

Lawyer Insights

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Chapter 11 Debtors Could Recoup Some US Trustee Fees

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In October 2017, Congress passed the Bankruptcy Judgeship Act of 2017,¹ which, among other things, drastically increased the post-petition quarterly fees payable by certain Chapter 11 debtors to the office of the United States Trustee.² At the high end of the new fee scale,³ Chapter 11 debtors with quarterly “disbursements” that equal or exceed \$1 million are now subject to having to pay up to \$220,000 more per quarter in quarterly fees to the U.S. Trustee, an 833 percent increase in the maximum amount of quarterly fees payable.⁴ Some view these increases to the quarterly

fees as imposing an additional financial hardship on medium and large Chapter 11 debtors at a time when their balance sheets often are at their leanest — during bankruptcy and just after confirming a reorganization plan.

Faced with just such a complaint from a Chapter 11 debtor, the U.S. Bankruptcy Court for the Western District of Texas recently ruled that these new quarterly fees are excessive and unconstitutional in their attempted retroactive application.⁵

Background

On March 7, 2016, more than a year prior to introduction of the act raising the quarterly fees, Buffets LLC and its affiliates, one of the largest operators of buffet-style restaurants in the United States, including chains such as Old Country Buffet, HomeTown Buffet and Ryan’s filed for Chapter 11 bankruptcy in the Western District of Texas, San Antonio Division. On April 27, 2017, still six months before the act was signed into law, the debtors confirmed a Chapter 11 plan of reorganization. As required by the Bankruptcy Code, the plan contemplated continued payment of quarterly fees to the U.S. Trustee until the bankruptcy cases were closed.

The debtors’ first three post-confirmation quarterly reports showed disbursements in excess of \$60 million for each of the quarters. Under the prior fee schedule, the quarterly fees due for each of these three quarters would have been \$30,000. Under the new fee schedule, the quarterly fees due for each of these three quarters would have been \$250,000; an increase of 833 percent.

The debtors opposed paying \$250,000 per quarter in quarterly fees on two primary grounds: that the term “disbursements” in 28 U.S.C.S. Section 1930(a)(6) should be limited to funds disbursed by the debtors that are bankruptcy-related, as opposed to any and all funds disbursed by the debtors, including

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nonbankruptcy related business operations; and that the new quarterly fees are unconstitutional because the amended statute improperly applied them retroactively.⁶

“Disbursements” and the Scope of Quarterly Fees

In relevant part, the statute provides that:

During each of fiscal years 2018 through 2022, if the balance in the United States Trustee System Fund as of Sept. 30 of the most recent full fiscal year is less than \$200 million, the quarterly fee payable for a quarter in which disbursements equal or exceed \$1 million shall be the lesser of 1 percent of such disbursements or \$250,000.⁷

The term “disbursements” is not defined in the statute. The debtors argued that the term “disbursements” should be read narrowly “to only include payments made to creditors of the bankruptcy estate.”⁸ This interpretation of the statute would result in the debtors owing just \$4,875 in quarterly fees for each quarter. In support of this reading, the debtors cited the U.S. Bankruptcy Court for the Western District of Wisconsin’s recent ruling in *In re Cranberry Growers Coop.*, which held that “disbursements” under amended 28 U.S.C. Section 1930(a)(6) did not include certain post-confirmation contractual payments made by the debtor under a revolving line of credit.⁹

While agreeing with statements from the *Cranberry Growers* decision that “the new UST fees are excessive and certain situations may require a limitation on what constitutes a disbursement,” the court nevertheless adopted a broad reading of the term “disbursements” as including all transfers from the estate, including payments made in the ordinary course of business.¹⁰

Despite this conclusion, the court also held that a “broad interpretation of disbursements, however, does not subject the Reorganized Debtors’ 2018 disbursements to the increased quarterly fee requirement of 28 U.S.C. Sec. 1930(a)(6) ... [because] [a]s applied to the Reorganized Debtors, the amendment is invalid.”¹¹

Unconstitutionality

The court found that two aspects of the amendment to 28 U.S.C. Section 1930(a)(6) made the amendments invalid when applied to the debtors. First, the initial application of the amendment violated the uniformity clause of the Constitution. Second, the retroactive application of the amendment violates the presumption against retroactively applying statutes.

