UNITED STATES TRUSTEE FEES
To pay or not to pay, that seems to be the question

The requirement to pay quarterly fees to the United States trustee[1] is a reality bankruptcy attorneys must consider cognizant prior to filing a petition. Until recently, the fees were consistent in amount, akin to a "buy in" each quarter. After the passage of the 2017 amendment to 28 U.S.C. § 1930(a)(6)(B), the spike in United States trustee fees has turned the fee structure on its head, resulting in substantial fee increases for many mid-sized chapter 11 debtors.

History of The United States Trustee Program

Bankruptcy judges used to appoint trustees. *See* Bankruptcy Act of 1898, 11 U.S.C. § 47 (repealed 1978). The appointment of trustees by judges often resulted in the appointment of friends, acquaintances, and former business or political associates. In 1940, the Attorney General's Committee proposed to reform the bankruptcy system by placing supervisory power in the hands of the newly created Administrative Office ("AO"), but Congress disagreed. 1 COLLIER ON BANKRUPTCY ¶ 6.34[6] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (citing Attorney General's Comm. on Bankruptcy Administration, Report on the Administration of the Bankruptcy Act (1940)). While contemplating the Bankruptcy Reform Act of 1978, Congress decided that the patronage system needed oversight from the Executive Branch, so it set up the United States Trustee Program ("USTP") in 18 judicial districts as a pilot program. *See* H. Rep. No. 595, 95th Cong., 2d Sess. 108 (1978), *reprinted in* 1978 U.S.C.C.A.N. pp. 5787, 5963, 6069. The Northern District of Texas was one of the pilot districts. *See id.*

In 1986, after the successful completion of the pilot program, Congress permanently established the USTP when President Reagan signed into law the Bankruptcy Judges, United

[1] The Bankruptcy Code and Bankruptcy Rules lowercase the first letter of "trustee." *See, e.g.*, 11 U.S.C. § 307; FED. R. BANKR. P. 1002(b).

States Trustees, and Family Farmer Bankruptcy Act of 1986 ("The 1986 Act"). Pub. L. No. 99-554, 99th Cong. 2d Sess., 100 Stat. 3088 (1986). The USTP is a division of the Department of Justice ("DOJ"), and its main objective is administrative oversight of bankruptcy cases. *See* 28 U.S.C. § 586(a)(3)(A). "The program was intended to alleviate some of the administrative burdens faced by bankruptcy judges, to eliminate the appearance of favoritism arising from the close relationship that existed between judges and trustees, and to address the problem of 'cronyism that exists in many parts of the count[r]y in appointment of trustees by bankruptcy judges.'" *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1529 (9th Cir. 1994), *amended*, 46 F.3d 969 (9th Cir. 1995) (citing H. Rep. No. 595, 95th Cong., 2d Sess. 108 (1978), *reprinted in* 1978 U.S.C.C.A.N. pp. 5787, 5963, 6069).

The Attorney General was directed to appoint United States trustees in all districts. "As a component of the United States Department of Justice, the operations of the United States trustee program are indeed subject to oversight power vested in the Attorney General." 1 COLLIER ON BANKRUPTCY ¶ 6.01[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). The 1986 Act created a self-funding mechanism for the UST system. *See* 28 U.S.C. § 589a. "Except as to payment of quarterly fees in a chapter 11 case, United States trustees have no economic motivation." COLLIER ON BANKRUPTCY ¶ 6.01[2]. The UST provides post-petition supervision of chapter 11 cases in their respective districts.

Alabama and North Carolina resisted the idea of adopting the USTP, so Congress initially excluded Alabama and North Carolina from the requirement. *See* H. Rep. No. 764, 99th Cong., 2d Sess. 29–30 (1986), *reprinted* in 1986 U.S.C.C.A.N. 5227, 5241–42. Instead, Alabama and North Carolina utilized (and still utilize) the Bankruptcy Administrator ("BA") program, which reports to the AO of the United States Courts. While the USTP is part of the Executive Branch, the BA

program is part of the Judiciary. Congress mandated that the USTP be implemented in Alabama and North Carolina either upon the districts electing to join or by October 1, 1992. *See* P.S.L. No. 101-650, Dec. 11, 1990, title III, § 317(a) & (c), 104 Stat. 5115, 5116. BA districts were not required to pay UST fees.

The Initial Non-Uniformity of Quarterly Fees and Resolution

The amendment to the 1986 Act provided the BA districts with a new deadline for implementing the USTP of October 1, 2002. *Id.* This extension became the basis for the debtor in *St. Angelo v. Victoria Farms., Inc.* to argue that the amendment violated the Uniformity Clause of the U.S. Constitution. *See St. Angelo,* 38 F.3d at 1529.

In *St. Angelo v. Victoria Farms, Inc.*, the debtor filed for chapter 11 bankruptcy in 1990. *Id.* at 1528. The bankruptcy involved a sale of a farm to pay off the first and second mortgages. *Id.* The debtor received $5,772.00 in remaining proceeds. *Id.* The bankruptcy court held that the debtor was required to pay the UST $400 pursuant to 28 U.S.C. § 1930(a)(6). The $400 fee was calculated by excluding the sale proceeds; the court reasoned that the fees were distributed indirectly by the escrow agent and the debtor's attorney. *Id.* The UST appealed, and the district court affirmed the bankruptcy court's decision. *Id.*

On appeal, the debtor argued that 28 U.S.C. § 1930(a)(6) violated the Uniformity Clause because it did not apply to the BA districts. *Id.* at 1529–30. The Uniformity Clause requires Congress to establish uniform laws throughout the United States. U.S. CONST. art. I, § 8, cl. 1 & 4. In 1990, 28 U.S.C. § 1930 was amended via section 317 of the Judicial Improvements Act. Pub. L. No. 101–650, 101st Cong., 2d Sess. § 317(a) (1990). Despite apparent efforts to implement the USTP in BA districts, Congress granted the extension of the deadline while St. Angelo was in bankruptcy. The Ninth Circuit struck down the 1990 amendment to the statute as nonuniform. The

court declined to determine whether "Congress' decision to phase the program in gradually was unconstitutional, or even whether Congress' initial decision to extend the implementation period only for North Carolina and Alabama violated the Uniformity Clause." *St. Angelo*, 38 F.3d at 1533. The Court believed it had resolved the issue by striking down the amendment, "leav[ing] in place a uniform law governing bankruptcy throughout the nation." *Id.*

Congress amended § 1930 after the Ninth Circuit's decision in *St. Angelo*. The amendment codified in 28 U.S.C. § 1930(a)(7) provides the following:

> In districts that are not part of a United States trustee region as defined in section 581 of this title, the Judicial Conference of the United States may require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection. Such fees shall be deposited as offsetting receipts to the fund established under section 1931 of this title and shall remain available until expended.

28 U.S.C. § 1930(a)(7). This amendment temporarily remedied the uniformity problem with the statute, but an entirely separate issue of statutory interpretation later emerged.

<u>The Disbursement Fracas</u>

The quarterly fees the debtor pays to the UST are based on the total amount of disbursements in each quarter. 28 U.S.C. § 1930(a)(6)(A). The term "disbursements" in § 1930 is not defined. For years, courts have had to decide what Congress meant by the term. A majority of courts interpret the term broadly to include all transfers from the estate, including payments made in the ordinary course of business. *See Robiner v. Danny's Markets, Inc. (In re Danny's Markets, Inc.)*, 266 F.3d 523, 526 (6th Cir. 2001) (defining disbursements as "all payments to third parties directly attributable to the existence of the bankruptcy proceeding"); *In re Celebrity Home Entm't, Inc.*, 210 F.3d 995, 998 (9th Cir. 2000) (describing disbursements as an "'expansive' term that captures 'all payments'"); *Walton v. Jamko, Inc. (In re Jamko, Inc.)*, 240 F.3d 1312, 1315–16 (11th Cir. 2001) (holding that post-confirmation quarterly fees include all post-confirmation

disbursements); *In re Pars Leasing, Inc.*, 217 B.R. 218 (Bankr. W.D. Tex. 1997) (holding that disbursements include not only the debtor-in-possession's cash disbursements, but also payments made by third parties for the benefit of the debtor-in-possession); *In re R & K Fabricating, Inc.*, 2013 WL 5493161, at *3–4 (Bankr. S.D. Tex. Sept. 30, 2013) (holding that disbursements include both payments under a plan and "all other amounts paid out by a reorganized debtor").

A minority of cases limit the interpretation of disbursements. The Northern District of Illinois and Southern District of Florida held that disbursements are only the payments of claims and expenses under the plan. *In re Pettibone Corp.*, 244 B.R. 906, 922 (Bankr. N.D. Ill. 2000), *rev'd*, *U.S. Trustee v. Pettibone Corp.*, 251 B.R. 335 (N.D. Ill. 2000); *In re Betwell Oil & Gas Co.*, 204 B.R. 817, 819 (Bankr. S.D. Fla. 1997). The Central District of California held that disbursements are only the payments from the estate rather than post-petition payments in general. *Tiffany v. Celebrity Duplicating Servs., Inc. (In re Celebrity Duplicating Servs., Inc.)*, 216 B.R. 942, 944–45 (C.D. Cal. 1997). One decision from the Southern District of Texas interprets disbursements narrowly. *See In re Brown*, No. 05-49053-H3-11, 2008 WL 899333 (Bankr. S.D. Tex. Mar. 31, 2008) (Clark, J.). In *Brown*, an individual chapter 11 debtor owed quarterly fees to the U.S. trustee. *Id.* The debtor disputed the amount owed, and Judge Letitia Clark concluded that "disbursements" only include the payments "disbursed on priority and administrative expense claims, the claims of creditors, and the interests of equity security holders pursuant to the plan." *Id.* at *4.

The *Brown* opinion is an outlier. Judge Clark spent a great portion of her opinion acknowledging the courts that define the term "disbursements" to include all post-confirmation payments made by the debtors; however, she based her holding on the fact that courts broadly construing the term do so without considering §§ 507(a)(2) and 1129(a)(9) of the Bankruptcy

Code. *Id.* at *3. To this day, Congress has not amended the statute to define disbursements, and courts are still tasked with interpreting the statute based on the term's plain meaning.

The 2017 Fee Escalation

Despite Congress's original intent to implement the USTP nationwide, it has never been implemented in Alabama and North Carolina. The six districts in Alabama and North Carolina continue to operate under the BA program. In 1992, the General Accounting Office ("GAO") filed a report recommending the USTP absorb the BA program because there was no need to continue two separate programs. U.S. GEN. ACCOUNTING OFFICE, GAO REPORT NO. GAO/GGD-92-133, BANKRUPTCY ADMINISTRATION: JUSTIFICATION LACKING FOR CONTINUING TWO PARALLEL PROGRAMS (Sept. 28, 1992). "Accordingly, because of the advantages in oversight and funding provided by the UST program and to make bankruptcy administration consistent across the country, we recommend that Congress incorporate the BA program into the UST program now rather than in 2002 as currently scheduled under statute." *Id.* at 2. The report indicated that the purpose of the UST System Fund was to create a self-funding mechanism. Originally, chapter 11 debtors in UST districts paid filing and quarterly fees, but debtors in BA districts were *not* charged quarterly fees. The report indicated that the UST program had a surplus because the fee revenues exceeded program funding by millions of dollars. *Id.* The Bankruptcy Reform Act of 1994 remedied several differences between the two programs, but *it did not apply uniform fee requirements*. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 103d Cong. (2d Sess.) (Oct. 22, 1994).

Since the *St. Angelo* decision, the Federal Courts Improvement Act of 2000 was signed into law, and 28 U.S.C. § 1930 was amended to allow the imposition of fees in BA districts. 28 U.S.C. § 1930(a)(7). The Judicial Conference of the United States ("JCUS") approved the

Bankruptcy Committee's recommendation to impose quarterly fees "in the amounts specified" in § 1930. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 45–46 (Sept./Oct. 2001). In October 2017, Congress considered and passed a bill to provide additional bankruptcy judgeships and extend or make permanent other bankruptcy judgeships. Partially to satisfy the "pay go" requirement, staffers inserted an increase in UST fees to fund not only the new judgeships, but also to replenish the UST System Fund. The Bankruptcy Judgeship Act of 2017 revised subsection § 1930(a)(6) to increase the maximum UST quarterly fees by 833%, effective January 1, 2018, but this increase did not apply to the BA districts. The amendment codified in § 1930(a)(6)(B) provides the following:

> During each of fiscal years 2018 through 2022, if the balance in the United States Trustee System Fund as of September 30 of the most recent full fiscal year is less than $200,000,000, the quarterly fee payable for a quarter in which disbursements equal or exceed $1,000,000 shall be the lesser of 1 percent of such disbursements or $250,000.

28 U.S.C. § 1930(a)(6)(B).

Recognizing the non-uniform fees imposed in UST districts, but not in BA districts, the BA districts petitioned the Committee to apply the amendment to all districts. The Committee agreed and the JCUS approved. The increase began applying to BA districts in October 2018, the first quarter of the new fiscal year, nine months after the effective date in UST districts. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Sept./Oct. 2001) at 11–12.

DECISIONS, DECISIONS

In re Millennium Lab Holdings II, LLC

Once the 2017 amendment went into effect, debtors with pending cases had two choices: (1) come to terms with congressionally mandated highway robbery, or (2) close the chapter 11

case and close it quickly. On January 23, 2018, the reorganized debtors in *In re Millennium Lab Holdings II, LLC, et al.*, filed a motion for final decree. *See In re Millennium Lab Holdings II, LLC, et al.*, No. 15-12284, *Reorganized Debtors' Motion for Entry of a Final Decree and Order Closing the Reorganized Debtors' Chapter 11 Cases Nunc Pro Tunc to January 23, 2018 and Terminating Certain Claims and Noticing Services* (Bankr. D. Del. 2018) (ECF No. 514). The reorganized debtors asked the court to enter a final decree date of January 23, 2018, the date of the motion, instead of the date of the order. *See id.* Aside from an appeal of the confirmation order, the reorganized debtors' cases had been fully administered. *See id.* at *Opt-Out Lenders' Objection to Reorganized Debtors' Motion for Entry of a Final Decree and Order Closing the Chapter 11 Cases* (ECF No. 520).

The UST filed an objection to the motion for final decree. *See id.* at *Limited Objection of The United States Trustee to Reorganized Debtors' Motion for Entry of a Final Decree and Order Closing the Reorganized Debtors' Chapter 11 Cases Nunc Pro Tunc to January 23, 2018 and Terminating Certain Claims and Noticing Services* (ECF No. 521). The U.S. trustee argued that *nunc pro tunc* relief requires "extraordinary circumstances" and the reorganized debtors' "[d]esire to avoid a statutory fee is not an 'extraordinary circumstance' – that is, a circumstance beyond the movant's control." *Id.* at 4 (citing *In re Arkansas Co.*, 798 F.2d 645, 650 (3d Cir. 1986)).

The trustee argued that the reorganized debtors should have moved for a final decree before the statute became effective. *See id.* at 5. The debtors responded, stating that they acted expeditiously to close the cases, and the amendment will require them to pay $145,000 more in UST fees. *See id.* at *Reorganized Debtors' Omnibus Reply* (ECF No. 523). The debtors also explained that the Office of the U.S. trustee only sent notice of the amendment on December 20,

2017 – 60 days after the statute was amended. *See id.* at *3.* The debtors filed their motion for a final decree one month later.

On March 20, 2018, Judge Silverstein ruled from the bench granting the motion for final decree but declining the *nunc pro tunc* request. *See id.* at *Final Decree and Order Closing Reorganized Debtors' Chapter 11 Cases and Terminating Certain Claims and Noticing Services* (ECF No. 547). The court agreed with the UST that the debtors should have filed the motion earlier, because they had notice of the statutory amendment in October of 2017. Hr'g Tr. Re: Final Decree (Mar. 20, 2018).

Cranberry Growers Coop. v. Layng (*In re* Cranberry Growers Coop.)

The next UST fee case following the 2017 amendment challenged the interpretation of "disbursements" and (on appeal) the constitutionality of the 2017 amendment. *In re Cranberry Growers Coop.*, 592 B.R. 325 (Bankr. W.D. Wis. 2018) (often referred to as "CranGrow"). In *CranGrow*, the reorganized debtor obtained debtor-in-possession ("DIP") financing via a DIP revolver loan consisting of a roll-up and a revolver. *See id.* The loan required that the proceeds of the debtor's accounts receivable be paid to the lender who deducted sufficient sums to pay accrued interest and applied the balance (from an accounting standpoint) to reduce the pre-petition revolving credit line. *Id.* The amount of the pre-petition principal reduction was then immediately advanced to the debtor as a post-petition loan. The UST sought to collect $42,601.17 for the first quarter. The 2017 amendment to 28 U.S.C. § 1930(a)(6)(B) was passed during the pendency of the case, and another $170,000 would become due under the amended statute. *Id.* The debtor objected to the payment of the fees and asked the court for a narrow interpretation of disbursements. *Id.*

The bankruptcy court excluded repayments on a revolving line of credit, which the debtor

was contractually obligated to use to make ordinary course operating payments, from disbursements subject to quarterly fees. *See id.* at 333–34. The court reasoned that the fees imposed an undue hardship on chapter 11 debtors, mandated a double fee in the revolving loan context, and impaired the debtor's ability to obtain a fresh start. Additionally, the court concluded that the quarterly fees owed on direct revolver payments do nothing to further the purpose of the statute, which is to enable the UST system to be self-funding. *See id.*

The UST appealed, and Judge Furay issued an *Opinion on Certification to the Seventh Circuit*. In her opinion, Judge Furay also footnoted the problems with the amendment's violation of the Uniformity Clause. The Seventh Circuit granted the direct appeal on December 10, 2018.

In the reorganized debtor's brief to the Seventh Circuit, it stated that when the discrepancy arose regarding what funds were disbursements, the debtor explained its position to the UST, and the UST "understood what CranGrow was doing and agreed that 'clearly [the lender] wasn't a net recipient of a 'disbursement' from the debtor." Brief for Debtor at 5, *Cranberry Growers Coop. v. Layng*, 930 F.3d 844 (7th Cir. 2019) (No. 18-3289). Later, the UST changed its mind and demanded that "all receipts applied to the revolver be counted as disbursements – not just 'the net change in the revolver balance.'" *Id.* The debtor, for the first time on appeal, also raised the argument that the 2017 amendment violated the Uniformity Clause and was retroactively applied in their case. *Id.* at 15–16.

At oral argument, the United States trustee's counsel addressed only the disbursements issue. *See* Oral Argument at 1:00–14:55, *In re Cranberry Growers Coop.*, 930 F.3d 844 (7th Cir. 2019) (No.18-3289). In contrast, the Seventh Circuit panel and the debtor's counsel spent nearly all of the debtor's argument time discussing the Uniformity Clause issue. *Id.* at 15:00–33:00. Primarily, the judges wanted to know if the debtor's counsel could have discovered the

constitutional issue in time to argue it in front of the bankruptcy court. *Id.* at 20:36–21:45. Counsel explained that the debtor was under the impression that the Judicial Conference would remedy the problem when it convened on September 13, 2018, but it did not. *Id.*

On rebuttal, the UST was asked several times how the amendment to the statute could be constitutional when it did not uniformly apply to all states, and the Judicial Conference expressly rejected retroactive application of the statute to the BA districts. *Id.* at 32:42–40:02. The UST's counsel argued that the debtor had an opportunity to raise the issue with the bankruptcy court but failed to do so. *Id*. It is the UST's position that the amendment is constitutional, but counsel repeatedly urged the court not to address that issue since it was not argued below. *Id.* Instead, the UST's counsel reminded the court of a Texas case that was on appeal in the Fifth Circuit, *In re Buffets, LLC*. *Id.* at 35:20–38:16.

On July 17, 2019, the Seventh Circuit reversed and remanded Judge Furay's decision. *Cranberry Growers Coop. v. Layng (In re Cranberry Growers Coop.)*, 930 F.3d 844 (7th Cir. 2019). The court held that based on the plain meaning of disbursement (money paid out; expenditure), the payments made to the reorganized debtor's lender were disbursements. *Id.* at 853. The court compared the payments to the post-petition loan payments in *In re Fabricators Supply. See In re Fabricators Supply Co.*, 292 B.R. 531 (Bankr. D. N.J. 2003). In *Fabricators*, the chapter 11 debtor obtained a $2.5 million revolving line of credit. *Id.* at 532. The loan agreement required the debtor to deposit all accounts receivable and proceeds from its collateral into a cash collateral account, over which the lender had sole control and drained daily. *Id.* at 532–33. The lender deposited funds from this account into a separate operating account for the debtor to pay its vendors. *Id.* at 533. The debtor argued that the lender's draining of the maintained account did not amount to disbursements, and the only disbursements were those that occurred when the debtor

paid money out from the operating account. The bankruptcy court disagreed and held that both were disbursements subject to UST fees based on the word's plain meaning. *Id.* at 536.

The Seventh Circuit declined to make a holding on the constitutionality of the 2017 amendment because it was not raised below. *In re Cranberry Growers Coop.,* 930 F.3d 844, 853–858 (7th Cir. 2019). The court recognized that the uniformity issue "re-emerged" with the adoption of the 2017 amendment. *Id.* (citing *In re Buffets, LLC*, 597 B.R. 588 (Bankr. W.D. Tex. 2019)). The Seventh Circuit declined to decide the issue primarily because it found that the debtor could have raised the issue below but did not do so. *Id.* at 856–57. Because the issue was only raised on appeal, the court concluded:

> When Congress amended § 1930(a)(6) in late 2017, that problem arose. CranGrow began paying nonuniform fees early in 2018 and began litigating the calculation of those fees in mid-2018. Nevertheless, despite the potential constitutional issue, CranGrow kept silent. Indeed, even when the Judicial Conference did not cure fully the nonuniformity – and the constitutional problem became concrete – CranGrow did not bring the issue before the Bankruptcy Court.

Id. (emphasis added).

<u>In re Buffets, LLC</u>

The *Buffets* opinion was released between the bankruptcy court's decision and the Seventh Circuit's reversal in *CranGrow*. In *Buffets*, the reorganized debtors filed chapter 11 petitions on March 7, 2016. On April 27, 2017, the debtors confirmed a plan and were substantively consolidated. *In re Buffets, LLC*, 597 B.R. 588, 591 (Bankr. W.D. Tex. 2019). In 2018, the reorganized debtors filed a motion requesting the court limit "disbursements" in § 1930(a)(6) to disbursements under the plan, which would result in quarterly-fee liability of $4,875 per quarter. The bankruptcy court denied that motion, but the reorganized debtors filed a motion to reconsider and filed a subsequent brief arguing that the statute violated the Uniformity Clause and the presumption against retroactivity.

The bankruptcy court applied the term "disbursements" broadly, but it ruled the 2017 amendment unconstitutional as applied in this case. The court relied on the Ninth Circuit's decision in *St. Angelo* and held that the statute violated the Uniformity Clause because the increase in quarterly fees applies only to UST districts and not BA districts in Alabama and North Carolina. *See St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1533, 1535 (9th Cir. 1994) (striking down the statutory amendment that extended the BA program because it violated the Uniformity Clause). While the Judicial Conference of the United States eventually approved the Bankruptcy Committee's recommendation to apply the fees to BA districts, the fees were not uniform for the first three quarters of 2018. Therefore, the reorganized debtors were not required to pay the increased amount of $250,000 per quarter for the first three quarters of 2018. Additionally, the court held that the statute should be applied only prospectively pursuant to the presumption against retroactivity. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994).

In *Landgraf*, the Supreme Court laid out the guidelines for determining whether a statute applies retroactively. *Buffets* followed the guidelines and determined that the amendment to § 1930(a)(6)(B) did not indicate an intent by Congress to apply the amendment retroactively. Moreover, the amendment imposed new duties and liabilities on the reorganized debtors, which increased financial liability in an already expensive case. "Judge King also found a violation of the Due Process Clause, because imposing 'the fees retroactively in this case did not provide the Reorganized Debtors with sufficient notice of the increased fees prior to filing chapter 11 or confirmation of the plan.'" Rochelle, Bill, *Another Court Strikes Down Higher U.S. Trustee Fees in Some Cases*, AM. BANKR. INST., ROCHELLE'S DAILY WIRE (Feb. 15, 2019), https://www.abi.org/node/273901 (citing *Buffets*, 597 B.R. at 597). "The amendment also cannot

be retroactively applied to the Reorganized Debtors for any relevant year." *Buffets*, 597 B.R. at 597.

On February 21, 2019, the United States trustee appealed the bankruptcy court's decision. *See Hobbs v. Buffets, LLC (In re Buffets)*, No. 5:19-CV-173-DAE (W.D. Tex. 2019). The reorganized debtors cross appealed on the court's interpretation of the term "disbursements." *See id*. On June 24, 2019, the United States District Court for the Western District of Texas, Judge David Ezra, certified both issues on direct appeal to the Fifth Circuit. *See Order Granting Appellant's Motion for Certification for Direct Appeal* (ECF No. 6). In the meantime, "[t]he court's decision in [*Buffets*] provides meaningful relief to medium and large Chapter 11 debtors that confirmed a plan prior to Oct. 26, 2017… [t]he *In re Buffets LLC* decision may provide a basis to challenge and recover such overpayments, including by reopening cases in appropriate circumstances." Paget & Kramer, *Chapter 11 Debtors Could Recoup Some US Trustee Fees*, LAW360, https://www.law360.com/articles/1132048/chapter-11-debtors-could-recoup-some-us-trustee-fees (Feb. 25, 2019, 3:38 PM EST).

Acadiana Mgmt. Group, LLC, et al., v. United States

The opinions from *CranGrow* and *Buffets* inspired other debtors to challenge the fees. On April 3, 2019, seven reorganized debtors with cases filed before the 2017 amendment joined forces to file a complaint in the United States Court of Federal Claims seeking class-action certification of all individuals and entities that have paid the increased fees prior to October 1, 2018. The reorganized debtors, various healthcare entities, each filed chapter 11 cases in the United States Bankruptcy Court for the Western District of Louisiana. The cases were all filed prior to the 2017 amendment, but they were closed before the increased fees were applied to the BA districts in October 2018.

The proposed class alleges that the 2017 amendment violates the Uniformity Clause, is retroactively applied to the plaintiffs and similarly-situated individuals and debtors, and the retroactive application violates the Due Process Clause. *See* Plaintiff's Complaint ⁋ 16, 22 (citing *In re Buffets*, 597 B.R. 588). "Plaintiffs paid $216,784.69 more in quarterly fees than they would have paid if their cases were pending in Alabama or North Carolina." *Id.* at ⁋ 11.

The reorganized debtors allege that the Tucker Act waives the sovereign immunity of the U.S. government in their case based on illegal exaction. *See* 28 U.S.C. § 1491. But "[t]here is a circuit split as to whether the United States' waiver of sovereign immunity for Tucker Act claims extends beyond the Court of Federal Claims to bankruptcy courts." Plaintiff's Complaint ⁋ 19, n. 3. Alternatively, the plaintiffs seek individual relief if the court refuses to certify the class.

On May 24, 2019, the plaintiffs amended their complaint to join "the Boegel plaintiffs" that had bankruptcy cases dismissed in June 2018 in the District of Kansas. The Boegel plaintiffs are an individual, his farming LLC, and his farming corporation. The Boegel "[p]laintiffs paid $357,629.69 more in quarterly fees than they would have paid if their cases were pending in Alabama or North Carolina." Plaintiff's Amended Complaint intro.

<u>In re Circuit City Stores, Inc., et al.</u>

Circuit City is yet another debtor affected by the increased fees. Amid the financial crisis, the Circuit City entities filed chapter 11 on November 10, 2008 in the Eastern District of Virginia. On September 14, 2010, the court confirmed a liquidating plan that, naturally, required the debtors to pay quarterly UST fees. *See In re Circuit City Stores, Inc., et al.*, No. 08-35653, *Motion of the Liquidating Trustee to Determine Extent of Liability for Post-Confirmation Quarterly Fees Payable to the United States Trustee Pursuant to 28 U.S.C. § 1930(a)(6) and Memorandum in Support* (ECF No. 14197). After the 2017 amendment, the trust paid $632,542 in UST fees. *Id.* at

5. Like the reorganized debtors in *Buffets*, the post-amendment disbursements exceeded $1 million in every quarter. On March 28, 2019, the liquidating trustee filed a motion and brief with the bankruptcy court seeking a determination that the increased quarterly fees were not owed due to the amendment's violation of the Uniformity Clause. *See id.* (citing *St. Angelo* and *In re Buffets, LLC*).

In addition, the liquidating trustee argued that the amendment was retroactively applied to the trust and the case. *Id.* at 8. "Consistent with established principles of statutory interpretation and in accord with Bankruptcy Judge King's application and reasoning, the new UST fee of $250,000 per quarter must not be applied to any open cases having a confirmed plan when the statute became effective on October 26, 2017, and the fees became effective in the first quarter of 2018." *Id.* at 10. The trustee also argued that the amendment violated the debtor's rights under the Due Process Clause because when the UST provided notice of the change in December 2017, "the Plan had been confirmed over seven years and the Trustee had made multiple, substantial distributions." *Id.* at 12.

On May 9, 2019, the UST responded by filing a motion for summary judgment. The UST alleged that the motion should have been filed as an adversary proceeding pursuant to FED. R. BANKR. P. 7001. *See id.* at *Notice of Motion for Summary Judgment of the Motion of the Liquidating Trustee to Determine Extent of Liability for Post-Confirmation Quarterly Fees Payable to the United States Trustee Pursuant to 28 U.S.C. 1930(a)(6)* (ECF No. 14202). Additionally, the UST argued FED. R. BANKR. P. 2020 does not apply because the liquidating trustee challenged a congressional act rather than an act or omission by the UST. *Id.* at 7.

On July 15, 2019, Judge Huennekens partially granted the liquidating trustee's motion. *In re Circuit City Stores, Inc., et al.*, No. 08-35653, *Memorandum Opinion* (ECF No. 14223) (E.D.

Va. July 15, 2019). The court determined that it may "simply convert the contested matter to an adversary proceeding." *Id.* at 7. (citing *Phillips v. Lehman Bros. Holdings, Inc. (In re Fas Mart Convenience Stores, Inc.*), 318 B.R. 370 (Bankr. E.D. Va. 2004)).

After addressing the procedural aspects of the UST's motion, the court held that the statute did not violate the presumption against retroactivity. *Id.* at 8–11. The court explained that it was bound by its prior decision in the *Robins* case. *See id.* (citing *In re A.H. Robins Co.*, 219 B.R. 145 (Bankr. E.D. Va. 1998)). In *Robins*, the Eastern District of Virginia bankruptcy and district courts evaluated the 1996 amendment to 1930(a)(6) to determine the amendment's application to pending cases. *In re A.H. Robins Co.*, 219 B.R. 145. The courts determined that the amendment was "substantively prospective in nature," because the quarterly fees amounted to nothing more than an "administrative expense attendant to an open case." *Id.* at 148 (citing *In re McLean Square Assoc*., 201 B.R. 436, 441 (Bankr. E.D. Va. 1996)).

On the issue of constitutional uniformity, Judge Huennekens agreed with Judge King's opinion in *Buffets* that the 2017 amendment violates the Uniformity Clause. *In re Circuit City Stores, Inc., et al.*, No. 08-35653, *Memorandum Opinion* at 12 (ECF. No. 14223) (E.D. Va. July 15, 2019). "Section 1930(a)(6)(B) contravened the Uniformity Clause through 'actual geographic discrimination' for the first three quarters of 2018." *Id.* (quoting *United States v. Ptasynski*, 462 U.S. 74, 85 (1983)). In addition, Judge Huennekens held that the amendment also violates the Bankruptcy Clause of the U.S. Constitution. *Id.* at 13. "The court in *In re Buffets* confined its analysis to whether section 1930(a)(6)(B) violated the Constitution's Uniformity Clause. This Court holds that section 1930(a)(6)(B) also violates the Constitution's Bankruptcy Clause." *Id.*

The Bankruptcy Clause gives Congress the *power* to enact "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. While Congress

certainly is authorized to establish uniform bankruptcy laws, the Constitution does not use mandatory language.

In re Life Partners Holdings, Inc., et al.

The *Life Partners* case has also joined the line of cases challenging the 2017 amendment. The case was filed in the Northern District of Texas on January 20, 2015, and a chapter 11 trustee was appointed. The trustee filed bankruptcy petitions for the Life Partners subsidiaries on May 19, 2015. The trustee, subsidiary debtors, and unsecured creditors' committee filed an amended joint plan of reorganization, which was confirmed on November 1, 2016. The plan became effective on December 9, 2016.

On February 19, 2019, the Life Partners Position Holders Trustee ("the PHT") filed its *Motion to Determine Liability for Post-Confirmation United States Trustee's Quarterly Fees and to Partially Disgorge Trustee Quarterly Fees Paid in 2018 with Brief in Support*. *See In re Life Partners Holdings, Inc., et al.*, No. 15-40289 (Bankr. N.D. Tex. 2019) (ECF No. 4307). Prior to the 2017 amendment, Life Partners paid $6,500 in the first two quarters of 2017, $13,000 in the third quarter, and $30,000 in the fourth quarter (a total of $56,000). *See id.* at 5. After the amendment, Life Partners paid roughly $200,000 in the first two quarters of 2018 and $250,000 (the max) in the third quarter of 2018 (a total of $654,896 before the fourth quarter calculations). *See id.* at 5–6. Had the amendment not passed, Life Partners would have owed $116,000 for Q1–Q3 of 2018. *Id.*

The PHT cited the *Buffets* opinion to argue that the amendment is unconstitutional, retroactive, and the UST should disgorge the $244,234 that the trust has already paid out for 2018. *Id.* (citing *Buffets*, 597 B.R. 588). On July 15, 2019, the PHT filed a *Notice of Supplemental Authority* attaching the *Circuit City* opinion. *See Life Partners*, No. 15-40289, *Notice of*

Supplemental Authority (ECF No. 4385). The UST responded with a motion for summary judgment. (ECF No. 4346). The UST argued that the PHT should have filed an adversary proceeding to seek the requested relief. On July 17, 2019, the court heard arguments from both parties and took the matter under advisement.

On August 22, 2019, the court issued an opinion. The court converted the matter to an adversary proceeding "out of an abundance of caution for the balance of the contested issues." *In re Life Partners Holdings, Inc. et al.*, No. 15-40289 at *7–8, *Memorandum Opinion and Order Regarding Post-Confirmation United States Trustee's Quarterly Fees* (ECF No. 4405) (Bankr. N.D. Tex. Aug. 22, 2019). Judge Mullin adopted the decisions of *Buffets* and *Circuit City* with a few modifications. First, the court held that not only does the amendment not apply to Life Partners, it does not apply to any chapter 11 case filed prior to the amendment because there is no express language in the amendment to indicate that Congress intended to apply the fees to pending cases. *Id.* at 8–11. The court emphasized its holding by explaining that the 1996 amendment to the statute specifically provided that the fees were due "*until a plan is confirmed* or the case is converted or dismissed, whichever occurs first." *Id.* at 9 (citing 28 U.S.C. § 1930(a)(6) (1995) (emphasis added) (amended by Balanced Budget Downpayment Act, Pub. L. No. 104–99, § 211, 110 Stat. 26, 37–38 (1996)). In contrast, the 2017 amendment has no specific language. The UST argued that the Congressional Budget Office estimate provides that the 2017 amendment increased fees paid by "businesses involved in ongoing Chapter 11 bankruptcy cases." *Id.* (quoting October 12, 2017 CBO estimate). Congress could have easily put in express language to make quarterly-fee amendments apply to pending cases, but it chose not to. Therefore, the court declined to follow the UST's recommendation that the fees apply to pending cases based on the ambiguous legislative history that it should apply to "ongoing" cases. *Id.*

Second, the court extended the holding in *Buffets* by determining that the statutory amendment is still unconstitutionally non-uniform. *Id.* at 12–13. The court adopted the holdings in *Buffets* that the fees violated the Uniformity Clause and the holding in *Circuit City* that they violate the Bankruptcy Clause of the Constitution for the first three quarters of 2018. Additionally, Judge Mullin recognized that the Judicial Conference Executive Committee did not remedy the uniformity problem. The Committee approved the recommendation of the Judicial Conference Committee of the Bankruptcy System that the increased fees apply to BA districts "*for cases filed on or after October 1, 2018* for any fiscal year in which the [USTP] exercises its authority under that statute, and pursuant to any future extensions of that or similar authority." *Id.* (citing U.S. [t]rustee Ex. N, Report of the Proceedings of the Judicial Conference of the United States (September 13, 2018) (the Judicial Conference Report) at 11–12 (emphasis added)). In the BA districts, any chapter 11 debtor with a case filed before October 1, 2018 that is still pending is *not* currently paying the 833% increase while debtors in UST districts *are* paying the increase. The debtors in BA districts that filed on or after October 1, 2018, and all debtors in the UST districts, are currently paying the increased quarterly fees. This results in the non-uniform treatment of chapter 11 cases within BA districts.

