

AMERICAN BANKRUPTCY INSTITUTE JOURNAL

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Feature

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Applicability of USTP Guidelines to Bankruptcy Administrators



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Two institutions exist to ensure that bankruptcy cases are conducted in conformity with bankruptcy laws: the U.S. Trustee Program (USTP) and the Bankruptcy Administrator (BA) Program.¹ These institutions perform substantially similar functions in guiding cases under the Bankruptcy Code, but they have certain administrative and structural differences. As part of its administrative function, in 1996 the USTP established its fee guidelines,² which have recently been amended to include additional guidelines for reviewing applications for compensation and reimbursement of expenses filed by attorneys in large chapter 11 cases.³ One question that remains is what impact, if any, these guidelines have on the separate BA Program.

Overview of USTP and BA Program

Currently, the USTP operates in 88 of the 94 U.S. judicial districts. The other six districts, all located in Alabama and North Carolina, are under the purview of the BA Program.⁴ The USTP was established by the Bankruptcy Reform Act of 1978,⁵ and the U.S. Trustees originally had oversight over 21 judicial districts in the pilot program.⁶ The USTP was expanded

nationwide in 1986 through the Bankruptcy Judges, U.S. Trustees, and Family Farmer Bankruptcy Act of 1986 (the "1986 Act").⁷ This act provided that its provisions did not apply to nonpilot districts until Nov. 26, 1986, and allowed for separate judicial districts for Alabama and North Carolina.

Although the Northern District of Alabama was part of the original U.S. Trustee pilot program, Alabama rejected the USTP once it went nationwide. Under the original provisions of the 1986 Act, Alabama and North Carolina were required to opt into the USTP no later than 1992. This original sunset provision was initially extended⁸ and finally removed.⁹ Prior to the establishment of the USTP and BA Program, bankruptcy judges performed the administrative tasks to supervise a debtor's estate that are now largely performed by the applicable program — or one of the two programs.¹⁰ The USTP was largely created to address the existence of so-called "bankruptcy rings," referring to the close relationships that some bankruptcy judges, trustees and attorneys enjoyed due to this centralized performance of their duties.¹¹ According to a 1992 report by the General Accounting Office (GAO), "[m]any in the bankruptcy community viewed judges' dual responsibilities — administrative and judicial — as a conflict in the bankruptcy system because in carrying out their administrative role, judges were exposed to inadmissible evidence that could bias them in making judicial decisions."¹²

1 The BA Program exists in North Carolina and Alabama; the USTP does not operate in these states.

2 See Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330, 28 C.F.R. pt. 58, Appendix A (1996).

3 Large chapter 11 cases are defined in the fee guidelines as those with \$50 million or more in assets and \$50 million or more in liabilities, aggregated for jointly administered cases. See Appendix B, Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under U.S. Code by Attorneys in Larger Chapter 11 Cases, 78 Fed. Reg. 36,248 (June 11, 2013) (to be codified at 28 C.F.R. pt. 58). Single-asset real estate cases, as defined under chapter 11, are excluded from fee guidelines established for larger chapter 11 cases.

4 See U.S. Court's website, available at www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyAdministrators.aspx (last visited Oct. 3, 2014).

5 See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

6 This pilot program operated in the Districts of Maine, New Hampshire, Massachusetts, Rhode Island, Delaware, New Jersey, District of Columbia, Minnesota, North Dakota, South Dakota, Colorado and Kansas, and in the Northern Districts of Alabama, Texas and Illinois, as well as the Southern District of New York, the Eastern District of Virginia and the Central District of California. See Pub. L. No. 95-598, § 224.

7 See Bankruptcy Judges, U.S. Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified at 28 U.S.C. § 581 (2006)).

8 Dan J. Shulman, "The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee And the Bankruptcy Administrator Programs," 74 Neb. L. Rev. 91, 123 (1995).

9 See Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501, 114 Stat. 2410, 2421 (codified at 28 U.S.C. § 581 (2006)).

10 Richard S. Lauter, "USTP: Is Reduced Discretion the Better Part of Valor?," XXXII ABJ Journal 4, 26, 91-92, May 2013.

11 *Id.*

12 See U.S. Gen. Accounting Office, GAO/GGD-92-133, Bankruptcy Administration: Justification Lacking for Continuing Two Parallel Programs 3-4 (1992) (hereinafter, GAO Report).

