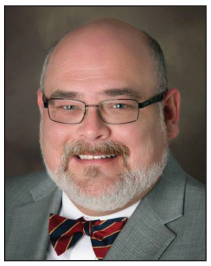
By Bradley L. Drell and Heather M. Mathews[1]

Siegel v. Fitzgerald: The Prologue and Aftermath



Bradley L. Drell
Gold, Weems, Bruser, Sues & Rundell, APLC
Alexandria, La.

Heather M. Mathews
Gold, Weems, Bruser, Sues & Rundell, APLC
Alexandria, La.

Brad Drell is a shareholder with Gold, Weems, Bruser, Sues & Rundell, APLC and leads the firm's Restructuring and Insolvency Practice in Alexandria, La. Heather Mathews is a shareholder in the same office.

The U.S. Supreme Court recently issued a rare decision on the uniformity requirement of the Bankruptcy Clause.[2] In *Siegel v. Fitzgerald*,[3] the Court unanimously held that Congress's enactment of a significant U.S. Trustee quarterly fee increase that exempted chapter 11 debtors in Alabama and North Carolina violated the uniformity requirement.

The decision, authored by Justice Sonia Sotomayor, marks only the second time that the Supreme Court has invalidated a bankruptcy law for lack of uniformity.[4] Full appreciation of the potential ramifications of *Siegel* requires understanding how two states have remained exempt from the U.S. Trustee Program (USTP) for more than 30 years.

Congress Comes to a Fork in the Road — and Takes It[5]

Before the U.S. Trustee system, there was "particular concern" regarding "'bankruptcy rings' among bankruptcy lawyers and the courts, within which judges appointed practitioners well known to them as trustees, set their compensation, and then ruled on disputes between their handpicked candidates and parties to the bankruptcy."[6] Congress decided to shift power to a newly created system of U.S. Trustees, primarily to avoid conflicts of interest that arose when a judge decided matters between the judge's chosen trustee and other parties.[7]

Finding the U.S. Trustee pilot program generally successful, Congress permanently established the program in 1986[8] under the Department of Justice.[9] However, Alabama and North Carolina resisted.[10] Districts in these states assigned some administrative duties to a Bankruptcy Administrator (BA) Program, under which bankruptcy judges retained significant oversight.[11]

The Government Accountability Office, known at the time as the General Accounting Office (GAO), found no justification for continuing separate programs.[12] However, bankruptcy judges in both states were successful in lobbying Congress — namely Sens. Jesse Helms from North Carolina and Howell Heflin from Alabama — to avoid joining the USTP.[13] North Carolina and Alabama received extensions[14] and were later exempted permanently[15] from the USTP, with the permanent exemption "tucked" into an unrelated bill.[16]

The distinction is more than historical artifact, as bankruptcy judges in both systems have observed the effects.[17] Congress has attempted to ameliorate complaints in piecemeal fashion, including proposed legislation to provide the U.S. Trustee with standing in BA district cases involving asbestos trusts.[18]

Congress Doubles Down on Non-Uniformity

The differences between the U.S. Trustee and BA Programs go beyond standing and appointment powers. Congress requires that the USTP be funded fully by user fees paid to the U.S. Trustee System Fund, mostly paid by chapter 11 debtors.[19] Conversely, Congress does not require the BA Program to fund itself; it receives funding through the Judiciary's general budget.[20] Originally, debtors in BA districts did not pay quarterly fees, but:

