

# Hold Alabama And North Carolina Accountable On Ch. 11 Fees

By **Donald Swanson** (June 21, 2022)

It seems like a small thing: Chapter 11 debtors in two states paying lower quarterly fees than Chapter 11 debtors in the other 48 states. What's the big deal?

Alabama and North Carolina threw a political hissy fit, three or four decades ago. They wanted their own bankruptcy administrator system, not the U.S. trustee system established everywhere else.

And they were rewarded. The reward included lower quarterly fees.

Where's the harm in lower quarterly fees? What follows is an attempt to identify some of the harms and costs of the lower fees — i.e., unconstitutionality, wasted judicial and legislative resources and a high cost remedy — and suggest remedies that provide accountability for the two states that caused the problem.



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## Unconstitutionality

For starters, the lower fees violate the U.S. Constitution — specifically, the uniformity requirement in its bankruptcy clause. On June 7, the U.S. Supreme Court in *Siegel v. Fitzgerald* explained:

The question in this case is whether Congress' enactment of a significant fee increase that exempted debtors in two States violated the uniformity requirement. Here, it did.[1]

But instead of imposing a remedy for the violation, the Supreme Court remanded the remedy questions, saying:

The court below ... has not yet had an opportunity to address ... the proper remedy. Mindful that we are a court of review, not of first view, ... this court remands for the Fourth Circuit to consider these questions in the first instance.

In light of high harm and costs involved, the U.S. Court of Appeals for the Fourth Circuit's remedy needs to identify those who caused the problem — i.e., the states of Alabama and North Carolina — and assure that those who caused the problem are accountable.

## High Costs

The costs of unconstitutionality include wasted judicial and legislative resources — twice.

## First Round

While Alabama and North Carolina have been enjoying their unconstitutional lower fee benefits, judicial and legislative resources have been wasted, across the land. Consider these wastes:

- Their special deal was declared unconstitutional nearly three decades ago, by the U.S. Court of Appeals for the Ninth Circuit in *St. Angelo v. Victoria Farms Inc.*; and
- The *St. Angelo* ruling induced remedial action by Congress, with no accountability for Alabama or North Carolina — they weren't even involved in the litigation.[2]

### ***Second Round***

Then, Alabama and North Carolina did it again — they created the very same lower fees problem, again, that *St. Angelo* declared unconstitutional and that Congress had to fix.

Second-round litigation on the same constitutionality issue resulted in a 2-1 circuit conflict, split panels on multiple circuits and sharply divided lower courts.[3] Specifically, the petition for writ of certiorari in *Siegel v. Fitzgerald* stated:

- "The Fourth and Fifth Circuits have now upheld the law (over strong dissents)";
- "The Second Circuit has expressly rejected those decisions";
- "The conflict is now entrenched";
- The law in question "is unconstitutional in some parts of the country but not others"; and
- "Debtors nationwide are left uncertain about the validity of the Act's quarterly fees — with massive amounts at stake." [4]

And Congress has to step in, again, to remedy, again, the very same lower fees problem.

This time, of course, the Supreme Court weighed in through *Siegel v. Fitzgerald* and agreed with the Ninth Circuit's prior analysis — declaring the lower fees unconstitutional. But the Supreme Court left various questions unresolved, with a remedy remand.

### ***Responsibility***

All of these wasted resources are the direct consequence of that political hissy fit, decades ago, by Alabama and North Carolina — which they then repeated.

Those two states are the ones responsible. But they have never been held accountable — they haven't even been involved in any of the litigation over their special deal.

That's because litigating debtors are trying to get the same special deal, not trying to strike that deal down.

### ***A Costly Remedy?***

The costs of Alabama's and North Carolina's unconstitutionality include a potential refund of overpaid fees, in huge amounts, by the U.S. government.

Though the Supreme Court in *Siegel v. Fitzgerald* remanded remedies issues, the parties are already on record. They've identified three possible remedies:

- Collect underpaid fees from Alabama and North Carolina debtors;
- Refund overpaid fee amounts to debtors in 48 states; and/or
- Pretend unconstitutionality did not happen, and move on.

