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Malorie Ruggeri

ST. JOHN'S UNIVERSITY
SCHOOL OF LAW

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Malorie Ruggeri, J.D. Candidate 2024

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Introduction

Article I, Section 8, Clause 4 of the United States Constitution contains the "Bankruptcy Clause," which vests Congress with the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[1] The clause's requirement that the bankruptcy laws be "uniform" is not a strictly construed requirement as Congress reserves the right to draft legislation depending on different regional issues that arise within the bankruptcy system.[2]

Congress created the United States Trustee Program (USTP) to, among other things, oversee the administration of bankruptcy cases and promote the integrity and efficiency of bankruptcy system for the benefit of all creditors, debtors, and the public.[3] Congress, nevertheless, has permitted six judicial districts in North Carolina and Alabama to opt out of the USTP.[4] In these districts, the administration of bankruptcy cases is overseen by an alternative program, the Administrator Program.[5] The USTP is funded in its entirety by user paid fees to the United States Trustee Fund (USTF), which is largely comprised of fees paid by debtors who

[1] U.S. CONST. art. I, § 8, cl. 2.
[2] *See* Siegel v. Fitzgerald, 142 S. Ct. 1770, 1776 (2022).
[3] *See id.*
[4] *See id.*
[5] *See id.*

file cases under Chapter 11 of the Bankruptcy Code.[6] In contrast, the Administrator Program is funded by the judiciary general budget, but Congress allowed the United States Judicial Conference to require debtors in the Administrator Program to pay quarterly fees equal to those imposed in the Trustee Program Districts.[7]

This article will examine the issue of whether Congress' enactment of a significant fee increase in bankruptcy fees applicable to large Chapter 11 cases in United States Trustee Program districts, but not to cases in the Administrator Program districts, violates the uniformity requirement of the Bankruptcy Clause of the U.S. Constitution. Part I of this article will discuss *Siegel v. Fitzgerald*, in which the Court held that this type of fee increase is unconstitutional.[8] Part II analyzes the Circuit Courts' decisions that have addressed the possible remedies for the unconstitutional overpayments.

Discussion

I. US Trustee Fee Increase That Applies Only to Cases in the United States Trustee Program District is Unconstitutional.

In 2017, Congress enacted a temporary fee increase in the fee rates applicable to large Chapter 11 cases to address a shortfall in the United States Trustee Fund that would be applicable to newly filed and currently pending cases, effective October 1, 2018.[9] The Judicial Conference adopted the same fee increase for the six administrator program districts in North Carolina and Alabama, also effective October 1, 2018, but only applicable to *newly* filed cases, not currently pending cases.[10]

In 2008, Circuit City Stores, Inc. ("Circuit City") filed a petition for relief under

[6] *See id.* at 1777.
[7] *See id.*
[8] *See id.*
[9] *See id.*
[10] *See id.* at 1778.

Chapter 11 of the Bankruptcy Code with the Eastern District of Virginia, a USTP district.[11] In 2010, the bankruptcy court confirmed a joint-liquidation plan for Circuit City, which among other things, established a trustee to administer Circuit City's case, and required Circuit City to pay quarterly fees to the USTF while the Chapter 11 case was pending.[12] The case was still pending when Congress enacted the fee increase applicable to Chapter 11 cases, resulting in total fees of $632,542.00, reflecting an increase of $56,400.00 in fees that would have been owed absent the fee increase.[13] Accordingly, Circuit City's Trustee filed for relief in the Bankruptcy Court of the Eastern District of Virginia against the acting local United States Trustee, requesting that Circuit City's estate pay the rate in effect prior to the 2017 Act and attempting to recover any overpayments made under the 2017 Act.[14] Circuit City's Trustee contended that the fee increase was not uniform across the United States, as debtors in USTP districts and the Administrator Program districts paid different amounts, in violation of the uniformity requirement of the Bankruptcy Clause.[15]

