IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
EXIDE TECHNOLOGIES,	:	Case No. 13-11482 (MFW)
	:	
Debtor.	:	**Hearing Date: September 18, 2019, 2 p.m.**
	:	**Reply Deadline: August 5, 2019**
	:	**RE: Doc. No. 5188**
	:	

UNITED STATES TRUSTEE'S OBJECTION TO REORGANIZED DEBTOR'S MOTION TO DETERMINE EXTENT OF LIABILITY FOR POST-CONFIRMATION QUARTERLY FEES PAYABLE PURSUANT TO 28 U.S.C. § 1930(a)(6) [Doc. No. 5188]

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Andrew R. Vara, the Acting United States Trustee for Region 3, objects to the *Reorganized Debtor's Motion to Determine Extent of Liability for Post-Confirmation Quarterly Fees Payable Pursuant to 28 U.S.C. § 1930(a)(6)* (the "Motion") [Docket No. 5188] filed by Exide Technologies. In support of this objection,[1] the United States Trustee states as follows:

SUMMARY

1. Under 28 U.S.C. § 1930(a)(6), a quarterly fee must be paid in every chapter 11 case, calculated upon disbursements made in the case during the quarter. In 2017, Congress amended section 1930(a)(6). That 2017 amendment temporarily increased the fees collected in larger chapter 11 cases, those with disbursements of $1 million or more in a quarter. Congress passed the 2017 amendment so the Treasury would collect sufficient fees to fully offset the congressional appropriations that fund the United States Trustee Program, and fund 18 additional bankruptcy judgeships, seven of which are in this District. It did that so ordinary taxpayers would not bear those bankruptcy-related costs. The amendment provided expressly that the temporary fee increase was effective for disbursements made on or after January 1, 2018.

2. Exide seeks to avoid paying the temporary fee increase by claiming that Congress's 2017 amendment is unconstitutionally (**i**) non-uniform, (**ii**) retroactive, and (**iii**) excessive. Motion ¶ 3. This Court should deny the Motion.

FACTS

I. Exide Files a Chapter 11 Case.

3. Exide filed a voluntary chapter 11 petition on June 10, 2013. Doc. No. 1.

[1] The United States Trustee has filed a separate motion requiring Exide to seek its requested relief through an adversary proceeding ("Rule 7001 motion"). In the event this Court grants the Rule 7001 motion and Exide commences an adversary proceeding, the United States Trustee asks that this objection be docketed there as a motion to dismiss or for summary judgment.

4. Exide filed a second amended disclosure statement, which included financial projections through 2019. Doc. No. 3095. As prologue, Exide set out a two and a half page disclaimer in all caps warning, among other things, that the projections were subject to "significant . . . uncertainties and contingencies," as well as "unanticipated" events, and "may not be relied upon as a guarantee or other assurance of the actual results." Doc. No. 3095 at pp. ii-iv. Exide further acknowledged "additional unanticipated costs related to its restructuring activities" as a factor that "could cause actual results to differ materially from" the financial projections *Id.* at 148.

5. This Court confirmed Exide's fourth amended plan of reorganization on March 27, 2015, which went into effect on April 30, 2015. Doc. 3409, 3423 & 3571. That plan provides that Exide "shall continue to pay fees pursuant to section 1930 of title 28 of the United States Code until the Chapter 11 Case is closed by entry of the Final Decree." Doc. No. 3409 at ¶ 15.2.

6. No final decree has been entered in this chapter 11 case.

II. Exide Challenges the Quarterly Fees Due Under 28 U.S.C. § 1930(a)(6).

7. Under 28 U.S.C. § 1930(a)(6), Exide must pay a quarterly fee calculated on disbursements in its case for each quarter it is in chapter 11. A 2017 amendment to section 1930(a)(6) temporarily increased the fees paid in the largest chapter 11 cases—those with quarterly disbursements of $1 million or more—to the lesser of 1% of quarterly disbursements or $250,000. The 2017 amendment applies to all disbursements made in Exide's case from January 1, 2018, onward. 28 U.S.C. § 1930(a)(6)(B); *see also* Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, § 1004(c), 131 Stat. 1224, 1232 (2017) (uncodified).[2]

[2] Section 1004 of the amendment provides in relevant part:
(c) APPLICATION OF AMENDMENTS.—The amendments made by this section shall apply to quarterly fees payable under section 1930(a)(6) of title 28, United States Code, as amended by this section, for disbursements made in any calendar quarter that begins on or after the date of enactment of this Act.

8. On June 12, 2019—after paying quarterly fees for a year in the amount required by the 2017 amendment—Exide filed the Motion. It alleges that it had $25 million or more in quarterly disbursements, and has paid the statutory maximum quarterly fees since the 2017 amendment went into effect. Exide's Memorandum in Support of Motion ("Brief") ¶ 12;[3] Motion, Ex. 1.

9. Exide asks this Court to declare the amendment unconstitutional on three grounds: (**i**) the temporary fee increase was unconstitutionally non-uniform, violating the Bankruptcy Clause, U.S. Const. art 1, § 8, cl. 4, because the increased fees in six judicial districts located in Alabama and North Carolina (the "bankruptcy administrator districts") were not collected in bankruptcy cases filed before October 1, 2018; (**ii**) the law is improperly retroactive, and violates the Takings and Due Process Clause of the Fifth Amendment; and (**iii**) it assesses an "excessive" user fee that constitutes a taking. Brief ¶¶ 29-69.

10. Exide requests that this Court find that (**i**) the 2017 amendment is unconstitutional and (**ii**) "the amount of fees owed to the UST pursuant to 28 U.S.C. § 1930(a)(6) is no more than $30,000 per quarter through the entry of the final decree in [its] chapter 11 case." Motion ¶ 5.

OBJECTION

11. The Motion should be denied. Congress exercised its legislative expertise and discretion in determining what fees are necessary to maintain the bankruptcy system. It takes seriously its duty in regulating the designation and collection of these fees. It adopted the 2017 amendment only after concluding that increased fees were necessary to offset the U.S. Trustee Program's operational costs and to fund additional bankruptcy judgeships.

12. Contrary to Exide's arguments, the 2017 amendment is not unconstitutional.

[3] The 2017 amendment temporarily increased the statutory maximum quarterly fee by 733%, not 833% as Exide represented, Brief ¶ 12. [($250,000 - $30,000) / $30,000 x 100 = 733%].

13. First, the 2017 amendment does not violate the Bankruptcy Clause. The Bankruptcy Clause requires only uniform laws. Section 1930, as amended, is uniform because 28 U.S.C. § 1930(a)(7) allows bankruptcy administrator districts—those in Alabama and North Carolina—to charge fees "equal" to those charged in the other districts under section 1930(a)(6); they may not charge a different fee, or charge the fee differently. Indeed, the Judicial Conference directed in 2001 (the "2001 Directive") that bankruptcy administrator districts impose fees in the amounts set in section 1930:

"as those amounts may be amended from time to time."[4]

Those districts' unexplained failure on January 1, 2018, to comply with the 2001 Directive, which remained in effect, and with section 1930(a)(7), was error, not the absence of a uniform law.

14. In enacting the 2017 amendment, Congress had every right to expect those districts would follow the applicable and long-settled Judicial Conference mandate and their governing statute. Congress did nothing unconstitutional in doing that.

15. Alternatively, the 2017 amendment does not violate the Bankruptcy Clause because section 1930(a)(6) is not a law on the subject of bankruptcy. "Bankruptcy" is the "subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." *Ry. Labor Execs. Ass'n v. Gibbons*, 455 U.S. 457, 466 (1982). By contrast, section 1930(a)(6) is a revenue measure that allocates the costs of certain government functions so that they fall on users rather than taxpayers.

16. Second, 2017 amendment is not impermissibly retroactive; it is expressly *prospective* as

[4] *See* Report of the Proceedings of the Judicial Conference of the United States 46 (Sept./Oct. 2001), http://www.uscourts.gov/sites/default/files/2001-09_0.pdf (excerpt attached as Exhibit A) ("2001 Judicial Conference Report").

it applies to disbursements beginning January 1, 2018 rather than going back to disbursements made since the petition date. Exide has such disbursements so it must comply with the law. But even if the amendment were retroactive, it is not unconstitutional. The Supreme Court has established that user fees are not takings, *see Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013), and user fees do not violate due process where—like here—it "is justified by a rational legislative purpose." *See United States v. Sperry*, 493 U.S. 52, 64 (1989).

17. Finally, the 2017 amendment is not an unconstitutionally excessive user fee that constitutes a taking. Again, user fees cannot be takings, *Koontz*, 570 U.S. at 615, and even if they could, as this Court has already held, fees assessed under section 1930(a)(6) are not "excessive" under Supreme Court precedent. *In re Kindred Healthcare, Inc.*, No. 99-3199 (MFW), 2003 WL 22327933, at *5 (Bankr. D. Del. Oct. 9, 2003).

I. Congress Imposes Chapter 11 Quarterly Fees For Deposit into a Fund at the U.S. Treasury So Taxpayers Will Not Pay the Cost of the United States Trustee Program.

A. No fewer than 11 times, Congress has carefully recalibrated quarterly fees and other court fees to meet the funding needs of the bankruptcy system.

18. In passing the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978), Congress overhauled the bankruptcy system to free bankruptcy courts from case-specific administrative duties. H.R. Rep. No. 95-595, at 3 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5965. Congress did this by transferring them to a "new system of United States trustees" in the Justice Department.[5] *Id*. at 4, 100. United States Trustees "were given responsibility for many administrative functions, such as appointing private trustees and monitoring their performance,

[5] The United States Trustee Program was established as a pilot program in 1978 and was made national in 1986. *See* Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 (1978); Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. 99-554, 100 Stat. 3088 (1986). All jurisdictions participate in the United States Trustee Program except those within Alabama and North Carolina. *See infra* ¶ 24.

and monitoring cases for signs of fraud or abuse." *Id*. Thus, as envisioned by Congress, the United States Trustee Program was integral to the new bankruptcy system. H.R. Rep. No. 95-595, at 88-109.

19. To fund the Program, Congress imposed a variety of "bankruptcy fees," including the quarterly fee required by 28 U.S.C. § 1930(a)(6). Quarterly fees under section 1930(a)(6) and a portion of the filing fees collected by the clerk of the bankruptcy court under other provisions of section 1930[6] are deposited into the United States Trustee System Fund established in the U.S. Treasury (the "Fund"), and are used to offset congressional appropriations made to directly fund the Program.[7] *See* 28 U.S.C. § 589a(a) & (b); H.R. Rep. No. 115-130, at 7 (2017), *reprinted in* 2017 U.S.C.C.A.N. 154, 159-60.

20. That helps ensure the Program's cost is borne "by the users of the bankruptcy system—at no cost to the taxpayer." *See* H.R. Rep. No. 99-764, at 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5227, 5238; *see also id*. at 22.

21. Before settling on quarterly fees based on disbursements as part of the way to fund the Program, Congress "considered many different possible mechanisms . . . including fees based on a debtor's assets, fees based on a debtor's liabilities, and a flat fee for all debtors." H.R. Rep. No. 99-764, at 26. Congress decided to charge graduated quarterly fees based on the size of a

[6] The filing fees paid to the clerk of the bankruptcy court under section 1930(a)(1) through (a)(5) are shared by the United States Trustee Program and the judiciary, among others. 28 U.S.C. § 589a(b); 28 U.S.C. § 1931 (text and notes). Thus, while Exide implies the contrary, Brief ¶ 68, debtors in *all* chapters share in off-setting the Program's costs.

[7] Prior to the 2017 amendment, 100% of quarterly fees collected was deposited into the Fund. The 2017 amendment temporarily reduced that to 98%, with the remaining 2% to be deposited in the general fund of the Treasury for use in funding 18 additional judgeships. *See* Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, div. B, § 1004(b), 131 Stat. 1224, 1232 (2017); H.R. Rep. No. 115-130, at 7-9.

chapter 11 case's disbursements because it determined that "[s]maller chapter 11 debtors should pay smaller additional fees than larger debtors; [and] the funding mechanism [in section 1930(a)(6)] ensures that this will be the case." *Id.*

22. This regime allows Congress to easily increase or reduce the fees paid under section 1930, so that the amount collected for deposit in the Fund will never be unacceptably small or unreasonably large. The Attorney General must report to Congress every year on the amounts deposited in the Fund and expenditures made to offset the United States Trustee Program's appropriations. *See* 28 U.S.C. § 589a(d). If the amounts collected exceed the appropriations for a particular year, the excess remains in the Fund to offset appropriations in subsequent years. *See* 28 U.S.C. § 589a(c). Conversely, if the costs of operating the Program in a particular year exceed the amounts available in the Fund, monies collected from taxpayers might be required to fund part of the appropriation to the Program. *See* 28 U.S.C. § 589a(e).

