SHOULD I STAY OR SHOULD I GO?* A PRACTITIONER'S GUIDE TO THE FIFTH CIRCUIT'S SPECIFIC AND UNEQUIVOCAL RETENTION STANDARD UNDER BANKRUPTCY CODE 11 U.S.C. § 1123

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I. INTRODUCTION

A challenging question burdening the Fifth Circuit, other Circuit Courts, and bankruptcy courts and lawyers across the country is the level of specificity needed to properly retain claims and interests (i.e. causes of action) in bankruptcy reorganization plans under 11 U.S.C. § 1123(b)(3). Section 1123(b)(3) provides that a plan of reorganization may provide for the retention and enforcement of any claim or interest belonging to the debtor or estate.[1] Courts have reached differing conclusions on what exactly § 1123(b)(3) means and how it should be applied in the context of a plan of reorganization.[2] Is retention of "any and all claims and interests" of the debtor or estate sufficient? Is retention of "all state, federal, and common law claims and interests" sufficient? Is retention of "all breach of contract and breach of fiduciary duty claims and interests" sufficient? Does section 1123 require the plan of reorganization to name the specific claim, interest, and/or cause of action, the amount, the nature of the debtor's interest, the name of the defendant, and other details related to such claim, interest, and/or cause of action?[3]

This article discusses and attempts to reconcile the "specific and unequivocal" standard that the Fifth Circuit has said must be satisfied to properly retain causes of action in Chapter 11 plans of reorganization.[4] Although the Fifth Circuit first implemented the "specific and unequivocal"

* THE CLASH, SHOULD I STAY OR SHOULD I GO (Epic Records 1982).

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[1] 18 USC § 1123(b)(3) (2006).

[2] *See infra* Part IV.

[3] The author will use the term cause of action throughout the remainder of the article rather than claim or interest.

[4] *In re* United Operating, L.L.C., 540 F.3d 351, 355–56 (5th Cir. 2008).

test for retention language in 2008 in the seminal case of *Dynasty Oil*, the Fifth Circuit's subsequent holdings and progeny have produced unclear standards.[5]

Understanding the "specific and unequivocal" standard is vital to debtors, bankruptcy attorneys, and creditors because without adequate retention language, a potential cause of action will not be retained in the plan of reorganization, and the bankruptcy estate will lose a potential asset of the estate that might have resulted in a distribution to creditors. If a potential cause of action is not properly retained in a plan of reorganization, the debtor (or reorganized debtor or other party with standing such as a liquidating trustee) will have no recourse post-confirmation to pursue the cause of action, thereby divesting the bankruptcy estate and creditors of any possible value from that potential cause of action.

Due to the brevity of § 1123 itself and the lack of guidance from the United States Supreme Court, a split among the courts has developed, creating different standards as to the specificity needed to retain causes of action in a plan of reorganization. A review of the statute provides a helpful starting point in understanding the standards of retention that have evolved.

II. SECTION 1123(B)(3)

A. Generally

The applicable Bankruptcy Code provision allowing the debtor to preserve potential post-confirmation causes of action in a plan of reorganization is 11 U.S.C. § 1123(b)(3).[6] The actual language of § 1123(b)(3) is short and direct in nature.[7] § 1123(b)(3) generally provides that a plan of reorganization may allow for the retention and enforcement of

[5] *Compare id.*, *with In re* MPF Holdings U.S., L.L.C., 701 F.3d 449, 453 (5th Cir. 2012), *and In re* Tex. Wyo. Drilling, Inc., 647 F.3d 547, 550 (5th Cir. 2011).

[6] 11 U.S.C. § 1123(b)(3).

[7] The relevant language of 18 USC § 1123(b)(3) is:

> **(3)** provide for—
>
> **(A)** the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
>
> **(B)** 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;

claims and/or causes of action belonging to the debtor or the estate.[8] It is important to note that nowhere in the language of § 1123(b)(3) is there a mention of the "specific and unequivocal" standard required by the Fifth Circuit. The statute simply provides that the contents of a confirmation plan must provide for the retention by the debtor of any claim or interest.[9]

While the language of the statute on its face appears fairly simple, the ultimate level of specificity needed to actually "retain" or "preserve" a cause of action in a plan of reorganization has created substantial litigation. Indeed, neither § 1123(b)(3), nor the legislative history provide any guidance on how specific a plan of reorganization should be worded or structured to preserve a cause of action, or how courts should determine whether a cause of action has been properly retained in a plan of reorganization. The Fifth Circuit has interpreted this section to mean that a plan of reorganization must have "specific and unequivocal" language in order to preserve claims and/or interests belonging to the debtor or the estate that might be pursued post-confirmation.[10]

B. Purpose of 1123(b)(3)

Section 1123(b)(3) is intended as a preemptive notice to creditors of the estate prior to plan confirmation.[11] To create a timely, comprehensive estate, the debtor is under a duty to put its creditors on notice of any claim that it intends to bring post-petition.[12] Without it, the creditors are not fully informed on all the liabilities and potential assets of the bankruptcy estate. Further, upon the tending of the retained claims, the creditors can make better economic decisions and analysis to vote for or against the confirmation of the estate. Creditors are entitled to have the opportunity to know whether the debtor will bring claims post-petition.[13] Section 1123(b)(3) allows for the proper procedure needed to give notice to creditors in order to retain those claims. In so doing, all parties involved are aware of what interests are being claimed, even if they will be possibly realized in the future.[14]

[8] *In re United*, 540 F.3d at 355.

[9] 11 U.S.C. § 1123(b)(3).

[10] *In re United*, 540 F.3d at 355.

[11] Harstad v. First Am. Bank, 39 F.3d 898, 903 (8th Cir. 1994).