Third, Judge Mullin adopted the holding in *Buffets* that the amendment violates the Due Process Clause. *Id.* at 16–17. "Congress crossed the line when (as the U.S. Trustee interprets the amendment) it applied an <u>*833%*</u> increase in maximum quarterly fees to the Life Partners Chapter 11 Cases *after* the creditors and parties in interest heavily negotiated the terms of the Plan, *after* the Plan was confirmed, and *after* the three successor entities under the Plan—including the PHT—were charged with monetizing the reorganized Debtors' remaining assets and making distributions to creditors." *Id.* The UST has appealed this decision.

In re Clinton Nurseries, Inc.

In a more recent chapter 11 case out of the Bankruptcy Court for the District of Connecticut, the debtors filed a *Motion to Determine Amount of United States Trustee Fees Pursuant to 28 U.S.C. § 1930(a)(6)*, arguing in part that the 2017 amendment violates the Bankruptcy Clause of U.S. Constitution due to non-uniformity. *In re Clinton Nurseries, Inc.*, 2019 WL 4072654 (Bankr. D. Conn. August 28, 2019) (ECF No. 672); *see* U.S. CONST. art. 1, § 8, cl. 4. The U.S. trustee filed two objections, and Judge Tancredi issued a Memorandum of Decision, which converted the contested motion to an adversary proceeding and treated the trustee's substantive objections as a motion to dismiss. *In re Clinton Nurseries*, 2019 WL 4072654.

The court in *Clinton Nurseries* dismissed the debtors' constitutional arguments. On the issue of uniformity, the court disagreed with *Buffets*, *Circuit City*, and *Life Partners*. The court relied on the Bankruptcy Clause and principles of statutory interpretation to hold that § 1930 as amended can be read as uniform on its face and is constitutional despite its non-uniform application as to the debtors. *See id.* The court did not address the constitutional issue based on the Uniformity Clause of the Constitution at Article 1, Section 8, Clause 1, which was one basis for the holding in *Buffets*. *See id*; U.S. CONST. art. 1, § 8, cl. 1 ("all Duties, Imposts and Excises shall be uniform throughout the United States").

In re Exide Technologies

Debtors continue to challenge the fees. The reorganized debtor in Exide Technologies, 2020 WL 211400filed a Motion to reduce the quarterly fees owed to the US Trustee. The impact of the quarterly fee increase was to raise the fees from $30,000 to $250,000 per quarter. Exide argued the fees were inapplicable because there was no express language in the 2017 Amendment making the increase applicable to pending cases. The challenge also raised the

constitutional issues of due process, retroactivity, impermissible taking under the Fifth Amendment and violation of the Bankruptcy Clause.

Judge Walrath charted a careful course in her decision finding that the subject of the 2017 Amendment was not cases but, instead, was disbursements. Thus, she concluded it was no retroactive in application. Despite the inclusion in the Amendment of express language with respect to the application to pending chapter 12 cases, the omission was not fatal according to Judge Walrath. She reasoned that if the amendment was not intended to apply to pending cases the introductory sentence regarding chapter 12 cases would have been superfluous.

Support for the UST system as well as the funding of additional new judgeships serve a legitimate purpose. The court continued that a decision to "impose higher fees on larger pending chapter 11 cases is rationally related to that goal." Larger cases tax the system more than smaller cases so that was an appropriate consideration according to the *Exide* decision. Because there is a lawful purpose for the 2017 Amendment and because, based on the reasoning it is disbursements and not cases that are the subject, there is no retroactivity and no due process concerns. This conclusion was bolstered by Judge Walrath's agreement with the *Circuit City* reasoning. It does not address, however, the reason for capping the fees at $250,000. If larger cases tax the system to a greater degree and accumulating a "reserve" of $200 million[2] is appropriate for the integrity of the system and Fund balance, then assessing user fees on all cases with disbursements of equal to or in excess of $1,000,000 without regard to a cap. This would certainly have generated sufficient funds for the Fund balance will before today.

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[2] It should be noted that a "self-funding" fees collected are first "credited" against any budget allocation to the USTP. Once that amount is covered then funds are credited to the Fund.

Rejecting the UST argument, Judge Walrath concluded the 2017 Amendment is a law on the subject of bankruptcy. Id. At *9. Nonethless, she concluded there was no violation of the requirement for uniformity.

> Even if the fees charged in BA districts were relevant, the Court concludes that the fees, as enacted by Congress, are uniform. Congress, in implementing fees for UST districts, acknowledged that it could not impose fees for the BA system, which is part of the judicial branch. Instead Congress provided that if the Judicial Conference did implement any fees for the BA system, then those fees had to be equal the fees in UST districts.

In essence, Judge Walrath seems to conclude that it was a failure in implementing the fees in BA districts that is problematic and that such failure does not render the statute non-uniform.

Acandiana Management Group LLC v. US

In addition to the challenges in bankruptcy courts, a class action was filed in April 2019 in the U.S. Court of Claims seeking a refund of increased U.S. Trustee fees paid by chapter 11 debtors whose cases were pending when the increase came into effect. *Acadiana Management Group LLC v. U.S.*, 19-496 (Ct. Cl.). The complaint alleges that the increased fees are unconstitutional as applied. The government filed a motion to dismiss and is scheduled to submit its reply brief at the end of January.

Concluding Thoughts

The controversy continues. Courts are divided. The briefing in the 5th Circuit in *Buffets* is scheduled to be completed in early February. No argument date has been set so far.

The cases above demonstrate that the 2017 Amendment is devastating to mid-sized and large chapter 11 debtors throughout the country, giving rise to an urgent need to curb increased

costs to participating in bankruptcy. A few strategies exist to help debtors reduce, or at least manage, the fees.

Pre-bankruptcy, a debtor may pursue a variety of strategies to minimize fees during a case. For instance, pre-packaged or pre-negotiated plans may help to reduce time in chapter 11. In addition, because UST fees are calculated on an entity-by-entity basis, with a sliding scale based on the amount of disbursements for each legal entity,[3] a debtor's cash management system might be modified to consolidate all disbursements into a single entity. Consolidating accounts so that all disbursements are made from a single entity would take advantage of the total cap on UST fees of $250,000 per entity per quarter, so that only a single entity has a large bill, rather than multiple entities. Similarly, pre-bankruptcy a debtor may also determine it will designate as the "lead" case the legal entity that is most likely to be subject to the most claims or other litigation, but modify the cash management system so that the lead entity does not typically maintain cash and make disbursements. This could ultimately allow the lead case to stay open longer without incurring significant fees and permit the entities that make disbursements to be closed more quickly.

During a bankruptcy case, multiple strategies may be employed to reduce time in chapter 11 and otherwise avoid additional fees. Scrutinizing any debtor-in-possession financing arrangements to avoid the double counting of payments that were evident in *CranGrow* is of heightened importance. Early bar dates for claims and quick claim objections may be sought to get resolutions before confirmation if possible. That could advance progress to a faster final decree

[3] U.S. trustee fee schedule as of January 1, 2018 is as follows: (a) disbursements of $0 to $14,999.99 = fee of $325.00; (b) disbursements of $15,000 to $74,999.99 = fee of $650.00; (c) disbursements of $75,000 to $149,999.99= fee of $975.00; (d) disbursements of $150,000 to $224,999.99 = fee of $1,625.00; (e) disbursements of $225,000 to $299,999.99 = fee of $1,950.00; (f) disbursements of $300,000 to $999,999.99 = fee of $4,875.00; and (g) disbursements of $1,000,000 or more = fee of 1% of quarterly disbursements or $250,000, whichever is less.

and case closure. Data and information should also be gathered early in the case regarding potential avoidance actions, so that these matters are also not left until post-confirmation.

UST fees should also be considered when structuring a plan. Particularly if a trustee or creditor representative would be responsible for claims reconciliation and litigation post-confirmation, the debtor may consider including short deadlines for claims objections to avoid a third-party administrator spending excessive time litigating in bankruptcy with the debtor responsible for fees. Debtors should also take care to avoid any method of repayment under the plan of reorganization that could trigger large disbursements or the double counting of disbursements (such as, the debtor directly receiving proceeds from an asset sale or debt or equity exit financing and then using such amounts to pay plan distributions, as opposed to the funds being delivered into escrow or delivered directly to creditors).

In addition, exiting bankruptcy as quickly as possible will be advantageous in reducing UST fees. An early effective date and substantial consummation date is critical in shortening the life of a chapter 11 case and paving the way for a final decree.

Since 2017 courts are seeing some of these strategies being implemented. For example, Sungard Availability Services Capital filed for chapter 11 protection in the Southern District of New York at 9:04 p.m. on May 1, 2019. *See In re Sungard Availability Services Capital, Inc.*, No. 19-22915 (Bankr. S.D.N.Y.) (ECF No. 1). A mere 19 hours later, at about 4:00 p.m. on May 2, 2019, the bankruptcy court confirmed the plan and set the record for quickest time between filing and plan confirmation. The same bankruptcy judge, Judge Robert Drain, also held the previous record when FullBeauty Brands Holding Corporation filed on February 4, 2019 and confirmed a plan on February 5, 2019. *See In re FullBeauty Brands Holding Corp.*, No. 19-22185 (Bankr. S.D.N.Y.) (ECF No. 1, 19). Although reorganized debtors remain liable for UST fees until entry

of a final decree, a quick confirmation of a prepackaged or pre-negotiated plan can dramatically reduce a debtor's time in bankruptcy and attendant quarterly fees.

Section 350 of the Bankruptcy Code expressly directs the bankruptcy court to close a case "after [the bankruptcy] estate is fully administered." 11 U.S.C. § 350(a). A motion for final decree can be filed once the Plan is substantially consummated and the case administered under section 350(a). There is support for the argument that whether a case should be closed is entirely within the discretion of the bankruptcy court based on the facts and circumstances of the case. *See, e.g.*, *In re Johnson*, 402 B.R. 851, 856 (Bankr. N.D. Ind. 2019); *Hoti Enters., L.P. v. GECMC 2007 C-1 Burnett St., LLC*, 2016 U.S. Dist. LEXIS 61206 at *2 (S.D.N.Y. May 6, 2016). The phrase "fully administered" is not defined in the Bankruptcy Code. The Advisory Committee Note to Bankruptcy Rule 3022, however, sets forth a non-exclusive list of factors to consider. *See In re Union Home & Indus., Inc.*, 375 B.R. 912, 917 (B.A.P. 10th Cir. 2007).

A debtor should consider whether it is appropriate to seek to close some or all jointly administered cases even in the face of continuing litigation or appeals. There may be a distinction between cases with pending contested matters and adversary proceedings that remain open. *See, e.g.*, *In re Valence Tech., Inc.,* 2014 Bankr. LEXIS 4429 (Bankr. W.D. Tex. Oct. 17, 2014); *In re JMP-Newcor Int'l, Inc.*, 225 B.R. 462, 465 (Bankr. N.D. Ill. 1998); *In re Union Home & Indus., Inc.*, 375 B.R. at 918.

Ultimately, if one case has multiple ongoing contested matters, such as claims objections, the debtor may have no choice but to keep it open and pay the UST fees until such matters are resolved. But the ongoing UST fees should enter into the debtor's calculations when determining whether to settle or to continue to litigate a matter. To add insult to injury, even if a debtor has

succeeded in closing its cases, two non-debtor parties may seek to reopen a case to adjudicate their own dispute, in which case the debtor may once again be stuck with UST fees.

930 F.3d 844
United States Court of Appeals, Seventh Circuit.

In re: CRANBERRY GROWERS COOPERATIVE, doing business as CranGrow, Debtor-Appellee,
v.
Appeal of: Patrick S. LAYNG, United States Trustee for Western District of Wisconsin.

No. 18-3289
|
Argued May 17, 2019
|
Decided July 17, 2019

Synopsis
Background: United States Trustee (UST) filed administrative claim seeking additional quarterly fees in connection with "direct revolver payments" that debtor's customers had made to lender that provided debtor's prepetition and court-approved debtor-in-possession (DIP) financing. Chapter 11 debtor objected. The United States Bankruptcy Court for the Western District of Wisconsin, Catherine J. Furay, J., 592 B.R. 325, sustained debtor's objection, and the UST appealed.

The Court of Appeals, Ripple, Circuit Judge, held that payments that were made by debtor's customers directly to lender that had provided debtor with both prepetition and debtor-in-possession financing, and that lender applied, first, to pay down debtor's prepetition debt on revolving line of credit, were in nature of "disbursements."

Reversed and remanded.

***845** Appeal from the United States Bankruptcy Court for the Western District of Wisconsin. No. 1:17-bk-13318-cjf — **Catherine J. Furay**, *Chief Bankruptcy Judge*.

Attorneys and Law Firms

Justin M. Mertz, Attorney, MICHAEL BEST & FRIEDRICH LLP, Milwaukee, WI, Peggy Hunt, Attorney, DORSEY & WHITNEY LLP, Salt Lake City, UT, for Debtor-Appellee.

Tiffany E. Rodriguez, Attorney, OFFICE OF THE UNITED STATES TRUSTEE, Madison, WI, Sumi Sakata, Wendy Cox, Attorneys, DEPARTMENT OF JUSTICE, Executive Office for United States Trustees, Office of the General, Washington, DC, for Trustee-Appellant.

Randall L. Klein, Attorney, GOLDBERG KOHN LTD., Chicago, IL, Amicus Curiae for COMMERCIAL FINANCE ASSOCIATION.

Before Ripple, Manion, and Sykes, Circuit Judges.

Opinion

Ripple, Circuit Judge.

***846** Under 28 U.S.C. § 1930(a)(6), quarterly fees paid by a chapter 11 debtor to the bankruptcy Trustee are based on the debtor's disbursements. Here, the Bankruptcy Court determined that certain payments made by the customers of Cranberry Growers Cooperative ("CranGrow") to its lender should not be considered "disbursements" for purposes of that calculation. Patrick S. Layng, United States Trustee for the Western District of Wisconsin ("Trustee"), appeals that determination. CranGrow agrees with the Bankruptcy Court's interpretation of disbursements, but, for the first time on appeal, maintains that the Bankruptcy Court unconstitutionally applied the recently amended fee schedule in assessing its quarterly fees.

We believe that the language of the fee statute requires that payments made by CranGrow's customers to CranGrow's lender be considered disbursements. We also decline CranGrow's belated invitation to consider the constitutionality of the fee statute. We therefore reverse the Bankruptcy Court's judgment and remand for further proceedings consistent with this opinion.

I

BACKGROUND
CranGrow is an unincorporated association that filed for chapter 11 bankruptcy relief on September 25, 2017.[1] At that time, CranGrow owed its bank, CoBank ACB ("CoBank"), roughly $8.1 million on a revolving line of credit.[2]

Shortly after filing for bankruptcy, CranGrow asked the Bankruptcy Court for permission to enter a new borrowing arrangement with CoBank that would give CranGrow an additional $5 million in credit needed to satisfy various monthly obligations.[3] According to the agreement, CoBank would increase the limit on CranGrow's revolving line of credit to $13.25 million.[4] CoBank would advance funds under the new line of credit so that CranGrow could pay its operating expenses[5] in accordance with a budget that CranGrow regularly submitted to CoBank.[6] In return, CranGrow agreed that all proceeds from its inventory sales would be paid directly to CoBank; these payments first would be used to pay off the existing, prepetition debt of $8.1 million, and then to repay amounts that CoBank extended under the new, postpetition line of credit.[7] Thus, according to this "roll-up" arrangement, postpetition payments would be ***847** used to reduce the prepetition debt balance.[8] The financing agreement also provided that the postpetition loan would be given priority over other postpetition administrative expenses.[9] In seeking the Bankruptcy Court's approval for this arrangement, CranGrow represented that it had no other reasonable alternatives for postpetition financing.[10] Although the Trustee objected to the roll-up request,[11] the Bankruptcy Court approved the financing arrangement.

After the agreement was signed, CranGrow's customers made payments to CoBank, and these payments were applied daily, as they were received, to reduce CranGrow's prepetition debt to CoBank.[12] The payments did not result in an automatic extension of postpetition credit to CranGrow in the amount of the payments. Instead, CoBank extended funds for operating expenses to CranGrow on a weekly basis[13] according to the budget that had been submitted to, and approved by, CoBank.[14]

On December 19, 2017, CranGrow proposed a chapter 11 reorganization plan. The Bankruptcy Court confirmed the plan on February 16, 2018, and it became effective on April 27, 2018. During this time, CranGrow made the required quarterly fee payments to the Trustee. As already noted, § 1930(a)(6) of Title 28 of the United States Code provides that fees are to be calculated based on the amount of the debtor's disbursements during the preceding quarter. In calculating its quarterly fees, CranGrow did not include as disbursements the amount that CranGrow's customers paid directly to CoBank.[15] CranGrow took the position that the collection of accounts receivable was not a disbursement because "[w]hen collected, accounts receivable sweep to pay down the revolver ..., and then the revolver is borrowed against to remit disbursements."[16]

The Trustee disagreed with this characterization. He maintained that, because the customers' payments were being used to reduce CranGrow's prepetition indebtedness, they should be considered disbursements.[17] When CranGrow continued to calculate and pay its quarterly fees without including its customers' payments to CoBank, the Trustee sent CranGrow a delinquency notice. CranGrow objected and asked the Bankruptcy Court to interpret the term disbursement to exclude the receivable payments to CoBank on the ground that the "funds were never seen by CranGrow or deposited in any way into a debtor-in-possession account."[18] In the alternative, it asked the Bankruptcy Court to waive the fees.[19]

In a written opinion, the Bankruptcy Court held that the customer payments to CoBank were not disbursements. It acknowledged that "[m]ost courts turn to the 'plain meaning' of 'disbursement' and define it expansively to include any transfer of funds of the estate—regardless of the method of transfer."[20] The court further ***848** acknowledged that "[m]ost often, payments on revolving lines of credit are considered disbursements."[21] Nevertheless, even though CranGrow's arrangement with CoBank "appear[ed] on the surface" to be similar to cases in which payments to creditors had been considered disbursements, the Bankruptcy Court concluded that the substance of the arrangements requires a different result:

> The deposit of funds into CranGrow's account was not governed by a formula that determined the amount of available credit. Rather, all of the collected accounts receivable minus fees and interest were deposited into Debtor's account. This flow of funds into the Debtor's account was viewed by the parties as a cash management system. There was a continual flow of dollars against the prepetition debt converting it to immediately available funds as postpetition debt. While expenditure of the funds is limited by a budget, there was a symmetry between amounts credited against the prepetition line of credit balance and the amounts drawn on the postpetition line of credit.[22]

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The Bankruptcy Court also believed that the Trustee's authorities were distinguishable

> because the funds at issue here—as a matter of substance—never settle debt. The cases cited by the [Trustee] involve funds permanently leaving the estate, whether through payment of operating expenses, prepayment of a loan, satisfaction of a mortgage through selling land, or reduction of line of credit indebtedness for periods of time. Here, the funds at issue—cash collateral—were returned to CranGrow immediately. It paid interest and fees from those funds before the money was deposited in its account. To the extent there was no reduction in the total revolver indebtedness, there was no real change in the underlying economic circumstances. CoBank merely received accounts receivable, subtracted fees and expenses, and returned the remainder to CranGrow. Analyzing the economic realities yields the conclusion these funds functionally belonged to CranGrow the entire time and were thus not "paid out" or "expended" in the traditional sense of "disbursement."[23]

Instead, the Bankruptcy Court likened CranGrow's arrangement to that employed in *In re HSSI*, 176 B.R. 809 (Bankr. N.D. Ill. 1995), *rev'd*, 193 B.R. 851 (N.D. Ill. 1996). In that case, subsidiary debtors deposited proceeds from some of their sales into "a pooled account. Pooled funds were used to make payments to a postpetition lender on an outstanding loan. Payments from the pooled account to repay the loan were disbursements, but payments from the single accounts to the pooled accounts were *not* disbursements."[24] According to the Bankruptcy Court, CranGrow's roll-up arrangement

> contain[ed] elements of a cash management system and transfers like that in *HSSI*. First, the DIP Revolver Loan document refers to the set-up as a "cash management arrangement," revealing the parties' intent. Second, funds are merely "recycled" through CoBank, who serves only as a conduit between revenue and expenses, since funds are immediately readvanced and deposited into Debtor's account.[25]

Finally, the court was concerned with "double dip[ping]" by the Trustee.[26] The ***849** court explained that, given that farming is seasonal, "CranGrow operates at break-even or a loss for much of the year," during which times

> CranGrow is cash-poor. Its prepetition revolver exhausted, it needed the availability of over-advances from the DIP Revolver Loan. In fact, the Revolver draw/repayment is projected to be identical to the net negative cash flow until about the fourth quarter of 2018. The negative cash flow also includes the [United States Trustee] quarterly fee. Since it is cash flow negative and draws additional funds to pay UST fees, CranGrow incurs UST fees on fees if applying accounts receivables to the prepetition debt and then immediately converting it to a postpetition debt re-advance counts as two separate disbursements. This in effect represents a fee on a fee, or a form of double tax, resulting in an unfair cycle and snowball effect for much of the year.[27]

According to the Bankruptcy Court, "the [Bankruptcy] Code aims to provide debtors with a 'fresh start.' "[28] Including "revolver" transactions as disbursements would have "a 'severe impact' on the ability of debtors, including CranGrow, to obtain a 'fresh start' and effectively reorganize."[29] In sum, the Bankruptcy Court

concluded that treating the revolver payments as disbursements "harms the viability of CranGrow moving forward,"[30] and, generally, "does not further the underlying purposes of section 1930(a)(6)."[31] Consequently, the Bankruptcy Court denied the Trustee's petition for fees.[32] The Trustee petitioned to file a direct appeal to this court, which we granted.[33]

II

DISCUSSION

A.

Section 1930(a) of Title 28 of the United States Code requires debtors to pay fees into the United States Trustee System Fund to support the operations of the bankruptcy courts. During the pendency of their bankruptcy cases, chapter 11 debtors are required to pay quarterly fees to the Trustee based on the amount of disbursements made by the bankruptcy estate. *See* 28 U.S.C. § 1930(a)(6). These range from $325 per quarter for debtors whose disbursements are $15,000 or less to $30,000 per quarter for debtors whose disbursements total more than $30,000,000. *See id.*

In 2017, Congress enacted a temporary amendment to 28 U.S.C. § 1930(a)(6) that significantly increases the fees for debtors whose quarterly disbursements are $1,000,000 or more; it provides:

> During each of fiscal years 2018 through 2022, if the balance in the United States Trustee System Fund as of September 30 of the most recent full fiscal year is less than $200,000,000, the quarterly fee ***850** payable for a quarter in which disbursements equal or exceed $1,000,000 shall be the lesser of 1 percent of such disbursements or $250,000.

28 U.S.C. § 1930(a)(6)(B).

Here, the parties dispute the meaning of the term "disbursement."[34] Because "disbursement" is not defined in the Bankruptcy Code, we employ the ordinary meaning of the term. *See Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011) (employing the ordinary meaning of the term "applicable" because the term is not defined in the Bankruptcy Code). The dictionary definition of "disbursement" is "[m]oney paid out; expenditure." The American Heritage Dictionary of the English Language (5th ed. 2018). In applying this term, courts have concluded that it is an "expansive term." *Tighe v. Celebrity Home Entm't, Inc. (In re Celebrity Home Entm't, Inc.*), 210 F.3d 995, 998 (9th Cir. 2000) (internal quotation marks omitted).[35] It includes payments "made in the ordinary course of business," *Walton v. Jamko, Inc. (In re Jamko, Inc.)*, 240 F.3d 1312, 1316 (11th Cir. 2001), whether made to secured or unsecured creditors, *see St. Angelo v. Victoria Farms, Inc*., 38 F.3d 1525, 1534 (9th Cir. 1994), *amended*, 46 F.3d 969 (9th Cir. 1995). Moreover, disbursements include "[p]ayments made on behalf of a debtor, whether made directly or indirectly," *Genesis Health Ventures, Inc. v. Stapleton (In re Genesis Health Ventures, Inc.)*, 402 F.3d 416, 422 (3d Cir. 2005); *see also St. Angelo*, 38 F.3d at 1534–35, as well as payments made on revolving lines of credit, *see In re Fabricators Supply, Inc.*, 292 B.R. 531, 534 (Bankr. D.N.J. 2003); *United States Trustee v. Wernerstruck, Inc. (In re Wernerstruck, Inc.)*, 130 B.R. 86, 89 (D.S.D. 1991). Indeed, the Bankruptcy Court acknowledged that "[t]he great weight of case law broadly defines 'disbursements,' " and the majority view considers direct payments to revolving lines of credit to be disbursements.[36]

Based on this definition, the payments made by CranGrow's customers to CoBank were disbursements. They were funds "paid out" to one of CranGrow's creditors on behalf of CranGrow. Indeed, the customer payments here closely resemble those in *In re Fabricators Supply*, in which the court concluded that such payments constituted disbursements. In that case, after filing for chapter 11 protection, Fabricators entered into a postpetition loan agreement for a $2.5 million revolving line of credit with Fleet Capital. *In re Fabricators Supply*, 292 B.R. at 532. At the time that the postpetition financing agreement was authorized by the court, Fabricators owed Fleet approximately $1.8 million. *Id*. The agreement "direct[ed] Fabricators to remit to Fleet all cash collateral, and further authoriz[ed] Fleet to apply the funds collected to the outstanding balance owed." *Id*. Pursuant to the agreement, Fabricators deposited all accounts receivable and other proceeds into an account that Fleet maintained. *Id*. Fabricators described this account for receivables as "blocked" because "Fleet ha[d] sole control over this account, and Fabricators [could]not withdraw any money from the account." *Id*. at 532–33 (internal quotation ***851** marks omitted). Fleet swept the monies from the blocked account on a daily basis. *Id*. at 533. Fabricators maintained a separate, operating account with Fleet from which it paid vendors and other expenses.

Id. The operating account was funded by monies transferred from the blocked account based on the available credit on the revolving loan. *Id*.

Fabricators maintained that Fleet's sweeps of the blocked account should not be considered disbursements for purposes of § 1930(a)(6). It characterized its agreement with Fleet "as creating a continuous flow of dollars against its credit line such that no disbursement occurs when Fleet sweeps the blocked account." *Id*. Instead, it maintained "that disbursements only occur[red] when it ma[de] payments from its operating account." *Id*. The bankruptcy court, however, disagreed. It held that Fleet's daily sweeps of the blocked account were disbursements for purposes of calculating the quarterly fees. It noted first that the term "disbursements" had to be given its "ordinary, contemporary common meaning." *Id*. (quoting *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979)). It further observed that two courts of appeals, after surveying various possible definitions, had concluded that "disbursement simply means ... 'to expend' or 'to pay out.' " *Id*. (quoting *Cash Cow Servs. of Fla., LLC v. United States Trustee (In re Cash Cow Servs. of Fla., LLC)*, 296 F.3d 1261, 1263 (11th Cir. 2002); *St. Angelo*, 38 F.3d at 1534). The court in *Fabricators* then concluded that

> it is readily apparent that the process by which Fabricators deposits its accounts receivable into the blocked account and Fleet then sweeps that account results in disbursements to Fleet on which the quarterly fees should be calculated. Fabricators' contention that it cannot be charged with a disbursement from the blocked account because it exercises no control over the account is totally without merit. The blocked account and the sweep of that account is simply the payment mechanism to which Fabricators agreed when it entered into the Loan Agreement with Fleet. The accounts receivable deposited by Fabricators into the blocked account certainly constitute debtor funds, and the sweep of the account by Fleet certainly constitutes an "action or fact of disbursing" ....

Id. at 534. The court in *Fabricators* disagreed with the characterization "that there [wa]s no economic substance to the sweeps by Fleet because the amount of the debt owed by Fabricators [wa]s essentially the same before and after the sweeps occur as a result of the revolving nature of the loan." *Id*. It explained that "the revolving nature of the Line of Credit is precisely what results in the disbursement when the blocked account is swept. During the term of the Line of Credit, Fabricators actually engages in a series of borrowing transactions which are repaid by the sweeps of the blocked account." *Id*.

Just as Fleet's sweep of Fabricators' blocked account constituted a disbursement, so too do payments by CranGrow's customers to CoBank. In both scenarios, customer payments are being used to pay down the debtor's revolving line of credit. In CranGrow's case, however, the disbursement was simply more direct: the customers were not depositing their payments into an account that was being swept, but were sending their payments directly to CranGrow's creditor.

CranGrow submits that there are critical differences between the situation in *Fabricators* and the one before us, and, therefore, *Fabricators* should not guide our analysis. These distinctions, however, are either illusory or immaterial. For instance, CranGrow submits that, according to the agreement in *Fabricators*, Fleet would make the funds available to the debtor based on a "lending formula," *id*. at 532, ***852** whereas here, once funds were received from CranGrow's customers, they became immediately available to CranGrow through the postpetition line of credit.[37] However, the amount of funds that CoBank made available to CranGrow was based on a budget submitted to, and approved by, CoBank.[38] And, as CranGrow's counsel acknowledged at oral argument, the extension of credit was not automatic; the receipt of a customer payment by CoBank and the extension of credit to CranGrow were "two separate transactions."[39]

Finally, CranGrow states that, "[u]nlike CranGrow," "Fabricators held a depository account with its lender" and "funds actually left Fabricators' bank account through a sweep by the lender."[40] CranGrow fails to explain why, for purposes of determining whether a disbursement has been made, it is material that CoBank is not a depository institution. Nor does it explain why it is material that customer payments did not make a momentary stopover in a depository account before being swept by the creditor. In both situations, funds that belonged to the debtor (customer receivables) were being paid to a creditor and, therefore, constituted disbursements.

Indeed, CranGrow "concedes that a majority of courts

expansively define 'disbursements,' in a way that almost always favors the U.S. Trustee."[41] It argues, however, that we should take a different approach for a number of reasons. First, it surmises that courts historically have taken a broad view of disbursements because, until recently, the fees were relatively small.[42] But a broad view of "disbursements" was well established when Congress increased the fees in 2017. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). When Congress enacted the increased fee schedule in 2017, it could have narrowed the courts' definition of disbursements, but it refrained from doing so.[43]

***853** Additionally, CranGrow asserts that giving "disbursements" a broad reading creates absurd results. We have explained, however, that the absurdity doctrine is not a license to "make the law 'better,' " *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 642 (7th Cir. 2012); rather, it deals with texts that do not make sense as written "and thus need repair work, rather than with statutes that seem poor fits for the task at hand." *Jaskolski v. Daniels*, 427 F.3d 456, 462 (7th Cir. 2005). Here, a broad reading of disbursements does not render the statute nonsensical.

In sum, "disbursements" has been interpreted broadly to mean all payments by or on behalf of the debtor. The payments by CranGrow's customers to CoBank were payments made on behalf of CranGrow and resulted in the reduction of CranGrow's prepetition debt. The customer payments therefore are disbursements for purposes of § 1930(a)(6) and should have been included in the calculation of CranGrow's quarterly fees.

B.

CranGrow argues that, even if it owes quarterly fees based on the payments to CoBank, those fees should be waived. It submits that a waiver is permitted by 28 U.S.C. § 1930(f)(3). Section 1930(f)(3) provides: "This subsection does not restrict the district court or the bankruptcy court from waiving, in accordance with Judicial Conference policy, fees prescribed under this section for other debtors and creditors." The Bankruptcy Court did not address this argument because it determined that additional fees were not owed.

Critically, CranGrow does not come forward with any authority, from our court or any other, that approves the waiver of quarterly fees. Additionally, CranGrow has not come forward with a Judicial Conference policy stating that quarterly fees generally may be waived or that a waiver in the circumstances presented here might be appropriate. Indeed, the Judicial Conference policies with respect to the waiver of fees do not mention quarterly fees. *See* 4 Administrative Office of the United States Courts, Guide to Judiciary Policy § 820 (Apr. 10, 2018).[44] Consequently, there is no basis for a waiver of quarterly fees under § 1930(f)(3).

C.

CranGrow submits, for the first time on appeal, that, in applying the amended fee schedule of § 1930(a)(6)(B), the Bankruptcy ***854** Court violated the uniformity requirement of the Bankruptcy Clause of Article 1, section 8 of the United States Constitution. Specifically, because the new fee schedule was not implemented nationwide until October 2018, some debtors, like CranGrow, were subjected to the increased fees whereas other debtors were not. This nonuniformity, CranGrow asserts, violates Article 1, section 8.[45]

The Trustee, however, maintains that CranGrow's constitutional challenge is untimely. He submits that CranGrow had a full and fair opportunity to raise this issue before the Bankruptcy Court, but failed to do so. Consequently, it has forfeited the constitutional argument. We agree with the Trustee.

1.

To understand CranGrow's uniformity argument, and why it is untimely, some background on the U.S. Trustee system is helpful. Congress initially instituted the Trustee system as a pilot program in select districts. After the trial period, Congress implemented it nationwide in 1986, with a temporary exception for districts in Alabama and North Carolina. Those districts initially were required to opt in by 1992. Eventually, however, this opt-in requirement was removed altogether.[46] In those districts, the functions of the Trustee are performed by Bankruptcy Administrators, who are employees of the Judicial Branch. When enacted, the Trustee system was to be funded primarily through user fees. Because the districts in Alabama and North Carolina did not employ a Trustee, Trustee fees were not imposed in those districts.[47]

The disparity in the fees assessed by these separate systems came to the fore in *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525 (9th Cir. 1994), *amended*, 46 F.3d 969 (9th Cir. 1995). In *St. Angelo*, the debtor argued that "because the U.S. Trustee program—and the fee system which supports it—ha[d] not been implemented in

Alabama and North Carolina, the law governing the fee system [wa]s not uniform and therefore must be struck down in its entirety." *Id*. at 1529. The Trustee defended the dual system on two grounds. The first was that Congress implemented the two systems "in order to study the effect of the U.S. Trustee system upon the administration of bankruptcy proceedings." *Id*. The court noted, however, that there was no support for this proposition. *Id*. Second, the Trustee submitted "that the U.S. Trustee program serves a purely administrative function and therefore is not constrained by the requirements of the Uniformity Clause." *Id*. at 1530. The court rejected this argument as well, stating:

> The statute clearly ... falls within the scope of the Uniformity Clause. The U.S. Trustees have assumed the supervisory roles of the bankruptcy judges. Indeed, the statute entrusts U.S. Trustees with extensive discretion to appoint interim and successor trustees, monitor and supervise bankruptcy proceedings, examine debtors, advise the bankruptcy courts, and even, in some circumstances, to seek dismissal of cases. Thus, the ***855** U.S. Trustees' activities have a direct effect upon the rights and liabilities of both debtors and creditors.
>
> The U.S. Trustee program is not only intimately connected to the government's regulation of the *relationship* between creditor and debtor, it also has a concrete effect upon the *relief* available to creditors. Because debtors in states other than North Carolina and Alabama must pay higher fees for the supervision of bankruptcy proceedings, the current system reduces the amount of funds that the debtor can ultimately pay to his creditors in the other 48 states.

St. Angelo, 38 F.3d at 1530–31 (citations omitted).

Turning to the remedy for the constitutional violation, the Ninth Circuit struck down "the 1990 amendments to 28 U.S.C. § 1930," which continued the Bankruptcy Administrator program in the six districts in Alabama and North Carolina. *Id*. at 1533. According to the court, it was this provision "that guarantee[d] that creditors and debtors in the 48 other states are governed by a[ ] dissimilar, more costly bankruptcy system than members of the same groups in Alabama and North Carolina." *Id*.

After *St. Angelo*, Congress amended 28 U.S.C. § 1930 to allow the Judicial Conference of the United States to impose in non-trustee districts fees equal to those imposed in trustee districts. *See* 28 U.S.C. § 1930(a)(7).[48] With the adoption of § 1930(a)(6)(B) in 2017, however, the disparity re-emerged. By statute, the increase in fees for chapter 11 debtors in trustee districts became effective January 1, 2018, and applied to debtors then in bankruptcy as well as those who filed after the effective date. The Judicial Conference did not adopt the same fee schedule for the bankruptcy-administrator districts until September 2018. When it did so, it made the new fee schedule effective as of October 1, 2018, and did not apply the new schedule to debtors already in bankruptcy. *See* Administrative Office of the United States Courts, Report of the Proceedings of the Judicial Conference of the United States 11 (Sept. 13, 2018).

2.

Based on *St. Angelo*,[49] CranGrow ***856** maintains that the Judicial Conference's failure to institute the new fee schedule for bankruptcy-administrator districts on the same timeline as trustee districts violates the Uniformity Clause. The Trustee, however, contends that this constitutional issue is not properly before us. He asserts that CranGrow had a full and fair opportunity to raise this issue before the Bankruptcy Court, but failed to do so. For its part, CranGrow explains that the Judicial Conference Report, which reflects the decision to apply the new fee schedule prospectively beginning in October 2018, was not issued until September 13, 2018. At that point, the fee issue was fully briefed before the Bankruptcy Court; in fact, the Bankruptcy Court ruled on the Trustee's claim only eight days after the Conference Report was issued. Thus, CranGrow submits, it did not have a meaningful opportunity to raise the constitutional issue between the time that the Judicial Conference acted and the time that the Bankruptcy Court ruled on the Trustee's claim.