23. On no fewer than eleven occasions, Congress has amended section 1930(a) or section 589a of title 28 to adjust the amount or allocation, or both, of filing fees and quarterly fees to be deposited into the Fund:

- Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, tit. II, § 406, 103 Stat. 988, 1016 (1989) (increasing filing fee);
- Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, tit. I, § 111, 105 Stat. 782, 795 (1991) (increasing filing fee and quarterly fees, and directing deposit of a percentage of fees into Fund);
- Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-121, tit. I, § 111, 107 Stat. 1153, 1164-65 (1993) (increasing filing fees, changing percentage of fees allocated to Fund, and requiring Judicial Conference to report on bankruptcy fee system and possible impact of using graduated fee system based on assets, liabilities, or both, of debtor);

- Balanced Budget Downpayment Act, Pub. L. No. 104-91, § 101, (1996) & Pub. L. No. 104-99, § 211, 110 Stat. 26, 37-39 (1996) (enacting into law provisions of H.R. Conf. Rep. No. 104-378 (1995), including section 111(a), which extended quarterly fee payments into post-confirmation period);

- Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, tit. I, § 109, 110 Stat. 3009, 3009-18-3009-19 (1996) (increasing quarterly fees and clarifying that prior amendment applies to all cases, including pending cases, regardless of confirmation status of reorganization plan);

- Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, §§ 103 & 105, 114 Stat. 2411 (2000) (increasing filing fee and conversion fee, and providing for fees under subsection (a)(7));

- Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, tit. III, § 325, 119 Stat. 23, 98-99 (2005), as amended by Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 6058, 119 Stat. 297 (2005) (increasing filing fees and changing percentage of fees allocated to Fund);

- Deficit Reduction Act of 2005, Pub. L. No. 109-171, tit. X, § 10101, 120 Stat. 4, 184 (2006) (increasing filing fees);

- Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. B, tit. II, §§ 212, 213, 121 Stat. 1844, 1914 (2007) (adjusting quarterly fees and directing deposit of fines into Fund);

- Temporary Bankruptcy Judgeships Extension Act of 2012, Pub. L. No. 112-121, § 3, 126 Stat. 346, 348-349 (2012) (increasing filing fee and decreasing allocation of fees into Fund); and

- Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, div. B, § 1004, 131 Stat. 1224, 1232 (2017) (increasing quarterly fees for largest chapter 11 debtors).

B. Any quarterly fees charged in judicial districts in Alabama and North Carolina must "equal" those charged in the rest of the country.

24. All jurisdictions participate in the Program except in Alabama and North Carolina. *See* Pub. L. No. 99-554 (1986); Pub. L. No. 106-518, § 501 (2000). In those two states, Judicial Branch employees known as bankruptcy administrators oversee chapter 11 cases.

25. Although bankruptcy administrators initially could not charge quarterly fees, at the request of the Judicial Conference, Congress fixed that in 2001 by enacting section 1930(a)(7).

See Pub. L. No. 106-518, § 105 (2000).

26. As the Judicial Conference requested, section 1930(a)(7) provides that in the bankruptcy administrator districts "the Judicial Conference of the United States may require the debtor in a case under chapter 11 of title 11 to pay fees *equal to* those imposed by paragraph (6) of this subsection." 28 U.S.C. § 1930(a)(7) (emphasis added). It does not permit them to charge fees that differ from those set by section 1930(a)(6). *Id*. The equal charge requirement was in full force and effect on January 1, 2018.

27. Congress adopted section 1930(a)(7) at the Judicial Conference's request specifically to resolve perceived uniformity issues between the United States Trustee and bankruptcy administrator districts, as explained by a Judicial Conference representative who testified before Congress. *See* Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary on H.R. 2112 and H.R. 1752,[8] 106 Cong. 26-27 (1999) (statement of Harvey F. Schlesinger, Judge, U.S. District Court for the Middle District of Florida), available at http://catalog.hathitrust.org/api/volumes/oclc/44193215.html.[9]

28. Promptly upon section 1930(a)(7)'s enactment, the Judicial Conference issued its 2001 Directive mandating the imposition of quarterly fees in bankruptcy administrator districts "in the amounts specified in 28 U.S.C. § 1930, *as those amounts may be amended from time to time.*" *See* 2001 Judicial Conference Report at 45-46 (emphasis added). Thus, the 2001 Directive

[8] H.R. 1752 is the House of Representative's companion bill to the enacted Senate bill, S.2915, which became Pub. L. No. 106-518. In that same legislation, Congress also removed the deadline for Alabama and North Carolina to adopt the United States Trustee system. *See* Pub. L. No. 106-518, § 501 (2000).

[9] Each website cited in this brief was last viewed on August 5, 2019.

automatically approved future changes to the quarterly fees charged in bankruptcy administrator districts so that they immediately mirror any amendment to section 1930(a)(6).

C. Congress temporarily increased fees in 2017 to (i) protect general taxpayers from having to subsidize the Program and (ii) fund additional judgeships.

29. In October 2017, Congress amended section 1930(a)(6) to increase temporarily the quarterly fees when the disbursements in a case equal or exceed $1 million during a quarter and the Fund balance is below $200 million in the most recent fiscal year. *See* H.R. Rep. No. 115-130, at 7-8. The new subparagraph (B) provides:

> (B) During each of fiscal years 2018 through 2022, if the balance in the United States Trustee System Fund as of September 30 of the most recent full fiscal year is less than $200,000,000, the quarterly fee payable for a quarter in which disbursements equal or exceed $1,000,000 shall be the lesser of 1 percent of such disbursements or $250,000.

28 U.S.C. § 1930(a)(6)(B).

30. The 2017 amendment provides that it "shall apply to quarterly fees payable under section 1930(a)(6) . . . for disbursements made in any calendar quarter that begins on or after the date of enactment" of the amendment. Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, § 1004(c) (uncodified). The first such quarter began on January 1, 2018.

31. Congress passed the 2017 amendment following an unprecedented seven-year decline in bankruptcy filings. *See* Dep't of Justice, U.S. Tr. Program FY 2018 Performance Budget Cong. Submission at 9, https://www.justice.gov/file/968761/download ("UST FY 2018 Submission") (showing a consistent decrease in quarterly fee and filing fee collections over the past several years). The resulting decrease in fees collected under section 1930(a) exhausted the Fund's unrestricted balance during fiscal year 2017. *See* Dep't of Justice, U.S. Tr. Program FY 2019 Performance Budget Cong. Submission at 9, https://www.justice.gov/jmd/page/file/1034391/download. Without the amendment, the Fund

was predicted to have a zero balance in fiscal year 2018. *See* UST FY 2018 Submission at 9. Any remaining balance and fee collections were projected to fall $92 million short of offsetting the funds appropriated for the Program in fiscal year 2017. *Id*.

32. Because the Program's appropriations are offset from the Fund, *id*. at 8, any shortfall in offsetting the appropriations results in taxpayers bearing the burden of those operational costs. Without the Fund surplus from prior years, the Fund would not have been able to fully offset appropriations to the United States Trustee Program prior to fiscal year 2017. *Id*. at 9 ("In FY 2016, offsetting collections covered approximately 66 percent of the Program's appropriation, with the remainder being drawn from the Fund.").

33. A May 17, 2017 House Report stated that the bill that led to the 2017 amendment additionally sought to convert 14 temporary bankruptcy judgeships to permanent judgeships and add four new bankruptcy judgeships.[10] H.R. Rep. No. 115-130, at 7-8 (attached as Exhibit B). Seven of the 18 judgeships are in this district. *Id.* at 8. The House Report explained that the increase in the quarterly fees for large chapter 11 cases was needed to cover the costs of the judgeships and to provide needed funds for the operations of the United States Trustee Program.[11]

34. The House Report stated that the Judiciary Committee expected, "based on informal estimates by [the Congressional Budget Office]," that the increased quarterly fees would increase

[10] H.R. 2266 was later amended to extend the temporary judgeships rather than converting them to permanent judgeships.

[11] *See* H.R. Rep. No. 115-130, at 8 ("The funds generated by the fee increase will cover both the costs of this bill and separately needed funds for the operation of the U.S. Trustee Program."); *id*. at 7 (noting "inclusion of an increase in the quarterly U.S. Trustee fees for large chapter 11 cases to serve as a funding offset for the cost of the judgeships"). Congress initially planned that 2.5% of quarterly fees would go to Treasury to offset the costs of the judgeships, *id*. at 10, but that amount was later reduced to 2%. Pub. L. No. 115-72, div. B, § 1004(b).

revenues "by an amount sufficient to fully offset the increases in direct spending caused by the bill." *Id*. at 9. The day after the House Report was issued, the Congressional Budget Office issued a Cost Estimate, which explained that the increases were necessary to fund the additional judgeships proposed by the bill. *See* Cong. Budget Office Cost Estimate, H.R. 2266, Bankruptcy Judgeship Act of 2017, at 3 (May 18, 2017) ("May 2017 CBO Report") (attached as Exhibit C), https://www.cbo.gov/system/files/2018-07/52739-hr2266.pdf.

35. Congress exercised its legislative judgment in designing the temporary fee increase. The 2017 amendment affected only those chapter 11 cases in which disbursements during a quarter equal or exceed $1 million. 28 U.S.C. § 1930(a)(6)(B). Quarterly fees in those cases were set to the lesser of 1% of their quarterly disbursements or $250,000. *Id*.

36. Based on historical fee and disbursement patterns, the government estimates that only about 10% of chapter 11 debtors have disbursements exceeding $1 million, and only about 1% of chapter 11 debtors would be assessed the maximum fee. *See* Remarks of Director Cliff White Before the Del. Bankr. Am. Inn of Court (Dec. 11, 2018), https://www.justice.gov/ust/speech/remarks-director-cliff-white-delaware-bankruptcy-american-inn-court. The 2017 amendment provides for the fees to revert to their previous levels when the Fund equals or surpasses $200 million at the end of a fiscal year. 28 U.S.C. § 1930(a)(6)(B). Regardless, the increase terminates at the end of fiscal year 2022. *Id*.

37. Notably, the 2017 amendment made the percentage charged in the largest chapter 11 cases more consistent with the percentages charged in smaller cases. The following chart shows the relative pre-amendment percentages (rounded to the nearest hundredth):

Section 1930(a)(6)(2017)	Disbursements	Fee	Percentage Range
Tier 1	$ -	$ 325.00	32500%
	$ 14,999.00	$ 325.00	2.17%
Tier 2	$ 15,000.00	$ 650.00	4.33%
	$ 74,999.00	$ 650.00	0.87%
Tier 3	$ 75,000.00	$ 975.00	1.30%
	$ 149,999.00	$ 975.00	0.65%
Tier 4	$ 150,000.00	$ 1,625.00	1.08%
	$ 224,999.00	$ 1,625.00	0.72%
Tier 5	$ 250,000.00	$ 1,950.00	0.78%
	$ 299,999.00	$ 1,950.00	0.65%
Tier 6	$ 300,000.00	$ 4,875.00	1.63%
	$ 999,999.00	$ 4,875.00	0.49%
Tier 7	$ 1,000,000.00	$ 6,500.00	0.65%
	$ 1,999,999.00	$ 6,500.00	0.33%
Tier 8	$ 2,000,000.00	$ 9,750.00	0.49%
	$ 2,999,999.00	$ 9,750.00	0.33%
Tier 9	$ 3,000,000.00	$ 10,400.00	0.35%
	$ 4,999,999.00	$ 10,400.00	0.21%
Tier 10	$ 5,000,000.00	$ 13,000.00	0.26%
	$ 14,999,999.00	$ 13,000.00	0.09%
Tier 11	$ 15,000,000.00	$ 20,000.00	0.13%
	$ 29,000,000.00	$ 20,000.00	0.07%
Tier 12	$ 30,000,000.00	$ 30,000.00	0.10%

38. After the 2017 amendment, the percentages for fees in cases with over $1 million in quarterly disbursements are as follows:

Tier 7	$ 1,000,000.00	$ 10,000.00	1.00%
28 USC 1930(a)(6)(A)	$ 25,000,000.00	$ 250,000.00	1.00%
	$ 30,000,000.00	$ 250,000.00	0.83%

39. Thus, both before and after the 2017 amendment, in cases with disbursements of less than $1 million the fees range from 0.49% to 4.33% of quarterly disbursements. By contrast, before the 2017 amendment cases with disbursements of $1 million or more paid a fee ranging from 0.07% to 0.65% of quarterly disbursements, but never *more* than 0.65%—while the fees were never *less* than 0.65% in cases with less than $300,000 in disbursements. Even after the 2017 amendment, high-disbursement cases still never pay a fee of more than 1%.

40. As of January 1, 2018, the effective date of the 2017 amendment, section 1930(a)(7) and

the 2001 Directive commanded bankruptcy administrators to charge fees beginning January 1, 2018 that were "equal" to those charged elsewhere: those set forth in section 1930(a)(6), as amended in 2017. The bankruptcy administrators failed to do so.

41. Ultimately, the Executive Committee for the Judicial Conference imposed quarterly fees in bankruptcy administrator districts in the amount specified under section 1930(a)(6)(B), but only as of October 1, 2018, and only in cases filed on or after that date. Report of the Proceedings of the Judicial Conference of the United States 11 (Sept. 2018), https://www.uscourts.gov/sites/default/files/2018-09_proceedings.pdf. Nothing in the 2017 amendment referenced October 1, 2018, as an effective date nor precluded its application to any bankruptcy case filed up to almost a year after its enactment. The Executive Committee identified no statutory authority for its decision.

II. The 2017 Amendment Does Not Violate the Bankruptcy Clause.

42. The Constitution provides that Congress "shall have the power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. 1, § 8, cl. 4. Congress did not violate this clause when it amended section 1930(a)(6).

