Benchnotes

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833 Percent Increase to UST Fees Faces Scrutiny and Limitations

In October 2017, Congress passed the Bankruptcy Judgeship Act of 2017, which, among other things, amended 28 U.S.C. § 1930 and effectively increased the maximum U.S. Trustee fees applicable in chapter 11 proceedings by 833 percent. The change was effective Jan. 1, 2018, and is designed to impact chapter 11 debtors with quarterly disbursements in excess of $1 million any time the U.S. Trustee System Fund Balance is less than $200 million. The timing of this increase could not have been worse for Buffets LLC, which had confirmed a reorganization plan in April 2017.

In *In re Buffets LLC*,[1] the debtor sought to challenge the increased fees by filing a motion seeking to clarify that "disbursements," as that term is used in 28 U.S.C. § 1930, was limited to payments to creditors and interests to equityholders pursuant to the debtor's confirmed plan. After initially denying the debtor's motion and determining that quarterly fees were properly calculated based on all disbursements made during a given quarter, the debtor sought reconsideration of the motion on constitutional grounds and based on a September 2018 ruling from the U.S. Bankruptcy Court for the Western District of Wisconsin in *In re Cranberry Growers Coop*.[2]

Similar to Buffets LLC, in *Cranberry Growers* the debtor challenged the definition of "disbursements" as used in 28 U.S.C. § 1930 and argued that "disbursements" should not include a debtor's revenues paid directly to its "roll up" revolving debtor-in-possession financing facility, where the principal payments applied are automatically readvanced to pay for a debtor's ongoing operations and the balance of the loan facility is never decreased.[3] After a lengthy analysis of the purpose/history of § 1930 and case law, the *Cranberry Growers* court concluded that assessing fees against payments that merely resulted in the recharacterization of a debt from pre-petition to post-petition, but did not reduce the debtor's debt obligation, could not be supported. The effect of such a system would be to mandate a double fee on the same debt payments: first, when the debt is recharacterized, and second, when the debt is later repaid.[4]

After reviewing the *Cranberry Growers* opinion, the U.S. Bankruptcy Court for the Western District of Texas agreed that the increased U.S. Trustee fees are excessive and could require limitations in certain circumstances, but declined to follow *Cranberry Growers* and construe "disbursements" as excluding all payments made by a reorganized debtor under its plan. All was not lost, however, as the court ultimately determined that the increase was not applicable to the *Buffets* debtor for at least three reasons:

1. The Bankruptcy Judgeship Act of 2017 initially adopted increased fees for the U.S. Trustee program but not for the Bankruptcy Administrator (BA) programs in Alabama and North Carolina. The BA programs in those states did not begin to apply the increased fees until October 2018. As a result, the statute was in violation of the Uniformity Clause of the Constitution to and through the time of the BA programs' adoption of the new fees, thus relieving the debtor of their application at least until that time.[5]
2. The amendment to 28 U.S.C. § 1930(a)(6) should not retroactively apply to cases filed before the effective date of the Bankruptcy Judgeship Act (Jan. 1, 2018). According to the bankruptcy court, Congress did not expressly indicate its intent that the Bankruptcy Judgeship Act be applied retroactively, and without any legislative history or guidance as to Congress's intent, the Bankruptcy Judgeship Act should not be read to apply retroactively.[6]
3. The possible retroactive application of the amendment to § 1930(a)(6) would constitute a violation of the due-process clause. The bankruptcy court concluded that an application of the new fees to a case that was filed without sufficient notice of the increased fees prior to filing for chapter 11 or plan confirmation did not provide the debtor with sufficient notice and would deny the debtor due process.[7]

While both *Cranberry Growers* and *Buffets* presented their courts with arguably unique facts and circumstances that might not be repeated in other future cases, their underlying themes of finding exceptions and limitations to the "excessive" fees now required by § 1930(a)(6) will certainly embolden parties and courts to consider further meritorious challenges to the fees in the future.

Miscellaneous

• *In re Parks*, 2018 WL 6603722 (Bankr. D. Kan. Dec. 12, 2018) (court rejected the debtors'

1 --- B.R. ---, 2019 WL 518318 (Bankr. W.D. Tex. 2019).
2 *Id.* at *2; *see also In re Cranberry Growers Coop.*, 592 B.R. 325 (Bankr. W.D. Wis. 2018).
3 *In re Cranberry Growers Coop.*, 592 B.R. 325, 328 (Bankr. W.D. Wis. 2018).
4 *Id.* (citing *In re Smith & Son Septic & Sanitation Serv.*, 88 B.R. 375, 384 (Bankr. D. Utah 1988)).
5 *In re Buffets LLC*, --- B.R. ---, 2019 WL 518318 at *3-4 (Bankr. W.D. Tex. 2019) (citing *St. Angelo v. Victoria Farms Inc.*, 38 F3d 1525, 1533, 1535 (9th Cir. 1994)).
6 *Id.* at *5 (citing *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483).
7 *Id.*

argument that gift cards were the equivalent of household goods under theory of equitable conversion; gift cards do not result in household furnishings and supplies presently in possession of debtors to satisfy even liberally construed exemption; gift cards are essentially cash, and statutes do not have exemptions from property of estate for cash);