CranGrow's assertion that it knew about the constitutional issue only a few days before the Bankruptcy Court ruled, however, only partially rings true. At oral argument, counsel for CranGrow admitted that it was aware of the *St. Angelo* case and of a potential constitutional problem much earlier.[50] Counsel simply assumed that the Judicial Conference would act to cure the fee disparity.[51]

CranGrow further submits that, even if it had an opportunity to raise the constitutional argument and failed to do so, we nevertheless have the discretion to address issues raised for the first time on appeal. *See Kaczmarek v. Rednour*, 627 F.3d 586, 595 (7th Cir. 2010). "In our adversary system, ... we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008). We operate on "the premise that the parties know what is best for them[ ] and are responsible for advancing the facts and arguments entitling them to

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relief." *Id.* at 244, 128 S.Ct. 2559 (quoting ***857** *Castro v. United States*, 540 U.S. 375, 386, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003) (Scalia, J., concurring in part and concurring in judgment)). Thus, although we have the discretion to determine "what questions may be taken up and resolved for the first time on appeal," *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), we exercise that discretion "sparingly," *In re Sw. Airlines Voucher Litig*., 799 F.3d 701, 714 (7th Cir. 2015). Indeed, we usually only do so when "failure to present a ground to the district court has caused no one—not the district judge, not us, not the appellee—any harm of which the law ought to take note," *Amcast Indus. Corp. v. Detrex Corp*., 2 F.3d 746, 749 (7th Cir. 1993).

We believe it would be particularly inappropriate to entertain CranGrow's constitutional challenge under the circumstances presented here. First, *St. Angelo* made litigants—including CranGrow—generally aware that constitutional problems would arise if bankruptcy fees were imposed in trustee, but not bankruptcy-administrator, districts. When Congress amended § 1930(a)(6) in late 2017, that problem arose. CranGrow began paying nonuniform fees early in 2018 and began litigating the calculation of those fees in mid-2018. Nevertheless, despite the potential constitutional issue, CranGrow kept silent. Indeed, even when the Judicial Conference did not cure fully the nonuniformity—and the constitutional problem became concrete—CranGrow did not bring the issue before the Bankruptcy Court. Instead, it was the bankruptcy judge who mentioned the constitutional problem for the first time in her certification for direct review.[52] CranGrow had the opportunity to raise the constitutional issue before the Bankruptcy Court, but simply failed to do so. Second, the Trustee has been denied the opportunity to address the issue; the Bankruptcy Court has been denied the opportunity to weigh on the issue; and we have been denied the benefit of a full vetting on an issue of constitutional dimension. Finally, in raising the issue of lack of uniformity, CranGrow is attempting to enlarge its rights, specifically, to recover fees already paid to the Trustee.[53] Given all of these factors—CranGrow's opportunity to raise the issue before the Bankruptcy Court, the harm to the Trustee and to the court system, and CranGrow's effort to enlarge its rights despite its prior silence—we decline to entertain CranGrow's constitutional challenges.[54]

***858 Conclusion**

For the foregoing reasons, we hold that the payments of CranGrow's customers to CoBank constituted disbursements, which should have been included in the calculation of quarterly fees paid to the Trustee. We also decline to reach CranGrow's constitutional challenges to the assessment of fees. The judgment of the Bankruptcy Court is reversed, and the action is remanded to the Bankruptcy Court for further proceedings consistent with this opinion. The Trustee may recover the costs of this appeal.

REVERSED and REMANDED

All Citations

930 F.3d 844, Bankr. L. Rep. P 83,424

Footnotes

1 B.R. 384 at 1.

2 B.R. 389 at 9 n.1. The parties and the Bankruptcy Court frequently refer to this revolving line of credit as "the revolver."

3 B.R. 10 at 15.

4 *Id*. at 3.

5 *Id.* at 5.

6 B.R. 384-2 at 7; *see also id*. at 6 (defining "Budget").

7 *Id*. at 6.

8 B.R. 10 at 16.

9 B.R. 384-2 at 5.

10 B.R. 10 at 17.

11 B.R. 67 at 6.

12 *See, e.g.*, B.R. 137 at 4.

13 B.R. 401 at 18.

14 B.R. 384-2 at 7.

15 *See, e.g.*, B.R. 137 at 2.

16 *Id*.

17 B.R. 384-3 at 2.

18 B.R. 323 at 4.

19 *Id*. at 17–18.

20 B.R. 389 at 3.

21 *Id*. at 4.

22 *Id*. at 5.

23 *Id*. at 9–10.

24 *Id*. at 11 (citations omitted).

25 *Id*.

26 *Id*. at 12.

27 *Id.*

28 *Id*. at 13 (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)).

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29 *Id*. at 14.

30 *Id*.

31 *Id*. at 15.

32 The practical effect of the Bankruptcy Court's decision is illustrated by a chart in CranGrow's brief. *See* Appellee's Br. 15. If customer payments were included as disbursements in the calculation of quarterly fees, CranGrow's fees for 2018 would have increased from $199,925.64 to $402,872.31.

33 The Bankruptcy Court had jurisdiction over CranGrow's chapter 11 bankruptcy case pursuant to 28 U.S.C. §§ 157(a) and (b), and 1334(a). Our jurisdiction is secure under 28 U.S.C. § 158(d)(2).

34 We review the Bankruptcy Court's interpretation of the statute, specifically the meaning of disbursement under 28 U.S.C. § 1930(a), de novo. *See Wittman v. Koenig*, 831 F.3d 416, 419 (7th Cir. 2016).

35 *See also Robiner v. Danny's Mkts., Inc. (In re Danny's Mkts., Inc.)*, 266 F.3d 523, 526 (6th Cir. 2001) ("We are unable to escape the conclusion that ... Congress contemplated that disbursements will encompass all payments to third parties directly attributable to the existence of the bankruptcy proceeding ....").

36 B.R. 389 at 15.

37 *See* Appellant's Br. 33.

38 *See* B.R. 401 at 17–19 (counsel for CranGrow recalling that "the advanced funds by CoBank were supplied based on the budget, and the budget had to be pre-approved on a weekly basis by CoBank" and also noting that "the amount of the advances were tied, in some mathematical way, to ... the assets of the debtor and the anticipated receivables of the debtor as well").

39 Oral Argument at 32:26. Similarly, CranGrow asserts that the extension of credit in *Fabricators* only involved postpetition debt. *See* Appellee's Br. 33. However, in *Fabricators*, the court recounted that, at the time it authorized the postpetition financing, "Fabricators owed Fleet approximately $1.8 million." *In re Fabricators Supply, Inc.*, 292 B.R. 531, 532 (Bankr. D.N.J. 2003).

40 Appellee's Br. 33.

41 *Id*. at 28.

42 The chart in CranGrow's brief illustrates the difference in fees resulting from the change in law. *See supra* note 32; Appellee's Br. 15. The chart reveals that, employing CranGrow's definition of disbursements, its 2018 quarterly fees would have totaled $46,800 under the old law. *See* Appellee's Br. 15. This amount increases to $199,925.64 under the new law. *Id*. The total fees increase to $402,872.31 when the payments on the revolver are included. *Id.*

43 Moreover, 28 U.S.C. § 1930(a)(6)(A) has one express exception; it provides that "[e]xcept as provided in subparagraph (B), ... a quarterly fee shall be paid to the United States trustee." Section 1930(a)(6)(B) provides for increased quarterly fees in fiscal years 2018 through 2022 for debtors with quarterly disbursements of at least $1,000,000. Congress did not set forth any other exceptions in subsection (a)(6) and, specifically, did not except any kind of payment from the term "disbursements." "The general rule of statutory construction is that the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." *Cash Currency Exch., Inc. v. Shine (In re Cash Currency Exch., Inc.)*, 762 F.2d 542, 552 (7th Cir. 1985). This canon of construction counsels against a judicially created exception to disbursements.

44 CranGrow has included in its appellate materials a recent report of the Judicial Conference's Committee on the Administration of the Bankruptcy System, in which the Committee "noted the following issues with interpreting the relevant statutes: (1) whether certain payments constitute 'disbursements' for purposes of calculating the quarterly fee (specifically payments made by a

chapter 11 debtor to its post-petition lender in connection with a revolving line of credit) ....” *See* Appellee’s Supp. App. 42 & n.3. After noting these issues, the Report states that “[t]he Committee will further consider these issues and consider whether the Conference should make a recommendation to Congress regarding whether to reenact revised subsection (a)(6)(B).” *Id*. at 42. Thus, the Committee has not made any policy recommendations, but simply is in the process of discussing these issues. Additionally, the Report’s summary advises that “no recommendations presented herein represent the policy of the Judicial Conference unless approved by the Conference itself.” *Id*. at 22 (capitalization removed). Thus, the Report itself confirms that it is not the type of definitive Judicial Conference action necessary to undergird a § 1930(f)(3) waiver of fees.

45 Article 1, section 8 of the United States Constitution provides, in relevant part, that “The Congress shall have Power ... To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.”

46 *See* Derek F. Meek & Ellen C. Rains, *Applicability of USTP Guidelines to Bankruptcy Administrators*, 33 Am. Bankr. Inst. J., Nov. 2014, at 16.

47 *See* Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 Neb. L. Rev. 91, 129–31 (1995).

48 28 U.S.C. § 1930(a)(7) provides:

> In districts that are not part of a United States trustee region as defined in section 581 of this title, the Judicial Conference of the United States may require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection. Such fees shall be deposited as offsetting receipts to the fund established under section 1931 of this title and shall remain available until expended.

49 In addition to *St. Angelo v. Victoria Farms, Inc*., 38 F.3d 1525, 1529–33 (9th Cir. 1994), *amended*, 46 F.3d 969 (9th Cir. 1995), CranGrow’s position finds support in a recent decision from the bankruptcy court in the Western District of Texas. *See In re Buffets, LLC*, 597 B.R. 588 (Bankr. W.D. Tex. 2019). In *Buffets*, the bankruptcy court determined that the Judicial Conference’s decision to apply the new fee schedule in bankruptcy-administrator districts

> remedies the amendment’s violation of the Uniformity Clause for future cases, but not in this case. Like the lack of uniformity that originally existed between the two programs, the gap in time between the imposition of the quarterly fees in [trustee] districts and [bankruptcy-administrator] districts is problematic. ...
>
> The Bankruptcy Judgeship Act of 2017 violated the Constitution when it increased quarterly fees only in the UST program. “Under any standard of review, when Congress provides no justification for enacting a non-uniform law, its decision can only be considered to be irrational and arbitrary.” *St. Angelo*, 38 F.3d at 1532. While the quarterly fees now apply in BA districts from October 1, 2018, forward, the increased fees ostensibly owed by the Reorganized Debtors during the first three quarters of 2018 violate the Uniformity Clause. Therefore, the Reorganized Debtors are not required to pay the $ 250,000 in fees for the first three quarters of 2018, but rather the uniform quarterly fee of $ 30,000.

In re Buffets, 597 B.R. at 594–95.

50 Oral Argument at 20:36–21:45 (counsel for CranGrow acknowledging that “[i]t’s possible that [CranGrow] could have known there was a problem” even before the Bankruptcy Court handed down its decision and agreeing with the court that counsel relied on the fact that, when the Judicial Conference acted with respect to the bankruptcy-administrator districts, the Conference would correct the nonuniformity).

51 Counsel also noted that it is not apparent from the language of § 1930(a)(7) that the Judicial Conference had to take the affirmative step of re-voting to increase fees in bankruptcy-administrator districts every time that there is a change to the schedule in § 1930(a)(6). The plain language of § 1930(a)(7) is permissive, not mandatory, *see id*. (stating that “the Judicial Conference of the United States *may* require the debtor in a case under Chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection” (emphasis added)), allowing the Judicial Conference to implement fee increases commensurate with § 1930(a)(6) as it deems appropriate. Nevertheless, the 2001 report of the meeting at which the Judicial Conference implemented § 1930(a)(7) suggests that the Judicial Conference may have intended for its one-time vote to encompass all future fee increases. *See* Administrative Office of the United States Courts, Reports of the Proceedings of the Judicial Conference of the United States 46 (Mar. 14, 2001) (“To implement this statute, the Conference approved a Bankruptcy Committee recommendation that such fees be imposed in bankruptcy administrator districts in the amounts specified in 28 U.S.C. § 1930, as those amounts may be amended from time to time.”).

52 Our grant of the petition for direct review of the Bankruptcy Court’s order, which addresses only the issue whether the direct customer payments to CoBank are disbursements, cannot be read as permission to raise issues on appeal that were not argued

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and disposed of by the Bankruptcy Court.

53 As previously noted, *see supra* p.849 & note 32, the Bankruptcy Court held that CranGrow properly excluded payments made by its customers to CoBank from the calculation of its quarterly fees. Excluding those payments from the calculation of the quarterly fees saved CranGrow approximately $200,000 over the course of 2018. *See supra* note 42; Appellee's Br. 15. However, if we were to hold that the new fee schedule had been applied in an unconstitutional manner to CranGrow, CranGrow would be able to recoup an additional $150,000 in fees.

54 CranGrow also attacks the quarterly fee payment as an unconstitutional user fee. *See* Appellee's Br. 20–21. This argument was apparent and available to CranGrow during the pendency of its case before the Bankruptcy Court, but CranGrow simply failed to raise it. We therefore will not entertain it on appeal. *See, e.g.*, *Bank of Am., N.A. v. Veluchamy (In re Veluchamy)*, 879 F.3d 808, 821 (7th Cir. 2018) ("It is well established that a party waives the right to argue an issue on appeal if he failed to raise that issue before the lower court.").

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597 B.R. 588
United States Bankruptcy Court, W.D. Texas, San Antonio Division.

IN RE: BUFFETS, LLC, et al., Debtors

Case No. 16-50557-RBK
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Signed February 8, 2019

Synopsis
Background: In substantively consolidated Chapter 11 cases, reorganized debtors whose quarterly disbursements exceeded $1 million filed motion to determine the extent of their liability for post-confirmation quarterly fees payable to the United States Trustee (UST), requesting, inter alia, an order establishing their quarterly-fee liability in the amount of $4,875. UST objected and asked court to set debtors' liability for quarterly fees at $250,000. After holding a hearing and making findings of fact and conclusions of law, court rendered order denying debtors' motion. Reorganized debtors filed motion to reconsider, citing alleged constitutional violations.

Holdings: The Bankruptcy Court, Ronald B. King, Chief Judge, held that:

the term "disbursements," as used in the subsection of the federal bankruptcy-fees statute governing UST fees, would be interpreted broadly to include all payments made by reorganized debtors;

the statutory amendment which increased the maximum post-confirmation quarterly fees payable by certain Chapter 11 debtors with disbursements that equal or exceed $1 million when the UST System Fund balance is less than $200 million was unconstitutional as applied to these cases; and

the amendment did not apply retroactively to pending cases such as the cases at bar.

Motion granted.

West Codenotes

Unconstitutional as Applied

28 U.S.C.A. § 1930(a)(6)(B)

Attorneys and Law Firms

***591** Tiffany L. Cox, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., San Antonio, TX, Katherine C. Fackler, Andrea S. Hartley, Amy M. Leitch, Esther A. McKean, Akerman, LLP, Miami, FL, Jennifer K. Oldvader, Ogletree, Deakins, Nash, Smoak & Stewart, Kansas City, MO, Scott D. Lawrence, John E. Mitchell, David W. Parham, Akerman LLP, Rachael L. Smiley, Law Offices of Judith W. Ross, Dallas, TX, for Debtors.

Michael J.D. Sweeney, Getman, Sweeney & Dunn, PLLC, Kingston, NY, for Plaintiff.

Kara E. Casteel, Brigette G. McGrath, Ask LLP, Bethany J. Rubis, St. Paul, MN, Jennifer Christian, Marianna Udem, Ask LLP, New York, NY, David B. Kurzweil, Greenberg Traurig LLP, Atlanta, GA, for Trustee.

OPINION

Ronald B. King, Chief United States Bankruptcy Judge

Buffets, LLC, and its affiliates* ("Debtors" or, post-confirmation, "Reorganized Debtors") filed voluntary chapter 11 petitions on March 7, 2016. On April 27, 2017, the Debtors confirmed a plan and were substantively consolidated. The plan and confirmation order provide for payment of quarterly fees to the United States trustee (UST). In October 2017, Congress amended Title 28, section 1930, to provide for an 833 percent increase in the maximum post-confirmation quarterly fees payable by certain chapter 11 debtors with disbursements that equal or exceed $ 1 million when the UST System Fund balance is less than $ 200 million. 28 U.S.C. § 1930(a)(6)(B) (2018). The UST System Fund balance currently is less than $ 200 million, and the Reorganized Debtors' 2018 disbursements exceed $ 1 million in every quarter. *See* U.S. DEP'T OF JUSTICE, EXEC. OFFICE OF U.S. TRUSTEES, CHAPTER 11 QUARTERLY FEES, https://www.justice.gov/ust/chapter-11-quarterly-fees.

The principals of the Reorganized Debtors were shocked by the quarterly fee increase. The Reorganized Debtors filed a motion requesting an order establishing the quarterly-fee liability in the amount of $ 4,875 and determining the word "disbursements" in § 1930(a)(6) is limited to funds disbursed as priority and administrative

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expense claims, claims of creditors, and interests of equity security holders pursuant to the plan.

In response, the UST filed an objection to the motion. The UST argued that the Reorganized Debtors' interpretation of the term "disbursements" contravenes the word's plain meaning and relevant case law. The UST asked the Court to deny the Reorganized Debtors' motion and set liability for the quarterly fees at $ 250,000. The Court held a hearing and heard argument from the Reorganized Debtors and the UST. After the hearing, but before the ruling, the UST filed a supplemental brief in support of the objection. The Reorganized Debtors filed a supplemental brief, arguing that the amendment amounts to an unconstitutional violation of the Due Process Clause.

592** The Court later made findings of fact and conclusions of law, which were stated on the record pursuant to FED. R. BANKR. P. 7052 and 9014, and rendered an order denying the Reorganized Debtors' motion. The Court held that the quarterly fees should be calculated based upon all disbursements made during the quarter. The Reorganized Debtors filed a motion to reconsider the order in light of constitutional violations and a recent opinion from the Western District of Wisconsin, ***In re Cranberry Growers Coop., 592 B.R. 325 (Bankr. W.D. Wis. 2018) (direct appeal filed).

On October 18, 2018, this Court issued a Notice and Certification of Constitutional Questions under 28 U.S.C. § 2403 and FED. R. CIV. P. 5.1. On November 7, 2018, this Court entered an Order Granting Request to File Brief in Response to Constitutional Challenges.

On November 9, 2018, the UST filed "The United States Trustee's Motion to Vacate the Court's November 7, 2018 Order or in the Alternative, to Adjust the Briefing Schedule so the Government can Meaningfully Address the Debtors' Attempt to Invalidate a Federal Statute." On November 16, 2018, the Court entered an order granting the motion, in part, setting forth a briefing schedule, and identifying issues to be addressed in the parties' briefs.

On December 7, 2018, the Reorganized Debtors filed "Reorganized Debtors' Memorandum of Law in Support of its Motion to Determine Extent of Liability for Post-Confirmation Quarterly Fees Payable to United States Trustee Pursuant to 28 U.S.C. § 1930(a)(6)." The Debtors argued that the statute violates the Uniformity Clause of Article I of the United States Constitution, and the retroactive effect of the amendment on the Reorganized Debtors violates the constitutional protections of due process and prohibition against takings. Further, the Debtors argued that UST fees are a form of user-fee rather than a tax; therefore, the user-fees are grossly disproportionate to the services that the UST provides to the Debtors. The UST filed its response brief on December 21, 2018.

The Court finds that it has jurisdiction to render a final order in this core proceeding pursuant to 28 U.S.C. §§ 157(b) and 1334. Venue is proper under 28 U.S.C. §§ 1408 and 1409. This opinion constitutes the findings of fact and conclusions of law of the Court pursuant to FED. R. BANKR. P. 7052 and 9014.

The issue before the Court is whether 28 U.S.C. § 1930(a)(6)(B) requires the Reorganized Debtors to pay $ 250,000 in quarterly fees to the United States trustee for each quarter of 2018. The amendment codified in § 1930(a)(6)(B) provides the following:

> During each of fiscal years 2018 through 2022, if the balance in the United States Trustee System Fund as of September 30 of the most recent full fiscal year is less than $ 200,000,000, the quarterly fee payable for a quarter in which disbursements equal or exceed $ 1,000,000 shall be the lesser of 1 percent of such disbursements or $ 250,000.

BACKGROUND

A discussion of the events that led to this statutory provision and its amendment is instructive. In 1986, after the completion of a pilot program, Congress established the UST program. The Attorney General was directed to appoint USTs in all districts, including Alabama and North Carolina; however, Congress excluded Alabama and North Carolina from the program. Instead, Alabama and North Carolina utilize the Bankruptcy Administrator (BA) program, which reports to the Administrative Office of the United States ***593** Courts. The BA program is part of the judicial branch while the UST program is part of the executive branch. Congress mandated that the UST program be implemented in Alabama and North Carolina either upon the districts electing to join or by October 1, 1992, later extended to October 1, 2002. *See* P.S.L. No. 101-650, Dec. 11, 1990, title III, § 317(a) & (c), 104 Stat. 5115, 5116. Despite Congress's original intent to implement the UST program nationwide, it has never been

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implemented in Alabama and North Carolina. The six districts in Alabama and North Carolina continue to operate under the BA program.

The UST and BA programs are a necessary component of the chapter 11 system in that they provide post-petition supervision of chapter 11 cases in their respective districts. In 1992, the General Accounting Office (GAO) filed a report recommending the UST program absorb the BA program because there was no need to continue two separate programs. GAO Report No. GAO/GGD-92-133, "Bankruptcy Administration: Justification Lacking for Continuing Two Parallel Programs" (Sept. 28, 1992). "Accordingly, because of the advantages in oversight and funding provided by the UST program and to make bankruptcy administration consistent across the country, we recommend that Congress incorporate the BA program into the UST program now rather than in 2002 as currently scheduled under statute." *Id.* at 2. The report indicated that the purpose of the UST System Fund was to create a self-funding mechanism. Originally, chapter 11 debtors in UST districts paid filing and quarterly fees, but debtors in BA districts were *not* charged quarterly fees. The report indicated that the UST program had a surplus because the fee revenues exceeded program funding by millions of dollars. *Id.* The Bankruptcy Reform Act of 1994 remedied several differences between the two programs, but *it did not apply uniform fee requirements*. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 103d Cong. (2d Sess.) (Oct. 6, 1994).

QUARTERLY FEES

Quarterly fees are based on the total amount of disbursements in each quarter. 28 U.S.C. § 1930(a)(6)(A). The term "disbursements" is not defined in the statute, but a majority of courts interpret the term broadly to include all transfers from the estate, including payments made in the ordinary course of business. *See* ***In re Danny's Markets, Inc.***, 266 F.3d 523, 526 (6th Cir. 2001) (defining disbursements as "all payments to third parties directly attributable to the existence of the bankruptcy proceeding"); ***In re Celebrity Home Entm't, Inc.***, 210 F.3d 995, 998 (9th Cir. 2000) (describing disbursements as an "expansive term that captures 'all payments' "); ***In re Jamko, Inc.***, 240 F.3d 1312, 1315–16 (11th Cir. 2001) (holding post-confirmation quarterly fees include all post-confirmation disbursements); ***In re Pars Leasing, Inc.***, 217 B.R. 218 (Bankr. W.D. Tex. 1997) (holding disbursements include not only the debtor-in-possession's cash disbursements, but also payments made by third parties for the benefit of the debtor-in-possession); ***In re R&K Fabricating, Inc.***, 2013 WL 5493161, at *3–4 (Bankr. S.D. Tex. Sept. 30, 2013) (holding disbursements include both payments under a plan and "all other amounts paid out by a reorganized debtor"). Certainly, this issue could be resolved if Congress amended the statute with a definition of the term "disbursements."

On September 21, 2018, Judge Catherine J. Furay in *In re Cranberry Growers Coop.* excluded repayments on a revolving line of credit from disbursements because the debtor was contractually obligated to use it to make ordinary course operating payments. ***594 *In re Cranberry Growers Coop.***, 592 B.R. 325 (Bankr. W.D. Wis. 2018). The Reorganized Debtors asked this Court to follow Judge Furay's opinion and narrowly interpret disbursements to only include payments made to creditors of the bankruptcy estate. This interpretation would result in the Reorganized Debtors owing $ 4,875.00 in fees payable to the UST's office for each quarter of 2018.

After careful examination, this Court agrees with Judge Furay that the new UST fees are excessive and certain situations may require a limitation on what constitutes a disbursement, but a narrow interpretation of disbursements that applies in the case of a revolving line of credit does not apply in this case. This Court reaffirms its original ruling that the term "disbursements" includes all payments made by the Reorganized Debtors. A broad interpretation of disbursements, however, does not subject the Reorganized Debtors' 2018 disbursements to the increased quarterly fee requirement of § 1930(a)(6)(B). As applied to the Reorganized Debtors, the amendment is invalid for the reasons set forth below.

1. The amendment to § 1930(a)(6) created non-uniform bankruptcy law.

In *St. Angelo v. Victoria Farms, Inc.*, the Ninth Circuit struck down the statutory amendment that extended the BA program, holding that it violated the Uniformity Clause. *See* ***St. Angelo v. Victoria Farms, Inc.***, 38 F.3d 1525, 1533, 1535 (9th Cir. 1994). The Uniformity Clause of the Constitution states "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." U.S. CONST. art. I § 8, cl. 1. The Ninth Circuit held that the extension of the existence of a BA program in Alabama and North Carolina and a UST program in the remaining states was unconstitutionally non-uniform because the fee system was not uniform. ***St. Angelo***, 38 F.3d at 1535.

While state laws may cause dissimilarities in the effects of bankruptcy laws as applied, with regard to the BA program, "[i]t is federal law, rather than state law, that

causes creditors and debtors to be treated differently in North Carolina and Alabama." *Id.* at 1531. Although exceptions exist to the uniformity requirement to deal with geographically isolated problems, such exceptions do not apply to the inequality of fees in the BA program.

Since the *St. Angelo* decision, the Federal Courts Improvement Act of 2000 was signed into law, and 28 U.S.C. § 1930 was amended to allow the imposition of fees in BA districts. 28 U.S.C. § 1930(a)(7). The Judicial Conference of the United States ("JCUS") approved the Bankruptcy Committee's recommendation to impose quarterly fees "in the amounts specified" in § 1930. *See* JCUS–SEP/OCT 01, pp. 45–46. The Bankruptcy Judgeship Act of 2017 revised subsection § 1930(a)(6) to increase the UST quarterly fees by 833 percent, but this increase did *not* immediately apply to the BA districts. The BA districts petitioned the Committee to apply the amendment to all districts, the Committee agreed, and the JCUS approved. The increase began applying to BA districts in October 2018, the first quarter of the new fiscal year, nine months after the effective date in UST districts. *See* JCUS-SEP/18, pp. 11–12.

The JCUS's decision to apply the fees to BA districts remedies the amendment's violation of the Uniformity Clause for future cases, but not in this case. Like the lack of uniformity that originally existed between the two programs, the gap in time between ***595** the imposition of the quarterly fees in UST districts and BA districts is problematic. "If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply." ***Marbury v. Madison***, 5 U.S. 137, 178, 1 Cranch 137, 2 L.Ed. 60 (1803).

The Bankruptcy Judgeship Act of 2017 violated the Constitution when it increased quarterly fees only in the UST program. "Under any standard of review, when Congress provides no justification for enacting a non-uniform law, its decision can only be considered to be irrational and arbitrary." ***St. Angelo***, 38 F.3d at 1532. While the quarterly fees now apply in BA districts from October 1, 2018, forward, the increased fees ostensibly owed by the Reorganized Debtors during the first three quarters of 2018 violate the Uniformity Clause. Therefore, the Reorganized Debtors are not required to pay the $ 250,000 in fees for the first three quarters of 2018, but rather the uniform quarterly fee of $ 30,000.

2. The § 1930(a)(6) amendment should not be applied retroactively.

In addition to the statute's violation of the Uniformity Clause, it is also being retroactively applied to the Reorganized Debtors. There is a statutory presumption against retroactively applying statutes. ***Landgraf v. USI Film Prods.***, 511 U.S. 244, 286, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). In *Landgraf*, The Supreme Court set out a detailed analysis of the antiretroactivity canon. *Id.* "The presumption against statutory retroactivity is founded upon sound considerations of general policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation." *Id.* Additionally, the importance of the presumption against retroactivity is prevalent in the Ex Post Facto Clause, the Obligation of Contracts Clause, the Fifth Amendment Takings Clause, the prohibition of Bills of Attainder, and the Due Process Clause. *Id.* at 266, 114 S.Ct. 1483.

To determine if a statute applies retroactively, "the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280, 114 S.Ct. 1483. If Congress did so, the inquiry ends. If, however, there is no express reach, the court should apply the rules of construction to determine the reach intended by Congress in the statute. ***Lindh v. Murphy*,** 521 U.S. 320, 323–26, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). If the court cannot determine the statute's reach, then it "must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when [it] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." ***Landgraf***, 511 U.S. at 280, 114 S.Ct. 1483. If the statute is retroactive, "then it does not govern absent clear congressional intent favoring such a result." *Id.*

In *Landgraf*, the Court considered the Congressional intent behind the Civil Rights Act of 1991, which amended Title VII of the Civil Rights Act of 1964. *Id.* at 251, 114 S.Ct. 1483. The petitioner argued that Congress expressed an intent to apply the statute retroactively by including the phrase "[e]xcept as otherwise specifically provided." *Id.* at 257, 114 S.Ct. 1483. The Court rejected this argument, reasoning that if Congress intended retroactivity, it would have used the same or similar retroactive language from the proposed 1990 Title VII bill instructing that the amendment "shall apply to all proceedings pending on or commenced after the date of ***596** enactment of this Act." *Id.* at 260, 114 S.Ct. 1483 (citing S. 2104, 101st Cong.,1st Sess. § 15(a)(4) (1990)).

Like the Title VII amendment, Congress did not expressly prescribe the reach of § 1930(a)(6)(B). The text of the statute begins with "[d]uring each of fiscal years 2018 through 2022," but this does not indicate a clear intent by Congress to *retroactively* apply the fees to pending cases.

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28 U.S.C. § 1930(a)(6)(B). "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." ***Landgraf***, 511 U.S. at 257, 114 S.Ct. 1483. Additionally, the legislative history to § 1930 provides little or no guidance on the matter. *See* H.R. Rep. No. 764, 99th Cong., 2d Sess. 22, *reprinted in* 1986 U.S.C.C.A.N. 5227, 5234–35. In proposing the amendment, the Judiciary Committee Report briefly explained that the UST program is funded by fees collected in bankruptcy cases. In the past, there was a surplus in the fund, but a decline in nationwide filings has decreased the amount of funds available. *See id.*

Nothing in the statute or legislative history indicates that Congress intended the amendment to apply retroactively. While the increase applies only to disbursements made on or after January 1, 2018, it does not specify its application to cases pending. The 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 October 26, 2017, and the fees became effective in the first quarter of 2018. "The *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." ***Landgraf***, 511 U.S. at 283–84, 114 S.Ct. 1483 (emphasis in original). Absent clear congressional intent, the court is not to read "a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment." *Id.* at 284, 114 S.Ct. 1483.

The amendment imposes new duties and liabilities on the Reorganized Debtors with respect to transactions already completed. This increase in financial liability negatively impacts the Reorganized Debtors. The plan is well underway, and in this case, like many chapter 11 reorganizations, there are numerous unforeseen administrative expenses, which the Reorganized Debtors must pay, in addition to the day-to-day costs of running over 100 restaurants located all over the United States. An increase in UST fees to $ 250,000 per quarter ($ 1 million per year) requires the Debtors to pay 833 percent more in UST fees than were required at the time of filing the case or confirmation of a plan. The amendment to § 1930(a)(6) would allow the UST to divert funds from the Reorganized Debtors' already lean budget to their extreme detriment. If the amendment applied to this case, the priority claimants would be at risk of non-payment and the plan's feasibility would be compromised. Section 1930(a)(6)(B) cannot be applied retroactively in this case; therefore, the quarterly fee increase shall not be applied in this chapter 11 case.

The amendment's possible retroactive application also violates the Due Process Clause. The Due Process Clause provides that "No person shall be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. The Supreme Court has established that "[t]he Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its ***597** retroactive application." ***Landgraf***, 511 U.S. at 266, 114 S.Ct. 1483 (citing ***Usery v. Turner Elkhorn Mining Co.***, 428 U.S. 1, 17, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976)). Applying the fees retroactively in this case did not provide the Reorganized Debtors with sufficient notice of the increased fees prior to filing chapter 11 or confirmation of a plan.

Section 1141 of the Bankruptcy Code describes the effect of confirmation of a plan. "[T]he important effect of a confirmed Chapter 11 plan is the creation of a contract which creates *vested substantive property rights* and that is *binding* on the debtor, on any entity issuing securities under the plan, on any entity acquiring property under the plan, and on any prepetition creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of any of these parties is impaired under the plan and whether or not any of these parties has accepted the plan." ***In re Burk Dev. Co.***, 205 B.R. 778, 796–97 (Bankr. M.D. La. 1997) (citing ***Holywell Corp v. Smith***, 503 U.S. 47, 56–59, 112 S.Ct. 1021, 117 L.Ed.2d 196 (1992); ***Eubanks, M.D. v. FDIC***, 977 F.2d 166 (5th Cir. 1992); ***Bank of Louisiana v. Pavlovich (In re Pavlovich)***, 952 F.2d 114 (5th Cir. 1992)) (emphasis in original).

The UST argues that the parties were properly notified by a letter sent out in December 2017. At the time of such notice, the Reorganized Debtors had already confirmed a plan and distributed millions of dollars. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." ***Landgraf***, 511 U.S. at 265, 114 S.Ct. 1483.

With the knowledge of the increased fees, future debtors may select pre-packaged plans or choose to restructure debts outside of bankruptcy to avoid the quarterly fees. The Reorganized Debtors in this case had no such opportunity. The Debtors' post-confirmation reports indicate a total of $ 65,274,569.74 in disbursements for the first quarter of 2018; $ 67,303,248.20 for the second quarter; and, $ 62,019,084.00 for the third quarter. Under the old statute, this would require quarterly-fee payments of $ 30,000 per quarter. The Reorganized Debtors are required to make quarterly-fee payments of $ 30,000 per quarter for the first three quarters of calendar year 2018, in adherence with the

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old statute in order to avoid constitutional violations and retroactive application of the statute.

CONCLUSION

After careful consideration of § 1930(a)(6)(B), this Court holds the amendment unconstitutional as applied to this case due to its lack of uniformity for the first three quarters of 2018. The amendment also cannot be retroactively applied to the Reorganized Debtors for any relevant year. Accordingly, the Reorganized Debtors' motion will be granted. A separate order will be entered.

All Citations

597 B.R. 588, 66 Bankr.Ct.Dec. 212

Footnotes

* **THE DEBTORS ARE BUFFETS, LLC; HOMETOWN BUFFET, INC.; OCB RESTAURANT COMPANY, LLC; OCB PURCHASING CO.; RYAN'S RESTAURANT GROUP, LLC; FIRE MOUNTAIN RESTAURANTS, LLC; AND TAHOE JOE'S, INC. THE CASES WERE JOINTLY ADMINISTERED.**

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608 B.R. 96
United States Bankruptcy Court, D. Connecticut, Hartford Division.

IN RE: CLINTON NURSERIES, INC.; Clinton Nurseries of Maryland, Inc.; Clinton Nurseries of Florida, Inc.; and Triem LLC, Debtors.
Clinton Nurseries, Inc.; Clinton Nurseries of Maryland, Inc.; Clinton Nurseries of Florida, Inc.; and Triem LLC, Plaintiffs
v.
William K. Harrington, United States Trustee, Region 2, Defendant.

CASE No. 17-31897 (JJT), CASE No. 17-31898 (JJT), CASE No. 17-31899 (JJT)
|
CASE No. 17-31900 (JJT) (Jointly Administered under Case No. 17-31897 (JJT))
|
Signed August 28, 2019

Synopsis
Background: Related Chapter 11 debtors filed motion to determine amount of United States Trustee (UST) fees, arguing, first, that statutory amendments which increased UST quarterly fees created non-uniform bankruptcy law in violation of the Bankruptcy Clause of the United States Constitution, and second, that amendments transformed their Chapter 11 quarterly fees into an unconstitutional user fee. UST objected, contending, inter alia, that claims raised in motion should have been brought in an adversary proceeding, and its objection was treated as a motion to dismiss.

Holdings: The Bankruptcy Court, James J. Tancredi, J., held that:

debtors only had standing to challenge those fees that they alleged were different from those they would have paid under the pre-amendment fee schedule;

the issues raised in debtors' motion required an adversary proceeding, into which the court would convert this matter, sua sponte, using its powers to issue any order that is necessary or appropriate to carry out the provisions of the Bankruptcy Code;

the bankruptcy-fee statute is uniform on its face and, thus, the subject amendments do not violate the Bankruptcy Clause;

because the Bankruptcy Clause is part of Article I, which only applies to Congress, the UST cannot violate the Clause;

the amended statute, as written, was not being misapplied unconstitutionally to debtors; and

debtors failed to establish that the increase in quarterly fees was an unconstitutional taking under the Fifth Amendment.