43. Three things must be true for the Bankruptcy Clause to be violated: there must be a lack of uniformity; the lack of uniformity must result from a "Law"; and the law must be "on the subject of Bankruptcies."

44. None is true here. First, the statute at issue is uniform as it requires that any fees charged in the bankruptcy administrator districts under section 1930(a)(7) must "equal" those imposed under section 1930(a)(6). Second, the alleged lack of uniformity resulted not from a law, but from error in the law's application. And third, the 2017 amendment is not "on the subject of Bankruptcies" because it does not alter debtor or creditor rights or remedies under the Code.

A. The Bankruptcy Clause ensures that Congress (i) can pass laws providing relief to debtors enforceable in all fifty states and (ii) does not pass private bankruptcy bills, and the 2017 Amendment impinges on neither purpose.

45. The two principal purposes of the Bankruptcy Clause are: **(i)** to enable Congress to pass nationwide bankruptcy laws enforceable among the states, because, "[g]iven the sovereign status of the States, questions were raised as to whether one State had to recognize the relief given to a debtor by another State"; and **(ii)** to prohibit Congress from enacting private bankruptcy laws. *See Ry. Labor Execs. Ass'n v. Gibbons*, 455 U.S. 457, 472 (1982); *see also In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996) ("The limited legislative history of the uniformity clause, plus the decisions by the Supreme Court interpreting it . . . establish that the clause forbids only two things. The first is arbitrary regional differences in the provisions of the Bankruptcy Code. The second is private bankruptcy bills—that is, bankruptcy laws limited to a single debtor—or the equivalent.").[12]

46. Given the history and purpose of the Bankruptcy Clause, the Sixth Circuit has explained that "the term 'uniform' was intended to grant an additional power at the expense of the fifty states, rather than to limit the scope of Congress's delegated powers." *See Schultz v. United States*, 529 F.3d 343, 356 (6th Cir. 2008).

47. Only once in the nation's history has the Supreme Court held that a statute violated the Bankruptcy Clause. It did so because the challenged act, by its terms, applied to only one regional bankrupt railroad; therefore, the statute was "nothing more than a private bill," which the Framers sought to prevent by adopting the Bankruptcy Clause. *Gibbons*, 455 U.S. at 470-72.

[12] Even in those areas, Congress retains flexibility in enacting legislation. *See Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 158 (1974) (rejecting uniformity challenge to statute applied in a single statutorily defined region because "it overlooks the flexibility inherent in the constitutional provision").

B. Congress's 2017 quarterly fee amendment does not violate the Bankruptcy Clause because the law is uniform.

48. Section 1930, as amended in 2017, applies uniformly on its face. The statute sets a graduated amount of fees for all cases under chapter 11, and the 2017 amendment governs fees in all chapter 11 cases with quarterly disbursements equal to or exceeding $1 million.

49. Exide argues that the 2017 amendment, despite its facial uniformity, is not uniform because the Judicial Conference did not immediately adopt the fee increase in bankruptcy administrator districts as of January 1, 2018, but instead only authorized the increase to begin for cases filed on or after October 1, 2018. Brief ¶ 35.

50. This is wrong for two reasons. First, under the Judicial Conference's 2001 Directive, which remained in effect, the fee increase *was* effective on January 1, 2018. Second, nothing in the 2017 amendment purports to exclude chapter 11 cases in Alabama and North Carolina from the fee increases. To the contrary, 28 U.S.C. § 1930(a)(7) mandates that any quarterly fees charged in bankruptcy administrator districts must be the same as—"equal to"—those prescribed in subparagraph (a)(6).[13] The law is thus uniform in its prescription of the amount of quarterly fees due in chapter 11 cases.

51. As a result, the statute itself refutes the *Buffets* court's statement, on which Exide relies, that the 2017 amendment "increased quarterly fees only in the UST program." *In re Buffets, LLC,* 597 B.R. 588, 595 (Bankr. W.D. Tex. 2019), appeal pending *sub nom. Hobbs v. Buffets Holdings, LLC*, Case No. 5:19-cv-0173-DAE (W.D. Tex.) (cited in Brief ¶ 33).[14]

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[13] Similar to the quarterly fees paid under section 1930(a)(6), quarterly fees collected in the bankruptcy administrator districts are deposited into a special fund to offset congressional appropriations for federal courts. *See* 28 U.S.C. §§ 1930(a)(7) & 1931.

[14] The United States Trustee has petitioned the Fifth Circuit for direct appeal of the bankruptcy court order. *Hobbs v. Buffets Holdings, LLC*, Case No. 19-90020 (5th Cir.) (petition filed July

52. Exide's reliance on *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525 (9th Cir. 1994), *as amended by* 46 F.3d 969 (1995), is misplaced. Brief ¶ 34. The divided panel in *Victoria Farms* addressed the constitutional validity not of section 1930(a)(6), but of a different statute: section 317(a) of the Judicial Improvements Act of 1990, which extended the time for Alabama and North Carolina to implement the United States Trustee Program. At the time of *Victoria Farms*, section 1930 did not provide for quarterly fees in the bankruptcy administrator districts. 38 F.3d at 1529. In response to *Victoria Farms*, the Judicial Conference proposed, and Congress enacted, subsection (a)(7) as a cure to the perceived uniformity problem. *Supra* at ¶¶ 25-28. As explained *infra* at ¶ 65, the United States Trustee disagrees with *Victoria Farms* that there was a uniformity problem, but regardless, that perceived issue was abrogated by statute.

53. Nor does the use of the term "may" in subsection (a)(7) render the 2017 amendment non-uniform, as Exide incorrectly posits.[15] Brief ¶¶ 37-38. Section 1930(a)(7) grants the Judicial Conference the authority, which it previously lacked, to charge quarterly fees, but only fees that are "equal to" those under subsection (a)(6). The Judicial Conference imposed those fees nearly two decades ago, and directed that they be charged in the amount specified in subsection (a)(6), "as those amounts may be amended from time to time." 2001 Directive at 46. As of January 1, 2018, then, the 2001 Directive and section 1930(a)(7) commanded bankruptcy administrators to charge the same fees as charged in the rest of the country: those set forth in section 1930(a)(6), as amended in 2017.

24, 2019).

[15] A recent ruling against the United States Trustee in a similar uniformity challenge to the quarterly fees also appeared to overly rely on the term "may," and thus was wrongly decided. *In re Circuit City Stores, Inc.*, Case No. 08-35653, Adv. No. 19-03060, 2019 WL 3202203, at *2 (Bankr. E.D. Va. July 15, 2019). The United States Trustee appealed this decision on July 26, 2019.

54. The term "may" in subsection 1930(a)(7) does not grant a free license to charge fees in any amount the Judicial Branch wishes.[16] Compare, for example, subsection (a)(7) to section 1930(b), which provides that the Judicial Conference "may" prescribe additional fees "of the same kind" as it prescribes under section 1914(b) for district court cases. It is clear that, in enacting section 1930(b), "Congress intended that filing fees in bankruptcy courts *be the same as those in other federal courts*." *Merrill Trust Co. v. Red Barn, Inc. (In re Red Barn, Inc.)*, 23 B.R. 593, 595 (Bankr. D. Me. 1982) (citing legislative history).

55. So too here. "Equal to those imposed by paragraph 6" is a limiting phrase modifying the authority of the Judicial Conference to charge fees. The "may" in section 1930(a)(7) does not give the Judicial Conference discretion to impose fees that are *not* equal to those imposed by section 1930(a)(6), any more than the "may" in sections 327 and 330 of the Bankruptcy Code give discretion to trustees to hire bankruptcy professionals who are *not* disinterested or courts to award compensation that is *not* reasonable. *Compare* 28 U.S.C. 1930(a)(7) *with* 11 U.S.C. § 327 ("[T]he trustee . . . *may* employ . . . professional persons[ ] that . . . are disinterested persons . . . .") *and* 11 U.S.C. § 330(a)(1) ("[T]he court *may* award a trustee . . . (A) reasonable compensation for actual, necessary services . . . .") (emphasis added).

56. And, as the Eighth Circuit has squarely held, even if there were statutory differences in the fees charged in different places, such differences would not render a federal statute

[16] Any reading of subsection (a)(7) that would grant the Judicial Conference such unfettered discretion should be rejected given the statute's context and legislative purpose. *See United States v. Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion[, but] [t]his common-sense principle of statutory construction . . . can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute . . . ."). "In dozens of cases, courts have held may to be synonymous with shall or must, usu[ally] in an effort to effectuate what is said to be legislative intent." *May*, Black's Law Dictionary (11th ed. 2019).

unconstitutional. *See In re Prines*, 867 F.2d 478 (8th Cir. 1989). *Prines* addressed the gradual roll-out of the United States Trustee Program when it was expanded nationwide, with different effective dates for districts that participated in the pilot program than for those that did not. *Id*. at 482-83. The Eighth Circuit upheld the different effective dates of the quarterly fee provision against an Equal Protection challenge, notwithstanding the uniformity requirement, noting that debtors were being treated equally because "pending cases are subject to the quarterly fee assessment only if the [United States] trustee has authority over them." *Id*. at 485. The same is true here; the only alleged lack of uniformity is between districts in which United States Trustees serve and those in which they do not.

57. Finally in an analogous context, the Supreme Court rejected the notion that tax uniformity required a tax to fall equally on each geographic region or prevented Congress from defining the subject of a tax by drawing geographic distinctions between similar classes. *United States v. Ptasynski*, 462 U.S. 74, 82-86 (1983) (deferring where "Congress has exercised its considered judgment" in geographically defined tax class); *see also Schultz*, 529 F.3d at 355 (finding a lower level of scrutiny should apply to the uniformity requirement of the Bankruptcy Clause than applied in *Ptasynski* to the tax uniformity clause).

C. A failure to apply section 1930 due to error does not violate the Bankruptcy Clause.

58. The Bankruptcy Clause applies only to "Laws," *i.e*., acts of Congress. Accordingly, someone's failure to enforce a law does not render it unconstitutionally non-uniform. *Cf. Rosenberg v. United States*, 72 Fed. Cl. 387, 395-96 (Fed. Cl. 2006) (holding that complaint alleging that IRS engaged in "*ultra vires* and nonuniform collection" of a tax did not allege a violation of the tax uniformity clause, U.S. Const. art. I, § 8, cl. 1, because "[t]he Uniformity Clause . . . is a limitation on legislative, not executive, action"); *Peony Park v. O'Malley*, 121 F.

Supp. 690 (D. Neb. 1954) (rejecting tax uniformity challenge where statute was uniform but enforcement was not), *aff'd*, 223 F.2d 668 (8th Cir. 1955).

59. As explained *supra* at ¶¶ 25-28 and ¶¶ 40-41, nothing in the 2017 amendment, 28 U.S.C. § 1930(a)(7), or the 2001 Directive in effect on January 1, 2018, permitted charging fees in bankruptcy administrator districts in any way other than equal to those charged under section 1930(a)(6). There is no explanation for why the bankruptcy administrators failed to impose the increased fees in January 1, 2018, nor for why the Executive Committee decided in September 2018 to permit bankruptcy administrator districts to disregard the governing statute and 2001 Directive and belatedly charge the increased fees only in cases filed on or after October 1, 2018. Nothing in the 2017 amendment established October 1, 2018 as a trigger date to implement the amended fee schedule, nor supports any decision to carve out cases pending as of that date.

60. Exide's grievance, ultimately, is not that the 2017 amendment is not uniform; it is that the uniform law was not uniformly implemented. The bankruptcy administrators' failure to comply with sections 1930(a)(6) and (7) and the Judicial Conference's 2001 Directive is not a problem of constitutional dimension, and cannot justify striking down a congressional enactment.[17]

D. Alternatively, the 2017 amendment does not violate the Bankruptcy Clause because section 1930(a)(6) is not a law "on the subject of Bankruptcies."

61. To be subject to the uniformity requirement of the Bankruptcy Clause, a law must be one "on the subject of Bankruptcies." U.S. Const. art. 1, § 8, cl. 4. The Supreme Court has defined "bankruptcy" as the "'subject of the relations between [a] . . . debtor and his creditors, extending

[17] Nor does a temporary inconsistency in the amount of fees charged by the bankruptcy administrators excuse a chapter 11 debtor in United States Trustee districts from paying the statutorily required amounts. Even in *Victoria Farms*, the Ninth Circuit enforced the quarterly fee requirement, despite a perceived uniformity problem during the challenged quarters, once the court "cured" the alleged constitutional infirmity going forward. 38 F.3d at 1534.

to his and their relief.'" *Gibbons,* 455 U.S. at 466 (quoting *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 186 (1902)); *see also Ashton v. Cameron Cty. Water Imp. Dist. No. 1*, 298 U.S. 513, 536-37 (1936) (explaining that the Court's consistent reading of the Bankruptcy Clause is that it says, in substance: "Congress shall have power to establish uniform laws on the subject of any person's general inability to pay his debts throughout the United States.") (Cardozo, J., dissenting) (internal quotation marks omitted).