[12] *See id.*

[13] *Id.*

[14] *Id.*

In short, § 1123(b)(3) is intended as the mechanism in a plan of reorganization by which the debtor provides notice to its creditors and other parties in interest of all potential claims, interests, and causes of action (i.e. assets) and notifies individual creditors and parties in interest of any possible litigation against the them post-confirmation. The question of how specific the retention language needs to be in the plan of reorganization is important in satisfying these notice provisions under the Bankruptcy Code. According to the Fifth Circuit, if the disclosure statement and plan of reorganization do not provide specific and unequivocal notice, which the statute was intended to protect, the creditor is at a disadvantage to fully respond or vote on the confirmation.[15]

Notwithstanding the Fifth Circuit's addition of a "specific and unequivocal" standard into § 1123(b)(3), attorneys remain uncertain about what level of specificity is actually required to retain causes of action that might be pursued post-confirmation. Prior to the Fifth Circuit's addition of a "specific and unequivocal" standard, plans of reorganization routinely utilized clauses that broadly and generally described claims in a catch-all manner.[16] The use of broad "any and all" clauses to retain causes of action in a plan of reorganization allowed debtors to 'lie behind the log' and surprise the creditors with causes of action against such creditors post-confirmation. The problem with broad and general retention language is that creditors have a valid interest in knowing the specific claims, interests, and cause of action the debtor may have generally as an asset of the estate or against the creditor specifically.[17] Whether the debtor will bring a cause of action against the creditor post-confirmation certainly impacts the way that creditors may vote on a plan of reorganization. For example, if a creditor does not know the full picture of the debtor's finances or claims, interests, and cause of action, the creditor cannot confidently vote for or against a plan of reorganization. Conversely, if the debtor does not specifically and unequivocally retain causes of action, the Fifth Circuit has held that § 1123 results in a rather draconian measure that the debtor cannot pursue an asset for the benefit of the estate. Therefore, the interpretation of § 1123 bears great consequence in the nature of Chapter 11 reorganization.

[15] *In re United*, 540 F.3d at 355.

[16] William L. Medford, *Retention of Claims Post-Confirmation: Fifth Circuit Clarifies Necessary Level of Specificity*, 30 AM. BANKR. INST. J., December/January 2012, at 24.

[17] *Id.*

C. 1123(b)(3) and Standing

The confirmation of a plan of reorganization and the nature of the retention language under § 1123(b)(3) also impacts post-confirmation standing and the application of res judicata. Indeed, a fundamental question examined by all courts, including bankruptcy courts, is whether this particular party has standing? Courts have held that confirmation of a Chapter 11 plan of reorganization has the effect of a final judgment and thereby results in res judicata to any non-retained causes of action.[18] Further, section 1141 explains that upon confirmation of a plan of reorganization, the debtor loses standing to bring any claims not reserved in the plan.[19] After confirmation of a plan of reorganization, the debtor's rights and powers to pursue legal claims or conduct business changes.[20] Specifically, this change then allows the debtor to sustain the same powers to bring claims as the trustee would have made either during pre-petition or post-petition on pre-petition claims.[21] After confirmation of the plan of reorganization, however, the debtor is no longer seen as the debtor-in-possession, but instead now only has the ability to bring claims retained by the estate.[22] The debtor loses the ability to bring any claims not reserved in the pre-confirmation proceedings of the estate.[23] The reason for the loss of the ability to bring the claims arises because of the lack of legal standing.[24] The claims are no longer the debtors, but instead are property of the estate.[25]

It is § 1123(b)(3) that allows reorganized debtors to bring post-confirmation actions on claims that "belong to the debtor of the estate."[26] This lifeline is an important tool to the debtor as it supports preservation of claims despite the debtor no longer having "possession" of the estate. Section 1123 provides an exception by reservation, without which the debtor would have to adjudicate all claims to finality prior to plan confirmation or risk losing the claim altogether.[27] If the debtor so chooses

[18] *See In re* Bankvest Capital Corp., 375 F.3d 51, 59 (1st Cir. 2004).

[19] *Id.*

[20] *In re* Diabetes Am., Inc., 485 B.R. 340, 343 (Bankr. S.D. Tex. 2012).

[21] *Id.*

[22] 11 U.S.C. § 1101(1) (2006).

[23] *In re* United Operating, L.L.C., 540 F.3d 351, 355 (5th Cir. 2008).

[24] *In re* MPF Holdings U.S., L.L.C., 701 F.3d 449, 453 (5th Cir. 2012).

[25] *Id.*

[26] *Id.*

[27] *In re* Kmart Corp., 310 B.R. 107, 119 (Bankr. N.D. Ill. 2004).

to bring claims post-confirmation during the bankruptcy, the debtor is required to clearly state so in the pre-confirmation plan and have retained the purported claim.[28] The benefit of listing the possible claims to the creditors in the pre-confirmation plan allows the opportunity to review possible claims that may be made. In turn, the creditors also would have more information and better knowledge from which to either vote for or against the confirmation of the plan.[29]

Res judicata plays an important role in the retention of claims under Chapter 11 reorganization plans. This legal doctrine impacts which causes of action a debtor may bring as a debtor-in-possession. Res judicata prevents any claims from being brought post-petition and after confirmation of a plan that are not retained under § 1123(b)(3).[30] Therefore, providing the specific retention language is important in the Fifth Circuit because of the simple fact that if a cause of action is properly reserved in a plan of reorganization, res judicata cannot affect the validity of that claim. Instead, that cause of action has been expressly reserved in the plan of reorganization and can be pursued post-confirmation.[31]

The reason this standard bears an important impact on bankruptcy litigants comes from the effect of the doctrine res judicata on the debtor's claims. Many circuits have held that under the sections of § 1123 and § 1141, the confirmation of a debtor's plan of reorganization produces a res judicata effect.[32] When a debtor files under Chapter 11 and before the reorganization plan is confirmed, the debtor in possession has the power to pursue any claims a trustee normally could.[33] However, once the plan is confirmed, the debtor loses the authority to bring claims as a debtor-in-possession.[34] This limits the ability of the reorganized debtor from bringing subsequent claims not expressly preserved by the estate.[35] Further, this allows the creditors to fully know the information needed to vote for, or against, confirmation. If creditors do not know what their possible liability or recovery may be, it is more difficult to support a confirmation plan. The

[28] *In re United*, 540 F.3d at 356.

[29] *Id.*

[30] *In re* Tex. Gen. Petroleum Corp., 52 F.3d 1330, 1335 n.4 (5th Cir. 1995).

[31] *In re Kmart*, 310 B.R. at 119.

[32] *See In re* Bankvest Capital Corp., 375 F.3d 51, 59 (1st Cir. 2004).

[33] *In re* Crescent Res., L.L.C., 463 B.R. 423, 426 (Bankr. W.D. Tex. 2011).