Ordered accordingly.

Attorneys and Law Firms

***102** Eric A. Henzy, Esq., Zeisler & Zeisler, P.C., 10 Middle Street, 15th Floor, Bridgeport, CT 06604, Attorney for the Movants/Plaintiffs

Robert J. Schneider, Jr., Esq., Kim L. McCabe, Esq., Steven E. Mackey, Esq., Department of Justice, Office of the United States Trustee, Region 2, Giamo Federal Building, 150 Court Street, Room 302, New Haven, CT 06510, Attorneys for the Respondent/Defendant

RE: ECF Nos. 672, 725, 726, 743, 773

RULING AND ORDER CONVERTING CONTESTED MOTION TO ADVERSARY PROCEEDING AND MEMORANDUM OF DECISION DISMISSING ADVERSARY PROCEEDING FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED

James J. Tancredi, United States Bankruptcy Judge

I. INTRODUCTION

In his famous *Lochner* dissent, Justice Holmes wrote:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed

> with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.... Some ... laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory .... It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Lochner v. New York, 198 U.S. 45, 75–76, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting).[1] Although those words concerned a different law passed in a different era that was struck down under a different part of the Constitution, they are apt here.

The related debtors, Clinton Nurseries, Inc.; Clinton Nurseries of Maryland, Inc.; Clinton Nurseries of Florida, Inc.; and Triem LLC (collectively, "Debtors") filed a Motion to Determine Amount of United States Trustee Fees Pursuant to 28 U.S.C. § 1930(a)(6) ("Motion," ECF No. 672), making two principal arguments: (1) that the 2017 amendments to 28 U.S.C. § 1930(a)(6), made through the Bankruptcy Judgeship Act of 2017, Pub. L. 115-72, Div. B, § 1004(a); 131 Stat. 1232 ("2017 Amendments"), created non-uniform bankruptcy law, in violation of Article 1, Section 8, Clause 4 of the United States Constitution ("Bankruptcy Clause"), and (2) that the 2017 Amendments transformed the Debtors' Chapter 11 quarterly fees into an unconstitutional user fee.

The United States Trustee for Region 2, William K. Harrington ("UST"), filed two ***103** objections, one procedural ("Procedural Objection," ECF No. 725) and one substantive ("Substantive Objection," ECF No. 726). In the Procedural Objection, the UST argues that the claims raised in the Motion must be brought in an adversary proceeding, and so the Motion should be denied. In the Substantive Objection, the UST argues that the 2017 Amendments do not violate either the Bankruptcy Clause or the Fifth Amendment to the United States Constitution.

The Court has studied the Motion, the Objections, and the parties' reply briefs ("Reply," ECF No. 743; "Sur-Reply," ECF No. 773). After a scrupulous review of the statute in question, along with governing precedent, and the record of the hearing, the Court determines that: (1) Triem LLC, as alleged, has no standing to pursue these matters; (2) the Court will convert the Motion to an Adversary Proceeding and treat the UST's Substantive Objection as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure; (3) the 2017 Amendments do not violate the Bankruptcy Clause and are otherwise being faithfully executed by the UST; and (4) the Debtors' allegations, as pleaded, are insufficient to establish a takings claim under the Fifth Amendment. The Court, therefore, DISMISSES the Adversary Proceeding upon the terms further stated within the Discussion.

II. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b)[2] and derives its authority to hear and determine this matter on reference from the District Court pursuant to 28 U.S.C. § 157(a) and (b)(1). Venue is proper under 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

III. DISCUSSION

A. Triem LLC Does Not Have Standing; Clinton Nurseries of Maryland, Inc., Has Limited Standing; No Debtor Has Standing Concerning 2019 Fees

The Court must first address the threshold issue of standing. Among other things, standing requires that a party seeking relief have an "injury in fact" that is "concrete and particularized[.]" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations and internal quotation marks omitted). While pointing out that the Debtors combined pay substantially increased fees, the Debtors' allegations in the Motion make clear that not every Debtor was affected every quarter. As alleged, Triem LLC paid the exact same fees in each quarter of 2018 as it would have paid under the prior version of 28 U.S.C. § 1930(a)(6). Clinton Nurseries of Maryland, ***104** Inc., meanwhile, was only affected by the 2017 Amendments in two of the four quarters. And, although the Debtors posit that their 2019 quarterly fees would be similar, the Debtors have not supplemented their pleadings to include what harm, if any, the Debtors have thus far experienced in 2019.[3]

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The Debtors' prayer for relief in the Motion seeks "an order determining that US Trustee fees payable by the Debtors in these cases will be calculated based on the pre-amendment 28 U.S.C. § 1930(a)(6) fee schedule[.]" Implicit in this request is a concession that the Debtors would not consider themselves harmed by the former fee schedule. Therefore, the Court finds that the Debtors only have standing to challenge those fees that they allege are different from those they would have paid under the former fee schedule, which means that Triem LLC does not have standing to pursue this Motion,[4] Clinton Nurseries of Maryland, Inc., only has standing to challenge the second and third quarters of 2018, and no debtor has standing to challenge its 2019 fees under the facts alleged.

B. The Court Converts This Matter to an Adversary Proceeding

The Court next addresses the UST's Procedural Objection, which also poses threshold issues, but, as will be discussed, not jurisdictional issues. The UST argues that under Federal Rule of Bankruptcy Procedure ("FRBP") 7001, the Debtors can only seek relief in an Adversary Proceeding. The Debtors maintain that FRBP 3012, rather than FRBP 7001, governs the issues and that, even if this matter should have been filed as an Adversary Proceeding, the UST has not been prejudiced, the Court could apply Part VII rules, or the Court could convert the matter to an Adversary Proceeding. The Court agrees with the UST that the issues raised in the Motion require an Adversary Proceeding, but the Court uses its powers under 11 U.S.C. § 105(a) to *sua sponte* convert the matter to an Adversary Proceeding.

1. *FRBP 7001 Applies to This Matter*

The parties principally disagree about which FRBP has been invoked by the issues raised in the Motion.[5] The UST argues that FRBP 7001 applies because the Debtors seek "to determine the validity ... [of an] interest in property" and seek "to obtain a declaratory judgment relating to any of the foregoing[.]" Fed. R. Bankr. P. 7001(2) and (9). The UST also argues ***105** that FRBP 2020[6] does not apply because the Debtors are not challenging the UST's actions, but an act of Congress. Even if FRBP 2020 applies, the UST argues that FRBP 9014 itself requires the Debtors to seek relief through an Adversary Proceeding. The Debtors, meanwhile, assert that under FRBP 3012, the amount of a priority claim is determined as a contested matter and that the Debtors are challenging the UST's actions, through FRBP 2020, in issuing invoices seeking payment of quarterly fees. The Court agrees with the UST.

The UST is correct that the Debtors seek "to determine the validity ... [of an] interest in property," Fed. R. Bankr. P. 7001(2), namely, money that is otherwise property of the Debtors' estates. FRBP 7001(2) does exempt from its definition "proceeding[s] under Rule 3012." FRBP 3012 states, in relevant part, that "the court may determine ... the amount of a claim entitled to priority under § 507 of the Code[,]" and that such "may be made by motion[.]" Fed. R. Bankr. P. 3012. The advisory committee notes make clear, however, that "[a]n adversary proceeding is commenced when the validity, priority, or extent of a lien is at issue as prescribed by Rule 7001. That proceeding is relevant to the basis of the lien itself" while FRBP 3012 is meant for valuation purposes.[7] *Id.*

The Debtors here do not merely seek to value what is owed to the UST. Their allegations make clear that they know how much they would owe for 2018 under the current and former versions of 28 U.S.C. § 1930(a)(6). Instead, the Debtors seek a determination that any amount paid beyond what the former fee schedule prescribed is invalid. Such must be sought in an Adversary Proceeding. *See* Fed. R. Bankr. P. 7001(9).

FRBP 2020 is also inapplicable to this matter. Although the Rule applies to "proceeding[s] to contest any act or failure to act by the [UST,]" according to the advisory committee notes, it "does not provide for advisory opinions in advance of the act." Fed. R. Bankr. P. 2020. Because the Debtors seek determinations both for the fees already assessed and those to be assessed in the future, FRBP 2020 does not help the Debtors.[8]

2. *The Court Can Convert the Motion to an Adversary Proceeding*

Having determined that FRBP 2020 and FRBP 3012 do not apply to this matter, the Court is left with only FRBP 7001. That, however, does not mean that the Court must deny the Motion and have the Debtors start over by filing an Adversary Proceeding. As the Debtors noted, this Court may convert the matter to an Adversary Proceeding. Unlike other cases where this Court has ordered that the Debtor file an Adversary Proceeding, the parties in this matter have fully briefed what they both consider, at this point at least, purely legal issues. In the interests of efficiency and judicial economy, the Court finds that the parties have had their full and fair opportunity to address the ***106** merits of these issues,[9] so denying the Motion and forcing the Debtors to start over and file an Adversary Proceeding would severely elevate form over substance.[10]

Instead of doing that, the Court will instead exercise its prerogative to *sua sponte* convert the contested matter to an Adversary Proceeding. The Bankruptcy Code allows

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this Court "to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. § 105(a). This power is broad enough to permit a court to "convert a contested matter to an adversary proceeding on its own motion." *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn)*, 401 B.R. 872, 892 (Bankr. S.D. Tex. 2009) (citing *Costa v. Marotta, Gund, Budd & Dzera, LLC*, 281 F. App'x 5, 6 (1st Cir. 2008) (per curiam); *Johnson v. Stemple (In re Stemple)*, 361 B.R. 778, 784 (Bankr. E.D. Va. 2007)). Accordingly, the Court OVERRULES the Procedural Objection and CONVERTS this matter to an Adversary Proceeding.

3. *The Court Treats the Substantive Objection as a Motion to Dismiss*

This procedure of converting a contested matter to an Adversary Proceeding was used in the face of this precise argument made by the UST in *In re Circuit City Stores, Inc.*, No. 08-35653, 606 B.R. 260, 265–66, 2019 WL 3202203, at *3–4 (Bankr. E.D. Va. July 15, 2019), and this Court readily acknowledges using the same authorities and logic to convert this matter as well. The *Circuit City* court decided that because "there were no material facts in dispute and that the matters raised in the pleadings were purely dispositive questions of law, the Court entertained the pleadings as cross-motions for summary judgment under Bankruptcy Rule 7056 and proceeded thereon." *Id.* at 267, at *4 n.19.

This Court is wary of proceeding under FRBP 7056. Although the parties do not seem to have any factual disputes at this point, this Court, unlike the *Circuit City* court, is faced with the argument that the Debtors' quarterly fees are takings, violating the Fifth Amendment. That claim, for reasons discussed in part III.D of this Memorandum, is ordinarily a fact-intensive exercise, and the Debtors have requested that the Court rule first on the legal cognizability of the claim before any discovery on it proceeds. Therefore, the Court will instead entertain the Debtors' Motion as a complaint; the UST's Substantive Objection as a motion to dismiss under ***107** Rule 12(b)(6) of the Federal Rules of Civil Procedure, as applied by FRBP 7012; the Debtors' Reply as an objection to the motion to dismiss; and the UST's Sur-Reply as a reply to the objection. To avoid confusion, the Court will continue to refer to the pleadings as they have been labeled by the parties, as already abbreviated by the Court (i.e., the Court will still refer to the Debtors' complaint as the "Motion," the UST's motion to dismiss as the "Substantive Objection," etc.). From this point forward in the Memorandum, the Court has not considered any attachment to any pleading to the extent that any would be considered evidence unless pleaded by the Debtors. Further, the Court has not considered any factual allegation by the UST that contradicts or supplements the allegations made in the Debtors' Motion.

The Court turns to the following applicable legal standard.

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in [*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)], the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*, at 555, 127 S.Ct. 1955 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555, 127 S.Ct. 1955. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.*, at 557, 127 S.Ct. 1955.
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, at 570, 127 S.Ct. 1955. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556, 127 S.Ct. 1955. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.*, at 557, 127 S.Ct. 1955 (brackets omitted).
>
> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.*, at 555, 127 S.Ct. 1955 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives

> a motion to dismiss. *Id.*, at 556, 127 S.Ct. 1955. Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.... But where the well-pleaded facts do not permit the court to infer ***108** more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).
>
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 677–79, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citation omitted). Having reached this point, the Court finally considers the merits.[11]

C. The 2017 Amendments Do Not Violate the Bankruptcy Clause

Article I, Section 8, Clause 4 of the United States Constitution vests Congress with the power "[t]o establish ... uniform Laws on the subject of Bankruptcies throughout the United States[.]" "To this specific grant, there must be added the powers of the general grant of clause eighteen. 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers ... [.]' " *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513, 58 S.Ct. 1025, 82 L.Ed. 1490 (1938). "The laws passed on the subject [of bankruptcy] must, however, be uniform throughout the United States, but that uniformity is geographical and not personal[.]" *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 188, 22 S.Ct. 857, 46 L.Ed. 1113 (1902). "The uniformity requirement is not a straitjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner. A bankruptcy law may be uniform and yet may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States." *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 469, 102 S.Ct. 1169, 71 L.Ed.2d 335 (1982) (citation and internal quotation marks omitted). In certain circumstances, Congress may "take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Id.* (citation and internal quotation marks omitted). "To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors." *Id.* at 473, 102 S.Ct. 1169. Thus, if a bankruptcy law applies with geographic uniformity to a particular class of debtors, it will pass muster.

The UST Program, a division of the Department of Justice, was established as a pilot program in conjunction with the adoption of the Bankruptcy Code in 1978. *See* Pub. L. 95-598, Title II, § 224(a), 92 Stat. 2662. The program became permanent in 1986 and now serves every district except those in Alabama and North Carolina. *See* Pub. L. 99-554, Title I, § 111(a)–(c), 100 Stat. 3090, 3091. The six districts ***109** in those two states are served by Bankruptcy Administrators ("BAs"), who operate under the purview of the Judicial Branch. The duties of BAs, in essence, match those of USTs.

Under 28 U.S.C. § 1930(a)(6), debtors in Chapter 11 cases are responsible for paying quarterly fees, the amount of which depends upon a number of factors. Initially, Chapter 11 debtors in BA districts did not have to pay any quarterly fees. In 1994, the Ninth Circuit, in *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1531 (9th Cir. 1994), *as amended by* 46 F.3d 969 (9th Cir. 1995), found this arrangement unconstitutional because Congress "provided no indication that the exemption [from the fees] in question was intended to deal with a problem specific to North Carolina and Alabama[.]" The Ninth Circuit, however, refused to find the dual system of USTs and BAs unconstitutional on its own, *id.* at 1532–33, and that dual system has persisted to this day.[12]

In response to *Victoria Farms*, the Judicial Conference asked Congress for permission to charge fees in BA districts "comparable" to those in UST districts. Report of the Proceedings of the Judicial Conference of the United States 10 (Mar. 1996). In 2000, Congress added subsection (7) to 28 U.S.C. § 1930(a). Pub. L. 106-518, Title I, § 105, 114 Stat. 2411. Shortly thereafter, the Judicial Conference began imposing quarterly fees in BA districts "in the amounts specified" in 28 U.S.C. § 1930(a)(6). Report of the Proceedings of the Judicial Conference of the United States 45–46 (Sept./Oct. 2001). In 2017, Congress amended 28 U.S.C. § 1930(a)(6), increasing quarterly fees, ostensibly to provide more money to the UST Program, which is self-funded, and to endow additional bankruptcy judgeships.[13] Bankruptcy Judgeship Act of 2017, Pub. L. 115-72, Div. B, § 1004(a), 131 Stat. 1232. Beginning January 1, 2018, quarterly fees increased in all Chapter 11 cases in all UST districts, whether new or pending; however, the Judicial Conference did not immediately

implement the fee increase in BA districts. Instead, the Judicial Conference adopted those fees beginning October 1, 2018, and only in cases filed on or after that date. Report of the Proceedings of the Judicial Conference of the United States 11–12 (Sept./Oct. 2018).[14]

The constitutionality of the 2017 Amendments was first addressed in *In re Buffets, LLC*, 597 B.R. 588 (Bankr. W.D. Tex. 2019), *appeal docketed*, No. 19-90020 (5th Cir. Aug. 16, 2019). In *Buffets*, the court held that the Judicial Conference's late implementation of quarterly fee increases under 28 U.S.C. § 1930(a)(6) and (7) meant that:

> The Bankruptcy Judgeship Act of 2017 violated the Constitution when it increased quarterly fees only in the UST ***110** program. "Under any standard of review, when Congress provides no justification for enacting a non-uniform law, its decision can only be considered to be irrational and arbitrary." [*Victoria Farms*], 38 F.3d at 1532. While the quarterly fees now apply in BA districts from October 1, 2018, forward, the increased fees ostensibly owed by the Reorganized Debtors during the first three quarters of 2018 violate the Uniformity Clause.

Id. at 595.[15] The Court then determined that the debtors in that case were "not required to pay the $250,000 in fees for the first three quarters of 2018, but rather the uniform quarterly fee of $30,000." *Id.* at 596.[16]

More recently, the aforementioned *Circuit City* court adopted the *Buffets* rationale when it held the 2017 Amendments unconstitutional. 606 B.R. at 269–71, 2019 WL 3202203, at *6–7.[17] The court there noted that for the first three quarters of 2018, "increased quarterly fees [were] assessed against chapter 11 debtors in only 88 of the 94 federal judicial districts throughout the country. It was not until October 1, 2018, that the [Judicial Conference] approved the imposition of quarterly fees on chapter 11 debtors in the BA Districts 'in the amounts specified in 28 U.S.C. § 1930(a)(6)(B).' ... The Bankruptcy Judgeship Act offered no justification for excluding the BA Districts from the fee step-up." *Id.* at 269, at *6 (citation omitted). The court also observed that debtors with cases pending when the fee increases went into effect in UST districts are charged the increased fees, but those in BA districts are not. *Id.* "As the BA Districts do not apply section 1930(a)(6)(B)'s fee increase to pending cases, the fee increase cannot constitutionally be applied to pending cases outside of the BA Districts. The Court holds that section 1930(a)(6)(B) remains unconstitutionally non-uniform *as applied* to pending cases." *Id.* at 270, at *7 (emphasis added). The court further held that "[a]s the amendment to section 1930(a)(6) does not apply uniformly both to chapter 11 debtors with pending cases in BA districts and to chapter 11 debtors with pending cases in U.S. Trustee districts, it is unconstitutional under the Bankruptcy Clause." *Id.* The court, similar ***111** to *Buffets* then determined that the debtor's fees must be based on the prior version of the statute.[18] In an opinion issued just last week, the Bankruptcy Court for the Northern District of Texas adopted the rationale of both *Buffets* and *Circuit City* on this particular issue. *In re Life Partners Holdings, Inc.*, No. 15-40289, 2019 WL 3987707, at *3–4, *7 (Bankr. N.D. Tex. Aug. 22, 2019).[19]

The Debtors here filed their cases in 2017. As Connecticut is served by the UST, the Debtors have been paying higher fees than they would have paid in BA districts, not only for the three quarters between the respective dates of implementation in UST and BA districts, but also because the BA districts have only applied the fees to debtors whose cases were filed on or after October 1, 2018. The Debtors, therefore, claim that this double non-congruence creates non-uniform bankruptcy law as each pertains to fees. The UST, on the other hand, argues that the non-uniformity stems only from the implementation of a law that is uniform on its face. The Court readily acknowledges that nothing distinguishes the Debtors here from the debtors in *Buffets*, *Circuit City*, or *Life Partners* on this issue. Nevertheless, the Court agrees with the UST.

1. *28 U.S.C. § 1930 is a Bankruptcy Law Subject to the Bankruptcy Clause*

As a threshold matter to determining whether the 2017 Amendments to 28 U.S.C. § 1930(a)(6), as construed and applied by subsection (7), created non-uniform bankruptcy law, the Court must address the UST's argument that 28 U.S.C. § 1930(a)(6) and (7) are not laws "on the subject of Bankruptcies." U.S. Const. art. I, § 8, cl. 4. The UST cites *Gibbons* for the proposition that "bankruptcy" is the "subject of the relations between [a] ... debtor and his creditors, extending to his and their relief." *Gibbons*, 455 U.S. at 466, 102 S.Ct. 1169 (citations and internal quotation marks omitted). The UST argues that this narrow definition of bankruptcy does not encapsulate Chapter 11 quarterly fees because such "is merely a funding mechanism for the efficient administration of bankruptcy matters ...; it does not alter substantive bankruptcy law." The UST also quotes a Third Circuit decision, which, agreeing with the UST there, stated that "Congress's mandate requiring payment of post-confirmation quarterly fees is not an effort to alter the terms of pre-existing debts; rather it creates a new expense that did not exist before the plan was confirmed." *U.S. Trustee v. Gryphon at Stone Mansion, Inc.*, 166 F.3d 552, 557 (3d Cir. 1999) (internal quotation marks omitted).

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The UST's argument is wholly without merit. The Supreme Court has not defined bankruptcy so narrowly. *Gibbons* does indeed say that bankruptcy is the "subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors extending to his and their relief[,]" but *in the very same sentence*, which the UST omits, states that "[t]he subject of bankruptcies is incapable of final definition[.]" *Gibbons*, 455 U.S. at 466, 102 S.Ct. 1169 (citations and internal quotation ***112** marks omitted). Additionally, although the UST states that this quote from *Gibbons* is sourced from *Moyses*, the quote actually is from *Wright*. In *Wright*, the Supreme Court further elaborated:

> The subject of bankruptcies is incapable of final definition. The concept changes. It has been recognized that it is not limited to the connotation of the phrase in England or the States, at the time of the formulation of the Constitution. An adjudication in bankruptcy is not essential to the jurisdiction. The subject of bankruptcies is nothing less than "the subject of the relations between an insolvent or nonpaying or fraudulent debtor, and his creditors, extending to his and their relief."

304 U.S. at 513–14, 58 S.Ct. 1025 (citations and footnotes omitted). That passage does not quote *Moyses*, as the UST states, but *In re Reiman*, 20 F. Cas. 490, 497 (S.D.N.Y. 1874),[20] although *Moyses* does cite to *Reiman* approvingly without any exposition of it. 186 U.S. at 187, 22 S.Ct. 857. *Moyses* also cites *In re Klein*, 42 U.S. (1 How.) 277, 14 F. Cas. 716, 11 L.Ed. 275 (C.C.D. Mo. 1843), an opinion from the Circuit Court for the District of Missouri that was written by Justice Caton riding circuit.[21] 186 U.S. at 186, 22 S.Ct. 857. *Klein* states that Congress's bankruptcy jurisdiction "extends to all cases where the law causes to be distributed, the property of the debtor among his creditors; *this is its least limit*." 42 U.S. (1 How.) at 281, 14 F. Cas. at 718 (emphasis added). *Moyses* quotes this line verbatim. 186 U.S. at 186, 22 S.Ct. 857.

What is evident, then, is that the Bankruptcy Clause does pertain to the debtor–creditor relationship, but at *the very least*. The Supreme Court has also said that "as [Congress] is authorized 'to establish uniform laws on the subject of bankruptcies throughout the United States,' it may embrace within its legislation *whatever may be deemed important to a complete and effective bankrupt system*." *United States v. Fox*, 95 U.S. 670, 672, 24 L.Ed. 538 (1878) (emphasis added). The Supreme Court later said that "[f]rom the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power." *Cont'l Ill. Nat'l Bank & Tr. Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 668, 55 S.Ct. 595, 79 L.Ed. 1110 (1935).[22] Likewise, almost two months after *Continental Bank* was decided, the Supreme Court refused to countenance a narrow definition of bankruptcy, stating that "[i]t is true that the original purpose of our bankruptcy acts was the equal distribution of the debtor's property among his creditors; and that the aim of ***113** the legislation was to do this promptly. But, the scope of the bankruptcy power conferred upon Congress is not necessarily limited to that which has been exercised." *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 587, 55 S.Ct. 854, 79 L.Ed. 1593 (1935) (footnote and citations omitted). Much more recently, the Supreme Court, in an opinion by the late Justice John Paul Stevens, stated: "The Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the res."[23] *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006).

Understanding that the Bankruptcy Clause is not as narrow as the UST would lead the Court to believe, the Court now examines the history of 28 U.S.C. § 1930. That section was first adopted as part of the very law establishing the current Bankruptcy Code in 1978, a law entitled "An act to establish a uniform Law on the Subject of Bankruptcies." Pub. L 95-598, Title II, § 246(a), 92 Stat. 2671. Congress added subsection (a)(6) to 28 U.S.C. § 1930 in 1986 in an amendment to the Bankruptcy Code and related laws under title 28. Pub. L. 99-554, Title I, § 117, 100 Stat. 3095. It, therefore, seems disingenuous for the UST—an office that only exists to administer bankruptcy cases—to claim that 28 U.S.C. § 1930(a)(6) and (7) are not "Laws on the subject of Bankruptcies." Given the Supreme Court's stated liberal interpretation of the Bankruptcy Clause and Congress's explicit invocation of the Bankruptcy Clause in passing 28 U.S.C. § 1930, the quarterly fee system, and creating the UST Program, the Court holds that 28 U.S.C. § 1930, particularly subsections (a)(6) and (7), and as amended by the 2017 Amendments, are laws on the subject of bankruptcies.

2. *28 U.S.C. § 1930 Is Uniform on Its Face*

Having established that 28 U.S.C. § 1930 is subject to the Bankruptcy Clause, the Court turns to the parties' chief disagreement: whether the 2017 Amendments to Chapter 11 quarterly fees outlined in 28 U.S.C. § 1930(a)(6) and the Judicial Conference's subsequent—but not immediate—adoption of those fees under 28 U.S.C. § 1930(a)(7) constitute a non-uniform law in violation of the Bankruptcy Clause. The Court holds that when reading subsections (a)(6) and (7) together, 28 U.S.C. § 1930 is a uniform law.

Given the flexibility of the Bankruptcy Clause, it is not so

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astonishing that the Supreme Court has struck down a bankruptcy law on uniformity grounds on only one occasion. In *Gibbons*, the Court considered a law that Congress adopted after a regional railroad company failed in its reorganization, a law that had certain employee protection provisions. 455 U.S. at 459–64, 102 S.Ct. 1169. After determining that the law was an exercise of Congress's ***114** bankruptcy powers, *id.* at 466, 102 S.Ct. 1169, the Court stated:

> By its terms, [the law] applies to only one regional bankrupt railroad. *Only* [the company's] creditors are affected by [the law's] employee protection provisions, and *only* employees of the [company] may take benefit of the arrangement.... [T]here are other railroads that are currently in reorganization proceedings, but these railroads are not affected by the employee protection provisions of [the law]. The conclusion is thus inevitable that [the law] is not a response either to the particular problems of major railroad bankruptcies or to any geographically isolated problem: it is a response to the problems caused by the bankruptcy of *one* railroad. The employee protection provisions of [the law] cover neither a defined class of debtors nor a particular type of problem, but a particular problem of one bankrupt railroad. Albeit on a rather grand scale, [the law] is nothing more than a private bill such as those Congress frequently enacts under its authority to spend money.

Id. at 470–71, 102 S.Ct. 1169 (citations and footnotes omitted). The Court determined that the law was "not within the power of Congress to enact[,]" noting that "[a] law can hardly be said to be uniform throughout the country if it applies only to one debtor and can be enforced only by the one bankruptcy court having jurisdiction over that debtor." *Id.* at 471, 102 S.Ct. 1169 (citation omitted). The Court grounded this holding in the history before the Constitution, when states enacted private bills that provided relief to specific individual debtors. *Id.* at 472, 102 S.Ct. 1169. This practice rendered uniformity impossible and was subject to abuse, leading the Court to reason that "the Bankruptcy Clause's uniformity requirement was drafted in order to prohibit Congress from enacting private bankruptcy laws." *Id.* (citation omitted). Finally, the Court held that "[t]he uniformity requirement ... prohibits Congress from enacting a bankruptcy law that, by definition, applies only to one regional debtor. To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors." *Id.* at 473, 102 S.Ct. 1169.

Turning now to the subsection in question here, 28 U.S.C. § 1930(a)(7) provides:

> In districts that are not part of a United States trustee region as defined in section 581 of this title, the Judicial Conference of the United States *may* require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection. Such fees shall be deposited as offsetting receipts to the fund established under section 1931 of this title and shall remain available until expended.

(emphasis added). The Debtors argue that the use of the word "may" provides the Judicial Conference with discretion to impose different fees. Congress also used the word "shall" in the same subsection, which the Debtors argue in the Reply, citing *Anderson v. Yungkau*, 329 U.S. 482, 485, 67 S.Ct. 428, 91 L.Ed. 436 (1947), is an indication "that each is used in its usual sense—the one act being permissive, the other mandatory." (citation omitted). The UST notes that the statute also says that the Judicial Conference "may require ... fees *equal* to those imposed" in UST districts and that a 2001 directive of the Judicial Conference required it to adopt the new fees the moment they were implemented.[24] The failure to do so, the UST argues, was *ultra vires*.

***115** "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1932) (citations omitted); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 38, 247–51 (2012) ("A statute should be

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interpreted in a way that avoids placing its constitutionality in doubt.”); Stephen Breyer, Making Our Democracy Work: A Judge's View 102–05 (2010) (“Although this interpretive principle [of avoiding constitutional questions] may depart from an ordinary purpose-based approach, it serves the same practical function.”). Therefore, if the Court can fairly read 28 U.S.C. § 1930(a)(7) to avoid the Bankruptcy Clause, it must.[25]

Although it is true that “may” ordinarily connotes discretion, while “shall” connotes something that is mandatory, this is not always true. “May” means “have permission to[,]” but it also means “shall, must—used esp[ecially] in deeds, contracts, and statutes[.]” *May*, 2 Webster's Third New International Dictionary 1396 (1966); *see also May*, Webster's New International Dictionary 1517 (2d ed. 1934) (“Where the sense, purpose, or policy of a statute requires it, *may* as used in the statute will be construed as *must* or *shall*; otherwise *may* has its ordinary permissive and discretionary force.”); *May*, American Heritage Dictionary of the English Language 1086 (5th ed. 2011) (Among other things, “may” defined as: “To be obliged, as where rules of construction or legal doctrine call for a specified interpretation of a word used in a law or legal document.”); *May*, Black's Law Dictionary 993 (7th ed. 1999) (At time of 28 U.S.C. § 1930(a)(7)'s adoption, then-current edition defined “may” as, among other things: “Loosely, is required to; shall; must .... In dozens of cases, courts have held *may* to be synonymous with *shall* or *must*, usu[ally] in an effort to effectuate legislative intent.”). As for “shall,” the Supreme Court has said that, “[a]s against the government, the word ‘shall,’ when used in statutes, is to be construed as ‘may,’ unless a contrary intention is manifest.” *Cairo & Fulton R.R. Co. v. Hecht*, 95 U.S. 168, 170, 24 L.Ed. 423 (1877). Thus, “[w]hen drafters use *shall* and *may* correctly, the traditional rule holds—beautifully.” Scalia & Garner, Reading Law § 11, 112. 28 U.S.C. § 1930(a)(7). This, however, is not such a case.

Words of obligation and their various “alternative interpretations are as old as the jurisprudence of [the Supreme] Court.” *Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 419, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413, 4 L.Ed. 579 (1819)). The Court, therefore, considers each of the three constructions that the text of 28 U.S.C. § 1930(a)(7) poses. First, in line with the UST's position, is the construction that the Judicial Conference “may require” fees in BA districts, but those fees must be “equal” to those in 28 U.S.C. § 1930(a)(6). This reading naturally flows from the text and contradicts the second construction, which would allow the Judicial Conference to impose fees different from those listed in 28 U.S.C. § 1930(a)(6). Although having different fees is the consequence of the Judicial Conference's late, and only prospective, implementation of fee increases until ***116** October 1, 2018, such is contrary to the text of 28 U.S.C. § 1930(a)(7), which states that the fees imposed in BA districts must be equal to those imposed in districts under the UST Program. A reading that would allow the Judicial Conference to impose different fees would render the part of the statute “equal to those imposed by paragraph (6) of this subsection” a nullity, which would violate the canon of statutory construction that “every word and every provision is to be given effect[.]” Scalia & Garner, Reading Law § 26, 174; *see also Obduskey v. McCarthy & Holthus LLP*, ––– U.S. ––––, 139 S. Ct. 1029, 1037, 203 L.Ed.2d 390 (2019) (Courts “generally presum[e] that statutes do not contain surplusage.” [citation and internal quotation marks omitted]); *United States v. Butler*, 297 U.S. 1, 65, 56 S.Ct. 312, 80 L.Ed. 477 (1936) (“These words cannot be meaningless, else they would not have been used.”). Moreover, it would violate the *expressio unius*[26] canon because by stating that the Judicial Conference may require equal fees, Congress implied that the Judicial Conference could *not* require fees that were *not* equal. Essentially, Congress granted the Judicial Conference permission to require quarterly fees, but with a condition—equality—that, for whatever reason, the Judicial Conference did not immediately meet.

The third possible construction, which would allow the Judicial Conference to charge either equal fees or no fees, fails for the same reasons as the second: a fee of $0 is not equal. This construction also contradicts the very reason why 28 U.S.C. § 1930(a)(7) was enacted in the first place: to avoid the constitutional issue identified in *Victoria Farms*. It would be perverse to say that the Judicial Conference retained the discretion not to require any quarterly fees in BA districts when the purpose and policy—the manifest intent—for enacting the law was to fix an identified constitutional issue.

Therefore, the only plausible construction of 28 U.S.C. § 1930(a)(7) is the first one: the Judicial Conference may impose fees in BA districts equal to those in 28 U.S.C. § 1930(a)(6). Because no other option is plausible, it matters not that Congress used the word “may” to describe the Judicial Conference's power. Congress's grant of discretion only allows one option; therefore, the statute is mandatory, not permissive.[27]

“The [Supreme] Court's charitable interpretation of ‘uniformity’ encouraged Congress ***117** to pass laws that were uniform in name only.” Kenneth N. Klee, Bankruptcy and the Supreme Court 126 (2008) (citation and footnote omitted). That said, this Court must observe that 28 U.S.C.

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§ 1930(a)(7) suffers none of the flaws inherent in *Gibbons* or *Victoria Farms*, which both struck down laws that were non-uniform on their very faces by their express or implied terms. Such is simply not true here. On its face, 28 U.S.C. § 1930(a)(7) is constitutionally uniform.[28]

3. *The Debtors' "As-Applied" Challenge Must Fail*

Having determined that 28 U.S.C. § 1930(a)(6) and (7) are constitutional on their face, the question shifts to whether the alleged non-uniform implementation of 28 U.S.C. § 1930(a)(6) in UST and BA districts renders the Debtors' quarterly fees unconstitutional as applied. The Court holds that such a challenge is not cognizable under the circumstances.

a. The UST Cannot Violate the Bankruptcy Clause Itself

The Court first addresses an issue not raised by either party, but which could be dispositive over whether the Debtors may challenge the application of 28 U.S.C. § 1930 as to them. Because the Bankruptcy Clause is a power of Congress and not the President, the Debtors may not be able to challenge statutes validly enacted under it.

In *Gonzales v. Raich*, 545 U.S. 1, 23–33, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005), the Supreme Court upheld Congress's ability to regulate cannabis grown for personal use that would never enter interstate commerce. Relevant here, the plaintiffs in *Raich* framed their challenge to the statute in question as unconstitutional as applied to them, but the Court analyzed whether the statute was a valid exercise of Congress's commerce powers on its face. *Id.* at 8, 15–33, 125 S.Ct. 2195. The Court noted that it has "often reiterated that [w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Id.* at 23, 125 S.Ct. 2195 (citations and internal quotation marks omitted).

At least one commentator has suggested that the effect of *Raich* is that "a Commerce Clause challenge cannot be 'as-applied.' " Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1279 (2010). Rosenkranz reasoned that because Congress and not the President is the subject of the Commerce Clause, the President cannot violate it, *id.* at 1277–78, and that, if Congress did violate the Constitution, it did so when it made the law. *Id.* at 1279. Rosenkranz then extended this reasoning to all of Congress's enumerated powers because they all have the same subject: Congress. *Id.* at 1281.

***118** There is some logic to Rosenkranz's position, and Courts of Appeals have applied *Raich* in a manner similar to Rosenkranz's position. *See, e.g., United States v. Nascimento*, 491 F.3d 25, 40–43 (1st Cir. 2007) ("Refined to bare essence, *Raich* teaches that when Congress is addressing a problem that is legitimately within its purview, an inquiring court should be slow to interfere.... [T]he class of activity is the relevant unit of analysis and, within wide limits, it is Congress—not the courts—that decides how to define a class of activity.").