62. Thus, "Congress' power under the Bankruptcy Clause 'contemplate[s] an adjustment of a failing debtor's obligations.'" *Gibbons,* 455 U.S. at 466 (quoting *Hanover Nat'l Bank*, 186 U.S. at 186). Congress enacted such a law on the subject of Bankruptcies, found in title 11 of the U.S. Code, titled "Bankruptcy." 11 U.S.C. §§ 101 *et seq.*

63. Section 1930(a)(6), as amended in 2017, is not found in title 11, but is in title 28. The statute provides a funding mechanism for the efficient administration of bankruptcy matters, including paying for additional bankruptcy judgeships; it does not alter substantive bankruptcy law. The 2017 amendment does not govern the relations between creditor and debtor. *See Gibbons,* 455 U.S. at 466; *Reese*, 91 F.3d at 39-40; *cf. U.S. Trustee v. Gryphon at Stone Mansion, Inc.*, 166 F.3d 552, 557 (3d Cir. 1999) ("Congress's mandate requiring payment of post-confirmation quarterly fees is not an effort to alter the terms of pre-existing debts; rather, it creates a new expense that did not exist before the plan was confirmed.") (internal quotations omitted). Indeed, the text of the Bankruptcy Code itself remains unchanged by the 2017 amendment. *See Reese*, 91 F.3d at 39 (holding Bankruptcy Clause forbids "arbitrary regional differences in the provisions of the Bankruptcy Code"). A change to the fees charged is a matter of appropriations involving a Treasury-based fund, not the substantive law of bankruptcy.

64. Contrary to Exide's contention, the mere reference to title 11 in section 1930 does not

instantaneously transform it into a bankruptcy law. Brief ¶ 26. Numerous federal statutes reference title 11. *See*, *e.g.*, 12 U.S.C. § 1150 (authority of Secretary of Agriculture to compromise, adjust or cancel farm loans); 15 U.S.C. § 78fff (general provisions of a liquidating proceeding); 18 U.S.C. §§ 151-158 (crimes related to bankruptcy); 26 U.S.C. § 1398 (rules relating to individuals' bankruptcy cases under Internal Revenue Code). These statutes are not laws on the subject of Bankruptcies either.

65. Exide further relies on *Victoria Farms* to argue that section 1930(a) is a law on the subject of Bankruptcies. Brief ¶ 28. Exide, falling into the same trap that befell the panel majority in *Victoria Farms*, erroneously focuses on a statute's "effect" to determine whether it was subject to the Bankruptcy Clause. *See Victoria Farms*, 38 F.3d at 1530-31 (reasoning that the statute establishing the United States Trustee system is a law on the subject of bankruptcies because it has a "direct effect" upon debtors and creditors and because higher fees have "a concrete effect" on the relief available to creditors). Any statute imposing or increasing a financial obligation—such as a property tax, a license fee, or a domestic support obligation—could "reduce[] the amount of funds that the debtor can ultimately pay to his creditors." *Id.* at 1531. Similarly, failure to comply with such statutes might bar confirmation of a plan, 11 U.S.C. § 1129(a)(14) (domestic support obligations), or result in conversion or dismissal of a chapter 11 case, 11 U.S.C. § 1112(b)(4)(I) (taxes). Yet the Supreme Court has never intimated that such laws would be one "on the subject of Bankruptcies."

III. The 2017 Amendment Is Not Impermissibly Retroactive, Nor Does It Violate the Fifth Amendment.

66. While the United States Trustee agrees with Exide that the 2017 amendment applied to all cases when it went into effect and did "not exempt cases filed prior to fiscal year 2018," Brief

¶ 41,[18] contrary to Exide's contention, this is neither retroactive nor unconstitutional.

A. The 2017 amendment mandates that it operate prospectively, and applies only to disbursements made more than two months after its enactment.

67. The 2017 amendment does not operate retroactively because it is triggered only by conduct that occurs after the amendment. The conduct that triggers liability for quarterly fees is the making of disbursements of amounts equal to or exceeding $1 million during any calendar quarter after January 1, 2018. Because the amendment applies only to disbursements made in pending cases more than 9 weeks after its enactment, the amendment is entirely prospective. *U.S. Trustee v. CF & I* Fabricators *of Utah, Inc. (In re CF & I Fabricators of Utah, Inc.)*, 150 F.3d 1233, 1237 (10th Cir. 1998) (holding that 1996 amendment to section 1930(a)(6) imposing quarterly fees post-confirmation is not retroactive); *Prines*, 867 F.2d at 485 (holding quarterly fees "operates only prospectively"); *In re Richardson Serv. Corp.*, 210 B.R. 332, 335 (Bankr. W.D. Mo. 1997) ("The amendment only triggers prospective assessment of fees from the amendment's effective date until entry of the final decree.").

68. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), undermines Exide's contention that the 2017 amendment is retroactive simply because it was enacted after Exide filed its bankruptcy petition and confirmed its plan. Brief ¶ 45. A statute does not operate retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." 511 U.S. at 269 (citation omitted). Nor is a law retroactive

[18] That the 2017 amendment applied to all cases as of its effective date is buttressed by the Congressional Budget Office's Cost Estimate, which assumed the temporary fee increase would apply to pending cases when it calculated that the costs of the 18 judgeships would be offset by the increased revenue from the 2017 amendment. *See* May 2017 CBO Report at 1 & 5 (reflecting, in three places, that the amendment would increase fees paid "by entities that are *currently* in Chapter 11 bankruptcy," "in *ongoing* Chapter 11 bankruptcy cases," "that are *already* in bankruptcy") (emphasis added).

simply because its application requires some reference to antecedent facts. *EPA v. New Orleans Pub. Serv., Inc.*, 826 F.2d 361, 365 (5th Cir. 1987) (holding that law altering classification of transformers for purposes of future matters is not retroactive).

69. "[A] statute may modify the legal effect of a present status or alter a preexisting relationship without running up against the retroactivity hurdle." *McAndrews v. Fleet Bank of Massachusetts*, 989 F.2d 13, 16 (1st Cir. 1993). "The key lies in how the law interacts with the facts. So long as the neoteric law determines status solely for the purposes of future matters, its application is deemed prospective." *Id.*

70. The 2017 amendment does not backdate collection of increased fees from the date a case was filed or the date a plan was confirmed. The amendment only triggers prospective assessment of the increased fees from the amendment's effective date until entry of the final decree. Exide needs to pay the increased fees only to the extent its case remains open and its quarterly disbursements exceed $1 million. Thus, the amendment does not operate retroactively.

B. Even had the 2017 amendment been retroactive, it would not have been unconstitutionally retroactive.

71. Even if the 2017 amendment had retroactive application, Exide is incorrect that it would (**i**) constitute a taking or (**ii**) violate the Due Process Clause. Brief ¶¶ 42-56.

72. As the Supreme Court has squarely addressed, Exide cannot state a takings claim based on what it believes to be a retroactive user fee. The Court explained in *Koontz v. St. Johns River Water Management District*, "[i]t is beyond dispute that '[t]axes and user fees . . . are not 'takings.'" 570 U.S. 595, 615 (2013) (quoting *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 243, n.2 (2003) (Scalia, J. dissenting)) (ellipses in original). Assessing a statutory fee is simply not akin to the exercise of eminent domain. *See Sperry*, 493 U.S. at 62 n.9 (rejecting notion that "any fee for services" might constitute a "physical occupation requiring just compensation"); *cf.*

Koontz, 570 U.S. at 617 ("[T]he power of taxation should not be confused with the power of eminent domain[.]") (internal quotation omitted). Thus, neither the quarterly fee under section 1930(a)(6), nor its increase under the 2017 amendment, constitutes a taking.

73. Exide's reliance on the plurality's taking analysis in *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998), is misplaced. First, the economic regulation at issue there did not involve user fees, which cannot be a taking. *Koontz*. 570 U.S. at 615. Second, the majority of the *Eastern* Court *rejected* the plurality's taking analysis where the regulation did "not operate upon or alter an identified property interest."[19] *Id.* at 613. Five justices (four in dissent, one concurring in the judgment) "rejected the idea that a law that imposed only a financial burden without identifying a particular property right could ever constitute a taking." *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 675 (3d Cir. 1999). The Third Circuit has recognized that it is "bound to follow the five-four vote *against* the takings claim in *Eastern*." *Id.* at 659 (emphasis added). The 2017 amendment might increase Exide's financial burden, but implicates no right tied to particular property, such as a parcel of land. Under circuit precedent, this is not a taking.

74. In any event, even under a takings analysis, Exide could not prevail. To determine whether a taking has occurred, courts examine "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). Such expectations must be more than "a unilateral expectation or an abstract need." *Id.* Exide has not shown what reasonable investment backed expectations were harmed by the 2017 amendment.

75. Chapter 11 debtors have long paid quarterly fees to support the bankruptcy system, and

[19] Even if the majority of the *Eastern* Court had not rejected the plurality's takings analysis, a plurality opinion does not make binding law. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 81 (1987).

'[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.'" *Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 371 (3d Cir. 2012). The 2017 amendment buttressed the revenue scheme designed by Congress to pay for the costs of the bankruptcy system. Any expectation that the quarterly fees would remain immutable is inherently unreasonable. *See CF & I*, 150 F.3d at 1239 (rejecting takings claim against section 1930(a) amendment and holding it "patently unreasonable to expect no variability in the final amount available to plan distributees" due to increased quarterly fees). "Carried to its logical conclusion, debtors' [retroactivity] arguments would mean no increases in fees, taxes, or assessments could be applied to any bankruptcy case after filing." *Prines*, 867 F.2d at 485.[20] Ultimately, Exide has expressed "no more than a 'unilateral expectation' that Congress would enact no new fees applicable to their bankruptcy case." *Id.* This is insufficient to establish a taking. *Id.*

76. Nor does the 2017 amendment violate the Due Process Clause. The constitutional restraint upon enacting retroactive civil legislation is a "modest" one. *Landgraf*, 511 U.S. at 272. Laws adjusting the burdens and benefits of economic life are presumed to be constitutional and the burden is on the party complaining of a due process violation to establish that Congress has acted in an arbitrary way. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). As long as there is a lawful legislative purpose furthered by rational means, economic legislation meets the test of due process. *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *United States v. Carlton*, 512 U.S. 26 (1994) (upholding amendment to estate tax deduction that operated retroactively).

[20] Exide's own disclaimers in its disclosure statement reflected its concurrent recognition, prior to plan confirmation, that future events—e.g., unanticipated restructuring costs—may impact its financial projections. *See supra* ¶ 4. It cannot claim it believed otherwise now.

77. In addition, "courts must accord substantial deference to the predictive judgments of Congress." *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (internal quotation marks omitted). This deference stems from the different institutional competencies and roles of the courts and Congress. Congress as an institution is best equipped to amass and evaluate data bearing on legislative questions. *Id*.

78. The Supreme Court has held that "[i]t is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them." *Sperry*, 493 U.S. at 64. Congress exercised its legislative expertise here in determining that the amount of quarterly fees it voted to impose was needed to fund the cost of providing the bankruptcy system to debtors. That decision was not arbitrary or irrational.

79. As explained *supra* in Part I.C., the 2017 amendment was enacted to collect sufficient funds to fully offset Program appropriations and the costs of 18 bankruptcy judgeships—seven in this district—so that ordinary taxpayers would not have to bear those costs of the bankruptcy system. H.R. Rep. No. 115-130, at 8. Congress acted rationally in applying the temporary fee increase in all pending cases, rather than only in cases filed after its effective date, because application to all pending cases spreads the costs among all of the larger chapter 11 debtors using the bankruptcy system, instead of making comparatively fewer debtors shoulder the burden. Moreover, applying the temporary fee increase to a larger number of cases allowed Congress's funding goal to be met, and met more quickly. *See* May 2017 CBO Report at 5 (relying on application of the fee increase to pending cases for cost and revenue estimates). This Congressional action was neither arbitrary nor irrational.

IV. Under Supreme Court Precedent, the 2017 Amendment Does Not Produce an Unconstitutionally Excessive User Fee.

80. Exide incorrectly alleges the 2017 amendment imposes an "excessive and unconstitutional user fee" that constitutes a taking. Brief ¶ 58. As explained *supra* at ¶ 72, the Supreme Court has made it clear that user fees simply are not takings. *Koontz,* 570 U.S. at 615. This Court need not go further in its analysis.

81. But even if user fees could be takings—which they cannot—quarterly fees are not a taking. The Constitution does not require a case-by-case correlation between a user fee and the costs or benefits to the user of the government's services. *Sperry*, 493 U.S. at 60-61. Rather, the standard under *Sperry*, which preceded *Koontz*, is whether fees are "so clearly excessive" that they "belie their purported character as user fees." *Id*. at 62. *Sperry* upheld the government's authority to charge a 1.5% fee on an arbitral award "by any standard of excessiveness." *Id*.

82. Following *Sperry*, this Court expressly upheld the constitutionality of section 1930(a)(6) against the same "excessive user fee" takings challenge asserted by Exide. *Kindred Healthcare, Inc.*, 2003 WL 22327933, at *3-5. This Court concluded that the quarterly fee "formula adopted by Congress calculates the 'fair approximation of the cost of benefits supplied' to the debtor," that a "more precise calculation of the benefit on a case by cases basis is not required," and that the range of percentages of disbursements in the quarterly fee schedule was, like the percentage in *Sperry*, not so excessive as to be unconstitutional. *Id.* at *5.

