

Lawyer Insights

The Divide Between Courts On Ch. 11 Trustee Fees

By Justin Paget and Nathan Kramer
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Two recent bankruptcy decisions addressed constitutional challenges to the fee schedule amendment,¹ which substantially increased the quarterly fees Chapter 11 debtors pay to the U.S. Trustee.

The [U.S. Bankruptcy Court for the Northern District of Georgia](#) in *In re: Clayton General*² and the U.S. Bankruptcy Court for the Southern District of Florida in *In re: Mosaic Management*³ reversed the recent trend of courts finding the fee schedule amendment unconstitutional, furthering the divide between courts that have considered the issue.

As explained in our prior Law360 [guest article](#),⁴ in early 2019 the [U.S. Bankruptcy Court for the Western District of Texas](#) in *In re: Buffets*⁵ first ruled that the increased Chapter 11 quarterly fees are unconstitutional based on an impermissibly nonuniform and retroactive application of the fee schedule amendment.

Several decisions that followed took different views of the constitutionality of the new fee schedule, but found various aspects of the fee schedule amendment unconstitutional.

More recent decisions, including from the [U.S. Bankruptcy Court for the District of Delaware](#) in *In re: Exide Technologies* and the U.S. Bankruptcy Court for the Northern District of Georgia in *In re: Clayton General* have reversed this trend — holding that the fee schedule amendment was not impermissibly nonuniform and/or retroactive.

Currently, challenges to the fee schedule amendment have resulted in at least seven bankruptcy court decisions, with three cases holding that the amendment is unconstitutional and four rejecting the constitutional challenges.⁶

Appeals from several of these decisions are pending in the U.S. Courts of Appeals for the Second Circuit, the U.S. Court of Appeals for the Fourth Circuit and the U.S. Court of Appeals for the Fifth Circuit. At a minimum, we should expect multiple decisions by the courts of appeal on this issue in the coming months.

Recent Decisions

The fee schedule amendment increased the maximum quarterly fee to \$250,000 from \$30,000, effective for all cases under supervision of the U.S. Trustee's Office on Jan. 1, 2018. Courts in states where the Bankruptcy Administrator Program is employed did not adopt the change until Oct. 1, 2018, 10 months later.

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In addition to the other cases discussed below, two recent decisions in March and April 2020 have held that the fee schedule amendment is constitutional. While the majority of the early decisions to consider these issues primarily held that the fee schedule amendment is unconstitutional, more recent decisions are increasingly holding that the fee schedule amendment is constitutional.

In the case of *In re: Clayton General*, the liquidating trustee argued that the increased quarterly fee was nonuniform and improperly retroactive as applied to the debtor. In this case, while the debtor's case was filed before the fee schedule amendment, the debtor did not file its plan until after Congress enacted the amendment.

The debtor had an opportunity to convert or dismiss its case, or take any other appropriate action, prior to confirming a liquidating plan. Therefore, the retroactivity concerns present in *Buffets* and other cases simply did not exist for the debtor.⁷

Considering uniformity, because the fee schedule amendment applied in every state that participated in the U.S. Trustee Program, the fact that it did not apply in the two bankruptcy administrator districts did not render the fee schedule amendment nonuniform.⁸ Several other courts, mentioned below, have reached the same conclusion on uniformity.

In *Mosaic Management*, the Mosaic investment trustee sought a declaration that the increased quarterly fees were not applicable to the debtors, challenging the constitutionality of the fee schedule amendment on the basis of retroactivity and uniformity.

Concerning retroactivity, the court held that the fee schedule amendment:

- “[B]y its terms applies to disbursements made on or after Jan. 1, 2018, without regard to when the underlying case was filed”;
- Is not retroactive “because it does not attach new legal consequences to the debtors’ confirmed plan but addresses only disbursements made after enactment of the amendment”; and
- Even if the fee schedule amendment was retroactive, then “it does not violate due process as it serves the legitimate legislative purpose of maintaining the self-funding nature of the U.S. Trustee system and that purpose is achieved by the rational means of increasing fees in the largest Chapter 11 cases.”⁹

With respect to uniformity, the *Mosaic Management* court determined that only an extremely narrow portion of the increased quarterly fees were not applied uniformly. The increased quarterly fees collected are used almost exclusively to defray the cost of the U.S. Trustee Program or fund related reserves.