This Court does not go so far as to say that all "as-applied" challenges to statutes under Congress's enumerated powers are noncognizable. The Court reiterates, however, that both *Gibbons* and *Victoria Farms* were both decided on facial grounds. But, as Rosenkranz himself acknowledged, what makes a challenge "facial" versus "as-applied" is "muddled." 62 Stan. L. Rev. at 1273. Unlike Rosenkranz, this Court will not be so bold as to say that the executive (or the judiciary) cannot violate the Constitution by failing to enforce validly enacted laws, but the Court does understand the barest point that Rosenkranz makes as applied to this case: the UST cannot violate the Bankruptcy Clause; only Congress can. That said, the Court holds that to the extent that the Debtors have argued that the UST has violated the Bankruptcy Clause, such is not cognizable because that Clause is a part of Article I, which only applies to Congress.

b. The Non-Uniform Application of 28 U.S.C. § 1930(a)(6) Is Not Unlawful as to the Debtors

The Judicial Conference is comprised of the Chief Justice of the United States, the Chief Judges of the thirteen circuit Courts of Appeals, the Chief Judge of the Court of International Trade, and judges from District Courts of each geographic circuit. 28 U.S.C. § 331. The Judicial Conference has been called an "auxiliary" of the Judicial Branch. *Lifetime Cmties., Inc. v. Admin. Office of U.S. Courts (In re Fidelity Mortg. Inv'rs)*, 690 F.2d 35, 38–39 (2d Cir. 1982); *see also Mistretta v. United States*, 488 U.S. 361, 388–89, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). In this respect, Congress has delegated nonadjudicatory tasks to the Judicial Branch, much as Congress has done with administrative agencies.[29]

Most bankruptcy administration work, however, has been delegated to the UST Program, which is under the purview of the Department of Justice, which in turn is a part of the Executive Branch. In light of this dichotomy, which the Debtors do not challenge, the Court must consider whether the UST has properly applied the statute. Because the Court has already held that 28 U.S.C. § 1930(a)(6) and (7) are properly understood as laws enacted under Congress's bankruptcy powers, the Court must consider the two classic

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as-applied challenges: (1) whether the statutes cover the class of cases presented here, and (2) whether the law, as written, is being misapplied unconstitutionally.

i. 28 U.S.C. § 1930 Covers This Case

The first as-applied challenge is dealt with easily. In this type of challenge, the statute in question is facially valid, but a literal interpretation would include examples that would intrude on the powers of other entities, like the states. *See, e.g.,* ***119** *Bond v. United States*, 572 U.S. 844, 856–66, 134 S.Ct. 2077, 189 L.Ed.2d 1 (2014). In this case, however, the Debtors sought protection under Chapter 11 of the Bankruptcy Code. With Chapter 11 cases come quarterly fees. There is no reading of 28 U.S.C. § 1930 that would invade the exclusive prerogatives of other entities, so the Court must reject any argument that the Debtors are somehow outside the constitutional limits of 28 U.S.C. § 1930's reach.[30]

ii. The UST Is Not Misapplying the Law

The Debtors' argument that the application of 28 U.S.C. § 1930(a)(6) is non-uniform can also be understood to contend that either the UST or the Judicial Conference is misapplying the law. Given the text of 28 U.S.C. § 1930(a)(6) and the fact that—crucially important here—the Debtors have not raised the separate claim that the increased fees should only apply to cases filed on or after January 1, 2018, it is clear that the Debtors have not alleged that the UST is misapplying the law as written. What can be inferred from all of this is that the Debtors allege that the Judicial Conference has misapplied the law. Given that the UST Program and the BA program exist in different branches with different constitutional responsibilities, there is nothing the Court can do to lower the quarterly fees the Debtors must pay.

A. The Court Cannot Order the UST to Violate the Law

Under the United States Constitution, the President must "take Care that the Laws be faithfully executed[.]" U.S. Const. art. II, § 3, cl. 5. This requirement applies to agencies under the purview of the President, including the UST. Under this scheme, once Congress has enacted a valid statute empowering the Executive Branch, the Executive Branch must enforce it faithfully. Because, as the Court has already held, 28 U.S.C. § 1930 is a facially constitutional statute, the UST must enforce the quarterly fee provisions within, lest they be accused of not faithfully executing Congress's valid legislation. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum," but "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb[.]" [citations omitted]).

Likewise, this Court, like all justices and judges of the United States, must take an oath to "faithfully and impartially discharge and perform all the duties incumbent upon [it] ... under the Constitution and laws of the United States." 28 U.S.C. § 453. To order the UST to charge or accept lesser fees than those prescribed in 28 U.S.C. § 1930(a)(6) essentially would be for this Court to order the UST to disregard the Take Care Clause and the law as written. This Court cannot do so.[31] "Why otherwise does [the Constitution] direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?" ***120** *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180, 2 L.Ed. 60 (1803).

B. Even If the UST Were Violating 28 U.S.C. § 1930, Such Is Not Unconstitutional

Even if this Court assumed that the UST violated the statute, the Court could not then conclude that its actions were unconstitutional. The Supreme Court has said that its "cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution. On the contrary, we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority.... If all executive actions in excess of statutory authority were *ipso facto* unconstitutional, ... there would have been little need ... for our specifying unconstitutional and ultra vires conduct as separate categories." *Dalton v. Specter*, 511 U.S. 462, 472, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994) (citations omitted). In *Dalton*, the plaintiffs sought to enjoin the Secretary of Defense and President from closing a military base pursuant to statute. *Id.* at 464, 114 S.Ct. 1719. That statute, Pub. L. 101-510, Div. B, Title XXIX, § 2901 *et seq.*, 104 Stat. 1808, was passed pursuant to Congress's powers to raise and maintain the armed forces, U.S. Const. art. I, § 8, cls. 11–14, which, like the Bankruptcy Clause, are among Congress's enumerated powers.

The Court fails to see how *Dalton*'s logic does not extend to this case. Therefore, if the UST has misapplied the law—

which the Debtors have not claimed, in any regard—such might warrant relief as unlawful, but would not render 28 U.S.C. § 1930(a)(6), as applied, unconstitutional.

c. The Debtors Have No Standing to Challenge Any Misapplication of the 2017 Amendments by the Judicial Conference

Because the Court has held that the UST has not misapplied the law, that can only mean that the Debtors believe that the Judicial Conference has. The problem with any assertion to this effect is that the Court possesses no power to order the Judicial Conference to do anything in this case. The Debtors filed this Motion against the UST; the Judicial Conference is not a party to it. In order to rope the Judicial Conference into this case, however, the Debtors need to have standing to do so. They do not. As noted above, standing requires that a plaintiff have an "injury in fact." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (citations and internal quotation marks omitted). It also required that "the injury has to be fairly ... trace[able] to the challenged actions of the defendant, and not ... th[e] result [of] the independent action of some third party *not before the court*." *Id.* (emphasis added; citation and internal quotation marks omitted).

The Judicial Conference is not before this Court. Any claim of injury is not rooted in the UST's actions, but rather the Judicial Conference's actions. Moreover, had the Judicial Conference implemented the quarterly fees in BA districts without any change in the UST's actions, the Debtors would have nothing to complain of under the facts alleged. In other words, the Judicial Conference's delay in implementing the fee increases and decision not to apply the increases to pending cases has had no effect on the fees assessed in this case; the Debtors' quarterly fees would be the same as they are now. Therefore, there is no injury traceable to the UST's actions.[32]

***121** In *Marbury*, Chief Justice Marshall, quoting Blackstone's Commentaries, stated that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 5 U.S. (1 Cranch) at 163 (citation and internal quotation marks omitted). Having found that William Marbury had a remedy through mandamus, *id.* at 168, the Court still could not enforce it because the statute providing the Court with original jurisdiction to issue a mandamus was unconstitutional. *Id.* at 173–80. The Court invalidated the law despite the fact that James Madison did not appear or argue the case at all. *See id.* at 153–54; *cf.* footnote 11 of this Memorandum.

In an 1893 article, Harvard law professor James Bradley Thayer contended that courts "can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question." James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1893). Thayer's point, highlighted eloquently by Justice Holmes in his *Lochner* dissent and less so in his letter to Harold Laski, is taken here. Perhaps maintaining the dual system of USTs and BAs is a mistake. There certainly have been consequences of that dual system that seem unfair to the Debtors in this case, who are paying the fees they are, while their carbon copies in Alabama and North Carolina would not. But that concern is not properly before this Court and, moreover, the remedy does not lie in striking down the law or forcing the UST to disregard the law as written. Whatever mistake was made is not inherent in the text of the statute. But, whatever errors the Judicial Conference may have committed, this Court, for jurisdictional reasons, cannot fix them.

In sum, the Court holds that 28 U.S.C. § 1930(a)(6) and (7) are facially valid "uniform laws on the subject of Bankruptcies." The Court also holds that any "as-applied" challenge fails as a matter of law. Therefore, the Debtors have failed to state a claim for which relief may be granted, and the Court DISMISSES the uniformity count with prejudice. *See Iqbal*, 556 U.S. at 677–79, 129 S.Ct. 1937.

D. The Debtors' User Fee Claim Fails to Allege Legally Sufficient Facts That the Increase in Chapter 11 Quarterly Fees Is an Unconstitutional Taking

The Debtors' second claim is that the increase in Chapter 11 fees are an unconstitutional user fee.[33] Specifically, the Debtors allege in the Motion that their quarterly fees would total an amount that "may be not much less than, if not more than, the attorneys' fees for the Debtors in these sometimes very active cases." To illustrate this, the Debtors show the discrepancy between what they actually paid in quarterly fees and what they would have paid under the old scheme.[34] The UST argues that the user fees imposed are ***122** not takings.[35] The Court holds that under the facts alleged, the Debtors are not entitled to relief as a matter of law.

The Supreme Court "has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a 'fair approximation of the cost of benefits supplied.' " *United States v. Sperry*, 493 U.S. 52, 60, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989) (citation omitted); *cf. FCC v. Fla.*

Power Corp., 480 U.S. 245, 253, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987) ("So long as the rates set are not confiscatory, the Fifth Amendment [Takings Clause] does not bar their imposition." [citations omitted]). The Court has also upheld a flat user fee "without regard to the actual use ..., so long as the fee is not excessive." *Evansville–Vandenburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 715, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972) (citations omitted).[36]

"It is beyond dispute that ... user fees ... are not takings." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013) (citation and internal quotation marks omitted). This, of course, presumes that the user fee is *reasonable*.[37] *Sperry*, 493 U.S. at 63, 110 S.Ct. 387. "[T]he challenger has the burden of proving that the fee is 'unreasonable in amount for the privilege granted.' "[38] *N.H. Motor Transp. Ass'n v. Flynn*, 751 F.2d 43, 47 (1st Cir. 1984) (Breyer, J.) (citing *Evansville–Vandenburgh*, 405 U.S. at 716, 92 S.Ct. 1349); *see also Sperry*, 493 U.S. at 60, 110 S.Ct. 387.

The determination of reasonableness is a fact-intensive exercise. *See Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 98 (2d Cir. 2009) (*Selevan I*); *see also Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986) (The Supreme Court has "eschewed ***123** the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case." [citations omitted]). The disparities the Debtors allege might support arguments that the quarterly fees are not a "fair approximation" of the benefits and are excessive.

In determining whether a fee "is based on some fair approximation of the use of the facilities," the Second Circuit has directed a court "to consider whether the ... policy at issue reflects rational distinctions among different classes ..., so that each user, on the whole, pays *some* approximation of [its] fair share[.]" *Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 259 (2d Cir. 2013) (*Selevan II*) (citations and internal quotation marks omitted). As for excessiveness, the Second Circuit has upheld a District Court's conclusion that user fees were not excessive "based on evidence regarding ... costs and expenditures," and that "any revenues collected did not exceed proper margins[.]" *Id.* at 260 (citations omitted).

The Second Circuit, in *Selevan I*, has also admonished courts that "whether [a] fee represents a fair approximation of [a party's] use ... [is] an inquiry that is too fact-dependent to be decided upon examination of the pleadings." *Selevan I*, 584 F.3d at 98 (citing *Nw. Airlines*, 510 U.S. at 369, 114 S.Ct. 855). Despite this admonition, this Court holds that the Debtors' legal theories underlying their claim of harm, as alleged in the Motion, are not cognizable on their own.

First, the Debtors' allegations concerning the overall percentage of Chapter 11 cases nationwide and the contributions made by Chapter 11 debtors to the UST System cannot, without more, form the basis for the Debtors' takings claim.[39] *See Connolly*, 475 U.S. at 224, 106 S.Ct. 1018; *cf. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540–45, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (An inquiry into whether a law "substantially advances" government interests "is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose[,]" but is "untenable as a takings test" because it could "demand heightened means-ends review of virtually any regulation of private property.").

Second, the Debtor's contention that there is no correlation between the quarterly fees charged and the presumed amount of time the UST has spent working on the main case cannot, even read with the national statistics, form the basis for the Debtors' takings claim. Specifically, the Debtors, who also lay out the amount of quarterly fees that have been and would have been charged in 2018, allege the following:

> In these cases, ... assuming the Debtors are able to close their cases by the end of the third quarter of 2019, US Trustee fees under the amended fee schedule would total approximately $560,000, which may be not much less than, if not more than, the attorneys' fees for the Debtors in these sometimes very active cases. At a blended rate of $350 (assuming 50% of time spent by a trial attorney at $475 per hour, which is [the Debtors' lead counsel's] rate, and 50% of time spent by an analyst at $225 per hour), that would translate to 1,600 ***124** hours. Given the volume of cases that the US Trustee oversees and the level of activity of the US Trustee in these cases, it is impossible that the US Trustee has spent even fifty percent of that time on these cases. While the fit between the fee and the benefit conferred or cost of services used need not be perfect, "the discrepancy here exceeds permissible bounds." *See* [*Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 86 (2d Cir. 2009)]. The fees charged to these Debtors under the amended fee structure are a "forced contribution to general government revenues ... not reasonably related to the costs of using the courts," *Webb's Fabulous Pharmacies,* 449 U.S. at 163, 101 S.Ct. 446, an "exaction for public purposes" rather than compensation for private benefit or for services used.

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The Debtors' references to *Bridgeport Steamboat* do not help them on the facts alleged. In that case, the Second Circuit held that the fees the Bridgeport Port Authority charged ferry passengers were not a fair approximation of the services provided. 567 F.3d at 88. The Court held this because "the passenger fees were supporting the entirety of the [Bridgeport Port Authority's] operating budget and that this budget was supporting some [of their] activities of no benefit to the ferry passengers[.]" *Id.* at 87. The Court, however, did not hold the fees excessive. *Id.* at 88. It merely upheld the District Court's finding of modest damages for the passengers, nominal damages for the ferry company, and an injunction prohibiting the collection of a fee "that exceeded what was necessary to pay for benefits to the ferry passengers." *Id.* at 81, 85, 88.

What differentiates this case from *Bridgeport Steamboat* is that the fees in that case clearly went beyond what was necessary because the fees *necessarily* were covering other services. To reach this, the District Court had "to make particularized inquiries as to the various [Bridgeport Port Authority] expenditures" to determine what did and did not benefit passengers. *Id.* at 87. Here, the Debtors' more concrete allegations regarding the amount of time the trial attorneys and analysts have spent on the main case, however, are too narrow because they fly in the face of the Supreme Court's statement that the government does not "need to record invoices and billable hours to justify the cost of its services." *Sperry*, 493 U.S. at 60, 110 S.Ct. 387.[40] The UST, even as it relates to this case, consists of more than the trial attorneys and analysts.

The Court does not mean to say that neither national statistics concerning the UST nor analyses of the UST's time expended are not pertinent to this issue; both certainly are highly relevant. The Court only means to say that the user fee analysis is too fact-intensive to consider anything less than a totality of the circumstances, which needs to be alleged, and the Supreme Court has foreclosed the extremes alleged from being cognizable on their own. Nevertheless, given the authorities ***125** the Court has reviewed and discussed, the Court can, in its experience and common sense, see a plausible set of facts between—and possibly including—those extremes upon which the Debtors could ground their takings claim. *See Iqbal*, 556 U.S. at 677–79, 129 S.Ct. 1937. Those hypothetical facts could include analyses related to, but better tailored than the facts posed here, without running afoul of *Sperry*, *Connolly*, and *Lingle*; however, those authorities could also provide the UST with relevant defenses.[41] Absent the extremes alleged, which on their own are foreclosed by law, the allegations are no more than "naked assertion[s] devoid of further factual enhancement." *Id.* at 678, 129 S.Ct. 1937 (citation and internal quotation marks omitted).

The Court, therefore, DISMISSES the user fee claim, but without prejudice[42] to the Debtors filing an amended complaint that meets the standards laid out in Rule 8 of the Federal Rules of Civil Procedure.[43]

IV. CONCLUSIONS AND ORDER

The Court having considered the pleadings and related arguments at the hearing on August 14, 2019, it is hereby **ORDERED**:

(1) That the Triem LLC claim is **DISMISSED** from this action for its lack of standing;

(2) That the UST's Procedural Objection (ECF No. 725) is **OVERRULED**;

(3) That the Debtors' Motion to Determine (ECF No. 672) be deemed an Adversary Proceeding complaint;

(4) That the Clerk is **DIRECTED** to promptly open an Adversary Proceeding docket, placing ECF Nos. 672, 725, 726, 743, 773, and this Memorandum within that docket;

(5) That the Debtors are **DIRECTED** to pay the requisite Adversary Proceeding filing fee within seven (7) days of this Memorandum issuing;

(6) That the UST's Motion to Dismiss (ECF No. 726) is **GRANTED** with prejudice as to the uniformity claim and without prejudice as to the user fee claim;

(7) That the Debtors may replead the user fee claim in an Amended Complaint filed within twenty-one (21) days, which may include a claim of Triem LLC should it allege cognizable damages to support its standing; and

(8) That the Debtors may seek to add any new claims as additional counts to an Amended Complaint by filing a motion under Rule 15 of the Federal Rules of Civil Procedure within twenty-one (21) days.

***126 IT IS SO ORDERED** at Hartford, Connecticut this 28th day of August 2019.

All Citations

608 B.R. 96, 67 Bankr.Ct.Dec. 183

Footnotes

1 Privately, Justice Holmes wrote to a friend that he and his fellow justices were loath to strike down a particular statute "unless it makes us puke." Letter from Justice Oliver Wendell Holmes to Harold J. Laski (Oct. 23, 1926), *in* 2 Holmes–Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 888 (Mark DeWolfe Howe ed., 1953).

2 Section 1334(b) grants the district court original jurisdiction over all civil proceedings "arising under title 11, or arising in or related to cases under title 11." This grant of jurisdiction is made "notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts[.]" *Id.* The Court finds this statute sufficient to allow the Court to address the Debtors' user fee claims, which under 28 U.S.C. §§ 1346 and 1491 would, outside of bankruptcy, need to be addressed in the Court of Federal Claims, at least in part. *See Plum Run Serv. Corp. v. U.S. Dept. of Navy (In re Plum Run Serv. Corp.)*, 167 B.R. 460, 464–65 (Bankr. S.D. Ohio 1994). In considering whether this Court should abstain from hearing the matter under 28 U.S.C. § 1334(c)(1), *see Marah Wood Prods., LLC v. Jones*, 534 B.R. 465, 477–79 (D. Conn. 2015), this Court will not do so because of the predominance of bankruptcy issues in determining whether the user fee is a taking, not some specialized knowledge exclusively within the expertise of the Court of Federal Claims, which does not have exclusive jurisdiction over all takings claims.

3 In a joint scheduling order laying out the briefing schedule on this matter, the Debtors and the UST agreed that the UST would not compel the payment of quarterly fees during the pendency of this matter (ECF No. 681), which the Debtors note in their proposed Chapter 11 plan of reorganization (ECF No. 718). Because the Debtors have not identified those fees in any regard, the Court need not surmise whether the Debtors' claims regarding the 2019 fees are ripe.

4 From this point forward in this Memorandum, "Debtors" will only refer to Clinton Nurseries, Inc.; Clinton Nurseries of Maryland, Inc.; and Clinton Nurseries of Florida, Inc.

5 As a preliminary matter, the Court notes that the Debtors stated that they would withdraw their request for a refund of fees already paid during a status conference on the Motion (ECF No. 796), which the Debtors stated they would pursue pending the outcome of these proceedings. This proposed withdrawal, reiterated at the hearing, would obviate the UST's concern about the applicability of FRBP 7001(1), but, given the Court's decision to convert the matter to an Adversary Proceeding, the Court will allow the Debtors to reassert their request for such relief in an amended complaint.

6 FRBP 2020 provides that "[a] proceeding to contest any act or failure to act by the United States trustee is governed by Rule 9014[,]" referring to the rule on contested matters.

7 The Court acknowledges that the advisory committee notes reference "lien[s]" but not "other interest[s] in property"; however, the logic behind the note extends equally to "other interest[s] in property."

8 The Court understands the contradiction in this statement, considering the Court has already held that the Debtors do not have standing to challenge those fees that were not detailed in the Motion; however, were the Court to rule in the Debtors' favor on the uniformity challenge, such would, as a matter of preclusion, preemptively decide any future challenge by the Debtors to any UST actions regarding quarterly fees, as well.

9 After filing the Motion, the Debtors, jointly with the UST, agreed to allow the UST 61 days to file an objection (ECF No. 681), which exceeds the amount of time the UST would have had to answer an adversary complaint by *26 days*. Fed. R. Bankr. P. 7012(a). And yet, the UST did not file the Procedural Objection until the very last day available. This particular circumstance, coupled with the UST not having claimed or demonstrated any prejudice here, leads this Court to conclude that converting the Motion to an Adversary Proceeding without denying the Motion is the better course than forcing the Debtors—who *would* be prejudiced by such—to file an Adversary Proceeding from scratch.

10 Regardless of whether the Court maintains this matter as a contested matter or converts it to an Adversary Proceeding, the Court is not deprived of jurisdiction, even if—as the UST claims—such were error. *See Hamer v. Neighborhood Hous. Servs.*, ––– U.S. –––, 138 S. Ct. 13, 17–18, 199 L.Ed.2d 249 (2017) ("Only Congress may determine a lower federal court's subject-matter jurisdiction[,]" and "mandatory claim-processing rules [not prescribed by Congress] must be enforced, *but they may be waived or forfeited*." [emphasis added; citations and internal quotation marks omitted]).

11 In considering the Motion as a complaint, the Court assumes the parties' familiarity with the factual and legal allegations within it and will address pertinent facts as necessary. That consideration requires construing the Debtors' arguments as liberally as possible,

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but within the confines of the two counts alleged; however, it also requires the Court to consider the iceberg of precedent below the arguments and authorities discussed by the UST. These issues are serious, and the Court cannot decide the constitutionality of a statute only based on what has been expressed.

12 The Debtors have not claimed that the dual system of USTs and BAs is unconstitutional.

13 Prior to the 2017 Amendments, 100% of the quarterly fees collected were deposited into the UST System Fund. Currently, 2% of quarterly fees are deposited into the general treasury fund to fund additional bankruptcy judgeships. *See* Pub. L. 115-72, Div. B, § 1004(b); 131 Stat. 1232; *see also* H.R. Rep. No. 115-130, at 8, *reprinted in* 2017 U.S.C.C.A.N. 154, 160.

14 The Judicial Conference Committee on the Administration of the Bankruptcy System noted issues with quarterly fees generally, expressing concern that they chill large Chapter 11 case filings and preclude large Chapter 11 debtors from reorganizing successfully and that increased fees would exacerbate those problems. Report of the Judicial Conference Committee on the Administration of the Bankruptcy System 19–20 (Sept. 2018). Nevertheless, the Committee recommended that the Judicial Conference adopt the increased fees. *Id.*

15 The court noted that the Judicial Conference's "decision to apply the fees to BA districts remedies the amendment's violation of the Uniformity Clause for future cases, but not in this case. Like the lack of uniformity that originally existed between the two programs, the gap in time between the imposition of the quarterly fees in UST districts and BA districts is problematic." 597 B.R. at 594–95.

16 The *Buffets* court also considered the meaning of "disbursements" under 28 U.S.C. § 1930(a)(6) and the argument that the 2017 Amendments should not apply retroactively due to the "presumption against retroactively applying statutes." 597 B.R. at 593–97. The Debtors have not raised the disbursements issue or independently claimed that the 2017 Amendments should not apply to them because of the presumption against retroactivity, only arguing in the Motion that "the only way fee increases can be *applied uniformly* to all cases is to only apply [them] to cases filed on or after October 1, 2018." (emphasis added). Because the Debtors have not explicitly asked this Court to consider retroactivity outside of the uniformity question, the Court cannot do so.
Additionally, the *Buffets* court noted that the debtors there raised a claim that "the user-fees are grossly disproportionate to the services that the UST provides to the Debtors[,]" 597 B.R. at 592, but, apparently in light of its decisions on uniformity and retroactivity, did not decide the user fee issue.

17 The *Circuit City* court also considered the retroactivity question from *Buffets* and whether the 2017 Amendments are a non-uniform tax. 606 B.R. at 266–71, 2019 WL 3202203, at *4–7. The tax issue has also not been raised in this matter.

18 The Seventh Circuit was also recently asked to weigh in on the uniformity and user fee issues concerning the 2017 Amendments but declined to do so because the issues were not raised until appeal. *Cranberry Growers Coop. v. Layng (In re Cranberry Growers Coop.)*, 930 F.3d 844, 853–57 (7th Cir. 2019). The only issue decided at the bankruptcy court was the meaning of the term "disbursements" in 28 U.S.C. § 1930(a)(6), *id.* at 845–50, at *1–4, which was also considered in *Buffets*. *See* footnote 16 of this Memorandum.

19 The *Life Partners* court also addressed the retroactivity issue and likewise adopted the reasoning of the *Buffets* and *Circuit City* courts.

20 Besides the line cited, *Reiman* also states: "[E]ven if a more restricted meaning be given to the expression 'subject of bankruptcies,' there is, within the scope of discretionary power possessed by [C]ongress, of choosing the means to accomplish the end, a substantial appropriation of the existing property of the debtor towards all the debts due by him." 20 F. Cas. at 497.

21 *Klein* was reprinted in a note to *Nelson v. Carland*, 42 U.S. (1 How.) 265, 11 L.Ed. 126 (1843).

22 Although *Continental Bank* also acknowledged that the Bankruptcy Clause is not without limits, 294 U.S. at 669–70, 55 S.Ct. 595, it noted that all interpretations to that point "demonstrate[d] in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the [then] present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed." *Id.* at 671, 55 S.Ct. 595.

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23 Justice Stevens's pronouncement is supported by the lone mention of the Bankruptcy Clause in the Federalist Papers. "The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question." The Federalist No. 42, at 239 (James Madison) (Clinton Rossiter ed., 1961). Because Congress's powers under the Commerce Clause are expansive, *see, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421, 4 L.Ed. 579 (1819), this Court fails to see how UST's narrow definition is supportable.
Even the UST's contention that quarterly fees do not "alter substantive bankruptcy law" ignores the fact that, under 11 U.S.C. § 1112(b), a party in interest can seek conversion or dismissal for cause, which includes not paying quarterly fees.

24 Given the Court's construction of the statute, it need not address the 2001 directive cited.

25 Neither the *Buffets* court nor the *Circuit City* court mentioned the principle of avoiding constitutional questions.

26 *Expressio unius est exclusio alterius*, which is Latin for "the expression of one thing is the exclusion of others." The Supreme Court has noted that "the soundness of that premise is a function of timing." *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836, 121 S.Ct. 1934, 150 L.Ed.2d 45 (2001). The Court has also said that the canon's "fallibility can be shown by contrary indications that adopting a particular ... statute was probably not meant to signal any exclusion of its common relatives." *United States v. Vonn*, 535 U.S. 55, 65, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002) (citations omitted).
If Congress wanted to give the Judicial Conference discretion to charge any fee, it could have done so explicitly. Whether that would be constitutional is another matter. By stating that the Judicial Conference may charge fees *equal* to those in § 1930(a)(6), however, Congress seemingly limited the bounds of what the Judicial Conference may impose in quarterly fees by delineating but one option. What leads this Court to conclude that Congress necessarily did so was that the Judicial Conference asked Congress to allow the Judicial Conference to impose "comparable" fees, *see* Report of the Proceedings of the Judicial Conference 10 (Mar. 1996), but Congress passed a law that says "equal," *see* 28 U.S.C. § 1930(a)(7), thereby undercutting any argument that Congress did not intend to limit the Judicial Conference's discretion as to the amount of quarterly fees it could impose.

27 The *Circuit City* court highlighted the "may require" language of 28 U.S.C. § 1930(a)(7), but did not attempt to construe that phrase as modified by the phrase "fees equal to those imposed by [28 U.S.C. § 1930(a)(6)]." 606 B.R. at 264, 2019 WL 3202203, at *2. The *Life Partners* and *Buffets* courts likewise did not attempt to construe 28 U.S.C. § 1930(a)(7) with reference to the latter phrase. The *Cranberry Growers* court, in dicta that emphasized the word "may" but not the word "equal," stated that "[t]he plain language of § 1930(a)(7) is permissive, not mandatory[.]" 930 F.3d at 856 n.51. This Court disagrees with this assessment, both as a matter of plain language and the statute's policy and purpose.

28 It is in this manner that this Court chiefly disagrees with *Buffets* and *Circuit City*. The 2017 Amendments did not increase quarterly fees in the UST districts only and intentionally, purposely, or even accidentally omit BA districts. As soon as the higher fees imposed by the 2017 Amendments went into effect in UST districts, 28 U.S.C. § 1930(a)(7) *automatically* operated to mandate higher fees in BA districts.

29 The Judicial Conference is not an agency subject to the Administrative Procedure Act. *Fidelity Mortg. Inv'rs*, 690 F.2d at 38–39.

30 This argument was not explicitly made, but for the Court to address what the Debtors' arguments are, it must figure out what they are not.

31 There is one exception to this. Under 28 U.S.C. § 1930(f)(3), this Court may "waiv[e], in accordance with Judicial Conference policy, fees prescribed under this section for[, among others, Chapter 11] debtors and creditors." To the Court's knowledge, no such policy exists.

32 It is in this respect that this Court also disagrees with *Buffets* and *Circuit City*, namely, that the actions of the UST and Judicial Conference can transform a facially valid statute into an unconstitutional one. What is telling is that both courts found the statute uniform as applied *now*. *See Circuit City*, 606 B.R. at 269–70, 2019 WL 3202203, at *6; *Buffets*, 597 B.R. at 594. But these findings assume their conclusions. Only Congress can violate the Bankruptcy Clause, and it can only do so at the time of a statute's adoption; the UST and Judicial Conference might violate the law, but that does not invalidate the law.

33 The Court assumes for purposes of this Memorandum that Chapter 11 quarterly fees are user fees.

34 *But see* part III.A of this Memorandum.

35 The UST argues in his papers that the Debtors fail to specify what portion of the Constitution the statute violates, but as the Debtors articulated at the hearing, they only make a claim under the Takings Clause. Indeed, the Debtors' citations in their Motion only relate to the Takings Clause. Therefore, the Court only addresses the Debtors' allegation of an unconstitutional user fee as one invoking the Takings Clause.

36 Besides considering whether a fee charged "is based on some fair approximation of the use of the facilities" and "is not excessive relation to the benefits conferred," courts analyze whether the fee "discriminate[s] against interstate commerce." *Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 369, 114 S.Ct. 855, 127 L.Ed.2d 183 (1994) (citing *Evansville–Vandenburgh*, 405 U.S. at 716–17, 92 S.Ct. 1349). The final consideration—interstate commerce—is not relevant here. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994).

37 In *Koontz*, Justice Alito, writing for the Court, quoted parts of the previous sentence from Justice Scalia's dissent in *Brown v. Legal Found. of Wash*., 538 U.S. 216, 243 n.2, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) (Scalia, J., dissenting). Justice Scalia's footnote, in turn, cites *Sperry*, 493 U.S. at 63, 110 S.Ct. 387, which qualifies that user fees are, by definition, reasonable. Takings, it follows, are unreasonable. The UST may not escape liability simply because of the label "user fee." *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) (The government, "by *ipse dixit*, may not transform private property into public property without compensation[.]").

38 Even if the Court presumed that the shifting burdens applicable to objections to claims applies here, the Debtors' allegations are insufficient to shift the burden to the UST for the same reasons they fail to state a claim for relief.

39 Because the Court must ignore the facts posited by the UST, their similar arguments are unavailing for the same reasons.

40 *Webb's Fabulous Pharmacies*, which the Debtors cite, is also inapposite. There, the Supreme Court held "that under the narrow circumstances of this case—where there is a separate and distinct ... statute authorizing a ... fee 'for services rendered' ...—[the government's] taking unto itself, under [other statutes], the interest earned on [an] interpleader fund while it was in the registry of the court was a taking violative of the Fifth ... Amendment[ ]. *We express no view as to the constitutionality of a statute that prescribes [the] retention of interest earned, where the interest would be the only return ... for services [the government] renders.*" 449 U.S. at 164–65, 101 S.Ct. 446 (emphasis added; citations omitted). Such simply does not comport with the facts of this matter.

41 The Court reiterates that "a party challenging governmental action as an unconstitutional taking bears a substantial burden." *E. Enters. v. Apfel*, 524 U.S. 498, 523, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (citing *Sperry*, 493 U.S. at 60, 110 S.Ct. 387); *cf. Crowell*, 285 U.S. at 62, 52 S.Ct. 285 (a statute is presumptively valid and where its construction can be fairly and plausibly interpreted, courts will spare the question of its constitutionality).

42 The decision to dismiss without prejudice to replead is supported by the admonition from the Second Circuit noted above. *See Selevan I*, 584 F.3d at 98.

43 The Court would entertain severing the two counts to allow the Debtors to appeal the uniformity claim under FRBP 8004 and 28 U.S.C. § 158(a)(3). The Court would also entertain certifying a direct appeal of the uniformity claim to the Second Circuit under FRBP 8006 and 28 U.S.C. § 158(d)(2).
Furthermore, should the Debtors wish to plead additional counts in an amended complaint, the Debtors must seek leave of this Court to do so. Fed. R. Bankr. P. 7015; Fed. R. Civ. P. 15(a)(2).

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dant, Garlock's, asbestos was a substantial cause of the decedent's mesothelioma. The Sixth Circuit held that the plaintiff had not made this showing:

> While [the decedent's] exposure to Garlock gaskets may have contributed to his mesothelioma, the record simply does not support an inference that it was a *substantial* cause of his mesothelioma. Given that the Plaintiff failed to quantify [the decedent's] exposure to asbestos from Garlock gaskets and that the Plaintiff concedes that [the decedent] sustained massive exposure to asbestos from non-Garlock sources, there is simply insufficient evidence to infer that Garlock gaskets probably, as opposed to possibly, were a substantial cause of [the decedent's] mesothelioma.

Id. (emphasis in original). The *Moeller* court concluded by analogizing that "saying that exposure to Garlock gaskets was a substantial cause of [the decedent's] mesothelioma would be akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume." *Id.* Because the evidence demonstrating that Mr. Connor was exposed to Appellee's asbestos is so weak -- especially when compared to the evidence of Mr. Connor's asbestos exposure at Norfolk Southern -- we reach a similar conclusion here.

IV.

For the reasons set forth herein, the judgment of the district court is

AFFIRMED.

IN RE: CIRCUIT CITY STORES, INCORPORATED; Circuit City Stores West Coast, Incorporated; InterTAN, Inc.; Ventoux International, Inc.; Circuit City Purchasing Company, LLC; CC Aviation, LLC; CC Distribution Company of Virginia, Inc.; Circuit City Properties, LLC; Kinzer Technology, LLC; Abbott Advertising Agency, Incorporated; Patapsco Designs, Inc.; Sky Venture Corp.; PRAHS, Inc. (N/A); XSStuff, LLC; Mayland MN, LLC; Courchevel, LLC; Orbyx Electronics, LLC; Circuit City Stores PR, LLC, Debtors.

Alfred H. Siegel, Trustee of the Circuit City Stores, Inc. Liquidating Trust, Plaintiff – Appellee,

v.

John P. Fitzgerald, III, Acting United States Trustee for Region 4, Defendant – Appellant.

Acadiana Management Group, LLC; Albuquerque-AMG Specialty Hospital, LLC; Central Indiana-AMG Specialty Hospital, LLC; LTAC Hospital of Edmond, LLC; Houma-AMG Specialty Hospital, LLC; LTAC of Louisiana, LLC; Las Vegas-AMG Specialty Hospital, LLC; Warren Boegel; Boegel Farms, LLC; Three Bo's, Inc., Amici Supporting Appellee.

In re: Circuit City Stores, Incorporated; Circuit City Stores West Coast, Incorporated; InterTAN, Inc.; Ventoux International, Inc.; Circuit City Purchasing Company, LLC; CC Aviation, LLC; CC Distribution Company of Virginia, Inc.; Circuit City Properties, LLC; Kinzer Technology, LLC; Abbott Advertising Agency, Incorporated; Patapsco Designs, Inc.; Sky Venture

Corp.; PRAHS, Inc. (N/A); XSStuff, LLC; Mayland MN, LLC; Courchevel, LLC; Orbyx Electronics, LLC; Circuit City Stores PR, LLC, Debtors.

Alfred H. Siegel, Trustee of the Circuit City Stores, Inc. Liquidating Trust, Plaintiff – Appellant,

v.