83. Nor does the 2017 amendment impact this holding. As a percentage of disbursements, pre-amendment fees in cases with over $1 million in quarterly disbursements were disproportionately low compared to the fees paid in smaller cases. *See supra* at ¶¶ 37-39. The 2017 amendment merely brought the percentage charged in those largest cases in line with the percentages charged in the smaller cases. *Id*. Under the 2017 amendment, fees in these largest

chapter 11 cases never exceed 1%. Accordingly, the logic and holding of *Kindred Healthcare* remain valid today, and the temporary fee increase must be upheld under *Sperry* as follows:

Factor	***U.S. v. Sperry***	**Section 1930(a)(6) as amended in 2017**
Statutory Percentage	**1.5%** on first $5 million, 1% thereafter	**Up to 1%**
Dollar cap on payments?	**No**	**Yes** ($250,000)
Voluntary use of the service?	**No** (use was involuntary because party did not want to use tribunal)	**Yes** (debtor chose to use the bankruptcy system)
Sunset?	**No**	**Yes**
Retroactive statute?	**Yes** (expressly retroactive)	**No** (didn't apply until the quarter after enactment)
Upheld statute?	**Yes**. S. Ct. upheld	

84. In its arguments, Exide cites and misapplies cases that do not assess whether a user fee is a taking.[21] For example, *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974), cited in Exide's Brief at ¶ 65, addressed a statute granting federal agencies the authority to prescribe user fees that the Supreme Court found implicated the separation of powers doctrine. But *National Cable*'s "narrow rule of statutory construction" is not implicated when it is clear that the fees imposed reflect the "will of Congress." *U.S. v. E.I. Dupont De Nemours and Co., Inc.*, 432 F.3d 161, 165-69 (3d Cir. 2005) (*en banc*); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 224 (1989) (explaining *National Cable*). Similarly, *Massachusetts v. United States*, 435 U.S. 444 (1978) (upholding user fee against immunity of state government from federal taxation) and *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998) (rejecting user fee under tax prohibition of Export Clause, U.S. Const. art. 1, § 9, cl. 5), applied constitutional provisions with

[21] *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) and *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998), cited in Exide's Brief at ¶ 58, were takings challenges, but neither involved user fees. The statute challenged in *Webb's* did not assess a user fee, which was provided for by a separate statute, as expressly observed by the Supreme Court. 449 U.S. at 160 & 164. And while Exide mistakenly cites and quotes the dissent in *Garneau*, the majority there in fact upheld a land-use regulation against a takings challenge. 147 F.3d at 807.

no bearing here. Thus, the applicable standard is set out in *Sperry*, not in the inapposite cases.

85. Exide's contention that the fee is excessive because it will generate a surplus in the Fund, Brief ¶ 66, is also misplaced. The $200 million floor set by the 2017 amendment is less than the annual appropriations for the Program. *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, tit. II, 132 Stat. 348, 412 (2018) (appropriating $226 million for Program). As is consistent with the purpose of the Fund, the Fund balance is used to cover shortfalls between fees collected and the annual appropriations. *See* Dep't of Justice, U.S. Tr. Program FY 2016 Performance Budget Cong. Submission at 19, *available at* https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/01/18._u.s._trustee_program_ustp.pdf. This does not reflect an excessive fee. *Cf. Massachusetts*, 435 U.S. at 470 n.25 (holding that "a surplus of revenue over outlays in any one year can be offset against actual deficits of past years and perhaps against projected deficits of future years").

86. In light of the foregoing, there is no basis for this Court to overrule Congress's determination that the amount of the quarterly fees it voted to impose is a fair approximation of the cost of providing the bankruptcy system to debtors, and a fair distribution of those costs among those who use the bankruptcy system. *See Sperry*, 493 U.S. at 60, 63. As long as Exide continues to use the bankruptcy system, it must pay its quarterly fees. *See*, *e.g.*, *In re A.H. Robins Co. Inc.*, 219 B.R. 145, 148 n.8 (Bankr. E.D. Va. 1998) (holding that regardless of what United States Trustee had done in the case post-confirmation, the debtor "benefitted from the Court's continued involvement in this still-open case").

CONCLUSION

For these reasons, the United States Trustee respectfully asks this Court to deny the Motion, and grant any further relief that the Court deems proper.

DATED: August 5, 2019

Respectfully submitted,

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By /s/ Linda J. Casey

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EXHIBIT A

(Excerpt)

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

SEPTEMBER/OCTOBER 2001
WASHINGTON, D.C.

The Committee on Automation and Technology reported that it had approved priorities for implementing the recommendations of a comprehensive, independent study of the judiciary's national information technology program and approved resource requirements and priorities for the five programs under its jurisdiction: automation, telecommunications, court automation support reimbursable, library services, and electronic public access. The Committee discussed a revised information technology vision to be included in the next update to the *Long Range Plan for Information Technology* and received briefings on a number of information technology projects. The Committee also endorsed the continuation of an implementation strategy for installation of the replacement electronic mail system.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

TRUSTEE RETENTION OF PROFESSIONALS

Section 327(d) of the Bankruptcy Code (11 U.S.C. § 327(d)) allows courts to authorize trustees to hire themselves or their firms as attorneys or accountants for an estate if it is "in the best interest of the estate." This practice has been defended on the grounds of economy and efficiency to the estate, but has also raised concerns about possible conflicts of interest as well as a public perception of impropriety. In March 1994, the Judicial Conference agreed to support amendments to section 327(d) to address such concerns (JCUS-MAR 94, p. 11), but for a variety of reasons, such legislation has not been pursued. Upon reconsideration, the Committee determined to recommend that the Conference rescind its March 1994 position, noting that courts are aware of the dangers inherent in the practice of trustees employing themselves or their firms and have not encountered any difficulty in supervising the practice, or in applying the "best interest of the estate" standard that presently exists in section 327(d). The Conference adopted the Committee's recommendation.

CHAPTER 11 QUARTERLY FEES

Bankruptcy administrators are independent non-judicial officers within the judicial branch who by statute perform the same bankruptcy estate administration oversight functions in the six districts in Alabama and North Carolina that the United States trustees perform in the other districts. Section 105 of the Federal Courts Improvement Act of 2000, Public Law No. 106-518, proposed by the Judicial Conference in March 1996 (JCUS-MAR 96, p. 10)

and enacted on November 13, 2000, authorizes the Conference to impose quarterly fees in chapter 11 cases in bankruptcy administrator districts comparable to those already being charged in United States trustee districts. To implement this statute, the Conference approved a Bankruptcy Committee recommendation that such fees be imposed in bankruptcy administrator districts in the amounts specified in 28 U.S.C. § 1930, as those amounts may be amended from time to time.

COMMITTEE ACTIVITIES

The Bankruptcy Committee reported that it has established a subcommittee to study venue-related issues in bankruptcy cases, including effective procedures for handling large chapter 11 cases.[5] It also authorized its chair, at an appropriate time, to create a subcommittee to help coordinate the judiciary's implementation of bankruptcy reform legislation. The Committee further unanimously endorsed the recommendations of the Court Administration and Case Management Committee regarding privacy and public access to court case files (s*ee infra*, "Privacy and Public Access to Electronic Case Files," pp. 48-50) and of the Budget Committee regarding the designation of certifying officers (s*ee infra,* "Certifying Officers," p. 47).

COMMITTEE ON THE BUDGET

FISCAL YEAR 2003 BUDGET REQUEST

The Judicial Conference approved the Budget Committee's proposed budget request for fiscal year 2003, subject to amendments necessary as a result of new legislation, actions of the Judicial Conference, or any other reason the Executive Committee considers necessary and appropriate.

CERTIFYING OFFICERS

[5]Prior to this Judicial Conference session, the Bankruptcy Committee withdrew for further consideration certain recommendations it had made proposing amendments to statutory and rule provisions governing venue in bankruptcy cases and proceedings.

EXHIBIT B

115TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { 115–130

BANKRUPTCY JUDGESHIP ACT OF 2017

MAY 17, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 2266]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2266) to amend title 28 of the United States Code to authorize the appointment of additional bankruptcy judges; and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Bankruptcy Judgeship Act of 2017".

SEC. 2. CONVERSION OF THE TEMPORARY OFFICE OF BANKRUPTCY JUDGE TO THE PERMANENT OFFICE OF BANKRUPTCY JUDGE IN CERTAIN JUDICIAL DISTRICTS.

(a) DISTRICT OF DELAWARE.—

(1) The temporary office of 4 bankruptcy judges authorized for the district of Delaware by section 1223(b)(1)(C) of Public Law 109–8 (119 Stat. 197; 28 U.S.C. 152 note), and extended by section 2(a)(1)(C) of Public Law 112–121 (126 Stat. 346; 28 U.S.C. 152 note), is converted hereby to the permanent office of bankruptcy judge and represented in the amendment made by section 3(1) of this Act, and may be filled.

(2) The temporary office of bankruptcy judge authorized for the district of Delaware by section 3(a)(3) of Public Law 102–361 (106 Stat. 966; 28 U.S.C. 152 note), and extended by section 1223(c)(1) of Public Law 109–8 (119 Stat. 198; 28 U.S.C. 152 note) and section 2(b)(1) of Public Law 112–121 (126 Stat. 347; 28 U.S.C. 152 note), is converted hereby to the permanent office of bankruptcy judge and represented in the amendment made by section 3(1) of this Act, and may be filled.

(b) SOUTHERN DISTRICT OF FLORIDA.—The temporary office of 2 bankruptcy judges authorized for the southern district of Florida by section 1223(b)(1)(D) of Public Law 109–8 (119 Stat. 197; 28 U.S.C. 152 note), and extended by section 2(a)(1)(D) of Public Law 112–121 (126 Stat. 346; 28 U.S.C. 152 note), is converted hereby to the permanent office of bankruptcy judge and represented in the amendment made by section 3(3) of this Act, and may be filled.

(c) DISTRICT OF MARYLAND.—The temporary office of 1 bankruptcy judge first appointed as authorized for the district of Maryland by section 1223(b)(1)(F) of Public Law 109–8 (119 Stat. 197; 28 U.S.C. 152 note), and extended by section 2(a)(1)(F) of Public Law 112–121 (126 Stat. 346; 28 U.S.C. 152 note), is converted hereby to the permanent office of bankruptcy judge and represented in the amendment made by section 3(4) of this Act, and may be filled.

(d) EASTERN DISTRICT OF MICHIGAN.—The temporary office of bankruptcy judge authorized for the eastern district of Michigan by section 1223(b)(1)(G) of Public Law 109–8 (119 Stat. 197; 28 U.S.C. 152 note), and extended by section 2(a)(1)(G) of Public Law 112–121 (126 Stat. 346; 28 U.S.C. 152 note), is converted hereby to the permanent office of bankruptcy judge and represented in the amendment made by section 3(5) of this Act, and may be filled.

(e) DISTRICT OF NEVADA.—The temporary office of bankruptcy judge authorized for the district of Nevada by section 1223(b)(1)(T) of Public Law 109–8 (119 Stat. 197; 28 U.S.C. 152 note), and extended by section 2(a)(1)(Q) of Public Law 112–121 (126 Stat. 346; 28 U.S.C. 152 note), is converted hereby to the permanent office of bankruptcy judge and represented in the amendment made by section 3(6) of this Act, and may be filled.

(f) EASTERN DISTRICT OF NORTH CAROLINA.—The temporary office of bankruptcy judge authorized for the eastern district of North Carolina by section 1223(b)(1)(M) of Public Law 109–8 (119 Stat. 197; 28 U.S.C. 152 note), and extended by section 2(a)(1)(J) of Public Law 112–121 (126 Stat. 346; 28 U.S.C. 152 note), is converted hereby to the permanent office of bankruptcy judge and represented in the amendment made by section 3(7) of this Act, and may be filled.

(g) DISTRICT OF PUERTO RICO.—

(1) The temporary office of bankruptcy judge authorized for the district of Puerto Rico by section 1223(b)(1)(P) of Public Law 109–8 (119 Stat. 197; 28 U.S.C. 152 note), and extended by section 2(a)(1)(M) of Public Law 112–121 (126 Stat. 346; 28 U.S.C. 152 note), is converted hereby to the permanent office of bankruptcy judge and represented in the amendment made by section 3(8) of this Act, and may be filled.

(2) The temporary office of bankruptcy judge authorized for the district of Puerto Rico by section 3(a)(7) of Public Law 102–361 (106 Stat. 966; 28 U.S.C. 152 note), and extended by section 1223(c)(1) of Public Law 109–8 (119 Stat. 198; 28 U.S.C. 152 note) and section 2(b)(1) of Public Law 112–121 (126 Stat. 347; 28 U.S.C. 152 note), is converted hereby to the permanent office of bankruptcy judge and is represented in the amendment made by section 3(8) of this Act, and may be filled.

(h) EASTERN DISTRICT OF VIRGINIA.—The temporary office of bankruptcy judge authorized for the eastern district of Virginia by section 1223(b)(1)(R) of Public Law 109–8 (119 Stat. 197; 28 U.S.C. 152 note), and extended by section 2(a)(1)(P) of Public Law 112–121 (126 Stat. 346; 28 U.S.C. 152 note), is converted hereby to the permanent office of bankruptcy judge and is represented in the amendment made by section 3(9) of this Act, and may be filled.

