

## Preserving causes of action in Sixth Circuit: *In re Mountain Glacier*



Ashley J. Jericho | Wednesday, October 10, 2018

### **Clarification of Specificity Requirements for Preserving Causes of Action in the Sixth Circuit: *In re Mountain Glacier***

One important aspect of a chapter 11 case, whether the plan for the case is to reorganize and emerge from bankruptcy or to liquidate, is the preservation of pre-petition claims for prosecution after the plan is confirmed. If a claim is not properly preserved and transferred in the chapter 11 plan, the debtor risks losing the claim post-confirmation. The defendant may defend any such claim by asserting the claim is barred pursuant to res judicata or the debtor lacks standing to pursue the claim.

An order confirming a chapter 11 plan constitutes a final order in bankruptcy proceedings. The confirmation order is entitled to preclusive effect, and res judicata principles bar relitigation of any issues that were raised or could have been raised in the confirmation proceedings. Section 1123(b) of the Bankruptcy Code provides for the preservation of claims. The chapter 11 plan must preserve the estate claims through appropriate reservations and then transfer the claims to a post-confirmation entity to ensure the debtor maintains standing.

While most courts agree “blanket reservations,” which attempt to preserve “any and all claims belonging to the debtor,” are not specific enough to preserve any particular claim, the courts have not uniformly agreed as to what level of specificity is necessary to preserve a claim.<sup>1</sup>

The majority of courts (the First, Second, Third, Seventh, Ninth, and Tenth Circuits) have held that little to no specificity is required. Those courts generally hold that the basis for known claims should be provided. For unknown claims, those courts hold that plan language identifying general categories or types of claims is sufficient, at least for claims that are native to bankruptcy, such as avoidance claims. These courts analyze preservation language by examining the plan and disclosure statement together, and generally do not require the identification of potential defendants or the factual basis for potential claims.

The Fifth Circuit articulated a more stringent standard, requiring that a debtor must “expressly retain the right to pursue actions” and retention of the action must be “specific and unequivocal.”<sup>2</sup> Recent cases applying *United Operating* have narrowed this application, approving categorical descriptions, at least in instances involving avoidance actions.<sup>3</sup>

The Sixth Circuit fell somewhere in between these two approaches. The leading case in this Sixth Circuit was *Browning v. Levy*,<sup>4</sup> which had been cited by lower courts

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both inside and outside of the Sixth Circuit to support a more stringent standard.

On December 5, 2017, the Sixth Circuit Court of Appeals issued its decision in *In re Mountain Glacier, LLC*.<sup>5</sup> The Sixth Circuit declined to extend its earlier decision in *Browning v. Levy*, and it clarified the level of specificity necessary to preserve a claim.

The facts in *Mountain Glacier* were straightforward. The debtor, Mountain Glacier, LLC, and Nestle Waters were in the middle of arbitration when the debtor filed its bankruptcy petition. The arbitration was stayed, and it remained stayed until the debtor's plan of reorganization was confirmed and the bankruptcy proceedings were concluded. Shortly thereafter, the debtor attempted to resume arbitration. Nestle Waters objected on the basis that the debtor had not properly reserved the arbitration claim in its plan of reorganization. The bankruptcy court and the district court held that the debtor had properly preserved the arbitration claim. Nestle Waters appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit started its analysis with an explanation of the chapter 11 bankruptcy process and the disclosures required of the debtor. The court explained that the debtor is required to file a disclosure statement, which inventories all of the debtor's assets and liabilities and gives creditors the information they need to make an informed decision regarding the proposed plan. The court also noted that any creditor can object to the disclosure statement or the proposed plan if the information provided is thought to be inadequate.

The debtor submitted a disclosure statement detailing its assets and liabilities, which disclosed the stayed claim against Nestle Waters as follows: "a counterclaim asserted by the Debtor against Nestle Waters in arbitration pending in Chicago, IL," which "remain[ed] unliquidated and ha[d] unknown value." The debtor's plan indicated that this arbitration claim would be transferred to the "Reorganized Debtor" upon confirmation of the plan.

Nestle Waters argued *res judicata* barred the debtor's attempt to restart the arbitration. Nestle Waters argued the Sixth Circuit Court of Appeal's decision in *Browning v. Levy* set out stringent standards – even more stringent than those in the Bankruptcy Code – and the debtor failed to meet those standards to retain the arbitration claim.