[34] *Id.*

[35] *Id.*

impact of § 1123 on the standing and res judicata of retained claims in the Fifth Circuit has been an evolving standard.[36]

III. FIFTH CIRCUIT INTERPRETATION OF § 1123

A. Dynasty Oil *and the "Specific and Unequivocal" Standard*

The Fifth Circuit has actively interpreted the reservation language needed by a debtor to retain and pursue claims and causes of action post-confirmation. A series of cases from the Fifth Circuit and lower courts have evidenced an evolving standard to retain claims pursuant to § 1123(b)(3), but yet have not definitively decided on one uniform application of the rule. Instead, the Fifth Circuit provided "guideposts" from which an idea of the circuit's direction can be determined as to the language required.[37] The Fifth Circuit's seminal case of *In re United* ("*Dynasty Oil*"), from which all subsequent cases in the circuit have evolved, created the "specific and unequivocal" standard.[38]

In *Dynasty Oil*, the Fifth Circuit established its interpretation of what standard of specificity is needed under Bankruptcy Code § 1123(b)(3) pursuant to which a reorganized debtor would have standing to bring post-confirmation claims.[39] In that case, a debtor company, Dynasty, filed for Chapter 11 bankruptcy.[40] During the bankruptcy, Dynasty's largest creditor, Citizen, was granted the authority to bring several of Dynasty's oil and gas wells back into production by using and paying an outside company, Wildcat, to manage and operate the wells.[41] Subsequently, numerous parties questioned the validity of this arrangement because Citizen paid Wildcat with funds out of Dynasty's debtor-in-possession account.[42] After the debtor's plan of reorganization was confirmed, the unsecured creditor's committee filed suit, post-confirmation, under state law and bankruptcy law against Citizen and Wildcat, alleging that Citizen had needlessly depleted the balance of the debtor-in possession account.[43] Dynasty also filed a post-

[36] *Id.* at 437.

[37] *Id.*

[38] *In re* United Operating, L.L.C., 540 F.3d 351, 355 (5th Cir. 2008).

[39] *Id.*

[40] *Id.* at 353.

[41] *Id.* at 353–54.

[42] *Id.* at 354.

[43] *Id.*

confirmation lawsuit, individually, against Citizen and Wildcat[44] Dynasty's common law claims included fraud, breach of fiduciary duty, and negligence.[45] The lower courts dismissed Dynasty and the unsecured creditor's committee claims as barred under res judicata and collateral estoppel grounds.[46] Then, the Fifth Circuit granted review of this case, but not on either ground litigated at the lower court[47] Instead, according to the Fifth Circuit, the dispositive issue was one of standing.[48]

Dynasty's confirmation of its Chapter 11 plan of reorganization was imperative to the Fifth Circuit's decision in *Dynasty Oil*. Upon confirmation of the plan, the debtor's pre-bankruptcy estate no longer existed, and as such Dynasty's authority to pursue claims as a debtor-in-possession ceased as well.[49] However, the Fifth Circuit noted that § 1123(b)(3) allows the debtor to preserve claims, post-confirmation, only if the plan of reorganization expressly retains the right to try the actions.[50] Further, the Fifth Circuit held that the reservation of the claims must be "specific and unequivocal":

> A debtor may preserve its standing to bring such a claim (*e.g.*, for fraud or breach of fiduciary duty, or to avoid a preferential transfer) but only if the plan of reorganization expressly provides for the claim's "retention and enforcement by the debtor." § 1123(b)(3)(B). "After confirmation of a plan, 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." *In re Paramount Plastics, Inc.*, 172 B.R. 331, 333 (Bankr. W.D. Wash. 1994); *see also In re Tex. Gen. Petrol. Corp.*, 52 F.3d 1330, 1335 n.4 (5th Cir. 1995) (citing *Harstad*, 39 F.3d at 902-03). For a debtor to preserve a claim, "the plan must expressly retain the right to pursue such actions." *Paramount*, 172 B.R. at 333. The

[44] *Id.*

[45] *Id.* at 356.

[46] *Id*. at 354.

[47] *See id.* at 354–55.

[48] *Id*. at 356.

[49] *In re* Grinstead, 75 B.R. 2, 3 (Bankr. D. Minn. 1985).

[50] *In re United*, 540 F.3d at 355.

reservation must be "specific and unequivocal".[51]

In the *Dynasty Oil* case, the retention language used in the plan of reorganization to permit the reorganized debtor to pursue post-confirmation causes of action was found insufficient.[52] The Court held that Dynasty's blanket reservation of "any and all claims" in its confirmed plan of reorganization, was not the specific and unequivocal language needed to retain the common law causes of action under § 1123(b)(3).[53]

Importantly in *Dynasty Oil*, the Court noted that if the debtor fails to effectively preserve claims, it forfeits standing to pursue the claim post-confirmation.[54] This loss of standing upholds the purpose of bankruptcy proceedings of "secure prompt, effective administration and settlement of all debtor's assets and liabilities within a limited time."[55] Ultimately, *Dynasty Oil* stands for a simple rule of law that a blanket reservation is not enough to retain a specific cause of action.[56]

While the Fifth Circuit conclusively held that a blanket reservation of claims is insufficient - including language referring to "any and all claims", or "lawsuits"- it did not address in any detail the proper application or interpretation of specific and unequivocal standard.[57] As a result, lower courts in the Fifth Circuit have struggled in applying the specific and unequivocal standard.

The proper application of the Fifth Circuit standard is still debated by attorneys. Despite what standard is the proper one to satisfy specific and unequivocal, the Fifth Circuit has held that the use of language "any and all claims" is not sufficient to satisfy the standard of the Fifth Circuit.[58] Rather, the Fifth Court famously reiterated that the language of retention of claims needs to be specific and unequivocal.[59]

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[51] *Id.* at 355.

[52] *Id.* at 356.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 355 (quoting *In re* Kroh Bros. Dev. Co., 100 B.R. 487, 495 (Bankr. W.D. Mo. 1989) (internal citation omitted)).

[56] *In re* Crescent Res., L.L.C., 463 B.R. 423, 431 (Bankr. W.D. Tex. 2011).

[57] *In re United*, 540 F.3d at 356.

[58] *Id.*

[59] *Id.* at 355.