1 Mr. Drell is the architect behind a proposed class action premised on the fee increase held unconstitutional in *Siegel v. Fitzgerald*. He was a participant in a recent abiLIVE webinar discussing the case, a panel that also featured Hon. **Melanie L. Cyganowski** (ret.) of Otterbourg PC, Prof. **Stephen J. Lubben** of Seton Hall University Law School) and **Clifford J. White, III** of American Infosource, who led the U.S. Trustee Program as director for 17 years before retiring last March. ABI Editor-at-Large **Bill Rochelle** moderated the webinar, *available at* abi.org/newsroom/abi-media/videos (unless otherwise specified, all links in this article were last visited on June 28, 2022).
2 U.S. Const., art. I, § 8, cl. 4.
3 142 S. Ct. 1770 (2022).
4 *See Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982).
5 This notion is credited to Lawrence Peter "Yogi" Berra, who offered advice unrestrained by the Bankruptcy Clause.
6 *In re Plaza de Diego Shopping Ctr. Inc.*, 911 F.2d 820, 828 & n.15 (1st Cir. 1990).
7 *Id.* at 828 (citation omitted); *see Siegel*, 142 S. Ct. at 1775-76.
8 Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (1986) (hereinafter, the "1986 Act").
9 *Siegel*, 142 S. Ct. at 1776.
10 *In re Clinton Nurseries Inc.*, 998 F.3d 56, 69 (2d Cir. 2021) (citation omitted); *Siegel*, 142 S. Ct. at 1776 (noting "resistance from stakeholders in North Carolina and Alabama") (citation omitted).
11 1986 Act, § 302(d)(3)(I); Travis Sasser, "Why Bankruptcy Judges in North Carolina Still Appoint Trustees," Sasser Law Firm (Feb. 15, 2019), *available at* sasserbankruptcy.com/wp-content/uploads/2019/05/Trustee-Appointment-in-NC-Bankruptcy-Travis-Sasser.pdf.
12 "Bankruptcy Administration: Justification Lacking for Continuing Two Parallel Programs," No. GAO/GGD-92-133, at 15 (September 1992), *available at* gao.gov/assets/ggd-92-133.pdf.
13 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, 123 (1995).
14 Judicial Improvements Act of 1990, Pub. L. No. 101-650, title III, § 317(a), (c) (1990).
15 Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501, 114 Stat. 2410, 2421-22 (2000) (hereinafter, the "2000 Act").
16 *Clinton Nurseries*, 998 F.3d at 69; *In re Buffets LLC*, 979 F.3d 366, 383 (5th Cir. 2020) (Clement, J., dissenting).
17 *See* Mem. Opp'n, *In re LTL Mgmt. LLC*, No. 21-30589, Doc. 1212 at 4 (Bankr. D.N.J. Jan. 20, 2022) (noting controversy arose from one of "many differences under [the BA] system of oversight"); Hr'g Rec., *In re Kaiser Gypsum Co. Inc.*, No. 16-31602, Doc. 1779 at 33:00-34:06 (Bankr. W.D.N.C. Sept. 5, 2019) (viewing Department of Justice "as primarily an unsecured creditor and not in a position to be arguing matters related to asbestos claims" in a BA district).
18 *See* Protect Asbestos Victims Act of 2021, S.574, 117th Cong., § 4 (2021).
19 *Siegel*, 142 S. Ct. at 1776 (citing 28 U.S.C. § 589a(b)(5)). These debtors pay quarterly fees based on disbursements. *Id.* (citing 28 U.S.C. § 1930(a)).
20 *Id.* (citing *In re Circuit City Stores Inc.*, 996 F.3d 156, 160 (4th Cir. 2021)).

after the Ninth Circuit held that system unconstitutional, *see St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1532-1533 (1994), *amended*, 46 F.3d 969 (1995), Congress provided that "the Judicial Conference of the United States may require the debtor in a case under chapter 11 [filed in a BA Program district] to pay fees equal to those imposed" in Trustee Program districts, 2000 Act § 105, 114 Stat. 2412 (enacting 28 U.S.C. § 1930(a)(7)).[21]

Thus, the statutory fee language was merely *permissive* in the BA Program. In 2001, some 15 years after the USTP's imposition of quarterly fees,[22] the Judicial Conference adopted a standing order directing BA districts to charge fees "in the amounts specified in 28 U.S.C. § 1930, as those amounts may be amended from time to time."[23]

Equal fees were imposed until a budgetary crisis occurred in the USTP: during FY 2017, the USTP was expected to deplete the U.S. Trustee System Fund balance and fail to offset its appropriation.[24] This funding shortfall must be considered relative to BA Program costs. In 2021, the USTP incurred obligations totaling $241,061,805,[25] while the BA Program had obligations of $6,523,000.[26] If the BA Program were imposed in 48 states, the cost would theoretically approximate $156,552,000 — a reduction of about 35 percent.[27]

In his 2017 remarks on behalf of the USTP, then-Director **Clifford J. White, III** thanked the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Committee on the Judiciary "for favorably acting on our proposal to increase quarterly fees paid into the U.S. Trustee System Fund."[28] Thereafter, Congress enacted the "temporary, but significant, increase," raising the maximum quarterly fee from $30,000 to $250,000.[29] The statute provided that the fee increase would begin the first quarter of 2018.