As a result, bankruptcy administrators and U.S. Trustees operate independently of the bankruptcy courts and federal district courts.¹³

Although the two programs perform virtually identical administrative functions, they have structural, administrative and governance differences. One distinction is that they are positioned under two different branches of the federal government.¹⁴ U.S. Trustees are members of the executive branch under the purview of the U.S. Department of Justice,¹⁵ while bankruptcy administrators are non-judicial officers in the judicial branch under the Administrative Office of the U.S. Courts.¹⁶ Bankruptcy administrators are licensed attorneys appointed by the U.S. courts of appeals following public notice and review by merit selection panels. They serve five-year terms and may be reappointed for additional five-year terms.¹⁷ U.S. Trustees are appointed by the U.S. Attorney General.¹⁸ This difference in structural hierarchy creates many of the subtle differences between the two programs. One example is that the Bankruptcy Code directs that a U.S. Trustee appoints interim chapter 7 and 13 trustees, as well as committee members in chapter 11 cases. Bankruptcy administrators do not conduct these functions, but they do help facilitate them.¹⁹

Bankruptcy administrators act under regulations promulgated by the Judicial Conference of the U.S., the principal judicial policy-making body of the judiciary.²⁰ The Executive Office for U.S. Trustees (EOUST) “provides general policy and legal guidance, oversees the Program’s substantive operations, and handles administrative functions.”²¹ Furthermore, the EOUST provides administrative and management support to the various U.S. Trustee Offices in their implementation of federal bankruptcy laws.²² In 1994, Congress expanded the role of the U.S. Trustees by amending 28 U.S.C. § 586, the primary statutory basis for their authority, to give the EOUST power to adopt certain procedural guidelines pursuant to which applications for compensation under § 330 of the Bankruptcy Code would be reviewed. Through the 1994 Act, Congress granted the U.S. Trustee standing to file objections to applications and request that the court award compensation of less than the requested amount.²³ Due in part to this expansion, the bureaucracy of the USTP has greatly expanded since its inception.

Another important difference is the funding that each program receives. Both systems collect fees from debtors. The BA Program deposits those fees with the U.S. Treasury Department and then operates with appropriated funds.²⁴ By way of contrast, the U.S. Trustee deposits its fees in an independent USTP fund.

An important benefit from the BA Program is the use of bankruptcy administrators as in-house mediators for

bankruptcy cases. In an attempt “to assist in addressing the concerns of limited judicial resources, increasing litigation costs and the expediency of dispute resolutions,” the U.S. Bankruptcy Administrator for the Northern District of the Southern Division of Alabama began offering limited informal mediation services in Birmingham in 1998.²⁵ Both the results of and response to this informal practice were overwhelmingly positive, and a mediation division has been established as a formal practice section within the U.S. bankruptcy administrator organization.²⁶ The benefits to the mediation division are similar to the benefits to mediation in other areas and include:

a savings of costs; typically a more rapid resolution than a trial; effectiveness in maintaining business relationships [that] are often crucial to a reorganization; help in minimizing hostility due to the nonadversarial nature of mediation; maintenance of the parties’ rights under the Bankruptcy Code and Rules; and the ability to provide a great degree of flexibility.²⁷

This program is offered at no cost to participants, and the authors of this article have successfully used the program.²⁸

Application of the U.S. Trustee Fee Guidelines to the BA Program

The question of whether the fee guidelines are applicable to the bankruptcy administrator is not a difficult one. Given the structural differences and separate governance outlined above, bankruptcy administrators are not directly subject to the guidelines as promulgated by the EOUST. However, the more difficult question is whether these guidelines might still have an impact on the BA Program.

The Ninth Circuit in *St. Angelo v. Victoria Farms Inc.* considered, as a matter of first impression, the constitutionality of requiring debtors to pay quarterly administrative fees.²⁹ In that case, the debtor, Victoria Farms Inc., filed a chapter 11 petition and sought to avoid paying this fee. The debtor argued that because the USTP did not operate in each federal district, the entire scheme was in violation of the Uniformity Clause of the U.S. Constitution.³⁰ The Ninth Circuit agreed that the existence of the two programs violated the Uniformity Clause, and remedied this by invalidating § 317 of the Judicial Improvements Act of 1990, the provision under which Congress extended the deadline to Oct. 1, 2002, for Alabama and North Carolina to implement the USTP.³¹ The problem, the court found, is not that bankruptcy laws will be entirely uniform in practice but that federal law, rather than state law, was causing creditors to be treated differently in Alabama and North Carolina.³² Despite its bold invalidation, the practical impact of the *St. Angelo* decision has been minimal, at best.