The Bankruptcy Court of the Eastern District of Virginia agreed with Circuit City's Trustee and directed that the fees due from January 1, 2018 onward, should be paid at the rate in effect prior to Congress' 2017 Act.[16] The United States Trustee for Region 4 appealed, and the Fourth Circuit reversed the holding of the bankruptcy court.[17] The Fourth Circuit held that the fee increase did not violate the Bankruptcy Clause because the increase applied only to debtors in the Trustee Program districts to bolster the dwindling UST Fund, which funded the Trustee

[11] *See id.*
[12] *See id.*
[13] *See id.*
[14] *See id.*
[15] *See id.* at 1783.
[16] *See id.* at 1778.
[17] *See id*.

Program alone.[18] Other courts, however, had come to different conclusions: the U.S. Court of Appeals for the Tenth Circuit in *In re Mosaic Mgmt. Group, Inc.* and the U.S. Court of Appeals for the Second Circuit in *In re Buffets, LLC* both held that the 2017 Act is constitutional, while the U.S. Court of Appeals for the Eleventh Circuit *In re John Q. Hammons Fall 2006* and the U.S. Court of Appeals for the Second Circuit in *In re Clinton Nurseries* both found the act to be unconstitutional.[19]

The Supreme Court granted certiorari to resolve that circuit split.[20] The Supreme Court reversed and remanded the Fourth Circuit's decision, holding that Congress' enactment of a significant fee increase that only applied to debtors in the Trustee Program violated the uniformity requirement of the Bankruptcy Clause for two main reasons.[21]

A. The 2017 Act Is a Law on The Subject of Bankruptcies to Which the Uniformity Requirement Applies.

The Supreme Court rejected both arguments set forth by the U.S. Trustee as to why the 2017 Act was not a "law on the subject of bankruptcies" to which the uniformity requirement applies, but instead a bankruptcy law enacted to help administer substantive bankruptcy law pursuant to the Necessary and Proper Clause.[22]

First, the U.S. Trustee contended that the Necessary and Proper Clause supplies the authority for Congress to pass an "administrative" bankruptcy law, or "a law auxiliary to a substantive bankruptcy law," whereas strictly "substantive" bankruptcy law is governed by the Bankruptcy Clause. [23] The Supreme Court, however, has long held that nothing in the language

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[18] *See id.*
[19] *See In re* Mosaic Mgmt. Grp., 22 F.4th 1291 (11th Cir. 2022); *In re* Buffets, LLC, 979 F.3d 366 (2d Cir. 2022); *but see In re* John Q. Hammons Fall 2006, LLC, 15 F.4th 1011 (10th Cir. 2021); *In re* Clinton Nurseries, Inc. 998 F.3d 56 (2d Cir. 2021).
[20] *See Siegel*, 142 S. Ct. at 1778.
[21] *See id*. at 1778.
[22] *See id*.
[23] *See id*.

of the Bankruptcy Clause suggests a distinction between substantive and administrative bankruptcy law.[24] Furthermore, the Supreme Court has repeatedly emphasized that the language of the Bankruptcy Clause, "the laws on the subject of Bankruptcies," is "broad" and that the "subject of bankruptcies is incapable of a final definition."[25] Similarly, in *Hanover Nat. Bank v. Moyses,* the Supreme Court interpreted the Bankruptcy Clause to have "granted plenary power to Congress over the whole subject of bankruptcies," and observed that the "language used" did not "limit the scope" of Congress' abilities.[26]

Second, the U.S. Trustee argued that each of the Supreme Court's prior cases on the uniformity requirement addressed only "substantive" bankruptcy laws.[27] According to the Supreme Court, this argument fails as well because, again, there is no distinction between "substantive" and "administrative" bankruptcy law, and even if the U.S. Trustee was correct, these prior cases still do not establish that the uniformity requirement *exclusively* applies to "substantive" bankruptcy laws.[28] The Supreme Court has never concluded that all "administrative" bankruptcy laws are enacted pursuant to the Necessary and Proper Clause, nor that the Necessary and Proper Clause allows Congress to circumvent the limitations set by the Bankruptcy Clause.[29]