Under the amended fee schedule in 2018, the USTP saw quarterly fee collections more than double to $214,533,000 from $96,690,000 in 2017, even as filing fee deposits fell.[30] Quarterly collections increased in 2019 ($256,621,000) and 2020 ($280,827,000),[31] and soared to $335,551,000 in 2021, as filing fee deposits continued to fall.[32]

However, it was not until September 2018 that the Judicial Conference, with then-existing discretion under § 1930(a)(7),[33] ordered BA districts to implement the amended fee schedule.[34] In exercising its discretion, the Judicial Conference also reached a different conclusion about the proper reach of the fee increase, given concerns of notice and due process.[35] Its "Committee agreed that the quarterly fee calculation changes in 28 U.S.C. § 1930(a)(6)(B) should apply in BA districts beginning in the first quarter of fiscal year 2019 (that is, for any chapter 11 case filed on or after October 1, 2018, and not for cases then pending),"[36] and the Judicial Conference adopted this limited, prospective reach.[37] Thus, the fee increase was not imposed in BA districts until Oct. 1, 2018, guaranteeing nine months of non-uniform treatment. Because the fee increase also applied only to newly filed cases, USTP district debtors whose cases were filed before Oct. 1, 2018, were potentially subjected to years of non-uniform fees. The quarterly fees were not equalized as between the programs until the second quarter of 2021.[38]

Supreme Court Strikes Down the Non-Uniform Trustee Fee Increase

Against this background, the Supreme Court considered quarterly fees imposed in the *Circuit City* bankruptcy filed in a U.S. Trustee district. The petitioner paid $632,542 in total quarterly fees for the first three quarters of the fee increase, compared to the $56,400, which would have been charged absent the increase.[39] A divided panel of the Fourth Circuit had concluded that the "Bankruptcy Clause forbids only 'arbitrary' geographic differences," so the fee increase in U.S. Trustee districts properly addressed its funding shortfall, while BA districts funded by the judiciary's general budget had no such issue.[40]

The Supreme Court granted *certiorari* to address a significant circuit split.[41] It found that the problem stemmed "from Congress's own decision to create a dual bankruptcy system funded through different mechanisms in which only districts in two States could opt into the more favorable fee system for debtors," but declined to address the constitutionality of dual systems.[42]

Siegel narrowly held that "only that the uniformity requirement of the Bankruptcy Clause prohibits Congress

