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The Devil's in the Details: Fifth Circuit Requires Debtors to "Specifically and Unequivocally" Reserve Claims That May Be Brought After Plan Confirmation

Lawyers often struggle with the question of what level of detail is necessary when describing yet-to-be-filed claims in a debtor's plan and disclosure statement. The Fifth Circuit recently answered that question in *Dynasty Oil and Gas, LLC v. Citizens Bank (In re United Operating, LLC)*, 540 F.3d 351 (5th Cir. 2008), ruling that a debtor must "specifically and unequivocally" describe claims in its plan if it intends to bring those claims after the plan is confirmed. The Fifth Circuit found that unless claims are described specifically, creditors lack the information necessary to "cast an intelligent vote" on the debtor's plan. General statements found in typical Chapter 11 plans that reserve "all claims under the Bankruptcy Code" may fail to reserve those claims under the Fifth Circuit's new standard. The careful practitioner must now take extra steps to specify claims the debtor intends to bring post-confirmation. The consequences of failure to do so will likely result in dismissal of the claims.

Background

Dynasty Oil and Gas, a Chapter 11 debtor, owned several non-operating oil and gas properties. During its Chapter 11 case, Dynasty's largest creditor, Citizens Bank, asked the Bankruptcy Court to appoint an operator of the oil and gas properties until a plan of reorganization could be approved. The Bankruptcy Court approved Citizens' request, and appointed Wildcat Energy to bring the properties back into production. Several months later, Dynasty proposed a Plan that authorized another creditor, Saber Resources, to purchase substantially all of Dynasty's assets for \$2.5 million. The Plan provided that, after the sale to Saber Resources, Dynasty would survive only as a shell corporation. Importantly, the Plan also provided that Dynasty and its Official Unsecured Creditors' Committee would retain limited powers to pursue certain claims held by the estate after confirmation of the Plan. The creditors approved Dynasty's Plan, and the Bankruptcy Court confirmed the Plan.

After confirmation of the Plan, the Creditors' Committee sued Citizens Bank and Wildcat Energy, alleging various claims arising under state law and the Bankruptcy Code related to Wildcat's operation of the properties during Dynasty's bankruptcy and Citizens Bank's payments to Wildcat for the alleged mismanagement by Wildcat. After the court dismissed the state-law claims against Wildcat, Citizens Bank and the Creditors' Committee settled, and the suit was dismissed. A year later, Dynasty brought similar claims in state court under common law theories including breach of fiduciary duty, fraud and negligence. The action was removed to the district court and referred to the Bankruptcy Court, which dismissed the claims on *res judicata* and collateral estoppel grounds, asserting that the claims already were resolved by the suit brought by the Creditors' Committee.

The Fifth Circuit's New Standard

Although the lower court dismissed the claims on *res judicata* and collateral estoppel grounds, the Fifth Circuit found that Dynasty failed to satisfy the more fundamental jurisdictional requirement of standing. The Court held that because the Plan did not specifically and unequivocally reserve the claims that Dynasty alleged, Dynasty lacked standing to bring the claims.

The Court began its analysis by focusing on a debtor's powers during its bankruptcy case. First, the Court found that a debtor, in its capacity as debtor-in-possession, holds most of the powers of a bankruptcy trustee to pursue claims on behalf of the debtor's estate. *Dynasty Oil* at 355. Upon confirmation of its plan, the estate ceases to exist, and a debtor loses its status as a debtor "in possession," along with its authority to bring claims on the estate's behalf. *Id.*

However, the Court noted that the Bankruptcy Code allows a debtor to bring post-confirmation claims in certain circumstances. In order to do so, a debtor must preserve its standing to bring such claims by expressly providing for the "retention and enforcement by the debtor" of the claim in the debtor's plan of reorganization. *Id.* (quoting Section 1123(b)(3)(B) of the Bankruptcy Code). Following confirmation of a plan, therefore, "the ability of the debtor to enforce a claim once held by the estate is limited to that which has been retained in the plan." *Id.*

The Court then addressed the key question of what is required to "retain" a claim: first, "the plan must expressly retain the right to pursue such actions," *Id.* (quoting *In re Paramount Plastics, Inc.*, 172 B.R. 331, 333 (Bankr. W.D. Wash. 1994)); and second, the reservation "must be 'specific and unequivocal.'" *Id.* (quoting *Harstad v. First Am. Bank*, 39 F.3d 898, 902 (8th Cir. 1994)). Thus, when a debtor fails to make an effective reservation of claims, it has no standing to pursue a claim that the estate owned before it was dissolved through confirmation of its plan. *Id.*

The Fifth Circuit tied the express reservation requirement to notice to a debtor's creditors, explaining that unless the debtor "puts its creditors on notice of any claim it wishes to pursue after confirmation,"

then the creditors are denied fair notice regarding the claims benefits and liabilities, which are necessary to "cast an intelligent vote." *Id.* Because Dynasty failed to specifically reserve the claims it asserted against Citizens Bank and Wildcat, the Court found that Dynasty lacked standing to bring them, and affirmed the lower court's dismissals of the claims.

What Constitutes "Specific and Unequivocal" Retention of Claims?

The Fifth Circuit did provide some guidance on what descriptions may satisfy its "specific and unequivocal" standard. For instance, the Court appears to cite with approval *In re Ice Cream Liquidation, Inc.*, 319 B.R. 324 (Bankr. D. Conn. 2005), which found that a plan's categorical reservation of "preference" claims was sufficiently specific because "a plan need not itemize individual transfers that may be pursued as preferential." *Dynasty Oil* at 355.

With respect to preference claims, it appears the Fifth Circuit will not require that plans "itemize" each potential preference claim, but rather may reserve preference claims generally. This makes sense in light of the nature of preference claims, which arise only in the context of a bankruptcy case and are often brought post-confirmation so as not to slow down the reorganization process within the limited time-frames required by the Bankruptcy Code.

The Court also addressed what **does not** constitute specific and unequivocal reservations of claims: (i) blanket reservations of "any and all claims" arising under the Bankruptcy Code; (ii) provisions providing that the Bankruptcy Court "retains jurisdiction" over claims, without specifically describing the claims; (iii) common-law based claims that are not specifically identified in a plan; and (iv) turnover and preference claims where plans fail to "mention" those claims at all. *Id.* at 355-56.

Bankruptcy practitioners must take extra precautions to adequately describe litigation claims that debtors may seek to bring post-confirmation. Such precautions will ultimately include additional due diligence by the debtors' advisors regarding not only pre-bankruptcy claims, but also claims that may

arise during the administration of the bankruptcy estate (e.g., the facts in the *Dynasty* case itself). Unless *Dynasty* is confined to its facts, which is unlikely, bankruptcy practitioners are well-advised to specifically detail in their plans all possible claims, because under the standard announced in that decision, it appears that the devil is truly in the details.

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