No. 02-___

IN THE

Supreme Court of the United States

John M. Lamie,

Petitioner,

v.

United States Trustee.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 11 U.S.C. § 330(a)(1) authorize a court to award fees to a debtor's attorney?

PARTIES TO THE PROCEEDINGS BELOW

In the court of appeals, this matter was captioned *In re Equipment Services (United States Trustee* v. *Equipment Services)*. Equipment Services is a debtor represented by John M. Lamie. Because the issue in this Court is Lamie's right to attorney's fees, and because the United States Trustee objected to the fee award in the proceedings below, they are denominated the petitioner and respondent in this Court. Equipment Services remains a nominal party.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

PETITION FOR A WRIT OF CERTIORARI

Petitioner John Michael Lamie respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinion of the Fourth Circuit (Pet. App. 1a-14a) is published at 290 F.3d 739. The opinions of the district court (Pet. App. 15a-27a) and bankruptcy court (*id.* 28a-44a) are unpublished. The court of appeals issued its opinion on May 31, 2002, and denied rehearing *en banc* on August 5, 2002. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

11 U.S.C. 330(a) provides:

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103--

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title [11 USCS §§ 101 et seq.];

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title [11 USCS §§ 101 et seq.].

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for--

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

STATEMENT

For more than a century, Congress has authorized the use of funds from the bankruptcy estate to pay the debtor's attorney. The Fourth Circuit in this case nonetheless held that such compensation is forbidden under Section 330(a) of the Bankruptcy Code. In reaching that conclusion, the court of appeals expressed its regret that its decision "widens the split on this issue with three other circuits." Pet. App. 2a. The question presented has great significance for the more than *one million* Chapter 7 bankruptcy filings in this country each year, as well as for the administration of the bankruptcy laws generally.

1. A business or individual who files for bankruptcy must, of course, pay its ongoing expenses during the course of the bankruptcy proceedings. Yet the bankrupt lacks funds to pay those expenses because it must "surrender[] for distribution the property which [it] owns *at the time of bankruptcy*." *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934) (emphasis in original). To solve this problem, Congress enacted a statutory scheme enabling debtors to pay their administrative costs during the course of the bankruptcy proceedings. See generally 11 U.S.C. 503.

Among these administrative costs are legal fees for representing the debtor during bankruptcy. The Bankruptcy Code sets out an orderly scheme for the payment of debtors' attorneys. First, it permits a debtor to pay a retainer to an attorney in advance of the work done. 11 U.S.C. 329. Second, it authorizes the award of interim compensation to a debtor's attorney during the course of the bankruptcy. *Id*. § 331. Third, it provides for full payment to various persons at the conclusion of the proceedings. *Id*. § 330. Fourth, it deems such payment to be a legitimate administrative expense with priority over other claims to the estate. *Id*. § 503(b).

This case involves the final payment of legal fees under 11 U.S.C. 330(a), which Congress enacted as part of the comprehensive Bankruptcy Code in 1978. The purpose of

Section 330 was to update and strengthen existing provisions for compensation that had been a part of U.S. bankruptcy law since 1898. See Collier on Bankruptcy ¶ 330.LH (15th ed. 2001). The compensation provisions of the predecessor Bankruptcy Act had been designed to minimize compensation to debtors' attorneys so as to keep the bankruptcy estate as large as possible. Section 330, by contrast, seeks to provide that "[a]ttorneys and other professionals serving in a bankruptcy case are * * * compensated at the same rate that would be used to compensate them for performing comparable services in nonbankruptcy cases." *Id.* ¶ 330.LH[4]. In the absence of a statute embodying this principle, "professionals capable of earning more substantial compensation in other fields might leave the bankruptcy arena." *Id.*

As currently enacted, Section 330 states: "[T]he court may award to a trustee, an examiner, [*sic*] a professional person employed [by the trustee] * * * reasonable compensation for * * * services rendered by the trustee, examiner, professional person, or attorney." 11 U.S.C. 330(a)(1)(A). Prior to 1994, the list of persons to whom "the court may award" compensation under this provision concluded with "or the debtor's attorney."[1] The question presented by this case is whether Congress's omission of that phrase in the 1994 recodification of Section 330 was

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[1] Prior to 1994, Section 330(a) provided:

> After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, *or to the debtor's attorney*—
>
> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney * * *.

(emphasis added).

purposeful and intended to deprive attorneys of compensation, or instead was an error in drafting.

2. Equipment Services hired petitioner John M. Lamie, an attorney, to represent the company in its bankruptcy proceedings. The company paid Lamie $1,000 for preparing the petition for Chapter 11 reorganization. It furthermore paid Lamie an additional $5,000 retainer for subsequent work, which he deposited into a client escrow account. That account served as a fund from which Lamie ultimately would seek to draw compensation for his work in the bankruptcy proceedings.

Lamie filed the petition for relief in December 1998, and the bankruptcy court appointed him counsel for the debtor. He then represented Equipment Services in its Chapter 11 proceeding while earning $1,325 in fees that he would later request to be paid from the escrow account.

In March 1999, respondent U.S. Trustee successfully moved to convert the case into a Chapter 7 liquidation proceeding. Lamie earned another $1,000 during the Chapter 7 phase.