What follows are the *Siegel v. Fitzgerald* parties' arguments on the three alternatives.

### ***Don't Collect Underpaid Fees From Alabama and North Carolina Debtors***

The brief of the Circuit City trustee, the petitioner, didn't want underpaid fees collected from Alabama and North Carolina debtors. The obvious and selfish reason is this: Former electronics retailer Circuit City is in one of the 48 states and wants a fee refund for itself.

But the stated reasons in its brief are that "the government ... has no realistic means of hunting down all BA debtors who escaped higher fees over a period of years — and somehow collecting those fees post-hoc" it "has no clear legal or practical path to unscramble the egg" and that "Congress elected against ... imposing fees retroactively on parties in BA districts."<sup>[5]</sup><sup>[6]</sup>

The U.S. trustee's brief did not dispute this argument.

### ***Refunding Fees in 48 States***

The brief of the Circuit City trustee argued, instead, for the government to refund higher fees paid by the 48 states' debtors.

"A prospective fix is inadequate" because it "cannot restore uniformity (or equal treatment) for past periods where that treatment was not equal" and while "Congress may prefer to avoid responsibility for past constitutional injuries," it has only "one viable option: refund the fees it unlawfully extracted under a non-uniform bankruptcy law."<sup>[7]</sup><sup>[8]</sup><sup>[9]</sup>

### ***Pretend Unconstitutionality Did Not Happen***

The brief of the U.S. trustee, the respondent, argued against monetary relief. The obvious and selfish reasons are that recovering fees from Alabama and North Carolina debtors would be difficult and that the government does not want to reimburse large fee amounts to debtors in 48 states.

The U.S. trustee said that "the appropriate remedy for any uniformity violation would be declaratory relief, not a refund of quarterly fees" and "Congress would not have chosen to remedy any constitutional flaw ... by granting massive refunds of fees previously paid by debtors in the 88 UST districts."<sup>[10]</sup><sup>[11]</sup>

### ***Accountability***

Neither of the *Siegel v. Fitzgerald* parties are proposing any type of accountability for Alabama or North Carolina.

Those two states would continue on, as always, with their special deal — undeterred, unfazed, unchastised and content in their specialness. Heck, if past behavior is any predictor of future action, Alabama and North Carolina are likely to try the same type of thing again — for a third time.

Alabama and North Carolina created unconstitutionality. They've enjoyed the special benefits of unconstitutionality. Yet, they get off scot-free. They always have, and they always will — or, at least, that's what they are obviously hoping.

So far, there is no accountability for the mess they have created and the huge amount of damage they have caused. None whatsoever.

### ***Remedies, With Accountability***

But there are remedies the Fourth Circuit could impose that would place accountability where it should lie.

Here's one. Each of the six judicial districts in Alabama and North Carolina could choose to either recover underpaid fees from the debtors in its district — because its operating budget is reduced by the amount of such underpaid fees — or voluntarily join the U.S. trustee system and have its constitutional sins purged thereby.

Here's another. The Fourth Circuit could declare that Congress has a choice to either fund a refund of all overpaid fees to debtors in the 48 states or eliminate Alabama's and North Carolina's exemption from the U.S. trustee system.

### **Conclusion**

It's time to make Alabama and North Carolina accountable for the unconstitutional mess and costs they have imposed upon the entire bankruptcy system.

Here's hoping that the Fourth Circuit, on remand, will do just that.

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[1] Siegel v. Fitzgerald, U.S. Supreme Court Case No. 21-441, decided June 6, 2022.

[2] St. Angelo v. Victoria Farms, Inc., 38 F. 3d 1525 (9th Cir. 1994).

[3] See Petition for Writ of Certiorari in Siegel v. Fitzgerald, at 17.

[4] Id.

[5] Brief of Circuit City Trustee, at 17-18.

[6] Id.

[7] Id. at 31.

[8] Id. at 32.

[9] Id. at 18.

[10] Brief of U.S. Trustee, at 19.

[11] Id. at 19-20.