

**United States Bankruptcy Court
Western District of Wisconsin**

Cite as: [Unpublished]

In re: Cranberry Growers Cooperative, Debtor
Bankruptcy Case No. 17-13318-11

October 24, 2018

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Catherine J. Furay, United States Bankruptcy Judge

**ORDER ON CERTIFICATION OF THE OCTOBER 24, 2018, ORDER FOR
DIRECT REVIEW IN THE COURT OF APPEALS UNDER 28 U.S.C. § 158(d)(2)**

This opinion accompanies this Court’s certification for direct appeal under 28 U.S.C. § 158(d)(2) of the Court’s September 21, 2018, Order (“September 21 Order”) disallowing the Administrative Claim of the United States Trustee under 28 U.S.C. § 1930(a)(6). See Fed. R. Bankr. P. 8006(e)(1).

QUESTION PRESENTED

Section 1930(a)(6) of Title 28 of the United States Code directs the payment of

a quarterly fee . . . in each case under chapter 11 of title 11 for each quarter . . . until the case is converted or dismissed, whichever occurs first. The fee shall be . . . payable for a quarter. . . . During each of fiscal years 2018 through 2022, if the balance in the United States Trustee System Fund as of September 30 . . . is less than \$200,000,000.00, 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)(A)-(B) (emphasis added).¹ The statute further provides that in cases in districts that are not part of the United States trustee region, the Judicial Conference may impose such fees.

¹ The effective date of the amendment creating the fee in Districts subject to the U.S. Trustee system was January 1, 2018. P.L.115-72, div. B, §100(c), Oct. 26, 2017, 131 Stat. 1232. In Districts not subject to the U.S. Trustee system (such as Alabama), the Judicial Conference approved a change for “all Chapter 11 cases filed on or after October 1, 2018” but does not apply retroactively to pending cases.

The question presented is: Whether additional United States trustee quarterly fees calculated under amended 28 U.S.C. § 1930(6)(B) on post-confirmation Direct Revolver Payments are “disbursements” and whether the fee properly applies to cases pending on January 1, 2018.

FACTS AND PROCEDURAL BACKGROUND

Debtor Cranberry Growers Cooperative (“Debtor” or “CranGrow”) filed a chapter 11 case in September 2017. Shortly after CranGrow filed its chapter 11 petition, this Court approved CranGrow’s financing facility with its existing lender, CoBank (the “DIP Revolver”). The DIP Revolver consisted of a roll-up and a revolver. It also included an over-advance provision. The DIP Revolver required direct payment to CoBank of proceeds from the sale of prepetition inventory (“Direct Revolver Payments”). The Direct Revolver Payments reduced the prepetition revolving line of credit by rolling that debt up into postpetition debt to the extent of each Direct Revolver Payment. CoBank then immediately re-advanced Direct Revolver Payments (less interest and fees) to CranGrow for payment of normal operating expenses. ECF No. 323-1 at 3. CranGrow’s revolving indebtedness to CoBank did not decrease. The only change was the label of the debt from prepetition debt to postpetition debt so CoBank could obtain priority on the debt owed. There was also over-advance availability.

The United States Trustee quarterly fees (“UST Fees”) are calculated based on information provided in the Monthly Operating Reports (“MOR”) CranGrow completed. It submitted its MORs and paid UST Fees based on the calculations from those reports. In December 2017, the United States Trustee (“UST”) contacted CranGrow about the calculations and, after various email exchanges, the UST agreed with CranGrow’s calculations. The UST then changed its position asserting additional UST Fees were due. ECF No. 323-4. The UST sent invoices to CranGrow for an additional \$42,601.17, representing the added fees for the first quarter of 2018. ECF Nos. 323-6 and 323-7.² Debtor objected to the Administrative Claim for additional UST Fees (“Objection”). ECF No. 323.

This Court held a preliminary hearing on the Objection. The parties agreed to submit a stipulation of facts, and a briefing schedule was set. ECF No. 372.

On September 21, 2018, this Court sustained the Objection and disallowed the added UST Fees. The September 21 Order finally adjudicates the parties’ dispute over how much additional UST Fees are due.

² The parties agree additional UST Fees will be due in similar amounts for subsequent quarters if the UST’s calculations are correct.

STATEMENT ON JURISDICTION

A. Bankruptcy Court's Jurisdiction

The Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1134, and the order of reference in this District. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A)-(B) as a matter regarding the administration of CranGrow's estate and involving the allowance of claims against the estate.

B. Court of Appeals' Discretionary Jurisdiction Over the Bankruptcy Court's Final Order

The court of appeals has permissive jurisdiction under 28 U.S.C. § 158(d)(2)(A) to hear an appeal of a final bankruptcy court order if the bankruptcy court certifies the order meets at least one of the section's criteria and the court of appeals authorizes a direct appeal. Section 158 reads:

The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court . . . certif[ies] that—

- (i) the . . . order . . . involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
- (ii) the . . . order . . . involves a question of law requiring resolution of conflicting decisions; or
- (iii) an immediate appeal from the . . . order . . . may materially advance the progress of the case . . . in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the . . . order.