The Sixth Circuit held "a debtor who wishes to retain an existing claim for future litigation need only note the reservation of that claim in its plan. The statute requires nothing more."<sup>6</sup> The Sixth Circuit addressed the requirements set forth in *Browning v. Levy* and indicated "Browning did not set out the stringent requires that Nestlé Waters reads into it."<sup>7</sup> The court explained: "In *Browning*, we stated that 'a general reservation of rights' is not sufficient to preserve the debtor's claims. But *Browning* does not require a debtor's reservation of claims to name each (potential) defendant and state the factual basis for each (potential) cause of action..."<sup>8</sup> The court further explained "what *Browning* held is that a debtor's reservation is sufficient so long as it enables creditors to (1) identify the claims (or potential claims) at issue and (2) evaluate whether those claims might provide additional assets for distribution."<sup>9</sup>

The Sixth Circuit held the debtor's reservation was sufficient, as it identified the counter party, identified the proceeding as the arbitration, and indicated the forum.<sup>10</sup> The court also noted, if the creditors needed or wanted additional information, they could have objected to the reservation and asked the court to require "a more fulsome description."<sup>11</sup> The court stressed Nestle Waters certainly had all the information it needed, as it was the opposing party involved in the pre-petition arbitration.<sup>12</sup>

In summary, in the Sixth Circuit, a debtor's reservation is sufficient so long as it enables creditors to (1) identify the claims (or potential claims) at issue and (2) evaluate whether those claims might provide additional assets for distribution. It is not necessary that a debtor identify each defendant (or potential defendant) and provide a factual basis for the claim (or potential claim). The debtor does not need to "intone any magic words."

This decision may indicate a pivot toward the majority approach, at least with regard to categorical preservation of preferential and fraudulent transfer claims under the general category of "avoidance claims." With other known potential claims, it is imperative that debtors provide sufficient information for creditors to identify the claims and evaluate their potential recoverable value.

While the *Mountain Glacier* decision provided some clarification regarding the level of specificity required to preserve a claim, given the case-by-case nature of the review, careful consideration of the content of the descriptions of claims will continue to be necessary to avoid the application of *res judicata* in post-confirmation litigation.

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<sup>1</sup> See generally Mark D. Collins and Corry D. Kandestin, *Preserving and Prosecuting Causes of Action Post-Confirmation*, Southeastern Bankruptcy Law Institute (2014), available at [http://www.sbli-inc.org/archive/2014/documents/Preserving\\_and\\_Prosecuting\\_Causes\\_of\\_Action\\_Post\\_Confirmation.pdf](http://www.sbli-inc.org/archive/2014/documents/Preserving_and_Prosecuting_Causes_of_Action_Post_Confirmation.pdf) (collecting cases); Siddharth P. Sisodia, *What Level of Specificity Is Needed to Preserve Post-Confirmation Claims?*, American Bar Association Articles (Oct. 6, 2015), available at <http://apps.americanbar.org/litigation/committees/bankruptcy/articles/fall2015-1015-specificity-needed-to-preserve-post-confirmation-claims.html> (collecting cases); Roye Zur, *Preserving Estate Causes of Action for Post-Confirmation Litigation*, 32 Cal. Bankr. J. 427 (2013) (collecting cases).

<sup>2</sup> *In re United Operating, LLC*, 540 F.3d 351 (5th Cir. 2008).

<sup>3</sup> See, *Spicer v. Laguna Madre Oil & Gas II, L.L.C.* (In re Texas Wyoming Drilling, Inc.), 647 F.3d 547, 549, 551 (5th Cir. 2011) (finding sufficient specificity and identification of claims where the claims were described as "various pre-petition shareholders of the Debtor [for] fraudulent transfer and recovery of dividends paid to shareholders" and defendants were not identified by name).

<sup>4</sup> *Browning v. Levy*, 283 F.3d 761 (6th Cir. 2002).

<sup>5</sup> *In re Mountain Glacier, LLC*, 877 F.3d 246 (6th Cir. 2017).

<sup>6</sup> *Mountain Glacier*, 877 F.3d at 248, citing *P.A. Bergner & Co. v. Bank One, Milwaukee, N.A.* (In re P.A. Bergner & Co.), 140 F.3d 1111, 1117 (7th Cir. 1998).

<sup>7</sup> *Mountain Glacier*, 877 F.3d at 248.

<sup>8</sup> *Id.* at 249 (internal citation omitted).

<sup>9</sup> *Id.* at 249 (citing *Browning*, 283 F.3d at 774–75; *P.A. Bergner*, 140 F.3d at 1117 (holding that the reservation of a claim need not name a defendant, but only identify the type of claim the debtor seeks to retain); *Harstad v. First Am. Bank*, 39 F.3d 898, 903 (8th Cir. 1994) (describing Section 1123(b)(3) as "a notice provision" intended to ensure creditors know about claims that might enlarge the estate)).

<sup>10</sup> *Mountain Glacier*, 877 F.3d at 249.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*



**Ashley J. Jericho**

Team member bio