Lower Courts in the Fifth Circuit have also weighed in on the issue, giving separate consideration to different retention language. In a case from the Northern District of Texas, *In re Texas Wyoming Drilling, Inc*., the court applied, interpreted, and distinguished the standard set forth by the Fifth Circuit's opinion in *Dynasty Oil*.[60]

Texas Wyoming was distinguishable from the *Dynasty Oil* opinion even though the confirmation plan used similar general retention language.[61] In *Texas Wyoming*, the disclosure statement that was provided in conjunction with the plan of reorganization had the additional language: 1. existence of avoidance actions; 2. possible amount of recovery they could recover; and 3. the basis for the actions and that the debtor intended to pursue those actions.[62] These factors were distinguishable from the *Dynasty Oil* case, and therefore the *Texas Wyoming* court determined the presence of these additional factors satisfied § 1123(b)(3).[63]

The appellants, *Laguna*, also argued that the proposed litigation did not reference any possible defendants by name and therefore the retention language was not sufficient to satisfy the retention standard.[64] The court dismissed this argument, and held that the confirmation plan, read in conjunction with the disclosure statement, satisfied the "specific and unequivocal" standard.[65] The language used in the disclosure statement identifying, "[v]arious pre-petition shareholders of the Debtor" was sufficient.[66] One of the provisions that a creditor relies on in Chapter 11 cases is the disclosure statement, and due to the lack of guidance from § 1123(b)(3), the Fifth Circuit held that the disclosure statement could be interpreted in conjunction with the confirmation plan.[67] The court provided through its opinion some clarification on the necessary language interpreting the specific and unequivocal standard set forth by the Fifth Circuit on disclosure statements for reorganization debtors.[68] This allowed creditors to be aware of what and where to look before they vote confirming a plan of reorganization.

[60] 647 F.3d 547, 551 (5th Cir. 2011).

[61] *Id.*

[62] *Id.*

[63] *Id.*at 552.

[64] *Id.* at 551–52.

[65] *Id.* at 552.

[66] *Id.*

[67] *Id.* at 551.

[68] *See id.*

B. Dynasty Oil *Progeny*

The Fifth Circuit since *Dynasty Oil* has reinterpreted and clarified its views as to the application of the specific and unequivocal standard. The subsequent cases of *In re MPF Holdings*[69], *In re Texas Wyoming*[70], and *In re SI Restructuring*[71] provide an evolution in change of the strictness needed to adequately retain claims post-confirmation in the Fifth Circuit. However, all the decisions support a strict and unforgiving take on the language needed. In *In re MPF Holdings*, the Fifth Circuit took up several issues including determining whether the individual defendants must be specifically named in the plan of reorganization and if the language must clearly identify the causes of action.[72]

In re MPF provided a significant clarification of the specific and unequivocal standard. This case involved a debtor, MPF, that included in its plan of reorganization causes of action against a company called Cosco that purchased, via lump sum, MPF's loans in order to obtain the company's contracts and equipment.[73] Following this sale in bankruptcy, the litigation trustee attempted several avoidance actions and creditors objected.[74] However, it was the bankruptcy court that *sua sponte* raised the *Dynasty Oil* issue of whether the causes of action were properly retained in the plan of reorganization.[75] Initially in *In re MPF*, the bankruptcy court held that the parties to be sued in the post-confirmation must be individually named.[76] This level of specificity had never been required in previous Fifth Circuit cases.[77] In fact, the bankruptcy court went on to hold that "the language must be so Shermanesque that anyone who reads the proposed plan knows that if the plan is confirmed, the putative defendant will unquestionably be sued post-confirmation under a particular legal theory or statute."[78] The Fifth Circuit however reversed the bankruptcy court and held that the

[69] 701 F.3d 449, 455 (5th Cir. 2012).

[70] 647 F.3d at 550.

[71] 714 F.3d 860, 862 (5th Cir. 2013).

[72] 701 F.3d at 455.

[73] *Id.* at 451–52.

[74] *Id.*

[75] *Id.*

[76] *In re* MPF Holding U.S., L.L.C., 443 B.R. 736, 745 (Bankr. S.D. Tex. 2011) *vacated and remanded*, 701 F.3d 449 (5th Cir. 2012).

[77] *In re* Tex. Wyo. Drilling, 647 F.3d 547, 547 (5th Cir. 2011).

[78] *In re MPF Holdings*, 443 B.R. at 747.

parties in fact did not have to be individually named.[79] Section 1123 text did not require this particularity or that retention language should retain the actual names of those to be sued. Further, the Fifth Circuit held that while language indicating a possible suit or claim is sufficient, there was no need to necessarily say that the claim will for certain be brought.[80] This answered an important legal distinction between possible claims brought post-confirmation and those that the debtor knew for certain that they would bring. The court simply decided both are allowed.[81] Finally, this decision provided clarification as to the level of specificity needed to retain certain claims, and appeared to be a retreat from the previous stringent holding of *Dynasty Oil*. Prior to *In re MPF*, the debtor's ambiguous language was thought to have made the claims lost because of a lack of standing post-confirmation. However, the Fifth Circuit in *In re MPF* found that just because the language is ambiguous does not make the retention a nullity.[82] The court found that parol evidence could be used in order to decipher the ambiguous claim.[83] After reviewing the evidence, the court found that the retention language was specific and unequivocal, as the information provided not only showed the basis for the claims in the plan of reorganization, but also the specific identity of each defendant to be sued by the trustee.[84] *In re MPF* was an important step to clarifying the specific and unequivocal standard in the Fifth Circuit, but is more readily understood by interpreting its predecessor *In re Texas Wyoming*.

The case of *In re Texas Wyoming*, although a precursor to *In re MPF*, also provided insight into the level of specificity needed to retain causes of action. In this case, the debtor-in-possession attempted to file suit for pre-petition dividend payments as fraudulent transfers.[85] The 1123(b)(3) language in this case provided for general retention of "estate actions," but the debtor was attempting to bring fraudulent transfer avoidance actions post-confirmation.[86] The Fifth Circuit ultimately held that because the

[79] In re MPF Holdings, 701 F.3d at 457.

[80] *In re Tex. Wyo. Drilling*, 647 F.3d at 552.

[81] *Id.*

[82] *In re MPF Holdings*, 701 F.3d at 457.

[83] *Id.* at 456.

[84] *Id.* at 457.

[85] *In re Tex. Wyo. Drilling*, 647 F.3d at 549.