SEC. 3. PERMANENT OFFICE OF BANKRUPTCY JUDGE AUTHORIZED.

To reflect the conversion of the temporary office of bankruptcy judge to the permanent office of bankruptcy judge made by the operation of section 2, and to authorize

the appointment of additional bankruptcy judges, section 152(a)(2) of title 28 of the United States Code is amended—

(1) in the item relating to the district of Delaware by striking "1" and inserting "8",

(2) in the item relating to the middle district of Florida by striking "8" and inserting "9",

(3) in the item relating to the southern district of Florida by striking "5" and inserting "7",

(4) in the item relating to the district of Maryland by striking "4" and inserting "5",

(5) in the item relating to the eastern district of Michigan by striking "4" and inserting "6",

(6) in the item relating to the district of Nevada by striking "3" and inserting "4",

(7) in the item relating to the eastern district of North Carolina by striking "2" and inserting "3",

(8) in the item relating to the district of Puerto Rico by striking "2" and inserting "4", and

(9) in the item relating to the eastern district of Virginia by striking "5" and inserting "6".

SEC. 4. BANKRUPTCY FEES.

(a) AMENDMENTS TO TITLE 28 OF THE UNITED STATES CODE.—Section 1930(a)(6) of title 28 of the United States Code is amended—

(1) by striking "(6) In" and inserting "(6)(A) Except as provided in subparagraph (B), in", and

(2) by adding at the end the following:

"(B) In any fiscal year, the quarterly fee payable for a quarter in which disbursements equal or exceed $1,000,000 shall be 1 percent of such disbursements or $250,000, whichever is less, unless the balance in the United States Trustee System Fund as of September 30 immediately preceding such fiscal year exceeds $200,000,000.".

(b) DEPOSITS OF CERTAIN FEES FOR FISCAL YEARS 2018 THROUGH 2022.—Notwithstanding section 589a(b) of title 28 of the United States Code, for each of the fiscal years 2018 through 2022—

(1) 97.5 percent of the fees collected under section 1930(a)(6) of such title shall be deposited as offsetting collections to the appropriation "United States Trustee System Fund", to remain available until expended, and

(2) 2.5 percent of the fees collected under section 1930(a)(6) of such title shall be deposited in the general fund of the Treasury.

(c) EFFECTIVE DATE; APPLICATION AMENDMENTS.—

(1) EFFECTIVE DATE.—Except as provided in paragraph (2), this section shall take effect on July 1, 2017, or on the date of the enactment of this Act, whichever is later.

(2) APPLICATION OF AMENDMENTS.—The amendments made by this section shall apply to quarterly fees payable under section 1930(a)(6) of title 28 of the United States Code, as amended by this section, for disbursements made in any calendar quarter that begins on or after the effective date of the amendments made by this section.

Purpose and Summary

H.R. 2266, the "Bankruptcy Judgeship Act of 2017," as amended, converts 14 temporary bankruptcy judgeships to permanent status and authorizes four new bankruptcy judgeships for certain federal judicial districts listed in the bill. Temporary bankruptcy judgeships were authorized for these districts by Pub. L. Nos. 102–361 and 109–8. The lapse date for certain of these judgeships was extended by Pub. L. No. 109–8 and further extended by Pub. L. No. 112–121. All 14 of the temporary judgeships converted under this bill are scheduled to lapse on May 25, 2017. Additionally, the Bankruptcy Judgeship Act provides for an increase in the U.S. Trustee's Quarterly Fees for large chapter 11 cases.

Background and Need for the Legislation

A. BRIEF OVERVIEW OF TEMPORARY BANKRUPTCY JUDGESHIPS

The United States bankruptcy court is a court of limited jurisdiction established pursuant to Article I of the Constitution.[1] The bankruptcy court is constituted to be a "unit" of the United States district court,[2] which is established under Article III of the Constitution.[3] Pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984,[4] bankruptcy judges are judicial officers of the United States district court.[5] In contrast to Article III judges (who are nominated by the President and confirmed by the Senate to life-tenured appointment),[6] bankruptcy judges are appointed for 14-year terms by the United States court of appeals for the applicable circuit, with eligibility for reappointment.[7]

Congress authorizes the number of bankruptcy judgeships.[8] In 1992, Congress authorized the first 10 temporary bankruptcy judgeships.[9] In 2005, 28 additional temporary bankruptcy judgeships were created and four of the 1992 temporary bankruptcy judgeships were extended, under the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).[10] Congress provided that, at the expiration of the five years, the additional judgeships would be lost following the first vacancies thereafter, bringing the districts back to their prior judgeship levels. After the lapse of these positions, new legislation would be necessary to create any new judgeship positions. As discussed in more detail below, filings have stayed fairly consistent and these temporary judgeships have required further extensions over the past several years.[11] Despite these extensions, certain of the temporary bankruptcy judgeships have expired prior to Congressional action, including one temporary judgeship in the Southern District of New York.

There are presently 29 temporary bankruptcy judgeships scheduled to lapse on May 25, 2017.[12] These temporary judgeships comprise more than eight percent of the current bankruptcy judgeships nationwide. A judge sitting in a temporary position can sit in that district to fulfill his or her term after May 25, 2017, and can seek reappointment. However, if any sitting judge in that district retires, dies, resigns, or becomes disabled after May 25, 2017, the temporary position lapses, permanently reducing the number of judgeships in that district.

B. JUDICIAL CONFERENCE RECOMMENDATIONS

Congressional authorization of bankruptcy judgeships is typically premised on recommendations required to be made, from time to

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[1] U.S. CONST., art. I, § 8, cl. 4.
[2] 28 U.S.C. § 151.
[3] U.S. CONST., art. III, § 1.
[4] Pub. L. No. 98–353, 98 Stat. 333 (1984).
[5] 28 U.S.C. § 151.
[6] U.S. CONST., art. II, § 2, cl. 2.
[7] 28 U.S.C. § 152(a)(1).
[8] 28 U.S.C. § 152.
[9] Pub. L. No. 102–361, 106 Stat. 965 (1992).
[10] *See* Pub. L. No. 109–8, 119 Stat. 23 (2005).
[11] *See generally Judicial Conference of the United States, 2017 Bankruptcy Judgeship Recommendations* (on file with Committee).
[12] *See* Pub. L. No. 112-121, 126 Stat. 349 (2012).

time, by the Judicial Conference of the United States,[13] the principal policymaking body concerned with the administration of the federal judiciary.[14] On April 3, 2017, the Judicial Conference made its most recent recommendation for bankruptcy judgeship needs.[15] The recommendation is for the conversion of 14 temporary judgeships to permanent status and the authorization of four new bankruptcy judgeships.[16] The 14 judgeship conversions include the following: five for the District of Delaware; two for the Southern District of Florida; one for the District of Maryland; one for the Eastern District of Michigan; one for the District of Nevada; one for the Eastern District of North Carolina; two for the District of Puerto Rico; and one for the Eastern District of Virginia. The four additional permanent bankruptcy judgeships include the following: two for the District of Delaware; one for the Eastern District of Michigan; and one for the Middle District of Florida.

The Judicial Conference's recommendation to Congress concerning the need for bankruptcy judgeships is the product of a multi-step process. First, a bankruptcy court submits a request for additional bankruptcy judgeships to the district court, which transmits the request to the circuit court. Then, the circuit's judicial council considers the request and either approves it, with or without modification, or disapproves it. Approved requests are then sent to the Judicial Conference's Bankruptcy Committee's Subcommittee on Judgeships for consideration. The Subcommittee reviews the circuit court's recommendation, conducts on-site evaluations of judicial needs, and makes a recommendation to the full Bankruptcy Committee. The Bankruptcy Committee reviews the Subcommittee's findings and makes a recommendation to the full Judicial Conference. Upon final approval, the recommendation is then transmitted by the Judicial Conference to Congress in a biennial report.

It is the practice of the Judicial Conference to use a "weighted case filing" method to determine judicial needs. This method assigns a case weight to each new case filed based on its complexity, the number of parties involved, and other data relevant to assessing how the case will affect judicial workload. It should be noted that the Judicial Conference's policy is to consider additional judgeships only for those courts that request them. Thus, if a district's weighted caseload would support requesting another judgeship but the district does not submit a request, the Judicial Conference will not recommend to Congress that the judgeship be created. Additionally, if a vacancy arises that could be filled under the authorizing statute, but the Judicial Conference determines the need is not sufficient to fill that position or an alternative approach is available, the Conference does not recommend to Congress that it be filled.

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[13] 28 U.S.C. § 152(b) (2). In addition, the Judicial Conference must biennially conduct a "comprehensive review" of all judicial districts for the purpose of assessing the "continuing need" for authorized bankruptcy judges as well as for the elimination of any authorized position when a vacancy occurs as a result of a judge's resignation, retirement, removal, or death. 28 U.S.C. § 152(b) (3). For example, a bankruptcy judge may be removed for incompetence, misconduct, neglect of duty or physical or mental disability. 28 U.S.C. § 152(e).

[14] *See generally* 28 U.S.C. § 331.

[15] Letter from James C. Duff, Secretary, Judicial Conference of the United States, to Chairman Bob Goodlatte, H. Comm. on the Judiciary (Apr. 3, 2017) (on file with Committee).

[16] *Judicial Conference of the United States, 2017 Bankruptcy Judgeship Recommendations* (on file with Committee).

Although bankruptcy filings nationwide have been declining in recent years, the districts included in the Conference's recommendation generally have experienced a sustained increase in filings.[17] Indeed, since the enactment of BAPCPA, the last time additional judgeship resources were authorized for most of the courts included in the Conference's recommendation, these districts have seen weighted filings increase by more than 55 percent.[18] These temporary judgeships have existed for at least 12 years and the need does not show signs of abating. Moreover, the Judicial Conference has demonstrated that, while a district may have a permanent judgeship, it will not be filled unless completely necessary. There are currently eight vacancies which the Judicial Conference has not sought to be filled and another 12 judgeships which may not be filled once a vacancy arises.

C. LEGISLATIVE HISTORY

The Bankruptcy Judgeship Act of 2017 is very similar to a bill introduced during the 111th Congress by then Judiciary Chairman Lamar Smith (R–TX), Judiciary Ranking Member John Conyers, Jr. (D–MI) and Rep. Steve Cohen (D–TN), which would have authorized new permanent judgeships, converted some temporary judgeships to permanent status, and extended some temporary judgeships.[19]

When a majority of the temporary judgeships were first created, they were paid for through an increase in chapter 11 filing fees.[20] However, through a unique interpretation by the Congressional Budget Office, the funding from the fee increases was not able to be used to offset the conversion or further extension of the temporary judgeships once they hit their initial expiration date.[21] As such, when the temporary judgeships were set to expire in 2011, a similar funding issue arose. To offset the cost, H.R. 4506 increased filing fees in chapter 7 and 13 bankruptcy cases by one dollar and in chapter 11 cases by $42.[22] The bill passed the House by a vote of 345–5. The Senate did not vote on the bill.

During the 112th Congress, Reps. Smith, Conyers and Cohen introduced a scaled back bill which did not create any new judgeships or convert any temporary judgeships, but extended the existing temporary judgeships for an additional five years.[23] The extension was paid for once again by increasing the filing fees in chapter 11 cases by $167.[24] The bill passed the House under suspension of the rules by voice vote, passed the Senate by unanimous consent, and was signed into law.[25]

In addition, the Judicial Conference previously requested consideration of a one-year extension of seven judgeships in the Fiscal Year 2017 appropriations bill. The Judicial Conference identified

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[17] Letter from James C. Duff, Secretary, Judicial Conference of the United States, to Chairman Bob Goodlatte, H. Comm. on the Judiciary (Apr. 3, 2017) (on file with Committee).
[18] *Id.*
[19] H.R. 4506, (111th Congress).
[20] *See* Pub. L. No. 109–8, 119 Stat. 23 (2005).
[21] CBO's reasoning is based on the fact that the fee increases were permanent but the judgeships were temporary. They focus on what the law is at the time of the request. Because the current law includes the permanent fee increase, it cannot be used to pay for the conversions.
[22] H.R. 4506, 111th Congress.
[23] H.R. 1021, 112th Congress.
[24] *Id.*
[25] Pub. L. No. 112–121, 126 Stat. 349 (2012).

districts that combine high caseloads with even higher likelihood of judicial vacancies soon after the lapse date. This group included two positions in the District of Delaware, two in the Southern District of Florida, one in the Eastern District of Virginia, one in the Eastern District of Michigan and one in the District of Puerto Rico. This request was made again in the Fiscal Year 2018 appropriations bill, for the same judgeships, but with a corresponding two-year extension.