• *SummitBridge Nat'l Invs. III LLC v. Faison*, --- F.3d. ----, 2019 WL 490573 (4th Cir. 2019) (Fourth Circuit joined Second and Ninth Circuits in concluding that there is no basis in Bankruptcy Code for barring unsecured claims for post-petition attorneys' fees arising under pre-petition contracts; in so doing, Fourth Circuit rejected debtor's arguments that § 502(b) precludes allowance of post-petition fees because it requires bankruptcy court to "determine the amount of [the] claim ... as of the date of the filing of the petition," and allow claim "in such amount"; Fourth Circuit rejected debtor's further argument that § 506(b) (which specifies that oversecured creditor might recover its attorneys' fees) prohibits recovery of attorneys' fees by unsecured creditor by negative inference; Fourth Circuit reasoned that § 506(b) neither addresses allowance nor disallowance of claims generally, nor can it be relied on to overcome presumption created by U.S. Supreme Court's decision in *Travelers Cas. & Surety Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443 (2007), that any claim enforceable under applicable state law is presumed allowable);

• *In re Ondova Ltd. Co.*, --- F.3d. ----, 2019 WL 419380 (5th Cir. 2019) (in issue of first impression, Fifth Circuit ruled that trustees are entitled to absolute immunity for actions taken pursuant to court orders and qualified immunity for personal harms taken within scope of their official capacity; in so ruling, Fifth Circuit aligned itself with prior rulings by Third, Fourth and Sixth Circuits (*see Phoenician Mediterranean Villa LLC v. Swope (In re J & S Props. LLC)*, 872 F.3d 138 (3d Cir. 2017); *Sierra v. Seeber*, 966 F.2d 1444 (4th Cir. 1992); *Grant, Konvalinka & Harrison PC v. Banks (In re McKenzie)*, 716 F.3d 404, 413 (6th Cir.));

• *PACA Tr. Creditors of Lenny Perry's Produce Inc. v. Genecco Produce Inc.*, 913 F.3d 268 (2d Cir. 2019) (PACA creditor not entitled to offset of liabilities owing to debtor because assets against which setoff was alleged were not estate assets but assets of PACA trust; creditor was entitled to *pro rata* distribution from PACA trust, however, despite creditor having failed to timely file claims pursuant to PACA Claims Procedure Order entered by district court);

• *In re Sneed Shipbuilding Inc.*, 2019 WL 442148 (5th Cir. 2019) (Fifth Circuit held that appeal to order approving settlement and sale pursuant to 11 U.S.C. § 363 is not equitably moot, but is statutorily moot under 11 U.S.C. § 363(m) because appellant failed to obtain stay of challenged order pending appeal; dismissal on grounds of equitable mootness was not appropriate because circuit court disfavors equitable mootness except in limited circumstances of complicated confirmed reorganization plans; statutory mootness under § 363(m) was appropriate, despite fact that challenge was not propriety of sale itself but to disbursement scheme of sale proceeds as determined by settlement portion of challenged order; circuit court found that "there is no way to sever the settlement from the sale," meaning that § 363(m) is applicable and dispositive);

• *In re Calvert*, 913 F.3d 697 (7th Cir. 2019) (Seventh Circuit held that collateral estoppel does not apply to dischargeability challenge under 11 U.S.C. § 523(a)(6) arising out of administrative proceeding in which debtor was held personally liable for back pay owing to employees of debtor's former business; National Labor Relations Board did not identify in record any specific findings in its administrative ruling that would give preclusive effect to issue of whether debtor acted maliciously);

• *In re Morreale*, 595 B.R. 409 (B.A.P. 10th Cir. 2019) (Tenth Circuit Bankruptcy Appellate Panel held that chapter 7 trustee who obtained order taking control of debtor's single-member limited liability company in separate chapter 11 case was not entitled to commission based on disbursements of company in chapter 11; trustee's chapter 7 commissions were limited to disbursements made from chapter 7 estate);

• *In re Ward*, 595 B.R. 127 (Bankr. E.D.N.Y. 2018) (bankruptcy court denies trustee's objection to claimed homestead exemption of debtor where debtor had entered into contract for sale of her home pre-petition and sought to close sale post-petition);

• *Hazelton v. UW-Stout*, --- B.R. ---, 2019 WL 413567 (W.D. Wis. 2019) (on appeal from bankruptcy court, district court determined that debtor's nonpayment of tuition did not qualify as loan under 11 U.S.C. § 523(a)(8); accordingly, tuition obligation was discharged when debtor received her chapter 7 discharge and her university's subsequent refusal to issue debtor's diploma and seizure of her state tax refund were violative of discharge injunction);

• *In re Swan Transp. Co.*, --- B.R. ---, 2018 WL 6841353 (Bankr. D. Del. 2018) (bankruptcy court extended *Barton* doctrine, which precludes party from suing bankruptcy trustee without leave of bankruptcy court, to trustees' asbestos/silica litigation trust; however, plaintiff's suit to remove trustees was not barred by *res judicata* because action to remove trustees was based on their post-appointment conduct and not propriety of their initial appointment as trustees); and

• *Brinson v. Eagle Express Lines Inc.*, --- B.R. ---, 2019 WL 423152 (N.D. Ill. 2019) (district court denied motion to dismiss harassment and retaliation complaint against former employer on grounds of judicial estoppel for plaintiff's failure to disclose claim on his bankruptcy schedules; although plaintiff's failure to disclose could not be inferred to be inadvertent, his subsequent disclosure and continued prosecution of claim for benefit of his bankruptcy estate militated against dismissal, stating that "[i]t would be inequitable to apply judicial estoppel when the proceeds of this suit will be used to make non-parties, [the] Plaintiff's creditors, whole"). abi