Fifth Circuit in setting forth the “specific and unequivocal” standard. Next, this paper shall review the subsequent decisions from lower courts within the Fifth Circuit which have attempted to apply the holding in *United Operating*. Then, this paper addresses the approach that has been used in the Seventh Circuit, including the interpretation that has been applied by one Bankruptcy Court in the Northern District of Illinois in the post-confirmation proceedings in the *Kimball Hill Homes* case, rejecting an application of the more stringent standard for the retention of causes of action under § 1123(b)(3)(B) pursuant to *United Operating*. Finally, this paper highlights what has previously been considered the contrary view to the “specific and unequivocal” standard and questions whether those cases can now be reconciled with the Fifth Circuit.

A. The Statutory and Case Law Basis for the “Specific and Unequivocal” Standard

i. The Statutory Background

Currently, the Bankruptcy Code provides that a plan “*may* provide for the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose of any such claim or interest.” 11 U.S.C. § 1123(b)(3)(B) (emphasis added). The predecessor to the present Section 1123(b)(3)(B) was found in former Section 216(13) of the Bankruptcy Act, which provided that a plan “*may* include provisions for the settlement or adjustment of claims belonging to the debtor or to the estate; and *shall* provide, as to such claims not settled or adjusted in the plan, for their retention and enforcement by the trustee.” Bankruptcy Act of 1898 § 216(13) (emphasis added). Herein lies the rub. That is, the interpretive difference of applying the current “*may* provide” language of Section 1123(b)(3)(B) and the former “*shall* provide” language in Section 216(13). Not surprisingly, courts had previously determined that under Section 216(13) of the Act, the retention of causes of action belonging to the estate was mandatory, not permissive, and that this mandatory post-confirmation retention of estate claims was “literally all encompassing.” *Ritz Metal Prods, Inc. v. Stapleton*, 265 F. 2d 630, 632 (1st Cir. 1959); *see also Price v. Gurney*, 324 U.S. 100, 106-107 (1945) (noting that it is mandatory for the plan to provide for the retention and enforcement of unsettled claims); *Brown v. Gerdes*, 321 U.S. 178, 182 (1944) (“[T]he plan must provide, in furtherance of the purpose of the Act to protect the security holders against previous acts of mismanagement and to preserve all assets of the estate, for retention and enforcement by the trustee of all claims of the debtor or the estate not settled or adjusted in the plan.”) (internal citation omitted).

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