The uniformity clause of the Constitution provides that “Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”¹² When first becoming effective on Jan. 1, 2018, the quarterly fee increase applied only to districts employing the U.S. Trustee program, such as the Western District of Texas, and not to the small number of districts employing the Bankruptcy Administrator program.¹³ The Judicial Conference of the United States¹⁴ did not begin to apply the new quarterly fee increases in Bankruptcy Administrator districts until Oct. 1, 2018, the first quarter of the new fiscal year.¹⁵

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The court held that the gap between the application of the quarterly fee amendments between districts “is problematic” and that “[t]he Bankruptcy Judgeship Act of 2017 violated the Constitution when it increased quarterly fees only in the UST program.”¹⁶ As a result of this uninform application, the debtors were only required to pay the \$30,000 quarterly fee due under the prior statute.

Perhaps more importantly, the court further held that the amendment “is also being retroactively applied to the reorganized debtors” in violation of the “statutory presumption against retroactively applying statutes.”¹⁷ Congress did not expressly “indicate a clear intent ... to retroactively apply the fees to pending cases.”¹⁸ Absent this clear intent, “[t]he new UST fee of \$250,000 per quarter should not be applied to pending cases with a confirmed plan when the statute became effective on Oct. 26, 2017, and the fees became effective in the first quarter of 2018.”¹⁹

Implications

The court’s decision in *In re Buffets LLC* provides meaningful relief to medium and large Chapter 11 debtors that confirmed a plan prior to Oct. 26, 2017. In those cases, many reorganized debtors have likely made several quarterly fee payments to the U.S. Trustee consistent with the new, much higher fee scale. Such payments should have been made “in adherence with the old statute in order to avoid constitutional violations and retroactive application of the statute.”²⁰ The *In re Buffets LLC* decision may provide a basis to challenge and recover such overpayments, including by reopening cases in appropriate circumstances.

For cases filed on or after Oct. 26, 2017, Chapter 11 debtors will need to carefully consider the impact of the new quarterly fees on the length of time that a bankruptcy case remains open, including after plan confirmation. Steps can be taken to administratively close cases while continuing to administer a Chapter 11 plan if the plan has been substantially consummated. Moreover, in instances where there is more than one Chapter 11 debtor involved in administratively consolidated cases, it may be appropriate to close certain of the cases, or seek further administrative consolidation as part of the Chapter 11 plan, in order to avoid the continual accrual of post-confirmation quarterly fee payments in those individual cases. In light of the judicial recognition in the *Cranberry Growers* and *Buffets* cases that the new quarterly fees are excessive, Chapter 11 debtors may also consider challenging the new quarterly fees in appropriate circumstances.

Notes

¹ The Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72.

² 28 U.S.C. § 1930(a)(6) is the provision of the U.S. Code that imposes quarterly U.S. Trustee fees on chapter 11 debtors. The fee amendments to 28 U.S.C. § 1930(a)(6) became effective as of January 1, 2018.

³ The prior and new quarterly U.S. Trustee fee schedules are available on the U.S. Department of Justice’s website at <https://www.justice.gov/ust/chapter-11-quarterly-fees>.

⁴ At the high end of the prior quarterly fee schedule, Chapter 11 debtors with disbursements equal to or exceeding \$30 million in a quarter were subject to the maximum quarterly fee of \$30,000. At the high end

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of the new quarterly fee schedule, Chapter 11 debtors with disbursements equal to or exceeding \$1 million in a quarter are now subject to a quarterly fee of \$250,000, an increase of 833 percent for a debtor with \$30 million or more in quarterly disbursements.

⁵ This case is *In re Buffets LLC*, No. 16-50557-RBK, 2019 WL 518318 (Bankr. W.D. Tex. Feb. 8, 2019).

⁶ *Id.* at *1-2.

⁷ 28 U.S.C. Sec. 1930(a)(6)(B) (emphasis added).

⁸ *In re Buffets*, 2019 WL 518318, at *3.

⁹ *In re Cranberry Growers Coop.*, 592 B.R. 325 (Bankr. W.D. Wis. 2018) (case pending on direct appeal to the U.S. Court of Appeals for the Seventh Circuit, Case No. 18-3289).

¹⁰ *In re Buffets*, 2019 WL 518318, at *3.

¹¹ *Id.*

¹² U.S. Const. Art. I Sec. 8, Cl. 1.

¹³ The U.S. Trustee program has not been implemented in two states, Alabama and North Carolina, which continue to operate under the Bankruptcy Administrator program.

¹⁴ The Bankruptcy Administrator program is a division of the Judicial Branch, as opposed to the U.S. Trustee program, which is a division of the Executive Branch.

¹⁵ *In re Buffets*, 2019 WL 518318, at *4.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at *5 (emphasis in original).

¹⁹ *Id.*

²⁰ *Id.* at *6.

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