D. INCREASE IN QUARTERLY U.S. TRUSTEE FEES

Historically, the U.S. Trustee Program has been funded by fees collected in bankruptcy cases.[26] However, the manner in which the fees are routed to the U.S. Trustee Program is a bit circuitous. Simply, the U.S. Trustee Program gets appropriated funds every year. Those appropriated funds are offset by past fees collected through bankruptcy cases that are deposited into a fund at Treasury. Most years, the fees collected exceed the appropriated funds. However, in recent years, due to overall declining bankruptcy filings nationwide, the appropriations have exceeded the fees collected and the surplus created by years past has been dwindling. However, as mentioned previously, the districts included in the Conference's recommendation generally have experienced a sustained increase in filings. In response, over the past couple of years the U.S. Trustee has proposed to increase one of the fees collected in chapter 11 bankruptcy cases that is collected quarterly and corresponds with the size of the company in bankruptcy. More recently, this type of fee increase was included in the President's "skinny" budget.[27]

E. THE BANKRUPTCY JUDGESHIP ACT

In the 115th Congress, Judiciary Ranking Member Conyers and Senator Chris Coons (D–DE) introduced companion bills that sought to implement the then-current recommendation of the Judicial Conference for 16 conversions and 6 new authorizations.[28] Importantly, the bills did not include an offset for the judgeships.

On May 1, 2017, Mr. Conyers, Judiciary Chairman Bob Goodlatte (R–VA), Tom Marino (R–PA), and David N. Cicilline (D–RI), introduced a new version of the Bankruptcy Judgeship Act that contained the following changes: (a) alignment of the bill with the Judicial Conference's latest recommendation of 14 conversions and four new appointments, which the committee believe to be a sound recommendation; and, (b) inclusion of an increase in the quarterly U.S. Trustee fees for large chapter 11 cases to serve as a funding offset for the cost of the judgeships. The affected districts, number of judgeship conversions, and new appointments under H.R. 2266 are as follows:

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[26] 28 U.S.C. 589a. Approximately 38 percent of the Program's revenue is derived from filing fees paid in chapters 7, 11, 12, and 13 cases while about 61 percent comes from quarterly fees in chapter 11 cases.

[27] *See* America First, A Budget Blueprint to Make America Great Again, Office of Management and Budget, at 30, *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf

[28] *See* H.R. 136, 115th Cong.; S. 632, 115th Cong.

Judicial District	Judgeships Converted	New Judgeship Authorization
District of Puerto Rico	2	
District of Delaware	5	2
District of Maryland	1	
Eastern District of North Carolina	1	
Eastern District of Virginia	1	
Eastern District of Michigan	1	1
District of Nevada	1	
Middle District of Florida		1
Southern District of Florida	2	

The Bankruptcy Judgeship Act of 2017 also provides for an increase in the U.S. Trustee fees for the largest chapter 11 debtors (i.e., excluding small businesses). The fee increase is directly tied to the balance of the United States Trustee System Fund and will only be applied when the balance of the fund falls below a $200 million threshold. The funds generated by the fee increase will cover both the costs of this bill and separately needed funds for the operations of the U.S. Trustee Program.

Hearings

The Committee on the Judiciary held no hearings on H.R. 2266.

Committee Consideration

On May 3, 2017, the Committee met in open session to consider the bill H.R. 2266. Ranking Member Conyers offered an amendment to correct certain typographical errors, clarify that notwithstanding an intervening vacancy in an authorized judgeship, the position can nevertheless be filled, and ensure the U.S. Trustee fee increase will offset the cost of the new and converted judgeships. Mr. Conyers' amendment was agreed to by voice vote and H.R. 2266 was favorably reported, by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 2266.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Committee Cost Estimate

A Congressional Budget Office cost estimate was not available at the time of filing of this report. In compliance with clause 3(d) of Rule XIII of the Rules of the House of Representatives, the Committee estimates, based on informal estimations made available to it by CBO, that enacting H.R. 2266 would increase direct spending by approximately $20 million over the next ten years. Therefore, pay-as-you-go procedures apply. The Committee also expects, based on informal estimates by CBO, that enacting H.R. 2266 would increase revenues from quarterly U.S. Trustee filing fees by an amount sufficient to fully offset the increases in direct spending caused by the bill.

Duplication of Federal Programs

No provision of H.R. 2266 establishes or reauthorizes a program of the Federal government known to be duplicative of another Federal program, a program that was included in any report from GAO to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 2266 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2266 converts 14 temporary bankruptcy judgeships to permanent status, authorizes four new bankruptcy judgeships, and increases the U.S. Trustee's Quarterly Fees for large chapter 11 cases.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2266 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title.

Section 1 sets forth the short title of the bill as the "Bankruptcy Judgeship Act of 2017."

Section 2. Conversion of the Temporary Office of Bankruptcy Judge to the Permanent Office of Bankruptcy Judge in Certain Judicial Districts.

Section 2(a) converts to permanent status the five temporary judgeships in the District of Delaware. Section 2(b) converts to per-

manent status the two temporary judgeships in the Southern District of Florida. Section 2(c) converts to permanent status the temporary bankruptcy judgeship for the District of Maryland. Section 2(d) converts to permanent status the temporary bankruptcy judgeship for the Eastern District of Michigan. Section 2(e) converts to permanent status the temporary bankruptcy judgeship for the District of Nevada. Section 2(f) converts to permanent status the temporary bankruptcy judgeship for the Eastern District of North Carolina. Section 2(g) converts to permanent status the two temporary bankruptcy judgeships for the District of Puerto Rico. Section 2(h) converts to permanent status the bankruptcy judgeship for the Eastern District of Virginia.

Section 3. Permanent Office of Bankruptcy Judge Authorized.

Section 3 amends section 152(a)(2) of title 28 of the United States Code to reflect the changes in temporary to permanent status as effectuated by section 2 of the bill. Also, section 3 authorizes two additional permanent bankruptcy judgeships for the District of Delaware, one additional permanent bankruptcy judgeship for the Eastern District of Michigan, and one additional permanent bankruptcy judgeship for the Middle District of Florida.

Section 4. Bankruptcy Fees.

Section 4(a) amends section 1930(a)(6) of title 28 of the United States Code to provide that the chapter 11 fee payable for a quarter in which a debtor's disbursements equal or exceed $1 million must be either one percent of such disbursements or $250,000, whichever is less, in a fiscal year unless the balance in the United States Trustee System Fund as of September 30 preceding such fiscal year exceeds $200 million.

Section 4(b) provides that, notwithstanding section 589a(b) of title 28 of the United States Code, for each of the fiscal years 2018 through 2012, 97.5 percent of the quarterly U.S. Trustee fees shall be deposited as offsetting collections to the United States Trustee System Fund and 2.5 percent of the quarterly U.S. Trustee fees shall be deposited in the general fund of the Treasury.

Section 4(c)(1) provides that section 4 takes effect on July 1, 2017, or the date of enactment, whichever is later, subject to subsection 4(c)(2). Section 4(c)(2) provides that section 4 applies to quarterly fees payable for any quarter that begins on or after the effective date of this legislation.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

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PART I—ORGANIZATION OF COURTS

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CHAPTER 6—BANKRUPTCY JUDGES

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§ 152. Appointment of bankruptcy judges

(a)(1) Each bankruptcy judge to be appointed for a judicial district, as provided in paragraph (2), shall be appointed by the court of appeals of the United States for the circuit in which such district is located. Such appointments shall be made after considering the recommendations of the Judicial Conference submitted pursuant to subsection (b). Each bankruptcy judge shall be appointed for a term of fourteen years, subject to the provisions of subsection (e). However, upon the expiration of the term, a bankruptcy judge may, with the approval of the judicial council of the circuit, continue to perform the duties of the office until the earlier of the date which is 180 days after the expiration of the term or the date of the appointment of a successor. Bankruptcy judges shall serve as judicial officers of the United States district court established under Article III of the Constitution.

(2) The bankruptcy judges appointed pursuant to this section shall be appointed for the several judicial districts as follows:

Districts	Judges
Alabama:	
Northern	5
Middle	2
Southern	2
Alaska	2
Arizona	7
Arkansas:	
Eastern and Western	3
California:	
Northern	9
Eastern	6
Central	21
Southern	4
Colorado	5
Connecticut	3
Delaware	**[**1**]** *8*
District of Columbia	1
Florida:	
Northern	1
Middle	**[**8**]** *9*
Southern	**[**5**]** *7*

Districts	Judges
Georgia:	
Northern	8
Middle	3
Southern	2
Hawaii	1
Idaho	2
Illinois:	
Northern	10
Central	3
Southern	1
Indiana:	
Northern	3
Southern	4
Iowa:	
Northern	2
Southern	2
Kansas	4
Kentucky:	
Eastern	2
Western	3
Louisiana:	
Eastern	2
Middle	1
Western	3
Maine	2
Maryland	**[**4**]** *5*
Massachusetts	5
Michigan:	
Eastern	**[**4**]** *6*
Western	3
Minnesota	4
Mississippi:	
Northern	1
Southern	2
Missouri:	
Eastern	3
Western	3
Montana	1
Nebraska	2
Nevada	**[**3**]** *4*
New Hampshire	1
New Jersey	8

Districts	Judges
New Mexico	2
New York:	
Northern	2
Southern	9
Eastern	6
Western	3
North Carolina:	
Eastern	**[**2**]** *3*
Middle	2
Western	2
North Dakota	1
Ohio:	
Northern	8
Southern	7
Oklahoma:	
Northern	2
Eastern	1
Western	3
Oregon	5
Pennsylvania:	
Eastern	5
Middle	2
Western	4
Puerto Rico	**[**2**]** *4*
Rhode Island	1
South Carolina	2
South Dakota	2
Tennessee:	
Eastern	3
Middle	3
Western	4
Texas:	
Northern	6
Eastern	2
Southern	6
Western	4
Utah	3
Vermont	1
Virginia:	
Eastern	**[**5**]** *6*
Western	3
Washington:	

Districts	Judges
Eastern	2
Western	5
West Virginia:	
Northern	1
Southern	1
Wisconsin:	
Eastern	4
Western	2
Wyoming	1

(3) Whenever a majority of the judges of any court of appeals cannot agree upon the appointment of a bankruptcy judge, the chief judge of such court shall make such appointment.

(4) The judges of the district courts for the territories shall serve as the bankruptcy judges for such courts. The United States court of appeals for the circuit within which such a territorial district court is located may appoint bankruptcy judges under this chapter for such district if authorized to do so by the Congress of the United States under this section.

(b)(1) The Judicial Conference of the United States shall, from time to time, and after considering the recommendations submitted by the Director of the Administrative Office of the United States Courts after such Director has consulted with the judicial council of the circuit involved, determine the official duty stations of bankruptcy judges and places of holding court.

(2) The Judicial Conference shall, from time to time, submit recommendations to the Congress regarding the number of bankruptcy judges needed and the districts in which such judges are needed.

(3) Not later than December 31, 1994, and not later than the end of each 2-year period thereafter, the Judicial Conference of the United States shall conduct a comprehensive review of all judicial districts to assess the continuing need for the bankruptcy judges authorized by this section, and shall report to the Congress its findings and any recommendations for the elimination of any authorized position which can be eliminated when a vacancy exists by reason of resignation, retirement, removal, or death.

(c)(1) Each bankruptcy judge may hold court at such places within the judicial district, in addition to the official duty station of such judge, as the business of the court may require.

(2)(A) Bankruptcy judges may hold court at such places within the United States outside the judicial district as the nature of the business of the court may require, and upon such notice as the court orders, upon a finding by either the chief judge of the bankruptcy court (or, if the chief judge is unavailable, the most senior available bankruptcy judge) or by the judicial council of the circuit that, because of emergency conditions, no

location within the district is reasonably available where the bankruptcy judges could hold court.

(B) Bankruptcy judges may transact any business at special sessions of court held outside the district pursuant to this paragraph that might be transacted at a regular session.

(C) If a bankruptcy court issues an order exercising its authority under subparagraph (A), the court—

(i) through the Administrative Office of the United States Courts, shall—

(I) send notice of such order, including the reasons for the issuance of such order, to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives; and

(II) not later than 180 days after the expiration of such court order submit a brief report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives describing the impact of such order, including—

(aa) the reasons for the issuance of such order;

(bb) the duration of such order;

(cc) the impact of such order on litigants; and

(dd) the costs to the judiciary resulting from such order; and

(ii) shall provide reasonable notice to the United States Marshals Service before the commencement of any special session held pursuant to such order.

(d) With the approval of the Judicial Conference and of each of the judicial councils involved, a bankruptcy judge may be designated to serve in any district adjacent to or near the district for which such bankruptcy judge was appointed.

(e) A bankruptcy judge may be removed during the term for which such bankruptcy judge is appointed, only for incompetence, misconduct, neglect of duty, or physical or mental disability and only by the judicial council of the circuit in which the judge's official duty station is located. Removal may not occur unless a majority of all of the judges of such council concur in the order of removal. Before any order of removal may be entered, a full specification of charges shall be furnished to such bankruptcy judge who shall be accorded an opportunity to be heard on such charges.

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PART V—PROCEDURE

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CHAPTER 123—FEES AND COSTS

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§ 1930. Bankruptcy fees

(a) The parties commencing a case under title 11 shall pay to the clerk of the district court or the clerk of the bankruptcy court, if one has been certified pursuant to section 156(b) of this title, the following filing fees:

(1) For a case commenced under—

(A) chapter 7 of title 11, $245, and

(B) chapter 13 of title 11, $235.

(2) For a case commenced under chapter 9 of title 11, equal to the fee specified in paragraph (3) for filing a case under chapter 11 of title 11. The amount by which the fee payable under this paragraph exceeds $300 shall be deposited in the fund established under section 1931 of this title.