John P. Fitzgerald, III, Acting United States Trustee for Region 4, Defendant – Appellee.

Acadiana Management Group, LLC; Albuquerque-AMG Specialty Hospital, LLC; Central Indiana-AMG Specialty Hospital, LLC; LTAC Hospital of Edmond, LLC; Houma-AMG Specialty Hospital, LLC; LTAC of Louisiana, LLC; Las Vegas-AMG Specialty Hospital, LLC; Warren Boegel; Boegel Farms, LLC; Three Bo's, Inc., Amici Supporting Appellant.

No. 19-2240, No. 19-2255

United States Court of Appeals, Fourth Circuit.

Argued: December 8, 2020

Decided: April 29, 2021

Background: Trustee of liquidating trust established under debtors' confirmed Chapter 11 plan filed motion to determine extent of liability for post-confirmation quarterly United States Trustee fees, asking the court to order that, notwithstanding amendment of governing statute by the Bankruptcy Judgeship Act of 2017, the amount of such fees be determined based on statutory rates in effect as of petition date in this case. United States Trustee moved for summary judgment. The United States Bankruptcy Court for the Eastern District of Virginia, No. 3:08-bk-35653, Kevin R. Huennekens, J., 606 B.R. 260, granted motion to determine and denied motion for summary judgment, and parties sought leave to appeal directly to the Court of Appeals.

Holdings: The Court of Appeals, King, Circuit Judge, held that:

(1) quarterly fees owed by certain debtors to fund the United States Trustee program were not "taxes," of kind subject to Uniformity Clause of the United States Constitution;

(2) legislation that required the payment of increased quarterly fees in large Chapter 11 cases only in judicial districts in which the United States Trustee program was in effect did not violate the uniformity requirement of the Bankruptcy Clause;

(3) application of legislation in pending Chapter 11 cases to the quarterly fees that accrued thereafter would not have impermissible retroactive effect.

Affirmed in part, reversed in part, and remanded.

Quattlebaum, Circuit Judge, filed opinion concurring in part and dissenting in part.

1. Bankruptcy ⚷3782, 3786

Court of Appeals generally reviews a bankruptcy court's factual findings for clear error and its legal rulings de novo.

2. Internal Revenue ⚷3022

Uniformity Clause of the United States Constitution applies only to taxes. U.S. Const. art. 1, § 8, cl. 1.

3. Bankruptcy ⚷3152

Internal Revenue ⚷3022

Quarterly fees owed by certain debtors to fund the United States Trustee program were not "taxes," of kind subject to Uniformity Clause of the United States Constitution. U.S. Const. art. 1, § 8, cl. 1; 28 U.S.C.A. § 1930(a)(6).

4. Bankruptcy ⚷2014, 3152

Legislation that required the payment of increased quarterly fees in large Chapter 11 cases only in judicial districts in which the United States Trustee program was in effect, in order to fund shortfall in this program, and not in judicial districts that had a Bankruptcy Administrator, permissibly differentiated between geographic areas to solve a funding shortfall that existed only in judicial districts in which the United States Trustee program was in effect, and thus did not violate the uniformity requirement of the Bankruptcy Clause. U.S. Const. art. 1, § 8, cl. 4.; 28 U.S.C.A. § 1930(a)(6).

5. Bankruptcy ⚷2014

To be constitutionally uniform, a law enacted pursuant to the Bankruptcy Clause must apply uniformly to a defined class of debtors and must also be geographically uniform. U.S. Const. art. 1, § 8, cl. 4.

6. Bankruptcy ⚷2014

Uniformity requirement of the Bankruptcy Clause is not straitjacket that forbids Congress from distinguishing among classes of debtors. U.S. Const. art. 1, § 8, cl. 4.

7. Bankruptcy ⚷2014

Bankruptcy law may be constitutionally uniform, as required by the Bankruptcy Clause, and yet may recognize state laws in certain particulars, though such recognition may lead to different results in different states. U.S. Const. art. 1, § 8, cl. 4.

8. Bankruptcy ⚷2014

In proper circumstances, Congress, without violating the uniformity requirement of the Bankruptcy Clause, may take into account differences that exist between different parts of the country and fashion bankruptcy legislation to resolve geographically isolated problems. U.S. Const. art. 1, § 8, cl. 4.

9. Bankruptcy ⚷2014

Uniformity requirement of the Bankruptcy Clause forbids only arbitrary geographic differences. U.S. Const. art. 1, § 8, cl. 4.

10. Constitutional Law ⚷3907

Applying a statute to events occurring before it was enacted gives rise to Fifth Amendment due process concerns by potentially depriving a party of adequate notice and undermining settled expectations. U.S. Const. Amend. 5.

11. Statutes ⚷1556(1)

Courts utilize a two-step analysis on retroactivity challenge to legislation, under which they first apply ordinary tools of statutory construction and ask whether Congress has expressly prescribed the statute's proper reach.

12. Statutes ⚷1555, 1556(1)

If Congress has expressly prescribed the proper temporal reach of statute, then that is the end of the matter, and court does not proceed to second step of retroactivity analysis; only if there is no express Congressional command does court proceed to second step of analysis and decide whether applying the new provision results in an impermissible retroactive consequence by affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment.

13. Bankruptcy ⚷2023, 3152

Legislation that required payment of increased quarterly fees in large Chapter 11 cases in attempt to make up funding deficiency in the United States Trustee program, by its clear and unambiguous terms, applied in Chapter 11 cases that were pending when the legislation went into effect to require payment of increased

quarterly fees going forward by debtors that met the requirements for payment of increased fees; language in statute, providing that increased fees would be paid "in each case" and "for each quarter," with no limitation based on when the case was filed, sufficiently manifested an intent that the legislation should apply in pending cases. 28 U.S.C.A. § 1930(a)(6).

14. Bankruptcy ⚷2023, 3152

Even assuming that legislation that required payment of increased quarterly fees in large Chapter 11 cases was ambiguous as to whether these increased fees applied in Chapter 11 cases that were pending when the legislation went into effect, application of legislation in pending Chapter 11 cases to the quarterly fees that accrued thereafter would not have retroactive effect, as not impairing rights that a party possessed when legislation went into effect, increasing a party's liability for past conduct, or imposing new duties with respect to transactions already completed. 28 U.S.C.A. § 1930(a)(6).

15. Statutes ⚷1557

While there is a presumption against the retroactive application of statutes, that presumption only applies if there is a possibility that a statute attaches new legal consequences to events completed before its enactment.

Appeals from the United States Bankruptcy Court for the Eastern District of Virginia, at Richmond. Kevin R. Huennekens, Bankruptcy Judge. (3:08-bk-35653)

ARGUED: Jeffrey E. Sandberg, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant/Cross-Appellee. Andrew William Caine, PACHULSKI STANG ZIEHL & JONES LLP, Los Angeles, California, for Appellee/Cross-Appellant. ON BRIEF: Joseph H. Hunt, Assistant Attorney General, Mark B. Stern, Civil Division, Ramona D. Elliott, Deputy Director/General Counsel, P. Matthew Sutko, Associate General Counsel, Beth Levene, Executive Office for United States Trustees, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant/Cross-Appellee. Lynn L. Tavenner, Paula S. Beran, David N. Tabakin, TAVENNER & BERAN, PLC, Richmond, Virginia, for Appellee/Cross-Appellant. Bradley L. Drell, Heather M. Mathews, GOLD, WEEMS, BRUSER, SUES & RUNDELL, Alexandria, Lousiana, for Amici Acadiana Management Group, LLC, Albuquerque-AMG Specialty Hospital, LLC, Central Indiana-AMG Specialty Hospital, LLC, LTAC Hospital of Edmond, LLC, Houma-AMG Specialty Hospital, LLC, LTAC of Louisiana, LLC, Las Vegas-AMG Specialty Hospital, LLC, Warren Boegel, Boegel Farms, LLC, and Three Bo's, Inc.

Before KING and QUATTLEBAUM, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed in part, reversed in part, and remanded by published opinion. Judge KING wrote the majority opinion, in which Senior Judge TRAXLER joined. Judge QUATTLEBAUM wrote a separate opinion concurring in part and dissenting in part.

KING, Circuit Judge:

These consolidated appeals present two constitutional issues concerning changes made to the bankruptcy laws nearly four years ago. Alfred H. Siegel, Trustee of the Circuit City Stores, Inc., Liquidating Trust (the "Circuit City Trustee"), sought a ruling in 2019 on his liability for quarterly fees assessed under a 2017 Amendment to the bankruptcy fees provisions of the United States Code (the "2017 Amendment"). In response, the Bankruptcy Court for the

Eastern District of Virginia ruled that the fees aspect of the 2017 Amendment is unconstitutional. *See In re Circuit City Stores, Inc.*, 606 B.R. 260 (Bankr. E.D. Va. 2019), ECF No. 2 (the "Bankruptcy Opinion"). That ruling was based on a perceived lack of uniformity between quarterly fees in the two types of bankruptcy court districts, that is, U.S. Trustee districts and Bankruptcy Administrator districts.

John P. Fitzgerald, III, the Acting U.S. Trustee for Region 4 (the "U.S. Trustee"), maintains that the Bankruptcy Opinion erred in its uniformity ruling and has appealed. The Circuit City Trustee, on the other hand, has cross-appealed a separate aspect of the Opinion that rejected his claim concerning retroactive application of the 2017 Amendment. In November 2019, the Circuit City Trustee and the U.S. Trustee jointly certified these appeals to this Court.[1] We granted their joint petition for permission to appeal and consolidated the appeals. The U.S. Trustee's appeal is designated as No. 19-2240, and the Circuit City Trustee's cross-appeal is designated as No. 19-2255.

As explained below, we rule in favor of the U.S. Trustee in each appeal. That is, we reverse the Bankruptcy Opinion's uniformity decision challenged by the U.S. Trustee, and we affirm the Opinion's retroactivity decision challenged by the Circuit City Trustee. As a result, we remand to the bankruptcy court for such other and further proceedings as may be appropriate.

I.

A review of the pertinent background and operations of the bankruptcy courts is essential to an understanding of these proceedings. Before addressing the legal issues presented, we will discuss some historical context of those courts, as well as the factual background of these proceedings.

A.

The bankruptcy courts operate under two distinct programs for the handling of their proceedings — the Trustee program and the Bankruptcy Administrator program. Congress initiated this two-program system in 1978 when it launched the Trustee pilot program within the Department of Justice. The Trustee pilot program was successful and became a permanent fixture in 1986. Eighty-eight of the 94 judicial districts operate with U.S. Trustees. The other districts — in Alabama and North Carolina — utilize the Bankruptcy Administrator program, which is overseen by the Judicial Conference of the United States.[2]

These bankruptcy court programs utilize distinct funding sources. The judiciary's general budget, overseen by the Judicial Conference, funds the Bankruptcy Administrator program. On the other hand, the bankruptcy debtors in Trustee districts primarily fund the Trustee program. Although annual congressional appropriations provide support for the Trustee pro-

1. The U.S. Trustee and the Circuit City Trustee jointly sought permission to appeal from this court, pursuant to 28 U.S.C. § 158(d)(2)(A). That provision confers jurisdiction on a court of appeals to consider a direct appeal from a bankruptcy court, bypassing the district court, if the statutory conditions are satisfied.

2. The exclusion of Alabama and North Carolina from the Trustee program was intended to be temporary. More than twenty years later, however, Congress confirmed the special status of the six judicial districts in those two states as Bankruptcy Administrator districts. *See* Federal Courts Improvement Act of 2000, Pub. L. No. 106-518 § 501, 114 Stat. 2410, 2421-22 (2000).

gram, Congress anticipated that debtor-paid fees would completely offset the program's cost. Debtor fees include Chapter 11 quarterly fees, which are based on quarterly "disbursements" that debtors make to their creditors until the cases are "converted or dismissed." *See* 28 U.S.C. § 1930(a)(6)(A).

At their inception, the Bankruptcy Administrator districts were not required to pay quarterly fees. In 1994, however, the Ninth Circuit ruled this distinction unconstitutional, explaining that the statutory imposition of such quarterly fees in certain districts but not in others was without justification and thus contravened the Bankruptcy Clause of the Constitution. *See St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1529, 1531-32 (9th Cir. 1994), *amended by* 46 F.3d 969 (9th Cir. 1995). In reaction to that decision, Congress empowered the Judicial Conference to fix and assess quarterly fees in the Bankruptcy Administrator districts that were "equal to those imposed" in the Trustee districts. *See* 28 U.S.C. § 1930(a)(7) ("In districts that are not part of a United States trustee region ..., the Judicial Conference may require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection.").[3] In 2002, the Judicial Conference began to impose quarterly fees in the Administrator districts that were consistent with the fees specified for the Trustee districts. The Administrator districts' quarterly fees are then deposited into a fund that offsets the general judicial branch appropriations rather than Trustee operations. *Id.* Until January 1, 2018, all Chapter 11 debtors, regardless of district, paid quarterly fees consistent with the same disbursement formula. At that point in time, a funding deficit in the Trustee program disrupted the status quo.

For several decades, Congress's annual appropriations to the Trustee program were entirely offset by the quarterly fees. The mid-2010s witnessed a decline in bankruptcy filings, however, and the Trustee program was no longer self-sustaining. Fueled by concerns that the financial burden might shift to taxpayers, Congress enacted the 2017 Amendment.[4] That Amendment altered the quarterly fees formula and increased the fees due in large Chapter 11 bankruptcy cases, on a temporary basis, during fiscal years 2018 through 2022. This fee increase is conditional, and it is only applicable if the Trustee Fund contains a balance of less than $200 million as of September 30 of the most recent fiscal year. The quarterly fee increase only applies to those bankruptcy debtors with disbursements of $1,000,000 or more in any quarter. If those criteria are satisfied, the quarterly fee is then the lesser of 1 percent of such disbursements, or $250,000. This potential fee is a substan-

3. As discussed further in footnote 10, in January 2021 — after this appeal was argued — Congress amended § 1930(a)(7) of Title 28, replacing the word "may" with the word "shall." *See infra* note 10.

4. The 2017 Amendment provision at issue in these appeals is codified in § 1930(a)(6)(B) of Title 28 and provides in pertinent part as follows:

> During each of fiscal years 2018 through 2022, if the balance in the United States Trustee System Fund as of September 30 of the most recent full fiscal year is less than $200,000,000, the quarterly fee payable for a quarter in which disbursements equal or exceed $1,000,000 shall be the lesser of 1 percent of such disbursements or $250,000.

See 28 U.S.C. § 1930(a)(6)(B). Congress specified that the 2017 Amendment "shall apply to quarterly fees payable under section 1930(a)(6) ... for disbursements made in any calendar quarter that begins on or after the date of enactment." *See* Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, § 1004, 131 Stat. 1224, 1232 (2017).

tial increase from the previous maximum fee of $30,000.

Initially, only those bankruptcy debtors in the Trustee districts incurred fee increases as a result of the 2017 Amendment. Several Trustee district bankruptcy courts applied the increased fees to quarterly disbursements that postdated the Amendment. As a result, large Chapter 11 debtors with bankruptcy cases pending on January 1, 2018, incurred increased fees for disbursements beginning in the first quarter of 2018. The bankruptcy debtors in the Administrator districts, however, were not subjected to increased quarterly fees. The Judicial Conference adopted an amended fee schedule in September 2018 and applied the increased fees to those bankruptcy cases filed in the six Bankruptcy Administrator districts on or after October 1, 2018. Consequently, any debtor in an Administrator district that filed for bankruptcy prior to October 1, 2018, does not owe increased quarterly fees, regardless of how long the bankruptcy case remains pending.

B.

1.

Circuit City Stores, Inc., and its affiliates (collectively "Circuit City") operated a chain of consumer electronic retail stores throughout the United States. In 2008, Circuit City filed for Chapter 11 bankruptcy protection in the Eastern District of Virginia, which is a Trustee district. In 2010, the bankruptcy court in eastern Virginia confirmed Circuit City's Chapter 11 liquidation plan. That plan provides, with respect to "fees that become due and payable" under 28 U.S.C. § 1930, that the Circuit City Trustee "shall pay [those] fees to the U.S. Trustee until the Chapter 11 Cases are closed or converted and/or the entry of the final decrees." *See* J.A. 110.[5] Circuit City's bankruptcy proceedings remained pending on January 2018, after the 2017 Amendment went into effect.

The Circuit City Trustee initially paid the increased quarterly fees. His willingness to pay those fees diminished, however, when the bankruptcy court in the Western District of Texas ruled in February 2019 that the 2017 Amendment is unconstitutional because it creates nonuniform bankruptcy laws in contravention of the Bankruptcy Clause, and also because it is unconstitutionally retroactive. *See In re Buffets, LLC*, 597 B.R. 588 (Bankr. W.D. Tex. 2019).[6] On March 28, 2019, the Circuit City Trustee filed for similar relief in the Eastern District of Virginia, seeking to limit his liability for quarterly fees assessed under 28 U.S.C. § 1930(a)(6). *See generally* J.A. 348-63. The Circuit City Trustee maintained that he was excused from complying with the revised quarterly fee schedule for the reasons adopted by the *Buffets* bankruptcy court decision in Texas — that is, the 2017 Amendment impermissibly created nonuniform bankruptcy laws that are unconstitutionally retroactive.[7] The U.S. Trustee opposed Circuit City's requests, maintaining that Congress's temporary, prospective in-

5. Citations herein to "J.A. ——" refer to the contents of the Joint Appendix filed by the parties in this appeal.

6. As explained more fully below, in November 2020, the Fifth Circuit reversed the February 2019 *Buffets* decision of the bankruptcy court. *See Matter of Buffets, L.L.C.*, 979 F.3d 366 (5th Cir. 2020).

7. In explaining his retroactivity contention, the Circuit City Trustee asserts, *inter alia*, that the 2017 Amendment's application to pending cases contravenes the Due Process Clause of the Fifth Amendment, in that it deprived bankruptcy debtors of fair notice.

crease in quarterly fees for a subset of Chapter 11 cases is not retroactive and does not implicate any constitutional uniformity issues.

2.

a.

By its Bankruptcy Opinion of July 15, 2019, the bankruptcy court in eastern Virginia granted Circuit City's request for relief. The court ruled that the quarterly fees imposed could be classified either as a tax or as a user fee under the Bankruptcy Code and, under either designation, the 2017 Amendment contravenes both the Bankruptcy Clause and the Uniformity Clause of the Constitution. *See* Bankruptcy Opinion 14.[8] If the quarterly fees are a tax, according to the Opinion, the 2017 Amendment contravenes the Uniformity Clause because such fees are not applied in a geographically uniform manner. *Id.* Alternatively, if the quarterly fees are Chapter 11 user fees, the Opinion ruled that the 2017 Amendment is yet unconstitutional because it violates the Bankruptcy Clause, which empowers Congress to establish uniform laws for bankruptcy in the United States. *Id.* For support, the Opinion relied on the fact that, for the first three quarters of 2018, the Judicial Conference did not increase quarterly fees in the Bankruptcy Administrator districts. *Id.* at 12. As the Opinion explained, the Bankruptcy Administrator districts imposed the amended quarterly fee schedule for bankruptcy cases filed after on or October 1, 2018. With these underpinnings, the Opinion ruled that the quarterly fees owed by the Circuit City Trustee under the 2017 Amendment "since January 1, 2018, [are unconstitutional and] must be determined based on the prior version of the statute." *Id.* at 14.

b.

The Bankruptcy Opinion also addressed Circuit City's retroactivity contention. As the Opinion explained, Congress had not explicitly defined the 2017 Amendment's temporal reach. *See* Bankruptcy Opinion 10. It was thus for the courts to decide whether the 2017 Amendment applied to bankruptcy cases pending when the Amendment became effective. The Opinion then ruled that the increased quarterly fees in Trustee districts do not contravene any anti-retroactivity principles of the Constitution because, despite the variance in expectations, the 2017 Amendment is "substantively prospective" rather than retroactive. *Id.* at 11 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 n.24, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) ("Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property.")).

c.

In August 2019, the U.S. Trustee appealed to the district court, challenging the Bankruptcy Opinion's ruling that the 2017 Amendment is unconstitutional due to a lack of uniformity. The Circuit City Trustee then cross-appealed the Opinion's ruling on retroactivity. The parties jointly sought permission for direct appeals, bypassing the district court and urging that the constitutional issues relating to the

8. The Bankruptcy Clause of the Constitution provides, in pertinent part, that Congress may "establish ... uniform Laws on the subject of Bankruptcies throughout the United States." *See* U.S. Const. art. I, § 8, cl. 4. The Uniformity Clause, on the other hand, relates only to taxation and empowers Congress to "lay and collect [t]axes ...; but all Duties, Imposts, and Excises shall be uniform throughout the United States." *See id.* at cl. 1.

2017 Amendment present questions of law "as to which there [are] no controlling decision[s] of [this Court] or of the Supreme Court" and involve matters of "public importance." *See* J.A. 413-16 (citing 28 U.S.C. § 158(d)(2)(A)(i) (authorizing certification to court of appeals by "all the appellants and appellees ... acting jointly")). By Order of November 6, 2019, we granted the joint petition for these appeals, and we possess jurisdiction pursuant to that Order.

II.

[1] We generally review a bankruptcy court's factual findings for clear error and its legal rulings de novo. *See In re Birmingham*, 846 F.3d 88, 92 (4th Cir. 2017). Because the relevant facts underlying these appeals are undisputed, the applicable standard of review is de novo.

III.

In his appeal, the U.S. Trustee maintains that the 2017 Amendment is constitutional and lawful in all respects. He thus challenges the Bankruptcy Opinion's ruling that the 2017 Amendment is unconstitutionally nonuniform and contravenes the Bankruptcy Clause and the Uniformity Clause. The Circuit City Trustee, on the other hand, maintains that the bankruptcy court ruled correctly on the uniformity issue being challenged by the U.S. Trustee. The Circuit City Trustee urges in his cross-appeal, however, that the 2017 Amendment's increased fee schedule constitutes an unconstitutional retroactive imposition of quarterly fees. We will assess these appeals in turn.

A.

[2, 3] The U.S. Trustee maintains that the bankruptcy court in eastern Virginia erroneously ruled that that 2017 Amendment's fee increase is unconstitutional. In making that ruling, the Bankruptcy Opinion relied on both the Bankruptcy Clause and the Uniformity Clause. With respect to his Uniformity Clause challenge, the U.S. Trustee finds support in the Fifth Circuit's ruling last year — reversing the decision of the Texas bankruptcy court relied on in the Bankruptcy Opinion — that Chapter 11 quarterly fees are user fees. *See Matter of Buffets, L.L.C.*, 979 F.3d 366, 376 n.7 (5th Cir. 2020). Put succinctly, because the Uniformity Clause only applies to taxes, as the U.S. Trustee maintains and as the Fifth Circuit correctly ruled, that Clause is inapplicable here. *Id.* (citing U.S. Const. art. I, § 8, cl. 1 ("Congress may 'lay and collect [t]axes ...; but all Duties, Imposts, and Excises shall be uniform throughout the United States.' ")).

[4] Because the Bankruptcy Opinion incorrectly relied on the Uniformity Clause, the uniformity ruling is left with only one other basis — that the 2017 Amendment violates the Bankruptcy Clause. The Bankruptcy Clause relates to the uniformity issue because Congress is empowered therein to establish uniform bankruptcy laws throughout the United States. The Bankruptcy Opinion, relying on that Clause and the Uniformity Clause, and drawing support from the now reversed decision of the Texas bankruptcy court, ruled that the 2017 Amendment is constitutionally flawed.

The U.S. Trustee contends that the quarterly fees being challenged here fail to implicate either the Uniformity Clause or the Bankruptcy Clause, because the 2017 Amendment is not a substantive bankruptcy law. Accordingly, he maintains that the 2017 Amendment is not subject to either of the uniformity requirements. Of importance, the Fifth Circuit has reversed the Texas bankruptcy court decision on which

the Bankruptcy Opinion relied, stating that "every bankruptcy court dealing with a challenge to the 2017 Amendment" has rejected the contention that the Amendment is not a law "on the subject of Bankruptcies." *See Buffets*, 979 F.3d at 377. We are persuaded to the Fifth Circuit's view, in that — as explained further below — there is no constitutional uniformity problem posed by the 2017 Amendment.

[5–8] To be constitutionally uniform, "[a] law enacted pursuant to the Bankruptcy Clause must: (1) apply uniformly to a defined class of debtors; and (2) be geographically uniform." *See In re SCI Direct, LLC*, No. 17-61735, 2020 WL 5929612, at *10 (Bankr. N.D. Ohio Sept. 22, 2020) (citing *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 473, 102 S.Ct. 1169, 71 L.Ed.2d 335 (1982)). The Bankruptcy Clause, however, "is not a straitjacket that forbids Congress to distinguish among classes of debtors." *See Gibbons*, 455 U.S. at 469, 102 S.Ct. 1169. In fact, as the Supreme Court has emphasized, "[a] bankruptcy law may be uniform and yet may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States." *Id.* (internal quotation marks omitted). In the proper circumstances, Congress may "take into account differences that exist between different parts of the country, and ... fashion legislation to resolve geographically isolated problems." *Id.*; *see also Reg'l R.R. Reorganization Cases*, 419 U.S. 102, 159-61, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) (recognizing that Act of Congress applicable only to rail carriers in certain regions and to carriers reorganizing within certain time period was uniform under the Bankruptcy Clause, in that it was designed to solve specific regional problem).

Several bankruptcy courts have recently addressed similar constitutional challenges to the 2017 Amendment, and most of those courts have ruled that the Amendment does not present a constitutional uniformity problem.[9] As explained below, the Fifth Circuit's *Buffets* decision correctly resolved the uniformity issue concerning the 2017 Amendment's quarterly fee increase and its application to debtors in the Trustee and Administrator districts. *See Buffets*, 979 F.3d 366.

The *Buffets* debtors filed their bankruptcy proceedings in the Western District of Texas in 2016. Those proceedings were pending in 2018 when the increased quar-

9. At least ten bankruptcy courts have addressed the uniformity question that we assess today, and six of those courts have ruled in favor of constitutionality. *See In re John Q. Hammons Fall 2006, LLC*, 618 B.R. 519, 524-26 (Bankr. D. Kan. 2020) (reviewing uniformity question that we assess with respect to 2017 Amendment and ruling — as we do today — in favor of constitutionality); *In re MF Glob. Holdings Ltd.*, 615 B.R. 415, 446-48 (Bankr. S.D.N.Y. 2020) (same); *Point.360 v. Office of the U.S. Trustee*, No. 2:19-ap-01442 (Bankr. C.D. Cal. Mar. 31, 2021) (same); *In re Mosaic Mgmt. Grp., Inc.*, 614 B.R. 615, 623-25 (Bankr. S.D. Fla. 2020) (same); *In re Clayton Gen., Inc.*, No. 15-64266, 2020 Bankr. LEXIS 842 at *27 (Bankr. N.D. Ga. Mar. 30, 2020) (same); *In re Exide Techs.*, 611 B.R. 21, 36-38 (Bankr. D. Del. 2020) (same).

On the other hand, four bankruptcy courts have addressed the same uniformity question that we assess and ruled — as did the Bankruptcy Court in eastern Virginia — that the challenged 2017 Amendment is unconstitutional. *See In re Circuit City Stores, Inc.*, 606 B.R. 260, 269-70 (Bankr. E.D. Va. 2019) (addressing uniformity question and ruling that challenged 2017 Amendment is unconstitutional); *In re Life Partners Holdings, Inc.*, 606 B.R. 277, 286-88 (Bankr. N.D. Tex. 2019) (same); *In re Buffets, LLC*, 597 B.R. 588, 594-95 (Bankr. W.D. Tex. 2019) (same), *rev'd*, 979 F.3d 366 (5th Cir. 2020); *USA Sales, Inc. v. Office of the U.S. Trustee*, 2021 WL 1226369, at *17-18 (C.D. Cal. Apr. 1, 2021) (same).

terly fees required by the 2017 Amendment went into effect. After the *Buffets* debtors declined to pay the increased fees and challenged the constitutionality of the 2017 Amendment on uniformity grounds, the bankruptcy court agreed with the debtors and ruled that the Amendment was not uniform and thus unconstitutional. The U.S. Trustee in Texas appealed, and — as in these appeals — the uniformity issue was certified to the court of appeals.

After concluding that the uniformity requirement of the Bankruptcy Clause is likely applicable to the 2017 Amendment, the Fifth Circuit decided that there is "no uniformity problem" with the Amendment. *See Buffets*, 979 F.3d at 377. That decision was made after a careful assessment of the applicable authorities, and the court of appeals recognized that "the uniformity requirement forbids only arbitrary regional differences in the provisions of the Bankruptcy Code." *Id.* at 378 (internal quotation marks omitted). As the court explained, however, the uniformity requirement does not deny Congress the power to enact legislation that resolves regionally isolated problems. *Id.* According to the Fifth Circuit, when Congress determined that it needed to remedy a shortfall in funding for the Trustee districts, it was entitled to "solve the evil to be remedied with a fee increase in just the underfunded districts." *Id.* (internal quotation marks omitted). Thus, the court of appeals explained, "[i]t is reasonable for Congress to have those who benefit from the Trustee program fill the hole in its finances." *Id.* at 380.

[9] As emphasized by the Fifth Circuit, the Bankruptcy Clause forbids only "arbitrary" geographic differences. And the Supreme Court has never held that a statute contravened the Bankruptcy Clause because of arbitrary geographic distinctions. For example, in the railroad setting, the Court allowed Congress to establish a special court and enact statutes to benefit bankrupt rail carriers in the northeast and midwest, as those were the only railroads facing the problem. *See Reg'l R.R. Reorganization Cases*, 419 U.S. at 159-61, 95 S.Ct. 335.

Just as it had successfully addressed the failure of certain railroads, Congress was confronted here with a U.S. Trustee problem. The 2017 Amendment drew a program-specific distinction that only indirectly has a geographic impact. *See Buffets*, 979 F.3d at 378. Although the Amendment may render it more expensive for some debtors in Virginia — as opposed to North Carolina or Alabama — to go through Chapter 11 proceedings, the 2017 Amendment does not draw an arbitrary distinction based on the residence of the debtors or creditors. Instead, the distinction is simply a byproduct of Virginia's use of the Trustee program. By increasing quarterly fees for large Chapter 11 bankruptcies in Trustee districts, Congress solved the shortfall in the program's funding. The Administrator districts, which are funded by the judiciary's general budget, did not face a similar financial issue. Because only those debtors in Trustee districts use the U.S. Trustees, Congress reasonably solved the shortfall problem with fee increases in the underfunded districts. *Id.*

As recognized by the Fifth Circuit, the Ninth Circuit had observed in 1995 that the establishment of separate Trustee and Administrator districts was an "irrational and arbitrary" distinction for which Congress had given "no justification." *See St. Angelo*, 38 F.3d at 1532. The 2017 Amendment, however, does not suffer from any such shortcoming. Congress has provided a solid fiscal justification for its challenged action: to ensure that the U.S. Trustee program is sufficiently funded by its debt-

ors rather than by the taxpayers. Because the 2017 Amendment does not contravene the uniformity mandate of either the Uniformity Clause or the Bankruptcy Clause, we are constrained to reverse the bankruptcy court and resolve appeal No. 19-2240 in favor of the U.S. Trustee.[10]

B.

Turning to the cross-appeal pursued by the Circuit City Trustee, we must decide whether the 2017 Amendment impermissibly applies to bankruptcy cases that were pending when the Amendment took effect. As explained heretofore, the bankruptcy court in Virginia characterized the 2017 Amendment as substantively prospective, and thus not in violation of any anti-retroactivity constitutional principles. On appeal, the Circuit City Trustee contends that, regardless of the statutory language, applying the new quarterly fees to pending bankruptcy cases is unconstitutionally retroactive. The Circuit City Trustee thus contends that the "exponential statutory increase" in quarterly fees could not have been anticipated when Circuit City's bankruptcy reorganization plan was confirmed. *See* Br. of Appellee 6.

[10–12] Applying a statute to events occurring before it was enacted gives rise to Fifth Amendment due process concerns. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). Indeed, such a retroactive application may deprive a party of adequate notice and undermine "settled expectations." *Id.* at 265, 114 S.Ct. 1483. In assessing the retroactive impact of legislation, the courts have utilized a two-step analysis. *Id.* at 280, 114 S.Ct. 1483. First, applying ordinary tools of statutory construction, we ask whether Congress "has expressly prescribed the statute's proper reach." *Id.*; *see also Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37, 126 S.Ct. 2422, 165 L.Ed.2d 323 (2006). And, if Congress did so, "this is the end of the analysis." *See Appiah v. INS*, 202 F.3d 704, 708 (4th Cir. 2000). Only if that effort fails do the courts proceed to the second step. At step two, a reviewing court must determine whether applying the new provision results in an impermissible retroactive consequence by "affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment." *See Fernandez-Vargas*, 548 U.S. at 37, 126 S.Ct. 2422 (quoting *Landgraf*, 511 U.S. at 278, 114 S.Ct. 1483). The question for the cross-appeal is thus whether the 2017 Amendment, by its terms, applies to bankruptcy cases that were pending prior to January 1, 2018. If Congress was not clear, we must then decide whether an application of the

10. The U.S. Trustee also contends on appeal that the combined application of § 1930(a)(6)(B) and 1930(a)(7) of Title 28 ensure that any quarterly fee increases would apply equally to all judicial districts. *See* Br. of Appellant 29-32. As such, the Trustee maintains, any discrepancy in impact would be merely a byproduct of implementation efforts, rather than unlawful congressional action. *Id.* Of possible relevance to this proposition, Congress amended § 1930(a)(7) of Title 28 and replaced the word "may" with the word "shall." Subsection (a)(7) now reads: "In districts that are not part of a United States trustee region ... the Judicial Conference of the United States shall require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection."

The U.S. Trustee promptly submitted to our panel a post-argument Local Rule 28(j) letter, pointing out this amendment but positing that it is merely a clarifying amendment that further confirms that Congress never gave the Judicial Conference discretion to charge unequal fees. The Liquidating Trustee failed to respond to the U.S. Trustee's Rule 28(j) letter and has not contested the proposition it espouses. Because we rule that the 2017 Amendment is constitutional, we need not further address this additional argument of the U.S. Trustee.

Amendment to those pending bankruptcy cases will lead to impermissibly retroactive consequences.

[13] As the text of the 2017 Amendment indicates, Congress intended for the increased quarterly fees to apply to all Chapter 11 cases. The bankruptcy fees provision mandates that quarterly fees be paid "in each case" and "for each quarter . . . until the case is converted or dismissed," without limitation based on when the case was filed. *See* 28 U.S.C. § 1930(a)(6)(A). In the 2017 Amendment, Congress directed that "[t]he amendments made by this section" — i.e., the increase in quarterly fees for the larger Chapter 11 cases — "shall apply to quarterly fees payable under section 1930(a)(6) . . . for disbursements made in any calendar quarter that begins on or after the date of enactment." *See* Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, § 1004, 131 Stat. 1224, 1232 (2017). The Amendment thus makes clear that Congress intended for the increase to apply to all Chapter 11 quarterly fees due in January 2018 or thereafter, without regard to the case's filing date.

Notwithstanding the statutory provision, the Circuit City Trustee contends that Congress never intended for the 2017 Amendment to apply to bankruptcy cases that were pending prior to January 1, 2018. The Circuit City Trustee relies on a 1996 amendment of the same statute and argues that Congress was "crystal clear" in 1996 that the amendment was intended to apply to current cases. *See* Br. of Appellee 22-23. That contention reflects a critical misunderstanding of the 1996 amendment. It was only after several courts reached divergent conclusions about whether Congress intended for the 1996 amendment to apply to ongoing bankruptcy cases that Congress enacted "clarifying legislation," making it explicit that pending cases were covered. *Cf. Brown v. Thompson*, 374 F.3d 253, 259 & n.2 (4th Cir. 2004). Unlike the 1996 amendment, the 2017 Amendment plainly applies to all disbursements made after its effective date.

[14, 15] Even if its terms were somehow ambiguous, however, the 2017 Amendment would have no "retroactive effect" because — consistent with Supreme Court precedent — it does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *See Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483. Although there is a presumption against the retroactive application of statutes, that presumption only applies if there is a possibility that a statute "attaches new legal consequences to events completed before its enactment." *Id.* at 270, 114 S.Ct. 1483. The 2017 Amendment plainly applies only to *future* disbursements, which are triggered by a debtor's conduct occurring after the law's effective date. *See F.D.I.C. v. Faulkner*, 991 F.2d 262, 266 (1993) ("A statute's application is usually deemed prospective when it implicates conduct occurring on or after the statute's effective date." (citations omitted)).

Of importance here, the Fifth Circuit's *Buffets* decision correctly resolved the retroactivity challenge to the 2017 Amendment. *See* 979 F.3d at 374-76. The court of appeals applied the Amendment only to disbursements made after its effective date. *Id.* at 374. After evaluating the congressional history for applying fee increases to disbursements made after an effective date, the court concluded that Congress had always made fee increases so applicable. *Id.* Its decision compared the increased quarterly fees to property taxes that increase after the purchase of a home. And the Fifth Circuit ruled that the challenged fee increase is not impermissi-

bly retroactive because it does not impair rights that debtors possessed when they filed for bankruptcy protection, nor does it increase liability for conduct that had already occurred. *Id.* at 375-76. Instead, this quarterly fee increase merely upsets debtors' "expectations as to amounts owed based on future distributions." *Id.* at 375.