The September 21 Order sustaining CranGrow's objection to the administrative expense claim of the UST denied the additional fees sought by the UST. The Order thus definitively resolves a controversy over computation and allowance of fees under 28 U.S.C. § 1930(a)(6)(B). This is a controversy that could not exist outside bankruptcy. For that reason, the September 21 Order is "final" for the purposes of 28 U.S.C. § 158.

The UST appealed the bankruptcy court's September 21 Order on October 4, 2018. ECF No. 392. The Notice of Appeal attaching the September 21 Order is attached as Exhibit A to this opinion. The bankruptcy court's Memorandum Decision is also attached as part of Exhibit A. Under Federal Rule of Bankruptcy Procedure 8006(b), a

matter remains pending in the bankruptcy court until thirty days after the effective date of the notice of appeal under Federal Rule of Bankruptcy Procedure 8002. As there is no pending motion under Federal Rules of Bankruptcy Procedure 7052, 9023, or 9024, the Notice of Appeal was effective when filed on October 4, 2018. See Fed. R. Bankr. P. 8002.

DECISIONS RELEVANT TO THE APPEAL

The bankruptcy court's September 21, 2018, Memorandum Decision on the administrative claim for additional UST fees is attached to the Notice of Appeal in Exhibit A.

STATUTES NECESSARY TO UNDERSTAND THE QUESTION PRESENTED

Section 1930, title 28, United States Code (emphasis added):

(a) The parties commencing a case under title 11 shall pay to the clerk of the district court or the clerk of the bankruptcy court, if one has been certified pursuant to section 156(b) of this title, the following filing fees:

...

(3) For a case commenced under chapter 11 of title 11 that does not concern a railroad, as defined in section 101 of title 11, \$1,167.

...

(6)(A) Except as provided in subparagraph (B), in addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each case under chapter 11 of title 11 for each quarter (including any fraction thereof) until the case is converted or dismissed, whichever occurs first. The fee shall be \$325 for each quarter in which disbursements total less than \$15,000; \$650 for each quarter in which disbursements total \$15,000 or more but less than \$75,000; \$975 for each quarter in which disbursements total \$75,000 or more but less than \$150,000; \$1,625 for each quarter in which disbursements total \$150,000 or more but less than \$225,000; \$1,950 for each quarter in which disbursements total \$225,000 or more but less than \$300,000; \$4,875 for each quarter in which disbursements total \$300,000 or more but less than \$1,000,000; \$6,500 for each quarter in which disbursements total \$1,000,000 or more but less than \$2,000,000; \$9,750 for each quarter in which disbursements total \$2,000,000 or more but less than \$3,000,000; \$10,400 for each quarter in which disbursements total \$3,000,000 or more but less than \$5,000,000;

\$13,000 for each quarter in which disbursements total \$5,000,000 or more but less than \$15,000,000; \$20,000 for each quarter in which disbursements total \$15,000,000 or more but less than \$30,000,000; \$30,000 for each quarter in which disbursements total more than \$30,000,000. The fee shall be payable on the last day of the calendar month following the calendar quarter for which the fee is owed.

(B) 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.

(7) 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.

REASONS FOR DIRECT REVIEW

- A. The appeal presents a question of law about which there is no controlling precedent.

The Code does not define the term “disbursements,” and the legislative history does not help. It merely suggests section 1930 “was to create a self-funding United States Trustee’s Office.” H.R. Rep. No. 764, 99th Cong., 2d Sess. 22, *reprinted in* 1986 *U.S.C.C.A.N.* 5227, 5234–35.

Resolution of the parties’ dispute depends solely on the answers to legal questions on which there is no controlling precedent from the Supreme Court or the Court of Appeals for the Seventh Circuit: Do roll-up payments and advances each constitute “disbursements” for computation of the fees?

Each case cited in the bankruptcy court supports a broad definition of “disbursements” and predates the statute at issue. None of the cases involved an over-advance and immediate remittance of collected funds to a reorganized debtor. Other than the *HSSI* case, none involved a cash management arrangement. *In re HSSI, Inc.*, 176 B.R. 809 (Bankr. N.D. Ill. 1995), *rev’d*, 193 B.R. 851 (N.D. Ill. 1996). None involved a double fee on expenditures. In most cases, there was an actual reduction in indebtedness.

The statute at issue is being applied to a case that was pending on the statute's effective date. It is being applied to a case that, if filed in a district not covered by the U.S. Trustee regions, would not have been subject to the fee. These nonuniform retroactive effects raise questions not addressed by any court.

B. The question of law presented requires resolution of conflicting decisions.

Bankruptcy cases tend to be fact specific. There is no line of cases providing clear rules or guidelines on how to interpret “disbursements.” When asked to interpret “disbursements,” some courts have looked to *Black’s Law Dictionary*, while others have looked to the “plain meaning” of the term. Courts have struggled to define “disbursements.”