(3) For a case commenced under chapter 11 of title 11 that does not concern a railroad, as defined in section 101 of title 11, $1,167.

(4) For a case commenced under chapter 11 of title 11 concerning a railroad, as so defined, $1,000.

(5) For a case commenced under chapter 12 of title 11, $200.

[(6) In**]** *(6) (A) Except as provided in subparagraph (B), in* addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each case under chapter 11 of title 11 for each quarter (including any fraction thereof) until the case is converted or dismissed, whichever occurs first. The fee shall be $325 for each quarter in which disbursements total less than $15,000; $650 for each quarter in which disbursements total $15,000 or more but less than $75,000; $975 for each quarter in which disbursements total $75,000 or more but less than $150,000; $1,625 for each quarter in which disbursements total $150,000 or more but less than $225,000; $1,950 for each quarter in which disbursements total $225,000 or more but less than $300,000; $4,875 for each quarter in which disbursements total $300,000 or more but less than $1,000,000; $6,500 for each quarter in which disbursements total $1,000,000 or more but less than $2,000,000; $9,750 for each quarter in which disbursements total $2,000,000 or more but less than $3,000,000; $10,400 for each quarter in which disbursements total $3,000,000 or more but less than $5,000,000; $13,000 for each quarter in which disbursements total $5,000,000 or more but less than $15,000,000; $20,000 for each quarter in which disbursements total $15,000,000 or more but less than $30,000,000; $30,000 for each quarter in which disbursements total more than $30,000,000. The fee shall be payable on the last day of the calendar month following the calendar quarter for which the fee is owed.

(B) In any fiscal year, the quarterly fee payable for a quarter in which disbursements equal or exceed $1,000,000 shall be 1 percent of such disbursements or $250,000, whichever is less, unless the balance in the United States Trustee System Fund as of September 30 immediately preceding such fiscal year exceeds $200,000,000.

(7) In districts that are not part of a United States trustee region as defined in section 581 of this title, the Judicial Conference of the United States may require the debtor in a case

under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection. Such fees shall be deposited as offsetting receipts to the fund established under section 1931 of this title and shall remain available until expended.

An individual commencing a voluntary case or a joint case under title 11 may pay such fee in installments. For converting, on request of the debtor, a case under chapter 7, or 13 of title 11, to a case under chapter 11 of title 11, the debtor shall pay to the clerk of the district court or the clerk of the bankruptcy court, if one has been certified pursuant to section 156(b) of this title, a fee of the amount equal to the difference between the fee specified in paragraph (3) and the fee specified in paragraph (1).

(b) The Judicial Conference of the United States may prescribe additional fees in cases under title 11 of the same kind as the Judicial Conference prescribes under section 1914(b) of this title.

(c) Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or a writ of certiorari $5 shall be paid to the clerk of the court, by the appellant or petitioner.

(d) Whenever any case or proceeding is dismissed in any bankruptcy court for want of jurisdiction, such court may order the payment of just costs.

(e) The clerk of the court may collect only the fees prescribed under this section.

(f)(1) Under the procedures prescribed by the Judicial Conference of the United States, the district court or the bankruptcy court may waive the filing fee in a case under chapter 7 of title 11 for an individual if the court determines that such individual has income less than 150 percent of the income official poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981) applicable to a family of the size involved and is unable to pay that fee in installments. For purposes of this paragraph, the term "filing fee" means the filing fee required by subsection (a), or any other fee prescribed by the Judicial Conference under subsections (b) and (c) that is payable to the clerk upon the commencement of a case under chapter 7.

(2) The district court or the bankruptcy court may waive for such debtors other fees prescribed under subsections (b) and (c).

(3) This subsection does not restrict the district court or the bankruptcy court from waiving, in accordance with Judicial Conference policy, fees prescribed under this section for other debtors and creditors.

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EXHIBIT C

CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

May 18, 2017

H.R. 2266
Bankruptcy Judgeship Act of 2017

As passed by the House of Representatives on May 17, 2017

SUMMARY

H.R. 2266 would authorize 18 permanent bankruptcy judgeships—4 judgeships would be new and 14 temporary judgeships would become permanent. Under current law, any vacancies that occur among those temporary judgeships after May 25, 2017, cannot be filled. Under the act, such vacancies could be filled at any time in the future. The act also would adjust the formula used to set certain quarterly fees paid by businesses involved in ongoing Chapter 11 bankruptcy cases and would change the budgetary treatment of a portion of those fees.

CBO estimates that enacting H.R. 2266 would increase direct spending by about $21 million and would increase revenues by about $21 million over the 2018-2027 period. CBO also estimates that implementing the act would reduce net discretionary spending by about $1 billion over the 2018-2027 period.

Because enacting H.R. 2266 would affect direct spending and revenues, pay-as-you-go procedures apply.

CBO estimates that enacting H.R. 2266 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 2266 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

H.R. 2266 would impose a new mandate, as defined in UMRA, by increasing fees paid to DOJ by entities that are currently in Chapter 11 bankruptcy and that have disbursements of more than $1 million per quarter. CBO estimates that the cost of the mandates would fall below the annual threshold established in UMRA for private-sector mandates ($156 million in 2017, adjusted annually for inflation).

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 2266 is shown in the following table. The costs of this legislation fall within budget function 750 (administration of justice).

	By Fiscal Year, in Millions of Dollars												
	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2017-2022	2017-2027
INCREASES IN DIRECT SPENDING													
Judicial Salaries and Benefits													
Estimated Budget Authority	0	*	1	1	1	2	3	3	3	3	3	6	21
Estimated Outlays	0	*	1	1	1	2	3	3	3	3	3	6	21
INCREASES IN REVENUES													
Chapter 11 Bankruptcy Quarterly Fees													
Estimated Revenues	0	5	5	4	4	4	0	0	0	0	0	21	21
NET INCREASE OR DECREASE (-) IN THE DEFICIT FROM INCREASES IN DIRECT SPENDING AND REVENUES													
Impact on Deficit	0	-5	-4	-3	-3	-2	3	3	3	3	3	-15	0
INCREASES OR DECREASES (-) IN SPENDING SUBJECT TO APPROPRIATION													
Judicial Administrative Costs													
Estimated Authorization Level	0	1	3	3	4	6	8	8	8	8	8	16	56
Estimated Outlays	0	1	3	3	4	6	8	8	8	8	8	16	56
Chapter 11 Bankruptcy Quarterly Fees													
Estimated Authorization Level	0	-144	-135	-126	-117	-109	-106	-99	-93	-86	-81	-631	-1,096
Estimated Outlays	0	-144	-135	-126	-117	-109	-106	-99	-93	-86	-81	-631	-1,096
Net Changes													
Estimated Authorization Level	0	-143	-132	-123	-113	-103	-99	-91	-85	-78	-72	-614	-1,039
Estimated Outlays	0	-143	-132	-123	-113	-103	-99	-91	-85	-78	-72	-614	-1,039

Notes: Amounts may not sum to totals because of rounding; * = between zero and $500,000.

BASIS OF ESTIMATE

For this estimate, CBO assumes that H.R. 2266 will be enacted near the end of fiscal year 2017 and that the necessary amounts will be appropriated each year.

Judicial Salaries and Benefits

The salaries and benefits for bankruptcy judges—about $232,000 in 2017 for each judge—are considered direct spending.

New Bankruptcy Judgeships. H.R. 2266 would authorize four new permanent bankruptcy judgeships. Incorporating the effects of anticipated inflation, CBO estimates that the salaries and benefits for those judges would increase direct spending by $11 million over the 2018-2027 period.

Temporary Bankruptcy Judgeships Converted to Permanent Judgeships. H.R. 2266 would convert 14 temporary bankruptcy judgeships to permanent judgeships. Under current law, those 14 judgeships expire on May 25, 2017. After that date, all judges currently serving in the districts where those temporary judgeships are assigned can continue to serve until their term expires, they retire, or they die. After May 25, 2017, if any bankruptcy judge currently serving in such a district vacates a seat that vacancy cannot be filled if the number of remaining judges in that district equals or exceeds the number of permanent judgeships authorized for that district. Under H.R. 2266, any vacancies after May 25, 2017, could be filled because those judgeships would be extended indefinitely.

CBO cannot predict the timing of vacancies among judgeships in the affected districts; however, based on an analysis of information from the Administrative Office of the U.S. Courts (AOUSC) about the age of the relevant judges, the amount of time remaining in the judges' terms, and the judges' likelihood of reappointment, we expect that six vacancies (from more than 50 sitting judges) will probably occur during the ten years following the enactment of H.R. 2266. Those vacancies will occur at different points over the next 10 years. CBO estimates that filling those six vacancies would increase direct spending for salaries and benefits by $10 million over the 2018-2027 period.

Judicial Administrative Costs

Implementing H.R. 2266 would increase administrative expenses for each judge appointed. Such expenses include supporting personnel, security costs, and court operations and maintenance. According to the AOUSC, expenses in 2017 are about $700,000 per judge. Based on that information and adjusting for anticipated inflation, CBO estimates that administrative costs associated with the 10 additional judges would be $56 million over the 2018-2027 period; subject to the availability of appropriated funds.

Chapter 11 Bankruptcy Quarterly Fees

H.R. 2266 would change the formula that determines the amount of quarterly fees paid by debtors in Chapter 11 bankruptcy cases. Chapter 11 of the Bankruptcy Code is typically used to reorganize a business that is in bankruptcy. Once a business owner or corporation files for bankruptcy under Chapter 11 they are required to pay a fee to the Department of Justice (DOJ) at the end of each quarter until their case is closed or dismissed. The quarterly fee is set in accordance with a formula that takes account of the amount of funds disbursed by the debtor for salaries, operating expenses, and other expenses in a given quarter. In 2016, DOJ collected $91 million from such quarterly fees. H.R. 2266 would increase the quarterly fee for debtors with disbursements over $1 million in a quarter.

Under current law, those quarterly fees are deposited into the U.S. Trustee System Fund and recorded as offsets to the annual appropriation to the U.S. Trustee Program (USTP). The fees are collected under permanent law thus their collection is not subject to appropriation action. (The USTP oversees the administration of bankruptcy cases.) Based on historic trends in bankruptcy filings and on an analysis of information from DOJ about the amounts collected from the quarterly fees, CBO estimates that enacting H.R. 2266 would increase collections by about $1.1 billion over the 2018-2027 period.

Under H.R. 2266, 2.5 percent of those quarterly fees would be deposited into the general fund of the Treasury during fiscal years 2018 through 2022 and would not be available to be spent. Those amounts would be recorded in the budget as additional revenues. The gross increase in revenues would be $26 million over the 2018-2027 period. Because excise taxes and other indirect business taxes (such as bankruptcy quarterly fees) reduce the base of income and payroll taxes for individuals employed by or serviced by the affected businesses, higher amounts of those indirect business taxes would lead to reductions in revenues from income and payroll taxes. As a result, the increase in fees would be partially offset by a loss of revenues of about 26 percent each year.

That 26 percent offset would normally apply to all of the increase in the bankruptcy fees (the estimated $1.1 billion), but the underlying law directs that those bankruptcy fees be treated as offsetting collections. Long-standing conventions dictate that CBO not score any foregone revenues to fees that are recorded as offsetting collections. The loss in revenues from increasing the bankruptcy fees would total about $0.3 billion over the 2018-2027 period. Thus, only the offsetting effects to the fees that would be treated as revenues are subject to the offset. CBO estimates that enacting the fee provisions would increase net revenues by $21 million over the 2018-2027 period.

PAY-AS-YOU-GO CONSIDERATIONS

The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in outlays and revenues that are subject to those pay-as-you-go procedures are shown in the following table.

CBO Estimate of Pay-As-You-Go Effects for H.R. 2266 as ordered reported by the House Committee on the Judiciary on May 3, 2017

	By Fiscal Year, in Millions of Dollars												
	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2017-2022	2017-2027
NET INCREASE OR DECREASE (-) IN THE DEFICIT													
Statutory Pay-As-You-Go Impact	0	-5	-4	-3	-3	-2	3	3	3	3	3	-15	0
Memorandum:													
Changes in Outlays	0	0	1	1	1	2	3	3	3	3	3	6	21
Changes in Revenues	0	5	5	4	4	4	0	0	0	0	0	21	21

INCREASE IN LONG-TERM DIRECT SPENDING AND DEFICITS

CBO estimates that enacting H.R. 2266 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

H.R. 2266 contains no intergovernmental mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

H.R. 2266 would impose a new mandate, as defined in UMRA, by increasing the amount of fees paid to the DOJ by entities that are already in bankruptcy and that have disbursements (salaries, operating expenses, etc. paid by the entity) of more than $1 million per quarter. Once an entity files for bankruptcy under Chapter 11, they must pay a fee to DOJ at the end of each quarter until their case is closed or dismissed. As noted above, CBO estimates that new fee collections would total $144 million in the first year

after enactment and decline to $109 million by the fifth year. Some portion of those collections would be from entities already in bankruptcy that have quarterly disbursements of more than $1 million, and those are the entities that would face a mandate under the act. In total, CBO estimates that the cost of the mandate would fall below the annual threshold established in UMRA for private-sector mandates ($156 million in 2017, adjusted annually for inflation).

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