[86] *Id.* (The pertinent language from the retention language: "[t]he Reorganized Debtor shall retain all rights, claims, defenses, and causes of action including, but not limited to, the Estate Actions, and shall have sole authority to prosecute and/or settle such actions").

debtor had listed "avoidance actions" as possible claims in the disclosure statement, amounts of recovery, the basis for the actions, and the intent to pursue those actions, the plan of reorganization was specific and unequivocal.[87] This case also provided guidance on how language in the disclosure statement should be interpreted. One issue was whether a potential defendant's name needs to be included in the retention language.[88] The court found that *Dynasty Oil* never required that a potential defendant's name be in the confirmation plan as a prerequisite to meeting the § 1123 standard.[89] Next, the court tackled whether the debtor was required to pursue the retained causes of action post-confirmation. Again, the Fifth Circuit found that the debtor was not required to bring all retained causes of action, just that they could if they so chose.[90]

Finally, the Fifth Circuit recently delivered another decision upholding the specific and unequivocal standard. As shown in its latest case of *SI Restructuring*, the court reviewed language that attempted two methods of retaining claims; however, neither was found by the Fifth Circuit as sufficient to satisfy the court's interpretation of § 1123.[91] The plan of reorganization's language contained two possible methods of retention: (1) the debtor retained "actions for the avoidance and recovery of estate property under Bankruptcy Code section 550, or transfers avoidable under Bankruptcy Code section 544, 545, 547, 548, 549, or 553(b)"; and that debtors (2) "may be potential plaintiffs in other lawsuits, claims, and administrative proceedings" and would "continue to investigate potential claims to determine if they would be likely to yield a significant recovery for the Estates."[92] Denying the preservation of claims, the Fifth Circuit held that the retention language was insufficient because it did not meet the minimum standard of putting the creditor on notice of debtor's potential claims post-confirmation. In other words the language was not specific and unequivocal.[93] Despite the debtor's attempt to argue that the bankruptcy estate and plan of reorganization was determined before the specific and unequivocal standard even existed, the Fifth Circuit still struck down claims as barred for lack of adequate retention. The Fifth Circuit's continued

[87] *Id.* at 551.

[88] *Id.* at 552.

[89] *Id.*

[90] *Id.*

[91] *In re* SI Restructuring, Inc., 714 F.3d 860, 862 (5th Cir. 2013).

[92] *Id.*

[93] *Id.* at 864.

commitment to this unique interpretation of § 1123(b)(3) places it at the stricter end of the spectrum when compared to the interpretation of other circuit courts.

Despite the recent "clarification" opinions issued by the Fifth Circuit, it appears that the decisions create more havoc than reconciliation. The further the cases try to consolidate and define what actually is specific and unequivocal under *Dynasty Oil*, the more difficult it becomes to know the proper level of specificity the Fifth Circuit requires. *Dynasty Oil* gave the oft mentioned phrase that the Chapter 11 plan cannot retain causes of action that are merely derived from "any and all" claims, but rather the retention language must be specific and unequivocal.[94] This has been interpreted to mean that there is no retention of categorical language when the creditors are not given adequate notice of the possible claims. However, *In re Texas Wyoming* distinguished itself from *Dynasty Oil* and leaves open the question of how unspecific and equivocal must the language be before it is not categorical and falls under prohibited "any and all" language.[95] The Fifth Circuit's case law leads to the conclusion that the specific and unequivocal nature will be determined by the circuit on a case-by-case basis. As more cases are excluded from the strict application of the standard produced by *Dynasty Oil*, the further the Fifth Circuit moves away from a definitive expression of specific and unequivocal. The ambiguous nature of the question is equivalent to Justice Potter Stewart's concurrence in *Jacobellis v. Ohio*, when, while trying to describe obscenity, he stated the famous phrase, "I know it when I see it."[96]

IV. THE CIRCUIT SPLIT COULD LEAD TO COMMON DECISION OR SUPREME COURT GUIDANCE

There is a current circuit split regarding the level of specificity needed to retain a cause of action in a reorganization plan.[97] This split is unevenly distributed between three competing views. The first school of thought includes a view that basic, general reservation of the claims is allowed in a plan of reorganization. The second and third genres support the idea that

[94] *In re* United Operating, L.L.C., 540 F.3d 351, 356 (5th Cir. 2008).

[95] Joseph J. Wielebinski & Davor Rukavina, *Bankruptcy*, 65 SMU L. REV. 279, 283 (2012).

[96] Jacobellis v. Ohio, 378 U.S 184, 197 (1964).

[97] *In re* Commercial Loan Corp., 363 B.R. 559, 567 (Bankr. N.D. Ill. 2007); *In re* Railworks Corp., 325 B.R. 709, 716 (Bankr. D. Md. 2005) (quoting *In re* USN Commc'n., Inc., 280 B.R. 573, 589 (Bankr. D. Del. 2002)); Medford, *supra* note 5, at 24).

specificity is required, but differ as to the level required.[98] The Sixth Circuit and Fifth Circuit have found that a high level of specificity is needed to properly retain causes of action.[99] However, the second group of strict circuits, including the majority of circuits of the First, Second, Seventh, Ninth, and Tenth Circuits, argue that broad, categorical language is sufficient under § 1123.[100]

A. General Reservation under 1123(b)(3)

A few courts hold that general reservation of causes of action is sufficient under 1123(b)(3). These courts find that despite the general nature of the preservation, the provision of § 1123 and bankruptcy principles are still upheld.[101] The general reservation language allows an expedited bankruptcy process, including lowering the time a debtor needs to review and analyze each claim against them.[102] Further, this view finds that through other bankruptcy provisions, such as § 502, the creditor is already on notice that the debtor can object at any time during the proceeding, and requiring more specific reservations would negate this important bankruptcy principle.[103]

In the case of *In Bleu Room Experience*, the court found the debtor had satisfied § 1123 and the right to pursue causes of action post-confirmation,

[98] *In re Commercial Loan Corp*., 363 B.R. at 567.

[99] Browing v. Levy, 283 F.3d 761, 774 (6th Cir. 2002); *In re* United Operating, L.L.C., 540 F.3d 351, 356 (5th Cir. 2008).