Some cases define “disbursements” expansively to include any transfer of funds of the estate—regardless of the method of transfer. See, e.g., *In re Huff*, 270 B.R. 649, 653 (Bankr. W.D. Va. 2001) (“disbursements” includes when a debtor pays out or expends money “even if the result seems harsh”); *In re Hays Builders, Inc.*, 144 B.R. 778, 779–80 (W.D. Tenn. 1992) (“disbursements” covers all disbursements, whether made directly by debtor or a third party on behalf of debtor). See also *In re Meyer*, 187 B.R. 650 (Bankr. W.D. Mo. 1995); *In re Ozark Beverage Co.*, 105 B.R. 510 (Bankr. E.D. Mo. 1989). Debt was reduced, expenses were paid, or a creditor was paid in full by refinancing in each of these cases.

A more restrictive analysis—typically because of the complexity or intricate facts—is used in other cases. For example, *In re HSSI, Inc.* involved intercompany transfers among a chapter 11 debtor parent company and debtor subsidiaries. 176 B.R. 809. The debtor and its twenty-seven subsidiaries had a coordinated cash management system. Revenue from the subsidiaries flowed into a pooled account. *Id.* at 813. Funds were also transferred between various debtor accounts. Pooled funds were used to make payments to a postpetition lender on an outstanding loan. *Id.* Payments from the pooled account to repay the loan were disbursements, but payments from the single accounts to the pooled account were *not* disbursements. *Id.* (emphasis added). Allowing the UST to calculate fees based on (1) payments from separate accounts to the pooled account and (2) payments from the pooled account to repay the loan constituted a “double fee.” *Id.* *HSSI* was reversed, but on grounds of insufficient factual findings, and not on a rejection of the cash management system view.

In a case involving an intercreditor transaction for purchase and assignment of prepetition loans, the transaction was not a “disbursement” even though it resulted in some benefit to the debtor. *In re Hale*, 436 B.R. 125 (Bankr. E.D. Cal. 2010). The court reasoned the debtor’s benefit was not a “disbursement” because the chapter 11 debtor had no interest in or control over a postpetition lender’s decision to purchase and accept assignment of prepetition loans secured by the debtor’s real property, even though the resulting debt restructuring was part of a larger agreement negotiated with the debtor.

C. The appeal involves an important Bankruptcy Code issue.

Section 1930(a)(6) was amended in October 2017 to include a subsection (B) that reads:

During each of fiscal years 2018 through 2022, if the balance of 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.

This amendment results in a significant increase in quarterly fees for certain chapter 11 debtors. For example, debtors previously would have paid no more than \$30,000 in quarterly UST fees. Now, debtors could pay as much as \$250,000 *per quarter*. Such a drastic increase will have ripple effects across chapter 11 cases in the coming years.

In addition, the increase in quarterly fees may violate the Uniformity Clause, which provides that “all Duties, Imposts and Excises shall be uniform throughout the United States.” U.S. Const. art. I, § 8, cl. 1. The uniformity requirement “prohibits Congress from enacting a bankruptcy law that, by definition, applies only to one regional debtor.” *Ry. Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457, 473 (1982). The Uniformity Clause requires “geographical” uniformity and is satisfied when the law applies to a defined class of debtors no matter where the bankruptcy court sits. *In re Cross*, 255 B.R. 25, 30 (Bankr. N.D. Ind. 2000).

The federal judicial districts in Alabama and North Carolina use a bankruptcy administrator. The recent increase in quarterly fees applies to chapter 11 cases in those regions filed on or after October 1, 2018.³ The increased quarterly fees for chapter 11 debtors outside Alabama and North Carolina apply beginning January 1, 2018. Consequently, the same chapter 11 debtor would be treated differently based on geography, potentially in violation of the Uniformity Clause.

There is also significant uncertainty about the retroactive application of new, increased quarterly UST fees. For example, debtors in cases pending January 1, 2018, and their creditors navigated the confirmation process—including disclosures, projections, voting, and confirmation—with the expectation the old quarterly fee schedule would apply. Projections were reasonably based on the existing fee schedule. Increased UST Fees reduce or possibly eliminate distributions to creditors. Since the plan confirmation order is a final order appealable for only 14 days after entry, creditors who relied on projected distributions could be left in the cold with no legal remedy if their projected distributions evaporate by an abrupt switch to the new fee schedule.

³ See, e.g., *United States Bankruptcy Administrator, Middle District of Alabama, Chapter 11 Instructions Concerning Quarterly Fees*, www.almba.uscourts.gov/images/QrtFeeInst2008.pdf (last visited Oct. 15, 2018).

Ultimately, an appeal to the District Court does little to resolve the uncertainty surrounding the application of UST Fees. Unlike a District Court decision, a Seventh Circuit decision creates binding precedent and enables future debtors and creditors to devise plans with increased predictability and guidance on how disbursements will be calculated.

Finally, there are no other pending cases involving this issue likely to reach the Seventh Circuit soon.

D. An immediate appeal from the judgment materially advances the progress of the case.

Given the parties' resources and amount of funds at stake, it is likely any decision of the District Court would be appealed to the Seventh Circuit. A direct appeal saves the parties time, energy, and costs, in addition to preserving judicial resources. Hence, the case is materially advanced by direct appeal.