However, 2% of the quarterly fees collected are disbursed to the [U.S. Department of the Treasury](#) without any restriction to address any fiscal needs. Because of this, debtors in U.S. Trustee districts “are required to pay a portion of their quarterly U.S. Trustee fee for national purposes rather than toward administration of bankruptcy cases in the geographic areas where the fee is charged.”¹⁰ Thus, the court determined that 2% of the increased fees are unconstitutionally nonuniform.

Thus far, *Mosaic Management* is the only decision considering the uniformity of the fee schedule

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amendment to draw this distinction.

The Divide on Constitutionality

The bankruptcy courts in Buffets Holdings LLC,¹¹ [Circuit City Stores Inc.](#),¹² and [Life Partners Holdings Inc.](#)¹³ have held that the fee schedule amendment was unconstitutionally nonuniform in application. However, the bankruptcy courts in Clinton Nurseries Inc., Mosaic Management (other than 2% of the quarterly fees used for general national purposes), Clayton General and Exide Technologies overruled these nonuniformity arguments, reasoning that the amendment is uniform on its face.

The latter courts considered that the underlying statute was intended to address budgetary shortfalls in U.S. Trustee districts, not bankruptcy administrator districts.¹⁴ It therefore was not relevant that there was a delay in application of the amendment to bankruptcy administrator districts.¹⁵

Furthermore, by operation of the statute, as soon as the Judicial Conference of the U.S. exercised discretion to raise fees in U.S. Trustee districts, the statute required that fees be correspondingly and automatically raised in bankruptcy administrator districts.¹⁶

These observations supported the conclusion reached by four bankruptcy courts that the fee schedule amendment was uniformly applied as intended by Congress and therefore constitutional.

The bankruptcy courts in Buffets¹⁷ and Life Partners¹⁸ have held that application of the increased quarterly fees to pending cases is an improper retroactive application. However, the bankruptcy courts in Circuit City,¹⁹ Mosaic Management,²⁰ and Exide Technologies²¹ have held that the application of the increased fees to pending cases is not retroactive.²²

These courts reasoned that the amendment is not impermissibly retroactive because the increased fees only apply prospectively to disbursements after Jan. 1, 2018, regardless of when debtors filed their bankruptcy cases.²³ Additionally, the court in Circuit City found that such application does not violate constitutional principles because a “mere increase in the quarterly U.S. Trustee fee is not substantively retroactive. It is more akin to ‘taxes arising post confirmation, or any similar post-confirmation expenses.’”²⁴

Implications

Beyond the fact that the fee schedule amendment presents interesting questions of constitutional law that are relatively infrequent in bankruptcy cases, how appellate courts rule on the fee schedule amendment will have a tangible financial impact on both Chapter 11 debtors and the U.S. Trustee Program.

According to the U.S. Trustee Program’s fiscal year 2020 performance budget congressional submission, in fiscal year 2017, the U.S. Trustee Program reported collecting Chapter 11 quarterly fees in the amount of \$96.69 million.²⁵

In fiscal year 2018, after the fee schedule amendment became effective, the U.S. Trustee Program reported collecting Chapter 11 quarterly fees in the amount of \$214.5 million, an increase of approximately 121% over the prior year. Furthermore, in fiscal years 2019 and 2020, the U.S. Trustee Program projects collecting \$318.16 million and \$330.04 million, respectively, in Chapter 11 quarterly fees. These figures represent an increase of approximately 229% and 241%, respectively, over fiscal

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year 2017.

While financial data is not reported in sufficiently minute detail to calculate what portion of these fees the U.S. Trustee Program projects to collect from Chapter 11 cases pending as of the effective date of the fee schedule amendment versus Chapter 11 cases filed after the amendment's effective date, tens, if not hundreds, of millions of dollars are at stake for both Chapter 11 debtors and the U.S. Trustee Program as appellate courts begin to consider the constitutionality of the fee schedule amendment.