[100] Roye Zur, *Preserving Estate Causes of Action for Post-Confirmation Litigation*, 32 CAL. BANKR. J. 427, 429 n.9 (2013) (citing Fleet Nat'l Bank v. Gray (*In re* Bankvest Capital Corp.), 375 F.3d 51, 58–60 (1st Cir. 2004); P.A. Bergner & Co. v. Bank One, Milwaukee, N.A. (*In re* P.A. Bergner & Co.), 140 F.3d 1111, 1117 (7th Cir. 1998); Alary Corp. v. Sims (*In re* Associated Vintage Grp., Inc.), 283 B.R. 549, 563–64 (B.A.P. 9th Cir. 2002); JP Morgan Trust Co. N.A. v. Mid-Am. Pipeline Co., 413 F. Supp. 2d 1244, 1280 (D. Kan. 2006); KHI Liquidation Trust v. Wisenbaker Builder Servs., Ltd. (*In re* Kimball Hill, Inc.), 449 B.R. 767, 778 (Bankr. N.D. Ill. 2011); Alberts v. Tuft (In re Greater Se. Cmty. Hosp. Corp.), 333 B.R. 506, 533 (Bankr. D.D.C. 2005); Ice Cream Liquidation, Inc. v. Calip Dairies, Inc. (*In re* Ice Cream Liquidation, Inc.), 319 B.R. 324, 337 (Bankr. D. Conn. 2005); Kmart Corp. v. Intercraft Co. (*In re* Kmart Corp.), 310 B.R. 107, 124 (Bankr. N.D. Ill. 2004); Peltz v. Worldnet Corp. (*In re* USN Commc'ns, Inc.), 280 B.R. 573, 594 (Bankr. D. Del. 2002); Cohen v. TIC Fin. Sys. (*In re* Ampace Corp.), 279 B.R. 145, 160 (Bankr. D. Del. 2002)).

[101] *Id.* at 429.

[102] *Id.* at 430.

[103] *Id.* at 43031.

by simply reserving the right to object to claims in the pre-confirmation.[104] The general reservation language in the reorganization plan was: "Debtor has not completed its review of Proof of Claim, however, and therefore reserves the right to object to any Proofs of Claims filed pursuant to Article XV of the Plan."[105] Following this confirmation of the plan, the debtor filed an objection to a claim of its creditor DGG.[106] The creditor argued that the objection was barred by res judicata, as this debtor's specific objection was properly preserved under § 1123.[107] The court held that despite the post-confirmation objection to the claim, the debtor was in full compliance with § 1123(b)(3).[108] In the plan of reorganization, the debtor had included a clause that allowed for objections to contested claims.[109] The rationale behind the court's decision to allow this extremely broad reservation of post-confirmation claims was based largely on its interpretation of the purpose of § 1123(b)(3).[110] The court found that the main purpose of § 1123(b)(3) is a notice provision, and the creditor in the case was put on notice as soon as the debtor filed bankruptcy that the creditor's claims might be in dispute.[111] Once the creditor submits to the "jurisdiction" of the bankruptcy court, the creditor is on notice that the debtor has an absolute right to object to the claim pursuant to § 502.[112] Ultimately, the court found that as long as there was the reservation of the opportunity to object to claims, a very low bar indeed, the debtor could object to claims post-confirmation.[113]

A different bankruptcy court held in *In re USN Communications* that a general reservation of "any and all claims" in the plan of reorganization was sufficient under § 1123 to preserve § 547 preferential transfer causes of action.[114] There, the debtor-in-possession created a confirmation plan that generally reserved "any and all claims" and expressly disclaimed any

[104] *In re* Bleu Room Experience, Inc., 304 B.R. 309, 314 (Bankr. E.D. Mich. 2004).

[105] *Id.*

[106] *Id.* at 313.

[107] *Id.*

[108] *Id.* at 318.

[109] *Id.* at 312.

[110] *Id.* at 314.

[111] *Id.*

[112] *Id.* at 315.

[113] *Id.*

[114] 280 B.R. 573, 590 (Bankr. D. Del. 2002).

waiver of claims post-confirmation.[115] When the bankruptcy trustee filed a § 547 preference cause of action post-confirmation, the defendant argued that since the preference action was not expressly retained in the confirmation plan, it was barred by res judicata and § 1123.[116] The court found that there was no statutory basis under § 1123 or res judicata to bar post-confirmation claims when there was a general reservation of "any and all claims".[117] The court's reasoning followed three distinguishing factors: (1) that § 1123 does not provide that the debtor must claim specific causes of action of debtor prior to confirmation; (2) that general reservation of claims more efficiently expedites the bankruptcy process; and (3) due to the contractual nature of the confirmation plan, if the creditor agrees to a plan which includes a general reservation, they should be bound by that agreement.[118] This court rejected the notion that specific retention language is required under § 1123, and distinguishes itself from other circuits which would have precluded these claims under res judicata and § 1123.

B. Specific Reservation under § 1123(b)(3)

The Sixth Circuit follows the Fifth Circuit's view that any claims that are to be retained under § 1123(b)(3) should be expressly and specifically mentioned or be barred by res judicata.[119] The main reason supporting this strict interpretation is the fundamental impact that confirmation of a plan of reorganization constitutes a final judgment.[120] Other causes of action are therefore nullified by the legal doctrine of res judicata. This circuit finds that upholding a strict interpretation satisfies the purpose and plain language of § 1123.[121] If this tenant of strict interpretation is not upheld, debtors are allowed to, by loose standards, circumvent bankruptcy law by retaining claims through blanket reservations.[122]

The Sixth Circuit has explained why the level of specificity cannot be through a general reservation of claims.[123] In order to defeat the grasps of

[115] *Id.*

[116] *Id.*

[117] *Id.* at 593.

[118] *Id.* at 590–93.

[119] Browing v. Levy, 283 F.3d 761, 774 (6th Cir. 2002).

[120] Sanders Confectionery Prods., Inc. v. Heller Fin., Inc., 973 F.2d 474, 480 (6th Cir. 1992).

[121] *Browning*, 283 F.3d at 775.