In these circumstances, Congress clearly intended for the 2017 Amendment to apply to all disbursements made after its effective date, and it intended for the Amendment to be prospective. It does not increase a debtor's "liability for past conduct, or impose new duties with respect to transactions already completed." *See Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483. Although the Circuit City Trustee correctly posits that the Amendment increases the quarterly fees that large Chapter 11 debtors will pay, such debtors were reasonably expected to pay fees pursuant to some formula. Accordingly, we are also constrained to reject the Circuit City Trustee's challenge to the Bankruptcy Opinion's retroactivity ruling and resolve appeal No. 19-2255 in favor of the U.S. Trustee.

IV.

Pursuant to the foregoing, we resolve appeal No. 19-2240 by reversing the bankruptcy court's ruling that the 2017 Amendment is unconstitutionally nonuniform. In appeal No. 19-2255, we affirm the bankruptcy court's decision that the 2017 Amendment is not unconstitutionally retroactive. Finally, we remand for such other and further proceedings as may be appropriate.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

QUATTLEBAUM, Circuit Judge, concurring in part and dissenting in part:

Make no mistake about it. We have two types of bankruptcy courts in the United States. Forty-eight states operate as part of the United States Trustee Program under which Unites States Trustees aid the courts in the administration and management of bankruptcy cases. But two states—Alabama and North Carolina—operate under a different system. They use Bankruptcy Administrators rather than United States Trustees. And the differences extend beyond titles. Some Chapter 11 debtors in districts that employ the United States Trustees pay materially more in quarterly fees than similarly situated debtors in districts that employ Bankruptcy Administrators. Those fee differences, in turn, trickle down and reduce the amounts unsecured creditors receive. Therefore, many unsecured creditors in the forty-eight states operating under the United States Trustee Program are receiving less of the amounts owed to them than similarly situated unsecured creditors in Alabama and North Carolina.

The Constitution prohibits this lack of uniformity. Article I, Section 8, Clause 4 of the Constitution, known as the Bankruptcy Clause, grants Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." Because I believe a faithful application of the Constitution's Bankruptcy Clause renders the statutory scheme permitting these different quarterly fees unconstitutional, I respectfully dissent from the portion of Section III-A of the majority's opinion that finds to the contrary. I concur as to the remainder of the majority's well-reasoned opinion.

I.

To understand how we arrived at the point where we have two types of bankruptcy courts, I begin with some background. "Before 1978, bankruptcy judges

were responsible for the administration of individual bankruptcy cases, including such tasks as appointing trustees to cases and monitoring individual cases." U.S. Gov't Accountability Off., GAO-GGD-92-133, Bankruptcy Administration: Justification Lacking for Continuing Two Parallel Programs 3 (1992) [hereinafter GAO Report]. "This responsibility placed administrative, supervisory, and clerical functions on judges in addition to their judicial duties." *Id.* at 3–4.

In an attempt to lessen these functions, in 1978, Congress "launched a trustee pilot program within the Department of Justice." *Matter of Buffets, L.L.C.*, 979 F.3d 366, 370 (5th Cir. 2020) (citing Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2662–65 (1978)). The program successfully reduced the administrative duties of bankruptcy judges and increased oversight of the bankruptcy system. Thus, in 1986, Congress permanently created the United States Trustee Program. The Trustee Program is overseen by the Department of Justice's Executive Office for United States Trustees ("EOUST"), which "provide[s] legal, administrative, and management support to the individual [United States Trustee] districts." GAO Report at 4.

But the Trustee Program only operates in forty-eight states, as "[t]he six districts in Alabama and North Carolina fall under the Bankruptcy Administrator program, which the Judicial Conference oversees." *Buffets*, 979 F.3d at 370. Bankruptcy Administrator districts do not benefit from "[t]he centralized support and oversight that the EOUST and its regional offices provide ...." GAO Report at 4. Instead, "[e]ach of the six [Bankruptcy Administrator] districts is independent, operating as a separate entity." *Id.* The Bankruptcy Administrator program "in each district is headed by a Bankruptcy Administrator who is selected by the U.S. Court of Appeals for a term of 5 years." *Id.* at 4–5. "It was originally thought that the exclusion of Alabama and North Carolina would last only a few years, but a later law enshrined their special status." *Buffets*, 979 F.3d at 370 n.1 (citing Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501, 114 Stat. 2410, 2421–22 (2000)). As the Acting United States Trustee ("U.S. Trustee") conceded at oral argument, Alabama and North Carolina's refusal to participate in the Trustee Program is not based on any unique attributes of those states. They simply prefer to use Bankruptcy Administrators rather than Trustees. The two systems are, therefore, candidly and unapologetically nonuniform. And the quarterly fees that Chapter 11 debtors pay in the Trustee Program and the Bankruptcy Administrator system are also non-uniform.

The way in which the two systems impose quarterly fees relates to the ways the two systems are funded. The Trustee Program is funded primarily by fees from debtors. *Id.* at 371. Debtors in Chapter 11 cases pay fees based on quarterly "disbursements" that are made until their cases are "converted or dismissed."[1] 28 U.S.C. § 1930(a)(6). Initially, Chapter 11 debtors in Bankruptcy Administrator districts were not required to pay these substantial quarterly fees. *Buffets*, 979 F.3d at 371. Instead, the Bankruptcy Administrator system was funded by the judiciary's general budget. *Id.* at 371. That meant that, in Bankruptcy Administrator dis-

1. Logistically, the Trustee Program is funded by congressional appropriations; however, the appropriation is offset by fees paid into the United States Trustee System Fund. *See* 28 U.S.C. § 589a(b) (directing that various fees should be deposited into the United States Trustee System Fund to offset the congressional appropriation).

tricts, funding from United States taxpayers was not offset by Chapter 11 quarterly fees. *See id.*

In 1994, the United States Court of Appeals for the Ninth Circuit, facing arguments much like those presented to us, ruled that the lack of quarterly fees in Bankruptcy Administrator districts violated the United States Constitution's Bankruptcy Clause, which "empowers Congress to enact 'uniform Laws on the subject of Bankruptcies throughout the United States.' " *See St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1529 (9th Cir. 1994) (quoting U.S. Const. art. I, § 8, cl. 4). The Court noted that "bankruptcy law[s] may have different effects in various states due to dissimilarities in state law as long as the federal law itself treats creditors and debtors alike." *Id.* at 1531. Because Chapter 11 debtors were only required to pay quarterly fees in districts participating in the Trustee Program, unsecured creditors in those districts received less money from debtors than they would have if the cases were filed in Alabama or North Carolina. *See id.* at 1531–32. Absent a justification for treating these debtors and creditors differently based solely on their geographic location, the Court ruled that the quarterly fee statute did "not apply uniformly to a defined class of debtors." *Id.* at 1532.

After the *St. Angelo* decision, Congress enacted 28 U.S.C. § 1930(a)(7) which empowered "the Judicial Conference to set fees in [Bankruptcy] Administrator districts that were 'equal to those imposed' in Trustee districts." *Buffets*, 979 F.3d at 371. Critically, however, the amended quarterly fee statute was permissive as to Bankruptcy Administrator districts. It did not *require* equivalent fees. It merely allowed them. *See* 28 U.S.C. § 1930(a)(7) (2018) ("In districts that are not part of a United States trustee region … the Judicial Conference of the United States *may require* the debtor in a [Chapter 11 case] to pay fees equal to those imposed [in Trustee Program districts] …." (emphasis added)).[2] If the Judicial Conference elected to impose quarterly fees, those funds were required to be deposited into a fund to offset appropriations from the federal judiciary's general budget. *See Buffets*, 979 F.3d at 371 (citing 28 U.S.C. § 1931).

"The Judicial Conference soon exercised the authority Congress gave it, charging quarterly fees in Administrator districts in the amounts specified in 28 U.S.C. § 1930 …." *Id.* (internal quotation marks omitted). This seemingly—at least in practice—eliminated the specific uniformity problem. That changed a few years ago, however, when bankruptcy filings declined and revenue from quarterly fees decreased. *Id.* With reduced fees, the Trustee Program was unable to make ends meet. *Id.* Thus, in response to its budgetary shortfall, Congress amended 28 U.S.C. § 1930(a)(6) to increase the quarterly fees in Chapter 11 cases. *Id.* Specifically, beginning January 1, 2018, Congress temporarily increased the quarterly fees for the largest Chapter 11 debtors, requiring debtors with quarterly disbursements "equal or exceed[ing] $1,000,000" to pay "the lesser of 1 percent of such disbursements or $250,000." 28 U.S.C. § 1930(a)(6)(B) (2018). This increase in quarterly fees applies "[d]uring each of fiscal years 2018 through 2022, if the balance in the United States Trustee System Fund as of September 30 of the most

2. As noted below, Congress recently amended the language of 28 U.S.C. § 1930(a)(7) to require Bankruptcy Administrator districts to impose equivalent fees. Therefore, because this case involves a challenge to the imposition of quarterly fees prior to the recent amendment, all citations to § 1930(a)(7) refer to the version of the statute in effect prior to the amendment unless otherwise specified.

recent full fiscal year is less than $200,000,000 . . . ." *Id.*

Important here, "[m]any courts in Trustee districts applied the new fees to any quarterly disbursements that postdated the effective date of the 2017 Amendment, even if the bankruptcy case had been pending before the fee increase." *Buffets*, 979 F.3d at 372. This was a dramatic increase for large debtors. Prior to the amendment, debtors whose quarterly disbursements exceeded $30,000,000 were required to pay a $30,000 fee. 28 U.S.C. § 1930(a)(6) (2012). After the amendment, however, those debtors were required to pay a $250,000 fee—an increase of more than 800%. *See* 28 U.S.C. § 1930(a)(6)(B) (2018).

The Bankruptcy Administrator districts did not immediately follow suit and increase their fees. *Buffets*, 979 F.3d at 372. "The Judicial Conference waited until September 2018 to adopt the increased fee schedule." *Id.* But the nine-month delay was not the only difference under the two systems. In Bankruptcy Administrator districts, the significantly increased quarterly fees applied only in cases "filed on or after October 1, 2018." *Id.* (internal quotation marks omitted). This led to vastly disparate fees paid by similarly situated debtors in different districts.

II.

With that background in mind, I turn now to the facts here. In 2008, Circuit City Stores, Inc. and its affiliates ("Circuit City") filed for Chapter 11 bankruptcy protection in the Eastern District of Virginia, which participates in the United States Trustee Program. In September 2010, the bankruptcy court confirmed Circuit City's proposed liquidation plan (the "Liquidating Plan"). "The Liquidating Plan provided for the formation of the Liquidating Trust, overseen by the Liquidating Trustee, to collect, administer, distribute, and liquidate all of [Circuit City's] remaining assets." J.A. 365 (footnote omitted). The Liquidating Plan further required the Liquidating Trustee to "pay quarterly fees to the U.S. Trustee until the Chapter 11 Cases are closed or converted and/or the entry of final decrees." J.A. 110.

Circuit City's bankruptcy cases were pending as of January 1, 2018, when the increased quarterly fee schedule took effect. It was, therefore, required to pay the increased fees. And the increased fees were far from nominal. "In the seven years between entry of the order confirming the Liquidating Plan and the effective date of section 1930(a)(6)(B), the Liquidating Trust paid approximately $833,000 in quarterly fees." J.A. 371 (footnote omitted). "In the first three quarters of 2018 alone, the Liquidating Trust paid approximately $632,000." J.A. 371. Without the increased quarterly fees, Circuit City would have paid $56,400—a difference of approximately $575,600.[3]

Recognizing the potential uniformity issues, the Liquidating Trustee moved to determine the extent of its liability for post-confirmation quarterly fees. The Liquidating Trust raised three arguments: (1) the amended quarterly fee statute was impermissibly applied to cases pending prior to its enactment; (2) the amended quarterly fee statute was non-uniform in violation of the Bankruptcy Clause of the United States Constitution; and (3) the amended quarterly fee statute was non-uniform in

3. The quarterly fee figures offered by the United States Trustee appear to differ from the amounts referenced by the Liquidating Trustee and the bankruptcy court. Regardless of the specific amount, it is undisputed that the Liquidating Trustee paid exponentially higher quarterly fees in 2018 than it would have in a Bankruptcy Administrator district.

violation of the uniformity requirement in the Taxing and Spending Clause of the United States Constitution.[4] The bankruptcy court rejected the Liquidating Trustee's retroactivity argument. However, it found that § 1930(a)(6)(B) violated both the Bankruptcy Clause and the uniformity provision of the Taxing and Spending Clause. I agree with the majority's decision on retroactivity and the uniformity provision of the Taxing and Spending Clause. But I would affirm the bankruptcy court's holding that § 1930(a)(6)(B) violates the Bankruptcy Clause.

Simply put, the imposition of quarterly fees in the two bankruptcy systems is not uniform. Many Chapter 11 debtors in Trustee Program districts pay more than similarly situated debtors in Bankruptcy Administrator districts. As a consequence, similarly situated creditors receive less in Trustee Program districts than in Bankruptcy Administrator districts. How then does the U.S. Trustee justify this obvious lack of uniformity? He offers three reasons that I address in turn.

A.

First, the U.S. Trustee argues that the Constitution's uniformity requirement only applies to substantive bankruptcy laws. To illustrate his point, the U.S. Trustee refers to 28 U.S.C. § 158(b)(1), which authorizes each circuit court to determine whether to establish a bankruptcy appellate panel, as a non-substantive bankruptcy law that is not uniformly implemented. Moreover, the U.S. Trustee argues that important aspects of bankruptcy practice—such as prescribing fees that an attorney or private trustee may charge and the waiver of certain fees for debtors or creditors—vary at the district level. He contends that those provisions are not substantive and, as a result, do not violate Article I, Section 8, Clause 4 of the Constitution. And he then argues that § 1930(a)(6)(B) likewise is not a substantive bankruptcy law and, thus, not constitutionally infirm.

However, there are several problems with this argument. Initially, the U.S. Trustee offers no precedent in support of his substantive versus non-substantive distinction. In fact, as the Fifth Circuit recognized, every bankruptcy court that has addressed this argument has rejected it. *See Buffets*, 979 F.3d at 377. This is hardly surprising since the Supreme Court has "defined 'bankruptcy' as the 'subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief.' " *Ry. Labor Execs. Ass'n v. Gibbons*, 455 U.S. 457, 466, 102 S.Ct. 1169, 71 L.Ed.2d 335 (1982) (quoting *Wright v. Union Central Life Ins. Co.*, 304 U.S. 502, 513–14, 58 S.Ct. 1025, 82 L.Ed. 1490 (1938)). The differences in § 1930(a)(6) and (a)(7) fit squarely within this definition.

What's more, there is a world of difference between the provisions cited by the U.S. Trustee and those at issue here. Of course, certain bankruptcy practices will vary at the local level. Bankruptcy courts must have the flexibility to operate in the most appropriate and efficient manner possible given their locality and staffing. But unlike various local rules or the existence of bankruptcy appellate panels, the disparate application of § 1930(a)(6)(B) regularly leads to similarly situated debtors paying *more* in fees and *less* to creditors in Trustee Program districts than they would in Bankruptcy Administrator

4. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1.

districts. The bankruptcy court below provided a succinct example: "Had the Debtors filed their chapter 11 bankruptcy petitions a mere 140 miles south in Raleigh, North Carolina, the Debtors would be paying substantially lower quarterly fees than they are paying now." J.A. 376 (footnote omitted). Certainly, statutes that alter the amounts similarly situated creditors receive based on geography are sufficiently substantive to implicate the Bankruptcy Clause.

B.

The U.S. Trustee next argues that § 1930(a)(6)(B) is, in any event, uniform. He insists that § 1930(a)(7) "mandates that quarterly fees in bankruptcy-administrator districts be 'equal to those imposed by [section 1930(a)(6)].' " Appellant's Br. at 28 (quoting 28 § 1930(a)(7)). Not so. Section 1930(a)(7) states that, in Bankruptcy Administrator districts, "the Judicial Conference of the United States *may require* the debtor in a [Chapter 11 case] to pay fees equal to those imposed by [§ 1930(a)(6)]." 28 U.S.C. § 1930(a)(7) (2018) (emphasis added). If the operative version of § 1930(a)(7) used the word "shall" rather than "may," this would be an entirely different case.

Illustrating this point, on January 12, 2021, during the pendency of this appeal, President Donald J. Trump signed the Bankruptcy Administration Improvement Act of 2020, Pub. L. 116-325, 134 Stat. 5085 (2021). The Act fixed the uniformity problem by striking the word "may" from § 1930(a)(7) and inserting the word "shall." Pub. L. 116-325, 134 Stat. at 5088. The Act further noted that its purpose was to "confirm the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts." *Id.* at 5086. The U.S. Trustee submitted a Rule 28(j) letter alerting the Court to this legislative change and arguing that the Act merely clarified, rather than changed § 1930(a)(7). I disagree. As is evident from the nine-month delay in implementing the increased quarterly fees, the unambiguous language of § 1930(a)(7) prior to the Act vested the Judicial Conference with discretion to assess increased quarterly fees. The Act constitutes a commendable congressional effort to remedy an unconstitutional statute. While that likely ameliorates the uniformity issue going forward, it does not eliminate the problem in the as-applied challenge before us.

That is so because the Act does not address the other critical difference between § 1930(a)(6) and (a)(7). Remember, in Bankruptcy Administrator districts, the increased quarterly fees only applied to cases filed after October 1, 2018. But in Trustee Program districts, the increased quarterly fees not only applied to disbursements in all cases filed after January 1, 2018, but also to all cases *pending* as of January 1, 2018. Therefore, because the increased quarterly fees in Trustee Program districts capture cases like this one—that was pending as of January 1, 2018—and the language of § 1930(a)(7) prior to enactment of the Act was discretionary as to Bankruptcy Administrator districts, the U.S. Trustee's argument that § 1930(a)(6)(B) and (a)(7) are actually uniform is at odds with reality.

C.

Finally, the U.S. Trustee claims that the differences in the Trustee Program and the Bankruptcy Administrator system are not geographically based. Instead, they are based on the unique budgetary challenges confronting Trustee Program districts. All Trustee Program districts, according to the U.S. Trustee, are treated uniformly, and, therefore, we should only inquire whether the increased fees apply with the

same force and effect in the Trustee Program districts.

But this argument misses the forest for the trees. Justifying the differences here on the fact that the Trustee Program districts face the budgetary problems—the trees—ignores the fact that those districts only face the budgetary problems because Congress treated them differently in the first place—the forest. And Congress did that purely based on geography.

To be fair, statutes accounting for geographic differences are not automatically a problem. *See Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 159, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) ("The uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve *geographically isolated* problems." (emphasis added)). But they are a problem if not aimed at addressing issues that are geographical in nature. Here, the quarterly fee statute does not "account [for] differences that exist between different parts of the country ...." *See id.* at 159, 95 S.Ct. 335. It is not a congressional attempt "to resolve geographically isolated problems." *See id.* Indeed, the difference in bankruptcy systems is arbitrary and financially damages unsecured creditors in every state other than Alabama and North Carolina.

In fact, a September 1992 report by the United States Government Accountability Office found no justification for having both the Bankruptcy Administrator and Trustee Programs. GAO Report at 16 ("We could not find any justification for continuing two separate programs."). Consistent with that, when faced with the question at oral argument whether there was anything geographically distinct about Alabama or North Carolina that justified a different approach in those states, the U.S. Trustee, to his credit, conceded there was not. While the uniformity provision of the Bankruptcy Clause "was not intended to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions," *Blanchette*, 419 U.S. at 159, 95 S.Ct. 335 (internal quotation marks omitted), it is a necessary safeguard to prevent laws from arbitrarily damaging creditors and debtors as a result of regionalism. Accordingly, while the constitutionality of the two types of bankruptcy systems is not before the court, I would nonetheless hold that the amended quarterly fee statute, as applied to the Liquidating Trustee, violates the Bankruptcy Clause.

III.

Words have meaning, and the words of the Bankruptcy Clause are clear. I do not reach my conclusion lightly, as I recognize that, "[i]n considering any constitutional attack on a federal statute, a court presumes that Congress has complied with the Constitution." *United States v. Comstock*, 627 F.3d 513, 518 (4th Cir. 2010). However, no matter how you slice it, uniform means not different. That was true when the Constitution was drafted, and it is still true today. Thus, for the reasons stated above, I would find that the amended quarterly fee statute is unconstitutionally non-uniform.

III.

We hold that the district court's order requiring the Secretary to disclose the identities of informant witnesses and their unredacted witness statements by April 2, 2021, is not "clearly erroneous as a matter of law." *Bauman*, 557 F.2d at 654. The petition for writ of mandamus is accordingly **DENIED**.

IN RE: JOHN Q. HAMMONS FALL 2006, LLC; ACLOST, LLC; Bricktown Residence Catering Co., Inc.; Chateau Catering Co., Inc.; Chateau Lake, LLC; City Centre Hotel Corp.; Civic Center Redevelopment Corp.; Concord Golf Catering Co., Inc.; Concord Hotel Catering Co., Inc.; East Peoria Catering Co., Inc.; Fort Smith Catering Co., Inc.; Franklin/Crescent Catering Co., Inc.; Glendale Coyotes Catering Co., Inc.; Glendale Coyotes Hotel Catering Co., Inc.; Hammons of Arkansas, LLC; Hammons of Colorado, LLC; Hammons of Franklin, LLC; Hammons of Frisco, LLC; Hammons of Huntsville, LLC; Hammons of Lincoln, LLC; Hammons of New Mexico, LLC; Hammons of Oklahoma City, LLC; Hammons of Richardson, LLC; Hammons of Rogers, Inc.; Hammons of Sioux Falls, LLC; Hammons of South Carolina, LLC; Hammons of Tulsa, LLC; Hammons, Inc.; Hampton Catering Co., Inc.; Hot Springs Catering Co., Inc.; Huntsville Catering, LLC; International Catering Co., Inc.; JQH - Allen Development, LLC; JQH - Concord Development, LLC; JQH - East Peoria Development, LLC; JQH - Ft. Smith Development, LLC; JQH - Glendale AZ Development, LLC; JQH - Kansas City Development, LLC; JQH - La Vista CY Development, LLC; JQH - La Vista Conference Center Development, LLC; JQH - La Vista III Development, LLC; JQH - Lake of the Ozarks Development, LLC; JQH - Murfreesboro Development, LLC; JQH - Normal Development, LLC; JQH - Norman Development, LLC; JQH - Oklahoma City Bricktown Development, LLC; JQH - Olathe Development, LLC; JQH - Pleasant Grove Development, LLC; JQH - Rogers Convention Center Development, LLC; JQH - San Marcos Development, LLC; John Q. Hammons 2015 Loan Holdings, LLC; John Q. Hammons Center, LLC; John Q. Hammons Hotels Development, LLC; John Q. Hammons Hotels Management I Corporation; John Q. Hammons Hotels Management II, LP; John Q. Hammons Hotels Management, LLC; Joplin Residence Catering Co., Inc.; Junction City Catering Co., Inc.; KC Residence Catering Co., Inc.; La Vista CY Catering Co., Inc.; La Vista ES Catering Co., Inc.; Lincoln P Street Catering Co., Inc.; Loveland Catering Co., Inc.; Manzano Catering Co., Inc.; Murfreesboro Catering Co., Inc.; Normal Catering Co., Inc.; OKC Courtyard Catering Co., Inc.; R-2 Operating Co., Inc.; Revocable Trust of John Q. Hammons Dated December 28, 1989 as Amended and Restated; Richardson Hammons, LP; Rogers ES Catering Co., Inc.; SGF - Courtyard Catering Co., Inc.; Sioux Falls Convention/Arena Catering Co., Inc.; St. Charles Catering Co., Inc.; Tulsa/169 Catering Co., Inc.; U.P. Catering Co., Inc., Debtors.

John Q. Hammons Fall 2006, LLC; ACLOST, LLC; Bricktown Residence Catering Co., Inc.; Chateau Catering Co., Inc.; Chateau Lake, LLC; City

Centre Hotel Corp.; Civic Center Redevelopment Corp.; Concord Golf Catering Co., Inc.; Concord Hotel Catering Co., Inc.; East Peoria Catering Co., Inc.; Fort Smith Catering Co., Inc.; Franklin/Crescent Catering Co., Inc.; Glendale Coyotes Catering Co., Inc.; Glendale Coyotes Hotel Catering Co., Inc.; Hammons of Arkansas, LLC; Hammons of Colorado, LLC; Hammons of Franklin, LLC; Hammons of Frisco, LLC; Hammons of Huntsville, LLC; Hammons of Lincoln, LLC; Hammons of New Mexico, LLC; Hammons of Oklahoma City, LLC; Hammons of Richardson, LLC; Hammons of Rogers, Inc.; Hammons of Sioux Falls, LLC; Hammons of South Carolina, LLC; Hammons of Tulsa, LLC; Hammons, Inc.; Hampton Catering Co., Inc.; Hot Springs Catering Co., Inc.; Huntsville Catering, LLC; International Catering Co., Inc.; JQH - Allen Development, LLC; JQH - Concord Development, LLC; JQH - East Peoria Development, LLC; JQH - Ft. Smith Development, LLC; JQH - Glendale AZ Development, LLC; JQH - Kansas City Development, LLC; JQH - La Vista CY Development, LLC; JQH - La Vista Conference Center Development, LLC; JQH - La Vista III Development, LLC; JQH - Lake of the Ozarks Development, LLC; JQH - Murfreesboro Development, LLC; JQH - Normal Development, LLC; JQH - Norman Development, LLC; JQH - Oklahoma City Bricktown Development, LLC; JQH - Olathe Development, LLC; JQH - Pleasant Grove Development, LLC; JQH - Rogers Convention Center Development, LLC; JQH - San Marcos Development, LLC; John Q. Hammons 2015 Loan Holdings, LLC; John Q. Hammons Center, LLC; John Q. Hammons Hotels Development, LLC; John Q. Hammons Hotels Management I Corporation; John Q. Hammons Hotels Management II, LP; John Q. Hammons Hotels Management, LLC; Joplin Residence Catering Co., Inc.; Junction City Catering Co., Inc.; KC Residence Catering Co., Inc.; La Vista CY Catering Co., Inc.; La Vista ES Catering Co., Inc.; Lincoln P Street Catering Co., Inc.; Loveland Catering Co., Inc.; Manzano Catering Co., Inc.; Murfreesboro Catering Co., Inc.; Normal Catering Co., Inc.; OKC Courtyard Catering Co., Inc.; R-2 Operating Co., Inc.; Revocable Trust of John Q. Hammons Dated December 28, 1989 as Amended and Restated; Richardson Hammons, LP; Rogers ES Catering Co., Inc.; SGF - Courtyard Catering Co., Inc.; Sioux Falls Convention/arena Catering Co., Inc.; St. Charles Catering Co., Inc.; Tulsa/169 Catering Co., Inc.; U.P. Catering Co., Inc., Appellants,

v.

Office of the United States Trustee, Appellee,

Acadiana Management Group, LLC; Albuquerque-AMG Specialty Hospital, LLC; Central Indiana-AMG Specialty Hospital, LLC; LTAC Hospital of Edmond, LLC; Houma-AMG Specialty Hospital, LLC; LTAC of Louisiana, LLC; Las Vegas-AMG Specialty Hospital, LLC; Warren Boegel; Boegel Farms, LLC and Three Bo's, Inc., Amici Curiae.

No. 20-3203

United States Court of Appeals,
Tenth Circuit.

FILED October 5, 2021

Background: Chapter 11 debtors moved for determination of extent of their liability

for United States Trustee (UST) quarterly fees, contending that amendment to statute governing Chapter 11 disbursement fees was unconstitutional. The United States Bankruptcy Court for the District of Kansas, Robert D. Berger, J., 618 B.R. 519, denied motion, and debtors appealed.

Holdings: The Court of Appeals, Phillips, Circuit Judge, held that:

(1) the presumption against retroactivity did not apply to statutory amendment mandating increased quarterly Chapter 11 disbursement fees for large debtors in Trustee districts, because Congress increased the quarterly fees prospectively;

(2) as a matter of apparent first impression for the court, the amendment violated the uniformity requirement of the Bankruptcy Clause by allowing higher quarterly disbursement fees on Chapter 11 debtors in Trustee districts than charged to equivalent debtors in Bankruptcy Administrator districts; and

(3) to remedy debtors' harms from the unconstitutional treatment, they were entitled to monetary relief in the form of a refund of the "excess" quarterly fees they paid.

Reversed and remanded.

Bacharach, Circuit Judge, filed dissenting opinion.

1. Bankruptcy ⚷3152

Bankruptcy courts calculate and collect Chapter 11 debtors' quarterly fees based on the size of quarterly "disbursements" paid creditors. 28 U.S.C.A. § 1930(a)(6).

2. Bankruptcy ⚷3152

By amending statute governing bankruptcy fees to substantially increase the quarterly Chapter 11 disbursement fees for large debtors in Trustee Program districts, Congress sought to secure funding levels in those districts, whose declining bankruptcy filings had reduced fees that contributed to overall funding. 28 U.S.C.A. § 1930(a)(6).

3. Bankruptcy ⚷3782

Court of Appeals reviews legal issues arising in bankruptcy proceedings de novo.

4. Bankruptcy ⚷2023, 3152

Presumption against retroactivity did not apply to statutory amendment mandating increased quarterly Chapter 11 disbursement fees for large debtors in Trustee districts, even though the amendment increased fees in pending cases, because Congress increased the quarterly fees prospectively; under the statute, debtors owe quarterly fees "in each case" and "for each quarter" regardless of case filing date, the amendment increased quarterly fees for all disbursements paid on or after its effective date, and even if the amendment's language were ambiguous, it did not operate retroactively, as it imposed no new legal consequences on disbursement fees before the amendment's effective date, but merely triggered prospective assessment of fees thereafter, akin to a property-tax increase after a home purchase. 28 U.S.C.A. § 1930(a)(6).

5. Statutes ⚷1557

Because, if Congress applies a new law to earlier events, this raises notice issues and could upset settled expectations, courts apply a presumption against retroactivity when interpreting statutes.

6. Statutes ⚷1557

Under canon of construction providing presumption against retroactivity, courts presume that Congress did not intend a statute to have a "genuinely retroactive effect."

7. Statutes ⚷1556(1), 1560

Court employs two-step analysis in assessing whether presumption against retroactivity applies: first, court employs ordinary statutory-interpretation tools to determine whether Congress has expressly prescribed statute's proper reach; if so, court's analysis stops there, but if not, court must determine whether new statute would have "retroactive effect," that is, whether it would impair rights party possessed when he acted, increase party's liability for past conduct, or impose new duties with respect to transactions already completed.

See publication Words and Phrases for other judicial constructions and definitions.

8. Statutes ⚷1556(1), 1557

If a statute would operate retroactively, the traditional presumption against retroactivity teaches that it does not govern absent clear congressional intent favoring such a result.

9. Statutes ⚷1557

Presumption against retroactivity applies only when new provision attaches new legal consequences to events completed before its enactment.

10. Statutes ⚷1403

Legislation is not unlawful solely because it upsets otherwise settled expectations.

11. Bankruptcy ⚷2014

Bankruptcy Clause of the United States Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States," thus requiring geographic uniformity. U.S. Const. art. 1, § 8, cl. 4.

12. Bankruptcy ⚷2014, 3152

Statutory amendment mandating increased quarterly Chapter 11 disbursement fees for large debtors in Trustee districts was a substantive law "on the subject of bankruptcies" and, thus, was subject to the uniformity requirement of the Bankruptcy Clause; amendment, which concerned a statute imposing fees that a debtor had to pay before paying creditors, and so had a direct effect on what creditors would receive, fit within the Supreme Court's broad definition of "bankruptcy" as the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief. U.S. Const. art. 1, § 8, cl. 4; 28 U.S.C.A. § 1930(a)(6).

See publication Words and Phrases for other judicial constructions and definitions.

13. Statutes ⚷1407

Mere use of "may" in a statute is not necessarily conclusive of congressional intent to provide for permissive or discretionary authority.

14. Statutes ⚷1387

For purposes of statutory interpretation, the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.

15. Constitutional Law ⚷994

Courts should, if possible, interpret ambiguous statutes to avoid rendering them unconstitutional.

16. Bankruptcy ⚷2014, 3152

Statutory amendment mandating increased quarterly Chapter 11 disbursement fees for large debtors in Trustee districts, which allowed higher quarterly disbursement fees on Chapter 11 debtors in Trustee districts than charged to equivalent debtors in Bankruptcy Administrator districts, violated the uniformity requirement of the Bankruptcy Clause; the amendment neither applied uniformly to a class of debtors nor addressed a geographically isolated problem but, instead, sub-

stantially increased fees, potentially by millions of dollars, for one debtor but not another identical in all respects save the geographic locations in which they filed for bankruptcy. U.S. Const. art. 1, § 8, cl. 4; 28 U.S.C.A. § 1930(a)(6).

17. Bankruptcy ⚷2014

Bankruptcy Clause does not require perfect uniformity. U.S. Const. art. 1, § 8, cl. 4.

18. Bankruptcy ⚷2534

State property laws may affect what property is available for distribution in a bankruptcy case, without running afoul of the Bankruptcy Clause. U.S. Const. art. 1, § 8, cl. 4.

19. Bankruptcy ⚷2014

Although the Bankruptcy Clause does not require perfect uniformity, the flexibility inherent in the constitutional provision has limits. U.S. Const. art. 1, § 8, cl. 4.

20. Bankruptcy ⚷2014

Uniformity requirement of the Bankruptcy Clause extends past private bills, even though the Supreme Court has struck down a bankruptcy law for lack of uniformity only once, where the stricken legislation amounted to nothing more than a private bill governing only one regional debtor. U.S. Const. art. 1, § 8, cl. 4.

21. Bankruptcy ⚷2014

In the context of the Bankruptcy Clause, "uniformity" requires that a law must at least apply uniformly to a defined class of debtors. U.S. Const. art. 1, § 8, cl. 4.

See publication Words and Phrases for other judicial constructions and definitions.

22. Bankruptcy ⚷2014

Bankruptcy Clause's uniformity requirement bars Congress from assessing disparate fees on debtors simply on grounds that it has chosen to treat them differently. U.S. Const. art. 1, § 8, cl. 4.

23. Bankruptcy ⚷2014, 3152

Bankruptcy Clause precludes increasing trustee fees based just on the location of the bankruptcy court. U.S. Const. art. 1, § 8, cl. 4.

24. Bankruptcy ⚷2014, 3152

Upon determination that statutory amendment mandating increased quarterly Chapter 11 disbursement fees for large debtors in Trustee districts violated the uniformity requirement of the Bankruptcy Clause by allowing higher quarterly disbursement fees on Chapter 11 debtors in Trustee districts than charged to equivalent debtors in Bankruptcy Administrator districts, the Chapter 11 debtors that challenged the amendment were entitled to monetary relief to remedy their harms from the unconstitutional treatment, namely, a refund of the amount of quarterly fees paid exceeding the amount that debtors would have owed in a Bankruptcy Administrator district during the same period. U.S. Const. art. 1, § 8, cl. 4; 28 U.S.C.A. § 1930(a)(6).

25. Courts ⚷96(5)

Tenth Circuit Court of Appeals lacks authority over quarterly Chapter 11 disbursement fees assessed in districts outside its circuit, and thus in Alabama or North Carolina. 28 U.S.C.A. § 1930(a)(6).

Appeal from the United States Bankruptcy Court for the District of Kansas (16-21142)

Nicholas Zluticky (with Zachary H. Hemenway, Michael P. Pappas, and J. Nicci Warr on the briefs) of Stinson LLP, Kansas City and Clayton, Missouri, for Debtors-Appellants.

Jeffrey E. Sandberg (with Mark B. Stern, Ramona D. Elliott, P. Matthew Sutko, Andrew W. Beyer, and Brian M. Boynton on the brief) of the U.S. Department of Justice, Washington, District of Columbia, for Appellee.

Bradley L. Drell and Heather M. Mathews of Gold, Weems, Bruser, Sues & Rundell, Alexandria, Louisiana, on the brief for Amici Curiae.

Before BACHARACH, EBEL, and PHILLIPS, Circuit Judges.

PHILLIPS, Circuit Judge.

Appellants, seventy-six Chapter 11 debtors associated with John Q. Hammons Hotels & Resorts (Debtors), argue that they incurred more than $2.5 million of quarterly Chapter 11 disbursement fees from January 2018 through December 2020. First, Debtors fault the bankruptcy court's statutory interpretation, arguing that it applied the quarterly fees retroactively to pending cases against Congress's intent. We conclude that the presumption against retroactivity doesn't apply here, because Congress increased the quarterly bankruptcy fees prospectively. Second, and alternatively, Debtors fault Congress, arguing that charging different Chapter 11 disbursement fees depending on the location of the bankruptcy filing violates the uniformity requirement of the Bankruptcy Clause, U.S. Const. art I, § 8, cl. 4. On this point, we conclude that Debtors must prevail. Accordingly, we reverse and remand for recalculation of the quarterly Chapter 11 disbursement fees and a refund of overpayments.