The confusing part of the *St. Angelo* decision is why they took up the issue at all. The court speaks harshly of the GAO report, which is perhaps the only large-scale study examining the differences between the two organizations.

25 J. Thomas Corbett, “Mediation, Bankruptcy and the Bankruptcy Administrator,” 65 *Ala. Law.* 410, 413 (2004).
26 *Id.*
27 *Id.*
28 *Id.* at 414.
29 38 F.3d 1525, 1528 (1994).
30 *Id.* at 1529, 1533.
31 *Id.* at 1529.
32 *Id.* at 1531. Courts have routinely upheld inconsistent state exemption laws, which are anything but uniform.

13 Peter C. Alexander, “A Proposal to Abolish the Office of United States Trustee,” 30 *U. Mich. J. L. Reform* 1, 9 (1996).

14 *Id.* at 10.

15 *Id.*

16 *Id.*

17 *Id.* at 9.

18 The U.S. Department of Justice, www.justice.gov/ust/uo/ust_org/index.htm (last visited Sept. 23, 2014) (hereinafter, USTP website).

19 Daniel A. Austin, “Bankruptcy and the Myth of ‘Uniform Laws.’” 42 *Seton Hall L. Rev.* 1081, 1132 (2012).

20 Rafael I. Pardo and Kathryn A. Watts, “The Structural Exceptionalism of Bankruptcy Administration,” 60 *UCLA L. Rev.* 384, 396 (2012).

21 See USTP website, *supra* n.18.

22 See 28 U.S.C. §§ 581-589a.

23 See Lauter, *supra* n.10, at 26.

24 See Alexander, *supra* n.13, at 11.

The report recommended that the USTP be promulgated nationwide, in large part because of the self-funding provisions of the USTP. The GAO report is more than 20 years old, and, particularly in light of *St. Angelo*, its findings might have been worth additional review even at the time that it was promulgated.³³

The possibility remains that if the fee guidelines do not apply in any fashion to bankruptcy administrators, a debtor might then raise a *St. Angelo* challenge. However, as one critic points out, the issue of whether the BA Program (or the USTP) is unconstitutional must wait until “a debtor in a BA jurisdiction complains that it is paying too little into the bankruptcy system — an unlikely complaint.”³⁴ Another possibility is that if the fees are significant enough, in the case of the fee guidelines that are applicable to large chapter 11 cases, there may be an incentive for debtors to file in Alabama or North Carolina rather than in U.S. Trustee jurisdictions. In practice, the likelihood of the fees having a significant impact on the filing of these cases is quite small. Further, in the bankruptcy administrator jurisdictions, the incidence of these large cases is also small compared to busier chapter 11 jurisdictions.

Furthermore, it cannot be overstated that there are a great deal of similarities and consistent communication between the two programs. When evaluating fees for debtors in large chapter 11 cases, bankruptcy administrators will likely look to the U.S. Trustee Guidelines for guidance. Looking at the structural differences in the two programs, the BA Program, as an arm of the judiciary, has the benefit of flexibility and responsiveness to local concerns. As one author stated:

The philosophy of decentralized authority that pervades the judiciary allows the Bankruptcy Administrator to consider the unique conditions that exist in each BA district without worrying about predetermined federal guidelines. Bankruptcy Administrators are also able to maintain a more cooperative relationship with bankruptcy judges within their district. Cooperation results in a more efficient resolution of bankruptcy petitions in many cases, with both creditors and debtors emerging [as] winners.³⁵

As a result, although the fee guidelines — and other U.S. Trustee guidelines promulgated by the EOUST — do not directly apply to bankruptcy administrators, they will likely be part of the totality of the circumstances considered by bankruptcy administrators. **abi**

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³³ *Id.* at 1529. The *St. Angelo* court found that the GAO report provides contradictory evidence regarding congressional intent. Also, the report only examined four USTP districts and four BA Program districts and found that the overall variation between the districts was greater than the variation between the two programs. GAO Report, *supra* n.12, at 6.

³⁴ See Alexander, *supra* n.13, at 21.

³⁵ *Id.* at 10.