21 *Id.* (emphasis added).
22 *See* 1986 Act, § 117.
23 *Siegel*, 142 S. Ct. at 1776-77 (citing Report of the Proceedings of the Judicial Conference of the United States 46 (September/October 2001)).
24 "A Time to Reform: Oversight of the Activities of the Justice Department's Civil, Tax, and Environment and Natural Resources Divisions and the U.S. Trustee Program," Hearing Before the Subcomm. on Regul. Reform, Com. & Antitrust L. of the H. Comm. on the Judiciary, 115th Cong. (June 8, 2017), *available at* docs.house.gov/meetings/JU/JU05/20170608/106076/HHRG-115-JU05-Wstate-WhiteC-20170608.pdf (statement of Clifford J. White, III).
25 "United States Trustee System Fund, Justice," USA Spending, *available at* usaspending.gov/federal_account/015-5073.
26 FY2023 Congressional Budget Request, Courts of Appeals, District Courts, and Other Judicial Services: Salaries and Expenses, at 8, Table 4.8, *available at* uscourts.gov/sites/default/files/fy_2023_congressional_budget_request/FY%202023%20Congressional%20Budget%20Request/04a%20-%20Courts%20of%20Appeals%2C%20District%20%26%20Other%20Salaries%20and%20Expenses.pdf.
27 An approximate cost is obtained by dividing the BA obligation of $6,523,000 by two to obtain the "per state" cost, and multiplying that figure by 48. This comparison is not exact; any such program would cost more in states like Delaware and New York, which have a relatively high volume and overall complexity of chapter 11 cases, particularly compared to Alabama and North Carolina.
28 "A Time to Reform: Oversight of the Activities of the Justice Department's Civil, Tax, and Environment and Natural Resources Divisions and the U.S. Trustee Program," Hearing Before the Subcomm. on Regul. Reform, Com. & Antitrust L., 115th Cong. (June 8, 2017), *available at* govinfo.gov/content/pkg/CHRG-115hhrg27890/html/CHRG-115hhrg27890.htm.
29 *Siegel*, 142 S. Ct. at 1777 (citing Pub. L. 115-72, Div. B, 131 Stat. 1229 (hereinafter, the "2017 Act")), codified at 28 U.S.C. § 1930(a)(6)(B) (2018).
30 "USTP FY 2022 Performance Budget Congressional Submission," U.S. Dep't of Justice at 15 (May 2021), *available at* justice.gov/jmd/page/file/1398586/download.
31 *See id.* Figures for FY 2018 and beyond exclude fees used to fund additional bankruptcy judgeships, indicating that actual collections were higher. *Id.* at table n.2; *see* Pub. L. No. 115-72, at § 1004(b), 131 Stat. 1232 (requiring 2 percent of fees to be deposited in Treasury's general fund).
32 "USTP FY 2023 Performance Budget Congressional Submission," U.S. Dep't of Justice, at 19 (March 2022), *available at* justice.gov/jmd/page/file/1492156/download.
33 In 2021, Congress amended this statute such "that the Judicial Conference 'shall require' imposition of fees in Administrator Program districts that are equal to those imposed in [USTP] districts." *Siegel*, 142 S. Ct. at 1777 (citing Pub. L. 116-325, 134 Stat. 5088 and § 1930(a)(7)).
34 *Id.* at *4.
35 Report of the Judicial Conference Committee on the Administration of the Bankruptcy System, September 2018, 18-20 (reflecting concerns over the "substantial increase" and wanting to assure proper notice to debtors).
36 *Id.* at 20.
37 Report of the Proceedings of the Judicial Conference of the United States, Sept. 13, 2018, 11-12, *available at* uscourts.gov/sites/default/files/2018-09_proceedings.pdf.
38 *See* Bankruptcy Administration Improvement Act of 2020, Pub. L. 116-325, 134 Stat. 5088-89 (imposing amended-fee schedule on both programs "for disbursements made in any calendar quarter that begins on or after the date of enactment of this Act," which occurred Jan. 12, 2021).
39 *Siegel*, 142 S. Ct. at 1778.
40 *In re Circuit City Stores Inc.*, 996 F.3d 156, 166 (4th Cir. 2021).
41 *Siegel*, 142 S. Ct. at 1778, n.1 (comparing *In re John Q. Hammons Fall 2006 LLC*, 15 F.4th 1011 (10th Cir. 2021) (holding that 2017 Act is unconstitutional); *In re Clinton Nurseries Inc.*, 998 F.3d 56 (2d Cir. 2021) (same); *with In re Mosaic Mgmt. Grp. Inc.*, 22 F.4th 1291 (11th Cir. 2022) (2017 Act is constitutional), *In re Circuit City Stores Inc.*, 996 F.3d 156 (4th Cir. 2021) (same), *In re Buffets LLC*, 979 F.3d 366 (5th Cir. 2020) (same)).
42 *Id.* at 1782-83.

continued on page 41

from page 21

from arbitrarily burdening only one set of debtors with a more onerous funding mechanism than that which applies to debtors in other States."[43] The Court remanded on the remedy issue, and did not consider its ruling to impair congressional authority to address geographically isolated problems.[44] The decision was perhaps tailored to promote agreement among the Justices, particularly given divisive cases then pending, but it does little to expound on the scant judicial interpretation of the Bankruptcy Clause's uniformity requirement.

What Happens Next?