[122] *Id.*

[123] *Id.*

res judicata post-confirmation, the litigant must either adjudicate the claims in the bankruptcy proceeding or reserve them in the reorganization plan or confirmation order.[124] In the case of *Browning v. Levy*, the Sixth Circuit held that an omnibus provision included in the disclosure statement was not sufficient to avoid res judicata.[125] In that case the debtor did not reserve, prior to conclusion of the bankruptcy proceeding, the specific causes of action.[126] Instead, via an omnibus reservation of rights, the debtor in its reorganization plan stated:

> "Company shall retain and may enforce any claims, rights, and causes of action that the Debtor or its bankruptcy estate may hold against any person or entity, including, without limitation, claims and causes of action arising under sections 542, 543, 544, 547, 548, 550, or 553 of the Bankruptcy Code."[127]

The court was not satisfied by the debtor's reference to "any and all claims" language.[128] Instead, the court found that the broad language had "little value" to the bankruptcy court because the debtor's full estate picture was not apparent.[129] The court explained that the disclosure statement should include the debtor's name, and specifically, the individuals that may be sued and the factual basis for the reserved claims.[130] By not doing so, the court found the reservation insufficient.[131]

The Sixth Circuit reasons that the requirement of express reservation is the key to preserving claims and upholding the language of § 1123.[132] In conjunction with § 1141(b), the reference to the specific post-confirmation litigation allows all parties the opportunity to know the possible causes of action that could be brought; and therefore, no surprises unfairly prejudice either party. However, this strict interpretation is not endorsed by all circuits.

[124] *Id.* at 774.
[125] *Id.*
[126] *Id.* at 766.
[127] *Id.* at 769.
[128] *Id.* at 775.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.* at 774.

C. Specific-Categorical Reservation under § 1123(b)(3)

The majority of circuits have instead found that a level of generality is a better approach when dealing with retention claims. These circuits, such as the First, Second, Seventh, Ninth, and Tenth Circuits believe that the underlying intent of § 1123(b)(3) was to expedite confirmation and rehabilitate the debtor; and therefore, broader retention language is appropriate.[133] The main view of this branch of thought is that broad, categorical language in the plan is enough to retain subsequent causes of action.[134] That way, confirmation of the plan is permitted before the claims have been fully investigated or pursued.[135] Also, due to the severe consequence of not retaining a claim, (i.e. res judicata), these Circuits hold that a cautious, general approach is better for all parties involved. In effect, legal matters are given a full opportunity to come to fruition for both parties.

The case of *In re Bankvest Capital Corp.,* from the First Circuit, dealt with an avoidance action by the debtor post-confirmation of a Chapter 11 reorganization.[136] The court first recognized that under § 1141 of the Bankruptcy code, the confirmation of the plan acts as a final judgment binding the parties from bringing claims not retained post-confirmation.[137] Further, it recognized the exception to this rule under § 1123(b)(3) that allows retained claims to be brought post-confirmation.[138] The language in the disclosure statement in this case showed that the debtor had used the phrase "any cause of action [including avoidance actions]".[139] The pertinent language here:

> The Liquidating Supervisor, under the supervision of the Post–Effective Date Committee . . . is authorized to investigate, prosecute and, if necessary, litigate, any Cause of Action [the definition of which expressly includes avoidance actions] . . . on behalf of the Debtor and shall have standing as an Estate representative to pursue any

[133] Zur, *supra* note 100, at 429.

[134] *Id.*

[135] *Id.*

[136] 375 F.3d 51, 58 (1st Cir. 2004).

[137] *Id.*

[138] *Id.* at 59.

[139] *Id.*

> Causes of Action and Claim objections, whether initially filed by the Debtor or the Liquidating Supervisor.[140]

The defendants, Fleet, objected on grounds that there was no specific reference to the claim against Fleet; therefore, res judicata denied standing for the debtor to bring the claim.[141] The court disagreed, noting that the cases Fleet had cited were far more general and blanket reservations than what was used in this case.[142] Accordingly, based on the specific facts in the case, the court held that the Chapter 11 retention language used by the debtor was sufficient to retain the avoidance action.[143] This court did not purport to need an express, specific and unequivocal language as shown by the Fifth Circuit, but did find necessary language more specific than "any and all claims".[144]

The Eighth Circuit also has weighed in on the appropriate language needed in retention claims in *Harstad v. First American Bank*.[145] There, a debtor listed in the plan of reorganization that it would conduct an analysis for pre-petition fraudulent transfers even though it did not know of any at the time.[146] Subsequently, a mere three months after the confirmation of the plan, the debtor claimed that it had conducted the analysis and found pre-petition preferential transfers.[147] It then filed adversary proceedings to recover the preferential transfers.[148] The bankruptcy and district court both held that the case should be granted summary judgment against the debtor as the debtor no longer had standing to pursue the claims.[149] The Eighth Circuit court laid out the retention language needed as one that required the debtor to follow the language of § 1123(b)(3).[150] The debtor argued to the Court of Appeals that they referenced the claim through a clause granting the bankruptcy court jurisdiction to hear post-confirmation claims.[151] The court found this argument unpersuasive and this reference fell too far from

[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.* at 60.
[144] *Id.*
[145] 39 F.3d 898, 903 (8th Cir. 1994).
[146] *Id.* at 901.
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.* at 902.
[151] *Id.*

satisfying § 1123(b)(3).[152] The debtors additionally argued that the court should read § 1141 in conjunction with § 1123(b)(3).[153] The debtor argued that the court should read § 1141 as vesting the debtor with all the property of the estate regardless of the plan, including causes of action.[154] The court explained the fundamental error in this logic. If the court were to follow the logic presented by the debtor for the cause of action, they would in effect render the § 1123(b)(3) clause meaningless.[155] It is the debtor's discretion which leads the court to allow or not allow post-confirmation claims.[156] The provision acts as notice to creditors of potential claims and without it, confirmation plans would not be as efficient or successful. Thereby, the court found § 1123 preempts § 1141 from avoidance claims that the debtor would otherwise receive.[157]

In re P.A. Bergner & Co. provides an example of a bankruptcy court choosing the broader approach after reconciling the specific and unequivocal.[158] In this case, a reorganized debtor, Bergner was an account party for standby letters of credit payable to Bank One.[159] Bergner paid upon those obligations to Bank One prior to filing Chapter 11 Bankruptcy.[160] Thereafter, Bergner filed against Bank One on voidable preference grounds and obtained a judgment against Bank One at the bankruptcy and district court level for these payments of the letters of credit.[161] Bank One disputed the judgment on the grounds that Bergner had no standing to bring such an action in the first place under § 1123.[162] Bank One advocated for the Wisconsin Bankruptcy Court to support the "specific and unequivocal" approach used in the majority of courts as controlling.[163] The court found that Bergner sufficiently retained the cause of action used to attain a judgment against the Bank, the debtor had standing, and the