In light of these varying rulings on the fee schedule amendment and the several appellate level decisions that will come down in 2020, it appears possible that this issue may ultimately require the [U.S. Supreme Court](#)'s interpretation.

Notes

1. The Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72.
2. In re: Clayton Gen., Inc., No. 15-64266-WLH, 2020 Bankr. LEXIS 842 (Bankr. N.D. Ga. Mar. 30, 2020).
3. In re: Mosaic Mgmt. Grp., Inc., Case No. 16-20833-EPK, 2020 WL 1808605 (Bankr. S.D. Fla. Apr. 9, 2020).
4. Justin F. Paget & Nathan 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>.
5. Hobbs v. Buffets Holdings, LLC (In re: Buffets LLC), 597 B.R. 588 (Bankr. W.D. Tex. 2019), direct appeal docketed, No. 19-50765 (5th Cir. Sept. 13, 2019).
6. These decisions are: Hobbs v. Buffets Holdings, LLC (In re: Buffets LLC), 597 B.R. 588 (Bankr. W.D. Tex. 2019), direct appeal docketed, No. 19-50765 (5th Cir. Sept. 13, 2019); Siegel v. Fitzgerald (In re: Circuit City Stores, Inc.), No. 19-03060 (Bankr. E.D. Va. July 15, 2019), direct appeal docketed, No. 19-2240 (4th Cir. Nov. 6, 2019); Neary v. Quilling (In re: Life Partners Holdings, Inc.), 606 B.R. 277 (Bankr. N.D. Tex. 2019), direct appeal docketed, No. 19-90041 (5th Cir. Dec. 13, 2019); Clinton Nurseries, Inc. v. Harrington (In re: Clinton Nurseries, Inc.), 608 B.R. 96 (Bankr. D. Conn. Aug. 28, 2019), appeal docketed, No. 19-1428(MPS) (D. Conn. Sept. 11, 2019), direct appeal to Second Circuit under consideration, No. 19-4067 (2d Cir. Dec. 9, 2019); and In re: Exide Technologies, 611 B.R. 21 (Bankr. D. Del. Jan. 9, 2020), direct appeal under consideration by Third Circuit, No. 20-8023 (3d Cir. 2020); In re: Clayton Gen., Inc., No. 15-64266-WLH, 2020 Bankr. LEXIS 842 (Bankr. N.D. Ga. Mar. 30, 2020); In re: Mosaic Mgmt. Grp., Inc., Case No. 16-20833-EPK, 2020 WL 1808605 (Bankr. S.D. Fla. Apr. 9, 2020).
7. Clayton Gen., Inc., 2020 Bankr. LEXIS 842 at *15-16.
8. Id. at *20-29.
9. Mosaic Mgmt., 2020 WL 1808605, at *5.
10. Id. at *7.

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11. 597 B.R. at 594-95.
12. 606 B.R. at 269-70.
13. 606 B.R. at 286-88.
14. Mosaic Mgmt., 2020 WL 1808605, at *6-7; In re: Clayton Gen., Inc., 2020 Bankr. LEXIS 842, at *23-27.
15. Exide Technologies, 611 B.R. at 33-38.
16. Clinton Nurseries, 608 B.R. at 114-16.
17. 597 B.R. at 595-97.
18. 606 B.R. at 283-85.
19. 606 B.R. at 267-69.
20. 2020 WL 1808605, at *5.
21. Exide Technologies, 611 B.R. at 27-30.
22. The debtor in Clinton Nurseries did not raise a retroactivity argument, and therefore the Court declined to opine on the issue. 608 B.R. at n.16. In Clayton General, the debtor's plan was filed after the fee schedule amendment.
23. Exide Technologies, 611 B.R. at 27-28; Circuit City, 606 B.R. at 269-70.
24. Circuit City, 606 B.R. at 268 (citing In re: A.H. Robins Co., 219 B.R. 145, 148 (Bankr. E.D. Va. 1998)).
25. US Dep't of Justice, US Trustee Program FY 2020 Performance Budget Congressional Submission, at 10, <https://www.justice.gov/doj/fy-2020-congressional-budget-submission>.

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