BACKGROUND

I. Historical Background

The federal judiciary is divided into ninety-four judicial districts. Nearly all judicial districts have a bankruptcy court. The Department of Justice, through its Trustee Program, administers bankruptcy proceedings for eighty-eight judicial districts.[1] *E.g.*, *In re Cir. City Stores, Inc.*, 996 F.3d 156, 160 (4th Cir. 2021). The Judicial Conference, through its Bankruptcy Administrator Program, administers bankruptcy proceedings in the remaining six districts, located in Alabama and North Carolina. *Id.* (footnote omitted).

This system of dual bankruptcy programs began in 1978. *See* Pub. L. No. 95-598, §§ 224–32, 92 Stat. 2549, 2662–65 (1978). Before then, bankruptcy judges in all judicial districts supervised and administered their own bankruptcy proceedings. H.R. Rep. No. 95-595, at 4 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 5965–66. In 1978, Congress launched a pilot trustee program (1) to alleviate the administrative burdens on bankruptcy judges, (2) to remove any appearance of bias arising from judges' administering cases, and (3) to establish bankruptcy-court "watchdogs." *Id.*; Pub. L. No. 95-598, §§ 224–32, 92 Stat. at 2662–65.

In 1986, Congress made the program permanent in all judicial districts, but allowed Alabama and North Carolina until

1. The Eastern and Western Districts of Arkansas share a bankruptcy court. *See* United States Courts, https://www.uscourts.gov/about-federal-courts/federal-courtspublic/court-website-links (last visited August 10, 2021). And the judicial districts for the Virgin Islands, Northern Mariana Islands, and Guam don't have bankruptcy courts. *See* Boston College Law Library, Bankruptcy Courts, https://lawguides.bc.edu/c.php?g=350874&p=2367777 (last visited August 10, 2021). But the Trustee Program still covers bankruptcy proceedings in these districts. *See* Judicial Districts Covered by USTP Regions, Department of Justice, https://www.justice.gov/ust/judicial-districts-covered-ustp-regions (last visited August 10, 2021).

1992 to join. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, §§ 111–17, 302(d), 100 Stat. 3088, 3090–96, 3119–23 (1986).

But in 1990, Congress extended the temporary delay until 2002. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 317(a), 104 Stat. 5089, 5115 (1990). Then in 2000, Congress granted Alabama and North Carolina a permanent exemption from joining the Trustee Program. Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501, 114 Stat. 2410, 2421–22 (2000).

This left the country with two different bankruptcy-administration programs. Each has a separate funding source. The general judicial budget funds Bankruptcy Administrators in Alabama and North Carolina. *Matter of Buffets, L.L.C.*, 979 F.3d 366, 383 (5th Cir. 2020); *cf.* 28 U.S.C. § 1930(a)(7). Debtors' fees fund the Trustee Program everywhere else.[2] H.R. Rep. No. 99-764, at 22 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5227, 5234.

[1] Chapter 11 debtors pay quarterly disbursement fees. 28 U.S.C. § 1930(a)(6). Bankruptcy courts calculate and collect these fees based on the size of quarterly "disbursements" paid creditors. *Id.* At first, Congress imposed these fees only in Trustee districts. *See Buffets*, 979 F.3d at 371. But in 1994, the Ninth Circuit ruled that imposing a "different, more costly system" on debtors everywhere except Alabama and North Carolina violated the Bankruptcy Clause's requirement that bankruptcy laws be uniform. *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1531–33 (9th Cir. 1994). The next year, Congress enacted § 1930(a)(7), which allowed the Judicial Conference to require debtors "to pay fees equal to those imposed" in Trustee districts.[3] Federal Courts Improvement Act of 2000 § 105. A year later, the Judicial Conference set fees in Bankruptcy Administrator districts "in the amounts specified [for Trustee districts], as those amounts may be amended from time to time." *Report of the Proceedings of the Judicial Conference of the United States* 45–46 (2001), https://www.uscourts.gov/sites/default/files/2001-09_0.pdf.

[2] For the next seventeen years or so, Trustee and Bankruptcy Administrator districts charged the same quarterly fees. That changed with Congress's 2017 Amendment to § 1930(a)(6), which mandated increased quarterly Chapter 11 disbursement fees for large debtors in Trustee districts. Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-72, § 1004(a)(2), 131 Stat. 1224, 1232 (2017). With this Amendment, Congress sought to secure funding levels in the Trustee Program districts, whose declining bankruptcy filings had reduced fees that contributed to overall funding. H.R. Rep. No. 115-130, at 6–7 (2017), *as reprinted in* 2017 U.S.C.C.A.N. 154, 159; *see also Cir. City Stores*, 996 F.3d at 161. Under the 2017 Amendment, each

2. Though Congress annually appropriates funds to the Trustee Program, it offsets appropriations with the bankruptcy fees collected. H.R. Rep. No. 115-130, at 6–7 (2017), *as reprinted in* 2017 U.S.C.C.A.N. 154, 159.

3. In a 2020 amendment effective on January 12, 2021, Congress amended "may" to "shall." Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325, § 3(d)(2), 134 Stat. 5086, 5088 (2020); *see* 28 U.S.C. § 1930(a)(7) (2021) (providing that "the Judicial Conference of the United States shall require [Chapter 11 debtors] to pay fees equal to those imposed" in Trustee districts). For quarters in 2021 and afterward, Congress has restored equilibrium for fees charged in Bankruptcy Administrator and Trustee districts.

year from 2018 through 2022, fees would increase for debtors with at least $1 million quarterly disbursements if "as of September 30 of the most recent full fiscal year," Trustee Program funds were below $200 million.[4] § 1004(a)(2). This substantially raised fees for these Trustee Program debtors, from a maximum of $30,000 to the lesser of either $250,000 or one percent of the quarterly disbursement.[5] *Id.*; 28 U.S.C. § 1930(a)(6) (2008).

For quarters beginning on and after January 1, 2018, quarterly Chapter 11 disbursement fees increased on all large debtors in Trustee districts, even debtors whose bankruptcy cases were pending before that date. *See, e.g.*, *Buffets*, 979 F.3d at 372. Bankruptcy Administrator debtors got a better deal. The Judicial Conference didn't increase quarterly fees for those debtors until October 2018, and then, the increase didn't apply prospectively to pending cases.[6] Thus, in Bankruptcy Administrator districts, unlike in Trustee districts, large debtors with cases pending before October 2018 incurred no increased fees however long their cases remained pending. *E.g.*, *Buffets*, 979 F.3d at 372.

II. Procedural Background

In June 2016, Debtors filed Chapter 11 bankruptcy cases in the District of Kansas, a Trustee district.[7] Their cases remained pending in January 2018 when the 2017 Amendment took effect. After that, their quarterly fees markedly increased. As of December 31, 2019, Debtors had paid over $2.5 million more in quarterly fees than they would have paid had they filed in a Bankruptcy Administrator district.

In the bankruptcy court, Debtors challenged the quarterly Chapter 11 disbursement-fee increase. They argued that the 2017 Amendment was unconstitutional "because it was unequally applied during the first three quarters of 2018 and because it was applied retroactively both without clear Congressional intent and only in states where the United States Trustee Program operates—excluding bankruptcy petitions filed in North Carolina and Alabama." Debtors/Appellants' App. vol. 71 at 9871. The bankruptcy court rejected both arguments and declined to redetermine Debtors' quarterly disbursement fees. We review under 28 U.S.C. § 158(d)(2).

DISCUSSION

[3] On appeal, Debtors maintain (1) that the bankruptcy court erred in interpreting the 2017 Amendment to require increased fees retroactively, and (2) that the 2017 Amendment violates the Constitution's Bankruptcy Clause by applying a bankruptcy law nonuniformly. We review these legal issues de novo, beginning with the retroactivity challenge.[8] *See In re Herd*, 840 F.2d 757, 759 (10th Cir. 1988) (citation omitted).

4. Congress also intended to finance eighteen new bankruptcy judgeships. *See* H.R. Rep. No. 115-130, at 7. To that end, Congress allocated 98% percent of the fees to the Trustee Program fund and 2% percent to the general Treasury fund. *See* § 1004.

5. In the 2020 Amendment, Congress reduced fees to the lesser of 0.8% of the disbursement or $250,000. § 3(d)(1).

6. *Report of the Proceedings of the Judicial Conference of the United States* 11–12 (2018), https://www.uscourts.gov/sites/default/files/2018-09_proceedings.pdf.

7. Because of their many business locations, Debtors had the flexibility to have filed in the Bankruptcy Administrator districts instead.

8. We address the retroactivity challenge first, because if Debtors prevailed on this issue we wouldn't need to decide the constitutionality of the 2017 Amendment under the Bankruptcy Clause.

I. Retroactivity

[4] Debtors argue that applying the 2017 Amendment to their bankruptcy cases, which were pending in January 2018, is "impermissibly retroactive." Opening Br. at 42. Specifically, they contend that the Amendment's fee increases apply only to bankruptcy cases *filed* after January 1, 2018, not to cases *pending* then. The Fourth and Fifth Circuits have rejected this argument. *Cir. City Stores*, 996 F.3d at 168–69; *Buffets*, 979 F.3d at 374–76. We do too.

[5–8] Obviously, if Congress applies a new law to earlier events, this raises notice issues and could upset "settled expectations." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (footnote omitted). So courts apply a presumption against retroactivity when interpreting statutes. *See id.* at 277, 114 S.Ct. 1483. Under this canon of construction, we presume that Congress didn't intend a statute to have a "genuinely 'retroactive' effect." *Id.* We employ a two-step analysis in assessing whether the presumption applies. *Id.* at 280, 114 S.Ct. 1483. First, we employ ordinary statutory-interpretation tools "to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* If so, our analysis stops there. *Id.* If not, second, we "must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* "If the statute would operate retroactively, our traditional presumption [against retroactivity] teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*

Debtors contend that we should apply the presumption against retroactivity to the 2017 Amendment; that is, they argue that the 2017 Amendment's text is ambiguous about whether it applies to already-pending cases and that it would have an impermissible retroactive effect if applied in such cases. We interpret the 2017 Amendment as increasing fees in pending cases. *Accord Cir. City Stores*, 996 F.3d at 168–69; *Buffets*, 979 F.3d at 374–75. Under § 1930(a)(6), debtors owe quarterly fees "in *each* case" and "for *each* quarter," regardless of case filing date. *Id.* (emphasis added). And the 2017 Amendment shows that Congress intended to increase quarterly fees for all disbursements paid on or after January 1, 2018. The 2017 Amendment ties the quarterly-fee increase to the disbursement date, no matter when the bankruptcy case was filed. The increase applies to "quarterly fees payable ... for *disbursements* made in any calendar quarter that begins on or after the date of enactment." § 1004 (emphasis added). The legislative history contains similar language. *See* H.R. Rep. No. 115-130, at 10 (providing that the fee increase "applies to quarterly fees payable for any quarter that begins on or after the effective date of this legislation").

Even so, Debtors argue that we should draw a negative inference from the 2017 Amendment's not more specifically applying its fee increases to pending cases. Debtors contend that whether the 2017 Amendment applies to those cases is ambiguous. Debtors contrast the 2017 Amendment's language to Congress's language in a clarifying amendment for a 1996 fee increase, which specified that it applied to pending cases. Debtors also point to amendments to Chapter 12 of the Bankruptcy Code contained in the same act as the 2017 Amendment, which did so also.

We decline to draw a negative inference. Debtors haven't overcome the 2017 Amendment's language increasing quarterly fees for all postenactment disburse-

ments. Additionally, Debtors' legislative examples differ. Congress intended the 1996 clarifying amendment to resolve judicial disagreement about whether a 1996 fee increase applied in pending cases. *Cir. City Stores*, 996 F.3d at 168 (citation omitted). By contrast, the 2017 Amendment increases all quarterly fees for disbursements made after its effective date. And when enacting the 2017 Amendment, "Congress operated under [a] widespread understanding that fee increases apply to postenactment disbursements in pending cases." *Buffets*, 979 F.3d at 374 (citation omitted).

Similarly, a negative inference doesn't arise from the Chapter 12 amendment, because that amendment addresses a different subject from § 1930(a)(6)'s. *Cf. Martin v. Hadix*, 527 U.S. 343, 356, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999) (finding a proposed negative inference inapposite because it depended on legislation on a "wholly distinct subject matter[ ]"). That amendment enlarged the scope of Chapter 12 discharge by expanding what debts are dischargeable. *See* Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017, § 1005; *see also Buffets*, 979 F.3d at 375 n.5 (citation omitted). To preserve existing rights in discharge, Congress clarified that the amendment didn't reach pending cases with existing discharge orders. *Buffets*, 979 F.3d at 375 n.5. Congress needn't have employed similar language when addressing the unrelated matter of Chapter 11 quarterly-fee increases, long assumed applicable to pending cases. *See id.* (citation omitted).

[9] Even if we viewed the 2017 Amendment as ambiguous, we still wouldn't apply the presumption against retroactivity. We conclude that the 2017 Amendment doesn't operate retroactively. The presumption against retroactivity applies only when "the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269–70, 114 S.Ct. 1483. As described, to have a retroactive effect, a new provision must "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280, 114 S.Ct. 1483. We've previously ruled that an amendment increasing § 1930(a)(6)'s quarterly fees wasn't retroactive, because the amendment merely "trigger[ed] prospective assessment of fees from the amendment's effective date." *In re CF & I Fabricators of Utah, Inc.*, 150 F.3d 1233, 1237 (10th Cir. 1998) (citation omitted). Most courts have concluded that the 2017 Amendment isn't retroactive, reasoning that the fee increase applies prospectively. *See, e.g., Buffets*, 979 F.3d at 375–76. We're persuaded by the Fifth Circuit's reasoning that the fee increase resembles a property-tax increase after a home purchase. *See id.* at 376 (citation and footnote omitted). The Supreme Court has described such taxes as "uncontroversially prospective." *Landgraf*, 511 U.S. at 269 n.24, 114 S.Ct. 1483 (citation omitted).

[10] Debtors can't refute this reasoning. Instead, they argue that "[w]hen the increased fees were applied to [their] bankruptcy cases, new legal obligations . . . were retroactively applied to their decision to file" in a Trustee district, rather than a Bankruptcy Administrator district. Opening Br. at 47. Debtors miss the mark. The issue is whether the 2017 Amendment's increasing of quarterly fees is retroactive. *Cf.* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 264 (2012) ("[R]etroactivity is to be judged with regard to the act or event that the statute is meant to regulate[.]"). The 2017 Amendment imposes no new legal consequences on disbursement

fees before January 2018. Thus, we reject Debtors' retroactivity challenge to the 2017 Amendment. Even if Debtors' expectations were unsettled, legislation isn't "unlawful solely because it upsets otherwise settled expectations."[9] *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729–30, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984) (citations omitted).

II. Bankruptcy Clause Uniformity

A. The 2017 Amendment is a Law on "the Subject of Bankruptcies"

[11, 12] The Bankruptcy Clause authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States," thus requiring geographic uniformity. U.S. Const. art I, § 8, cl. 4. The United States Trustee first contends that we needn't determine whether the 2017 Amendment violates this limitation, because the Amendment isn't a substantive law "on the subject of bankruptcies." The Trustee contends that the Amendment concerns an administrative matter and is not subject to the uniformity requirement. In that regard, the Trustee likens dual-system quarterly Chapter 11 disbursement fees to statutorily optional bankruptcy appellate panels, which only some judicial circuits use, or to optional local rules among bankruptcy courts. The Trustee also notes that 28 U.S.C. § 1930(f)(3) allows bankruptcy courts to waive some fees.

Every court that has addressed the Trustee's argument has rejected it, and for good reason. *See, e.g.*, *In re Clinton Nurseries, Inc.*, 998 F.3d 56, 64 (2d Cir. 2021) ("The Trustee's argument has been repeatedly rejected by other courts." (collecting cases)); *cf. Buffets*, 979 F.3d at 377 ("The consensus view of bankruptcy courts that Chapter 11 fees are Bankruptcy Clause legislation is likely correct."). The 2017 Amendment fits within the Supreme Court's broad definition of "bankruptcy" as "the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." *Ry. Lab. Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 466, 102 S.Ct. 1169, 71 L.Ed.2d 335 (1982) (internal quotation marks and citations omitted). The Amendment concerns a statute (§ 1930(a)(6)) imposing fees that a debtor must pay before paying creditors. *See, e.g.*, *Clinton Nurseries*, 998 F.3d at 64 ("Under § 1930(a)(6), a debtor must pay pre-confirmation [quarterly] fees as an administrative priority expense before it pays its commercial creditors, bondholders, and shareholders." (internal quotation marks and citation omitted)). Any fee increase reduces what creditors receive. *Buffets*, 979 F.3d at 377 (citation omitted); *see Clinton Nurseries*, 998 F.3d at 64 ("[A]ny change in fees imposed pursuant to § 1930 affects the amount of funds available for distribution to lower-priority creditors." (internal quotation marks and citation omitted)). Unlike the Trustee's examples, § 1930(a)(6) requires debtors to pay potentially significant sums: by December 2019, the 2017 Amendment increased Debtors' fees more than $2.5 million. *Cf. Buffets*, 979 F.3d at 377 ("[U]nlike the varying procedures that only indirectly might lead to different outcomes, the fee increase has a direct effect on what creditors receive[.]" (citation omitted)).

9. And we note that the 2017 Amendment was preceded by some tremors. In 2015, the Department of Justice signaled plans to seek a fee increase soon, and the next year, the department proposed increasing fees in October 2016. U.S. Dep't of Justice, *U.S. Trustee Program: FY 2017 Performance Budget Congressional Submission* 9–10 (2016), https://go.usa.gov/xpYS3; U.S. Dep't of Justice, *U.S. Trustee Program: FY 2016 Performance Budget Congressional Submission* 7 (2015), https://go.usa.gov/xpYJu.

We also reject the Trustee's argument that if every law bearing on distributions to creditors qualified as "laws on the subject of bankruptcies," the Bankruptcy Clause would extend even to taxes and business regulations. The 2017 Amendment and § 1930(a)(6) in which it rests are laws on the subject of bankruptcies. It governs relations between debtors and creditors. Indeed, Congress enacted the 2017 Amendment under the authority given by the Bankruptcy Clause. *See* 163 Cong. Rec. H3003-03 (daily ed. May 1, 2017) (statement of Rep. John Conyers). And 28 U.S.C. § 1930 is entitled "Bankruptcy fees," as part of "An Act to establish a uniform Law on the Subject of Bankruptcies," Pub. L. No. 95-598, 92 Stat. 2549. *See Clinton Nurseries*, 998 F.3d at 64 (finding persuasive that "[t]he 2017 Amendment amends a statute, § 1930, that is literally entitled: 'Bankruptcy fees' " (citation and footnote omitted)). So the 2017 Amendment governs debtor-creditor relations and thus concerns "the subject of bankruptcies," leaving it subject to the Bankruptcy Clause's uniformity requirement.

B. Uniformity

To defeat Debtors' constitutional challenge, the Trustee argues two alternative theories: (1) that the pre-2020 Amendment versions of § 1930(a)(6) and (7) together in fact already require uniform quarterly disbursement fees in all judicial districts, and (2) more narrowly, that the 2017 Amendment is constitutionally uniform because it increased quarterly fees on all large debtors in Trustee districts. Again, we're unpersuaded.

1. Sections 1930(a)(6) and (7) Didn't Impose Uniform Quarterly Fees Across All Judicial Districts

Until the 2020 Amendment revised "may" to "shall" in § 1930(a)(7), Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325, § 3(d)(2), 134 Stat. 5086, 5088 (2020), that section provided that the Judicial Conference "may require" debtors in Bankruptcy Administrator districts "to pay fees equal to those imposed" in Trustee districts. Federal Courts Improvement Act of 2000. The Trustee argues that "may require" is mandatory, requiring the Judicial Conference to impose the same quarterly fees as imposed in Trustee districts. To bolster this point, the Trustee notes that Congress enacted this "may require" term after *St. Angelo*, to resolve any conceivable uniformity problems.

[13] But the pre-2020 Amendment § 1930(a)(7)'s "may" is permissive. Granted, "the mere use of 'may' is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority." *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198–99, 120 S.Ct. 1331, 146 L.Ed.2d 171 (2000) (citations omitted). But for two reasons, we're persuaded that Congress intended to use "may" in a permissive sense. First, in the very next sentence in § 1930(a)(7), Congress used "shall." *Id.* ("Such fees shall be deposited as offsetting receipts to the fund established under section 1931 of this title and shall remain available until expended."); *see Lopez v. Davis*, 531 U.S. 230, 241, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001) (finding persuasive "Congress' use of the permissive 'may' " in "contrast[ ] with the legislators' use of a mandatory 'shall' in the very same section"). And second, Congress also repeatedly used "shall" elsewhere in § 1930. *See, e.g.*, 28 U.S.C. § 1930(a)(6) ("[A] quarterly fee shall be paid to the United States trustee . . . .").

Disregarding the plain language, the Trustee contends that the 2020 Amendment's amending "may" to "shall" shows

Congress's longstanding intent that § 1930(a)(7) be mandatory. The Trustee emphasizes that in the "Findings and Purpose" section of the Act containing the Amendment, Congress stated that the legislation "confirm[s] the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts." Response Br. at 31 (alteration omitted) (quoting Bankruptcy Administration Improvement Act of 2020 § 2(a)(4)(B)).

[14] Though this finding merits some weight, it doesn't control our interpretation of the earlier Congress's intent in enacting § 1930(a)(7). *See Haynes v. United States*, 390 U.S. 85, 87 n.4, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968) ("The view of a subsequent Congress ... provide[s] no controlling basis from which to infer the purposes of an earlier Congress." (citations omitted)). Indeed, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980) (citation and footnote omitted). The clear ordinary meaning of "may" outweighs Congress's 2020 view of any purportedly longstanding intention.[10] *Accord Clinton Nurseries*, 998 F.3d at 66 n.9 ("[T]he Congress that passed the 2020 Act inevitably looked through the lens of the constitutional quagmire that resulted [from use of the word 'may'] .... We conclude that the ordinary meaning of 'may' as permissive rather than mandatory ... outweighs Congress's subsequent statement regarding its earlier meaning[.]" (citation omitted)).

[15] Additionally, as the Second and Fifth Circuits reasoned in rejecting the Trustee's position, "[it] is ... telling that the Judicial Conference itself apparently understood the 2017 Amendment as authorizing, but not requiring, it to impose a fee increase in [Bankruptcy Administrator] Districts." *Id.* at 67; *see Buffets*, 979 F.3d at 378 n.10 (citation omitted). Thus, § 1930(a)(7) merely permitted the Judicial Conference to impose the same quarterly fees on Bankruptcy Administrator debtors as Congress did on Trustee debtors. So at least before the 2020 Amendment, § 1930 didn't require that quarterly fees be consistent nationwide.[11] *Accord Clinton Nurseries*, 998 F.3d at 67–68; *Buffets*, 979 F.3d at 378 n.10. So we now assess the 2017 Amendment for unconstitutional nonuniformity.

2. The 2017 Amendment is Unconstitutionally Nonuniform

[16] We hold that the 2017 Amendment is unconstitutionally nonuniform, because it allows higher quarterly disbursement fees on Chapter 11 debtors in Trustee districts than charged to equivalent debtors in Bankruptcy Administrator districts. We acknowledge that the Fourth and Fifth Circuits have upheld the Amendment against a Bankruptcy Clause challenge. *Cir. City Stores*, 996 F.3d at 165; *Buffets*, 979 F.3d at 378–79. But we agree with the Second Circuit's well reasoned and unanimous ruling to the contrary. *See Clinton Nurseries*, 998 F.3d at 69–70.

10. *Cf. GTE Sylvania, Inc.*, 447 U.S. at 108, 100 S.Ct. 2051 ("[T]he starting point for interpreting a statute is the language of the statute itself.").

11. Though, as the Trustee contends, "courts should, if possible, interpret ambiguous statutes to avoid rendering them unconstitutional," *United States v. Davis*, ––– U.S. ––––, 139 S. Ct. 2319, 2332 n.6, 204 L.Ed.2d 757 (2019), § 1930(a)(7) is unambiguous.

In upholding the Chapter 11 quarterly disbursement-fee increase, the Fourth and Fifth Circuits relied on *Blanchette v. Connecticut General Insurance*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), which ruled that in enacting bankruptcy laws, Congress may "take into account differences that exist between different parts of the country, and . . . fashion legislation to resolve geographically isolated problems." 419 U.S. at 159, 95 S.Ct. 335; *see Cir. City Stores*, 996 F.3d at 166 (comparing the quarterly-fees issue to *Blanchette*); *Buffets*, 979 F.3d at 378 (same). In *Blanchette*, the Supreme Court upheld legislation creating a special court and laws for bankrupt railroads in the northeast and midwest regions of the country. 419 U.S. at 108, 159–61, 95 S.Ct. 335. At the time of enactment, all the bankrupt railroads were operating there. *Id.* at 160, 95 S.Ct. 335. The Fourth and Fifth Circuits likened the geography-specific legislation in *Blanchette* to the 2017 Amendment's geographic distinction between the eighty-eight Trustee districts and the six Administrator districts in Alabama and North Carolina. *Cir. City Stores*, 996 F.3d at 166; *Buffets*, 979 F.3d at 378. The Trustee would have us adopt this reasoning.

[17–19] But the Second Circuit rejected the analogy to *Blanchette* and we're more persuaded by that court's reasoning than by the Fourth and Fifth Circuit's. *Cf. Clinton Nurseries, Inc.*, 998 F.3d at 68–69. As the Second Circuit reasoned, though *Blanchette* permitted geography-specific legislation, the challenged Act there still satisfied the Bankruptcy Clause's requirement that a law "apply uniformly to a defined class of debtors."[12] *Gibbons*, 455 U.S. at 473, 102 S.Ct. 1169; *see Blanchette*, 419 U.S. at 159–61, 95 S.Ct. 335; *see also Clinton Nurseries, Inc.*, 998 F.3d at 68. The Act applied uniformly to all bankrupt railroads. *Blanchette*, 419 U.S. at 159–61, 95 S.Ct. 335; *see Clinton Nurseries, Inc.*, 998 F.3d at 68. And so the Act also addressed a geographically isolated problem: no members of the class of debtors existed outside the defined region, *see Blanchette*, 419 U.S. at 159–60, 95 S.Ct. 335; that is, "all members of the class of debtors impacted by the statute were confined to a sole geographic area," *Clinton Nurseries*, 998 F.3d at 68. By contrast, the 2017 Amendment increased fees for all large Chapter 11 bankruptcy debtors in Trustee Program districts, with no showing that "members of that broad class are absent in [Bankruptcy Administrator] districts." *Id.* at 68–69. Common sense tells us that in 2018 through 2020, debtors like those here had bankruptcy cases pending in Alabama and North Carolina. So unlike the Act challenged in *Blanchette*, the 2017 Amendment neither applies uniformly to a class of debtors nor addresses a geographically isolated problem. As the Second Circuit reasoned, the 2017 Amendment "presents the exact problem avoided in *Blanchette*:" it substantially increased fees, potentially by millions, for one debtor but not another "identical in all respects save the geographic locations in which they filed for bankruptcy." *Clinton Nurseries*, 998 F.3d at 69 (footnote omitted).

12. We acknowledge that the Bankruptcy Clause doesn't require perfect uniformity. *See In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996) (Posner, C.J.). For instance, state property laws may affect what property is available for distribution. *Stellwagen v. Clum*, 245 U.S. 605, 613, 38 S.Ct. 215, 62 L.Ed. 507 (1918) (citation omitted). But the "flexibility inherent in the constitutional provision," that the Trustee relies on, Br. of Appellee at 33 (quoting *Buffets*, 979 F.3d at 378), has limits, *see, e.g.*, *Gibbons*, 455 U.S. at 473, 102 S.Ct. 1169 (requiring bankruptcy laws to apply uniformly to classes of debtors). For the reasons discussed, Congress has encountered the bounds of this flexibility with the 2017 Amendment.

[20–22] In so holding, we reject the Trustee's arguments that the relevant class of debtors is exclusively Trustee-district debtors and that the Trustee Program underfunding is a geographically isolated problem warranting geographic-specific legislation.[13] No one disputes that political maneuvering, not bankruptcy-policy considerations, led to the dual bankruptcy-administration system (which we're not criticizing, but simply noting in analyzing uniformity). *See id.* at 69 (citation omitted); *Buffets* (*Buffets Concurrence*), 979 F.3d at 383 (Clement, J., concurring in part and dissenting in part). Nothing distinguishes Alabama and North Carolina from the forty-eight other states in bankruptcy-administration matters. *Buffets Concurrence*, 979 F.3d at 383. The Bankruptcy Clause's uniformity requirement bars Congress from assessing disparate fees on debtors simply on grounds that it "has chosen to treat them differently." *Id.*; *Clinton Nurseries*, 998 F.3d at 69 (declining to create "the following inexplicable rule: Congress must enact uniform laws on the subject of bankruptcy … except when Congress elects to treat debtors nonuniformly").

[23] The Bankruptcy Clause precludes increasing fees based just on the location of the bankruptcy court. *Cf. Buffets*, 979 F.3d at 378 ("[T]he uniformity requirement forbids … 'arbitrary regional differences in the provisions of the Bankruptcy Code.' " (quoting *In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996) (Posner, C.J.))). That is what the 2017 Amendment does. Thus, we hold that the 2017 Amendment's fee disparities fail under the uniformity requirement of the Bankruptcy Clause. The Amendment imposed higher quarterly fees on large debtors in Trustee districts.[14]

C. We Remand for Determination of Debtors' Quarterly Fees

Debtors request monetary relief for "the excess fees they paid." Opening Br. at 50. The Trustee argues that we shouldn't grant that requested relief. The Trustee reasons that courts can remedy unequal treatment either by expanding or withdrawing benefits, depending on legislative intent, and that, here, Congress intended to increase quarterly fees nationwide. Though raising fees in Alabama and North Carolina might solve this problem, the Trustee recognizes that we lack authority to do that. So he asks that we declare the 2017 Amendment unconstitutional without granting further relief.

13. We acknowledge that, as the Trustee argues, the Supreme Court has struck down a bankruptcy law for lack of uniformity only once, and the stricken legislation amounted to "nothing more than a private bill" governing "only … one regional debtor." *Gibbons*, 455 U.S. at 471, 473, 102 S.Ct. 1169 (footnote omitted). But the Bankruptcy Clause's uniformity requirement extends past private bills. We acknowledge that in *Gibbons*, the Court didn't "impair Congress' ability under the Bankruptcy Clause to define classes of debtors and to structure relief accordingly." *Id.* at 473, 102 S.Ct. 1169. But uniformity requires that "a law must at least apply uniformly to a defined class of debtors." *Id.*

14. On appeal, Debtors argue that the dual bankruptcy-program system itself is unconstitutional, even if quarterly fees are consistent across all judicial districts. Debtors didn't preserve this argument in the bankruptcy court, raising it, if at all, in their reply brief, and the bankruptcy court didn't decide the question. *See Rosewood Servs., Inc. v. Sunflower Diversified Servs., Inc.*, 413 F.3d 1163, 1167 (10th Cir. 2005) ("Because this … argument was not made below, it is waived on appeal." (citation omitted)); *Hungry Horse LLC v. E Light Elec. Servs., Inc.*, 569 F. App'x 566, 572 (10th Cir. 2014) (unpublished) (explaining that we needn't consider issues not raised until the reply brief below and not addressed by the district court (citation omitted)).

[24, 25] We lack authority over quarterly fees assessed in districts outside our circuit, and thus in Alabama or North Carolina. *Cf. Buffets Concurrence*, 979 F.3d at 384 ("The *St. Angelo* court had no power to force Alabama and North Carolina into the [Trustee] system, which is why the constitutional infirmity persists and we are having this debate today. We have no greater authority than our colleagues on the Ninth Circuit to remake the bankruptcy system."). But Debtors are entitled to relief. *Cf. id.* (proposing reducing debtors' fees as a remedy: "What we can do is ameliorate the harm of unconstitutional treatment. So, we should."). The Second Circuit awarded monetary relief to remedy debtors' harms from the 2017 Amendment. *See Clinton Nurseries*, 998 F.3d at 69–70 ("To the extent that [debtor] has already paid the unconstitutional fee increase, it is entitled to a refund of the amount in excess of the fees it would have paid in a [Bankruptcy Administrator] District during the same time period."). We do so as well. Thus, we remand to the bankruptcy court for a refund of the amount of quarterly fees paid exceeding the amount that Debtors would have owed in a Bankruptcy Administrator district during the same period. This ruling is limited to Debtors in the instant appeal, who have standing to seek this refund.

CONCLUSION

We reverse and remand for determination of Debtors' quarterly Chapter 11 fees and a refund of overpayment consistent with this opinion.

BACHARACH, Circuit Judge, dissenting.

I agree with much of the majority's excellent opinion. In my view, however, the 2017 amendment does not violate the Bankruptcy Clause. So I respectfully dissent.

The majority points out that our nation has two separate bankruptcy systems. One system uses U.S. trustees in the bankruptcy courts in 48 states, 4 territories, and the District of Columbia. *See* Judicial Districts Covered by USTP Regions, Department of Justice, https://www.justice.gov/ust/judicial-districts-covered-ustp-regions (last visited September 3, 2021). By contrast, the bankruptcy courts in 2 states use bankruptcy administrators rather than U.S. trustees. Why the difference in systems? Politics. So we might reasonably question the need for separate bankruptcy systems in different states. But as the majority points out, the debtors didn't preserve their challenge to the dual systems. Maj. Op. at 1025 n.14.

Given the failure to preserve that challenge, we must consider the constitutionality of the 2017 amendment rather than the dual system of U.S. trustees and bankruptcy administrators. Because of the dual system, districts varied in their funding needs. This difference led to a budget shortfall in districts using U.S. trustees. *See* H.R. Rep. No. 115-130, at 8–9 (2017).

Congress responded to the budget shortfall. To do so, Congress "define[d] classes of debtors" based on the system in place. *Ry. Lab. Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 473, 102 S.Ct. 1169, 71 L.Ed.2d 335 (1982). Based on this classification, Congress "structure[d] relief" through separate funding processes in districts using U.S. trustees and bankruptcy administrators. *Id.*; *see Blanchette v. Connecticut Gen. Ins. Corps.* (*Regional Rail Reorganization Cases*), 419 U.S. 102, 159, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) (Congress may "take into account differences that exist between different parts of the country"). This approach allowed Congress to recoup the additional funds by targeting districts using U.S. trustees. By tailoring the financial solution to the need itself,

Congress didn't run afoul of the Bankruptcy Clause. *In re Circuit City Stores, Inc.*, 996 F.3d 156, 166 (4th Cir. 2021); *Matter of Buffets, L.L.C.*, 979 F.3d 366, 378–80 (5th Cir. 2020).

Perhaps there shouldn't be two separate systems, but the debtors forfeited their challenge to the existence of two separate systems. If we put aside that forfeited challenge, we have little reason to question Congress's approach. The dual systems created different financial needs, and Congress decided to raise fees in the jurisdictions creating the budget shortfall. That approach wasn't arbitrary and didn't violate the Bankruptcy Clause.

UNITED STATES of America, Plaintiff - Appellee,

v.

Adam HEMMELGARN, Defendant - Appellant.

No. 20-4109

United States Court of Appeals, Tenth Circuit.

FILED October 8, 2021

Background: Defendant moved for compassionate release. The United States District Court for the District of Utah, Robert J. Shelby, Chief Judge, 2020 WL 5645316, denied motion and defendant's motion for reconsideration. Defendant appealed.

Holdings: The Court of Appeals, Tymkovich, Chief Judge, held that:

(1) district court did not abuse its discretion in denying defendant's motion for compassionate release, and

(2) district court did not abuse its discretion in denying defendant's motion for reconsideration.

Affirmed.

1. Sentencing and Punishment ⚷2229

Once term of imprisonment has been imposed, courts are generally forbidden from modifying that term of imprisonment.

2. Sentencing and Punishment ⚷665, 2263

Prisoner may move for compassionate release only if: (1) district court finds that extraordinary and compelling reasons warrant such reduction; (2) district court finds that such reduction is consistent with applicable policy statements issued by Sentencing Commission; and (3) district court considers statutory sentencing factors to extent that they are applicable. 18 U.S.C.A. §§ 3553(a), 3582(c)(1)(A).

3. Federal Courts ⚷2031

"Jurisdictional rules" go to courts' authority to hear case, whereas "mandatory claim-processing rules" do not implicate courts' adjudicatory authority, but rather promote orderly progress of litigation by requiring that parties take certain procedural steps at certain specified times.

See publication Words and Phrases for other judicial constructions and definitions.

4. Federal Courts ⚷2031

If legislature clearly states that prescription counts as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue; but when Congress does not rank prescription as jurisdictional, courts should treat restriction as nonjurisdictional in character.