Since handing down the decision in *Siegel*, the Supreme Court has granted petitions for *writ of certiorari* in two other cases seeking review of the U.S. Trustee fee increase, namely in *John Q. Hammons*[45] from the Tenth Circuit and *Mosaic*,[46] from the Eleventh Circuit. These courts reached opposite conclusions, with the former holding the fee increase unconstitutional and ordering a refund in the case, and the latter holding the fee increase constitutional. Curiously, the Supreme Court nevertheless treated them alike, vacating both decisions and remanding for further consideration in light of *Siegel*. As of late June 2022, the government's *cert* petition is pending in *Clinton Nurseries*,[47] which may receive similar treatment.

For its part, the Second Circuit in *Clinton Nurseries* has applied the most aggressively remedial approach. After the court denied the government's petition for panel or *en banc* rehearing, it issued a mandate directing the bankruptcy court to refund the excess fees (presently held in escrow).[48] The mandate was recalled in light of the grant of *certiorari* in *Siegel*.[49] However, 10 days after the Supreme Court's *Siegel* decision, the Second Circuit seemingly *sua sponte* issued an order to show cause why the mandate should not reissue,[50] notwithstanding the pending *cert*. petition in the case.

In *Siegel*, the government submitted that the appropriate remedy would be "purely prospective relief — or, at most, a fee increase for underpaying debtors"[51] in BA districts, an argument that has gained prominence with every decision holding the fee increase as unconstitutional. The question of an appropriate remedy appears to be the present line in the sand, and litigation on the issue will no doubt continue, given the substantial amounts involved and remands to the Tenth and Eleventh Circuits. According to the government, the legal status of approximately $324 million in fees is in question.[52] The remedy issue will be before the Second, Fourth, Tenth and Eleventh Circuits, and may be back before the Supreme Court in the event of a circuit split.

Siegel may also spur further review of the reach of the Bankruptcy Clause. The case has been cited by a petitioner seeking *certiorari* on "whether a federal court deciding a state law issue in a bankruptcy case must apply the forum State's choice-of-law rules or federal choice-of-law rules to determine what substantive law governs."[53] Although the question does not involve congressional action, the petitioner frames the issue as one of uniform bankruptcy administration.[54]

The systemic dichotomy also may enter litigation crosshairs, with the legislative mechanism involved providing fertile ground for dispute. To opt in to the USTP requires a "majority vote of the chief judge of such district and each bankruptcy judge in such judicial district in favor of such election."[55] Thus, § 501 of the 2000 Act, which eliminated the deadline for BA districts to join the USTP, permanently rendered a law intended to be of general applicability entirely dependent on the whim of (primarily) bankruptcy judges in each district. There are questions of unlawful delegation of power under the Bankruptcy Clause and subjugation of Article III judicial power to Article I bankruptcy judges.[56]

With the fee statute clearly invalidated, it may be some time before a party can establish an injury that provides standing to challenge the dual systems. However, *Siegel* has raised attention to the previously ignored systemic dichotomy, and practitioners may begin to highlight differential treatment of parties between the systems, or challenge the standing of U.S. Trustees, BAs and appointed trustees in bankruptcy cases. The Court appears poised to entertain a direct challenge to the underlying division, having now admonished that the "[Bankruptcy] Clause does not allow Congress to accomplish in two steps what it forbids in one."[57] abi

43 *Id.*
44 *Id.*
45 S. Ct. No. 21-1078.
46 *Sub nom., Bast Amron LLP v. United States Trustee Region 21*, S. Ct. No. 21-1354.
47 S. Ct. No. 21-1123.
48 *Clinton Nurseries*, No. 1209, Docs. 141-142 (2d Cir. 2021).
49 *Id.* at Doc. 160.
50 *Id.* at Doc. 166.
51 *Siegel*, S. Ct. No. 21-441, Fitzgerald (Acting U.S. Trustee) Br. at 16 (S. Ct. March 28, 2022).
52 *Siegel*, S. Ct. No. 21-441; U.S. Resp. at 22 (S. Ct. Dec. 8, 2021).
53 *Cuker Interactive LLC v. Pillsbury Winthrop Shaw Pittman LLP*, No 21-55298, Cuker Pet., at i (2022).
54 *Id.* at 2, 4.
55 1986 Act, title III, § 302(d)(3).
56 *See, e.g., Stern v. Marshall*, 564 U.S. 462 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).
57 *Siegel*, 142 S. Ct. at 1782.