As of today, all courts that have decided on this issue, including the Supreme Court, have concluded that the 2017 Act is subject to the Bankruptcy Clause's uniformity requirement as it is most clearly a "law on the subject of bankruptcies" for three reasons.[30] First, the only subject of

[24] *See id*.
[25] *See id.*; *see also* Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 513 (1938).
[26] 186 U.S. 181, 187 (1902).
[27] *See Siegel*, 142. S. Ct. at 1778.
[28] *See id.* at 1779.
[29] *See id*.
[30] *Id.*

the 2017 Act is bankruptcy.[31] Second, the 2017 act affects the "substance of debtor-creditor relations," and lastly, the Act's effect is to set fees that must be paid by a bankruptcy trustee from the debtor's estate in a bankruptcy proceeding.[32]

B. The 2017 Act Violated the Uniformity Requirement of the Bankruptcy Clause Because the Bankruptcy Clause Does Not Permit Arbitrary Geographically Disparate Treatment of Debtors.

Having determined that the 2017 Act falls within the scope of the Bankruptcy Clause, the Supreme Court then addressed whether the Act was a permissible exercise of that Clause.[33] Although, as established, the Bankruptcy Clause confers broad authority on Congress, the Clause also imposes a limitation on that authority: the requirement that the laws Congress enacts be uniform.[34]

The Supreme Court first interpreted the uniformity requirement of the Bankruptcy Clause in *Hanover Nat. Bank v. Moyses*.[35] The Court held that if the general operation of the bankruptcy law is uniform, it satisfies the uniformity requirement, even if the results are different among different states.[36] Later, the Supreme Court affirmed its interpretation of the uniformity requirement, holding Congress can enact geographically limited bankruptcy laws consistent with the uniformity requirement if it is responding to a geographically limited problem.[37] The Regional Rail Reorganization Act of 1973 applied only to rail carriers operating within a defined region of the country.[38] The Court stated that the inherent flexibility in the Bankruptcy Clause allows Congress the power to "fashion legislation to resolve geographically isolated problems," and because the Regional Rail Reorganization Act of 1973 operated "uniformly upon all

[31] *Id.*
[32] *Id.*
[33] *See id*. at 1780.
[34] *See id*.
[35] 186 U.S. at 190.
[36] *See id.*
[37] Blanchette v. Conn. Gen. Ins. Corps. (Reg'l Rail Reorganization Act Cases), 419 U.S. 102, 159 (1974).
[38] *Id*. at 159–160.

bankrupt railroads then operating in the United States," it was consistent with the uniformity principle of the Bankruptcy Clause.[39] The Supreme Court, however, noted that while the uniformity requirement allows Congress to account for differences that exist in different parts of the country, it does not give Congress the power to subject "similarly situated debtors in different States to different fees."[40]

In *Siegel*, "there [was] no dispute that the 2017 Act's fee increase was not geographically uniform," and so, the Court's only remaining question was whether Congress permissibly imposed non-uniform fees because it was responding to a funding deficit limited to the USTP geographic region.[41] The Supreme Court held Congress did not, and in doing so, violated the uniformity requirement of the Bankruptcy Clause.[42] The fee increase applied differently to Chapter 11 debtors in different regions: debtors in North Carolina and Alabama, unlike the rest of the United States, were not subject to a fee increase for the first three quarters of 2018.[43] As stated above, this geographical disparity resulted in Circuit City paying $632,542.00 more in fees than an identical debtor in North Carolina or Alabama.[44] This disparity did exist in order to solve a geographical problem, the budgetary problems of the UST Fund, which supports only the USTP states, however, the shortfall only exists because Congress had arbitrability separated the districts into "two different systems with different cost funding mechanisms."[45] Therefore, the problem Congress was addressing here, was a problem created by Congress itself, unlike the problem Congress addressed in the *Regional Rail Reorganization Act Cases*, which was caused

