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Increased U.S. Trustee Fees: As Inevitable as Death and Taxes?

Reining in congressionally mandated highway robbery based on uniformity and retroactivity; issues regarding the definition of disbursements; strategies to avoid the increased fees; and judicial activism.

Panelists and Authors:

Chief Judge Ronald B. King, Western District of Texas Bankruptcy Court
Chief Judge Catherine J. Furay, Western District of Wisconsin Bankruptcy Court
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Bankruptcy is often a gamble. The debtor has a hand of cards based on its financial situation, and the restructuring counsel must determine how to strategically play them. At the table, a host of environmental factors exist that are beyond the debtor's control: the market, the Bankruptcy Code, the creditors, and, of course, the fees to enter and remain in the game. The requirement to pay quarterly fees to the United States trustee¹ is a reality of which bankruptcy attorneys are 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 a stacked deck for many mid-sized chapter 11 debtors.

History of The United States Trustee Program

Prior to the Bankruptcy Reform Act of 1978, district judges appointed referees to assist in the administration of bankruptcy cases. "On October 1, 1973, the Supreme Court renamed 'bankruptcy referees' as 'U.S. bankruptcy judges' pursuant to the Bankruptcy Rules under the Rules Enabling Act, 28 U.S.C. § 2705." Judge Craig A. Gargotta, *Who Are Bankruptcy Judges and How Did They Become Federal Judges?*, FED. LAW. BANKR. BRIEF, April 2018 at n.12. The bankruptcy judges appointed trustees to liquidate assets, pay creditors, file chapter 7 final reports, and other miscellaneous items. *See* Bankruptcy Act of 1898, 11 U.S.C. § 47 (repealed 1978).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

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).

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 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

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