[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.* at 903.
[158] *See* 140 F.3d 1111, 1117 (7th Cir. 1998).
[159] *Id.* at 1113.
[160] *Id.*
[161] *Id.*
[162] *Id.* at 1117.
[163] *Id.*

bankruptcy court did not enforce the judgment post-petition.[164] The Circuit Court found that in this particular case the claim against the bank was already pending prior to the confirmation of the plan.[165] The court found that the specific and unequivocal language theory was in itself not an invalid logical argument, but instead the plain language of § 1123(b)(3) did not require that degree of specificity in a plan's retention language.[166] Evaluating precedent, the court found that those circuits following the need for specific and unequivocal language have focused on requirements that plans retain claims of a certain type, not that individual claims be listed.[167] Then falling back to the purpose of the statute, the court held that Bank One had already received proper and sufficient notice of the claim under § 1123.[168]

Bank One also argued and relied on the proposed plan language that stated the debtor waived and released any avoidance or recovery actions upon the date of the approval of the disclosure statement.[169] However, the court denied this argument because Bank One had been in litigation with Bergner on the preference action for over fourteen months prior to the confirmation.[170] Letting Bank One disregard this substantial litigation when the language of § 1123 allowed for the preservation of the ongoing proceeding between the parties was enough to satisfy the purpose of the bankruptcy provision.

V. RETAINING CLAIMS AND INTERESTS IN THE FIFTH CIRCUIT GOING FORWARD

The Fifth Circuit's apparent evolution of statutory interpretation requires a high showing of specificity to meet its specific and unequivocal standard. The Fifth Circuit has shown a devotion to this specific and unequivocal interpretation. In response, the general objection that is made, by creditors and debtors alike, is that by requiring such specific nature of the claims to be reserved, the court is imposing a nearly impossible task on the debtors to find out all causes of action prior to confirmation of the plan,

[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.* at 1117.
[169] *Id.*
[170] *Id.*

or be barred by the res judicata and lack of standing.[171] The Fifth Circuit has held even if all underlying facts are not previously known to advocates prior to confirmation, the debtor is still required to retain all claims that it should know about or be barred post-confirmation.[172] Despite this harsh result, the Fifth Circuit maintains that its strict interpretation upholds the purpose and underlying intent of § 1123 as a matter of efficiency and notice to creditors. As noted by the bankruptcy court in *In re MPF*, "either be straightforward in the proposed plan, or be straight-jacketed after confirmation of the plan".[173] This strict embodiment of standard cautions practitioners to be wary of the language they use in the reorganization plan. Instead, lawyers practicing in this field should do all they can to provide detailed information of claims that might be pursued post-confirmation.

Attorneys for creditors and debtors alike should strive to utilize as specific and non-categorical type of language as possible when drafting and reviewing disclosure statements and plans of reorganization. As held by the Fifth Circuit, the retention language should state a specific basis of recovery, and further, the identity of each potential defendant if possible.[174] This retention language should also be noted in the disclosure statement as it likely provides another opportunity for the court to review the retention of causes of action under § 1123.[175] These are the two documents that provide reviewable retention language to the court applying the specific and unequivocal standard.[176]

With this knowledge and updated view by the Fifth Circuit, the practitioner must be weary of correctly wording retention claims. It would be prudent as an attorney preparing the reorganization or disclosure statement to realize that claims retained by broad "any and all" language most likely will not be upheld by the Fifth Circuit. Instead, as the Fifth Circuit currently stands, the debtor would lose any claims that are not at least categorically reserved by identifying potential parties or claims that would be brought post-confirmation. As an example, *In re MPF* and *In re Texas Wyoming Drilling* allowed for the retention of avoidance actions because the debtor specifically listed "avoidance actions" against a specific

[171] *In re* SI Restructuring Inc., 714 F.3d 860, 865–66 (5th Cir. 2013).

[172] *Id.*

[173] *In re* MPF Holdings U.S., L.L.C., 443 B.R. 736, 756 (Bankr. S.D. Tex. 2011) *vacated and remanded*, 701 F.3d 449 (5th Cir. 2012).

[174] *In re MPF Holdings*, 701 F.3d at 457

[175] *In re SI Restructuring*, 714 F.3d at 865.

[176] *Id.* at 864.

group of defendants that were listed in the plan language.[177] However, in its most recent case of *In re SI Restructuring*, the same use of avoidance action language was not specific enough to retain any breach of fiduciary duty claims or other common law claims post-confirmation.[178] The important lesson to the practitioner here is again one of specificity. If possible common law claims could arise, the least you should do is list the sort of claims by name and, if known, possible defendants. Also, explain to the debtor the importance of providing all information and analyzing all possible claims and causes of action as well as the consequence of not retaining through specific language. This will become rather important if the bankruptcy estate does not retain post-confirmation claims and a possible malpractice suit looms over the bankruptcy attorney. This derives from the harsh result that a debtor will not be able to retain post-confirmation unspecific claims. The moral to attorneys practicing in this area is one of caution and understanding of the limits of the Fifth Circuit's specific and unequivocal standard.

VI. CONCLUSION

Although the Bankruptcy Code, United States Supreme Court, and the current Circuit split do not definitively provide guidance of the proper standard for retention language, lawyers must draft retention plans that protect the interests of their clients. In this interest, while circuits like the Fifth Circuit still debate the full extent of specificity required in pre-confirmation plans under § 1123(b)(3), the important lesson to attorneys is one of fair warning. In detailing the causes of action a debtor chooses to retain post-confirmation, the lawyer should draft the disclosure statement and plan of reorganization to be as factually specific as possible. This includes naming the specific causes of action retained by the debtor as well as including possible parties against whom the debtor may bring the cause of action against. If there is a failure to conform to this standard in the Fifth Circuit, the debtor faces the substantial risk of being barred by res judicata for causes of action that are unspecific or equivocal. In summary, the Fifth Circuit would help all bankruptcy advocates by specifying an unequivocal interpretation of the "specific and unequivocal" standard.

[177] *See In re MPF Holdings*, 701 F.3d at 457.

[178] *In re SI Restructuring*, 714 F.3d at 866.