[39] *Id*. at 159.
[40] *Siegel*, 142 S. Ct. at 1781.
[41] *Id.*
[42] *Id.*
[43] *See id*.
[44] *See id*.
[45] *Id.* at 1782.

by eight major railroads located in the Northeast and Midwest going bankrupt.[46] Therefore, the Court held that Bankruptcy Clause does not permit Congress to treat identical debtors differently based on artificial distinctions Congress itself created, and therefore, held the 2017 Act is unconstitutional.[47]

II. The Remedy for Unconstitutional Overpayments is Full Monetary Amount Paid in Excess Recovered by Debtor.

The Supreme Court remanded the issue of proper remedy available to Circuit City for the overpayment to the Unites States Court of Appeals for the Fourth Circuit.[48] The Fourth Circuit, in turn, remanded the case to the United States Bankruptcy Court, Eastern District of Virginia, for the same purpose.[49] Ultimately, the bankruptcy court held that Circuit City is entitled to be made whole and that it may recover the full monetary amount of unconstitutional overpayments.[50]

The bankruptcy court first rejected the U.S. Trustee's argument that correcting the fee assessments on a "going-forward" basis is sufficient to provide adequate relief.[51] The U.S. Trustee relied on two cases to support his argument, both of which the court found distinguishable from Circuit City's situation because in both cases there was no monetary relief at issue, and moreover, no monetary relief could redress the constitutional injury.[52] The court

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[46] *See id.*
[47] *See id.*
[48] *See id.* at 1783.
[49] *In re* Cir. City Stores, Inc., No. 08-35653-KRH, 2022 WL 17722849, at *1 (Bankr. E.D. Va. Dec. 15, 2022).
[50] *See id.* at *7.
[51] *See id.* at *3.
[52] *See* Sessions v. Morales-Santa, 137 S. Ct. 1678, 1679 (2017) (declining to retroactively strip citizenship from children born to single mothers after finding the law unconstitutional that allowed citizenship); *see also* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 1335, 2336 (2020) (after defining a new category of illegal robocalls, declining retroactive punishment of robocalls that were legal when made).

stated that in the present instance, where monetary relief addressing unconstitutional treatment is at issue, prospective relief would only "cement the unconstitutional treatment."[53]

Once the bankruptcy court in *In re Cir. City Stores Inc*. established that prospective relief would be ineffectual, it relied on a Supreme Court case, *Heckler v. Matthews*, to determine the appropriate relief.[54] *Heckler* considered the possible remedies for an unconstitutional pension offset provision resulting in the unequal treatment of nondependent men and similarly situated nondependent women.[55] The court in *Heckler* ultimately held that when the "right invoked is that to equal treatment" the appropriate remedy is either withdrawal of benefits from the favored class or extension of benefits to the excluded class.[56] The bankruptcy court in *In re Cir. City Stores Inc.* likened the similarly situated nondependent men and nondependent women in *Heckler* to the similarly situated debtors in the USTP and BA districts.[57] Therefore, the bankruptcy court reasoned that there were two possible remedies available in *In re Cir. City Stores Inc.* First, debtors in USTP districts could receive a refund for the amount of the overpayments. Second debtors in the BA districts could be billed the amount they would have paid if the statute was uniformly applied.[58] The bankruptcy court concluded that "numerous legal and practical hurdles" stood in the way of imposing a retroactive assessment of debtors in the BA district, and so, found that a refund of unconstitutional overpayments was the more practical remedy.[59]

Lastly, the bankruptcy court held that Circuit City's Trustee can avoid unauthorized post-petition date transfers and recover the same for the benefit of the estate under section 549 of the

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[53] *In re Cir. City Stores, Inc.*, 2022 WL 17722849, at *3.
[54] 104 S. Ct. 1387, 1387 (1984).
[55] *See id*.
[56] *Id.* at 1395.
[57] 2022 WL 17722849, at *4.
[58] *Id.*
[59] *See id.*

Bankruptcy Code.[60] Under section 549 of the Bankruptcy Code, avoiding post-petition date transfers requires four elements be satisfied: "(1) a transfer; (2) property of the estate; (3) made after commencement of the case; and (4) that it is not authorized under Bankruptcy Code or by the bankruptcy court."[61] section 550 of the Bankruptcy Code goes on to say that if a transfer is avoided under section 549, "the trustee may recover, for the benefit of the estate, the property transferred" or the value of said property.[62] Here, applying section 549 in conjunction with section 550, the bankruptcy court reasoned that the unconstitutional overpayment was: (1) a transfer; (2) of property to the estate; (3) that occurred after the commencement of the bankruptcy proceeding; and (4) was not authorized under the Bankruptcy Code or by this Court because the Bankruptcy Code does not contemplate the payment of unconstitutional fees.[63] Accordingly, the bankruptcy court held the Circuit City's Trustee can avoid the transfer of the unconstitutional overpayment.[64]

This refund is consistent with previously decided cases in the Tenth Circuit and Second Circuit, *In re John Q. Hammons Fall 2006, LLC* and *In re Clinton Nurseries,* respectively.[65] *In re John Q. Hammons Fall* held that the debtors are entitled to monetary relief in the form of a refund of the excess quarterly fees they paid during that time period.[66] Similarly, *In re Clinton Nurseries* held that the debtors were entitled to a full refund the amount of quarterly fees paid in excess of the amount the debtor would have paid in a Bankruptcy Administrator district during the same time period.[67] Both courts reasoned that because the debtors had a constitutional injury-in-fact that is traceable to the geographically discrepant fee increase, that is capable of redress

[60] *See id*. at *6.
[61] *Id*. at *6.
[62] *Id.*
[63] *See id*.
[64] *See id*.
[65] 15 F.4th 1011 (10th Cir. 2021); 998 F.3d 56 (2d Cir. 2021).
[66] 15 F.4th at 1011.
[67] 998 F.3d at 57.

through a refund or partial refund, the debtors are entitled to reimbursement.[68] Moreover, in light of *Siegel* and prior to the decision of the United Bankruptcy Court of the Eastern District of Virginia in *In re. Cir. City Stores Inc.*, both the U.S. Court of Appeals for the Tenth Circuit and U.S. Court of Appeals for the Second Circuit affirmed their original decisions regarding refunds in *In re John Q. Hammons Fall 2006, LLC* and *In re Clinton Nurseries,* respectively.[69]

Conclusion

The uniformity requirement of the Bankruptcy Clause does not permit arbitrary geographically disparate treatment of otherwise identical debtors.[70] Therefore, Congress' enactment of a significant fee increase that exempted debtors in two states violates the Bankruptcy Clause of the United States Constitution.[71] Moreover, while the Supreme Court has not addressed the proper remedy for unconstitutional overpayments, there seems to be consensus among the lower Circuits that the debtor is entitled to full monetary recovery for the amount of quarterly fees paid in excess.[72]

[68] *See id*. at 64; *In re* John Q. Hammons Fall, 15 F.4th at 1026.
[69] *In re* John Q. Hammons Fall 2006, No. 20-3203, 2022 WL 3354682, at *1 (10th Cir. 2022); Clinton Nurseries, Inc. v. Harrington (*In re* Clinton Nurseries, Inc.), 53 F.4th 15, 15 (2d Cir. 2022).
[70] Siegel v. Fitzgerald, 142 S. Ct. 1770, 1783 (2022).
[71] *See id*.
[72] *See In re* John Q. Hammons Fall 2006, No. 20-3203, 2022 WL 3354682, at *1 (10th Cir. 2022); *In re* Clinton Nurseries, Inc., 53 F.4th 15, 15 (2d Cir. 2022).