3. In June 2000, Lamie filed with the bankruptcy court a request under Section 330(a) to approve the $2,325 in fees he had earned. The U.S. Trustee did not oppose an award of $1,325 for Lamie's work at the Chapter 11 stage. During that time, Equipment Services (as the debtor in possession) had the rights of a "trustee." See 11 U.S.C. 1107(a). The U.S. Trustee took the view that Section 330(a)(1) authorizes the payment of fees in that circumstance because the debtor's attorney is acting as "a professional person employed [by the trustee]."

However, the U.S. Trustee opposed the award of $1,000 for Lamie's work during the Chapter 7 stage. At that point, a trustee had been appointed, so the company was no longer the debtor in possession and it therefore lacked the rights of a "trustee." The U.S. Trustee contended that Section 330(a)(1) precludes the award of fees to a debtor's attorney because the

statute does not authorize the bankruptcy court to award compensation to a "debtor's attorney."

The bankruptcy court agreed with the U.S. Trustee's interpretation of Section 330(a)(1). See Pet. App. 32a-38a. But the court nonetheless awarded Lamie the full $2,325, including $1,000 for work during the Chapter 7 proceedings. It reasoned that the portion of the $5,000 retainer used to pay Lamie for his work should be treated as funds outside the bankruptcy estate. *Id.* 38a-43a. The U.S. Trustee appealed to the district court, which affirmed. *Id.* 15a-27a.

Although the bankruptcy court and district court concluded that Section 330(a)(1) precludes compensating debtors' attorneys from the bankruptcy estate, both noted the considerable problems associated with that interpretation. The bankruptcy court acknowledged that its interpretation renders Section 330(a)(1) "arguably internally inconsistent with § 330(a)(1)(A)," and that "the absence of legislative history and a brief review of the syntax of the statute might indicate that" the absence of "attorneys" in the initial list "was inadvertent." Pet. App. 35a-36a. The district court similarly found it "[e]asy to believe that" the omission was "inadvertent[]"; and it went on to explain: "There are doubtless strong policy reasons for *not* omitting a chapter 7 debtor's attorney from eligibility for fees paid from the debtor's estate." *Id.* 23a-24a (emphasis in original).

4. On the U.S. Trustee's appeal, a divided panel of the Fourth Circuit agreed that Section 330(a)(1) precludes compensating debtors' attorneys in cases in which a trustee has been appointed (including *all* Chapter 7 cases), but it concluded that the retainer paid to Lamie was part of the bankruptcy estate. It therefore disallowed payment to Lamie of the $1,000 he earned during the Chapter 7 proceedings.

The Fourth Circuit held that "the plain language of the 1994 version of § 330(a)" is "unambiguous and reasonable in application": "The 1994 version clearly omits the prior authorization to compensate the debtor's attorney from a

Chapter 7 estate." Pet. App. 8a-9a. The court thus agreed with rulings of the Fifth and Eleventh Circuits, but acknowledged that its decision conflicted squarely with rulings of the Third and Ninth Circuits. *Id.* 2a, 6a-7a.

The panel majority rejected petitioner's showing that the omission of "the debtor's attorney" from the list of persons to whom compensation may be paid was an inadvertent mistake of the drafting process, as evidenced by the fact that the revised statute omitted not merely "the debtor's attorney" but also the conjunction "or," leaving Section 330 grammatically incorrect. Pet. App. 8a-9a. The panel majority also rejected petitioner's arguments that reading the statute as respondent proposed would undo Congress's orderly scheme for compensating debtors' attorneys, rendering several of its provisions superfluous and nonsensical. For example, although Section 330(a) does not explicitly include a debtor's attorney among the persons who may be compensated, it *does* expressly provide for "reasonable compensation for * * * services rendered by *the* * * * *attorney*." The panel majority reasoned that "the reference to 'attorney' in [the latter half of] § 330(a)(1)(A) does not make the statute ambiguous" because "the antecedent to 'attorney' as used in § 330(a)(1)(A)" could be the words "a professional person employed [by the trustee]" in the first part of the sentence. Pet. App. 8a.

The Fourth Circuit separately reversed the lower courts' determination that the retainer received by Lamie was not part of the bankruptcy estate. The court of appeals reasoned that the retainer was placed in escrow only to protect Lamie against nonpayment. Pet. App. 9a-12a. Lamie had agreed to draw money from the retainer in proportion to the amount of work he did, and to return any unused money to Equipment Services at the end of the proceedings. The entire retainer,

therefore, belonged to the company according to principles of Virginia contract law. *Id.*[2]

Judge Michael agreed with the panel majority that the retainer was part of the bankruptcy estate but dissented from its interpretation of Section 330(a)(1). See Pet. App. 13a-14a. He would have adopted the conclusion of the Third and Ninth Circuits that "when Congress amended § 330(a) in 1994, it inadvertently deleted debtors' attorneys from the existing statutory list of those who could be paid from the bankruptcy estate for services rendered in bankruptcy proceedings." *Id.* 13a. Because the bankruptcy court had not applied the guidelines for awarding fees set out in Section 330, Judge Michael would have "vacate[d] the award of attorney's fees to Lamie for his post-Chapter 7 services and * * * remand[ed] for the bankruptcy court to evaluate Lamie's fee application under the proper standard." *Id.* 14a.

5. The Fourth Circuit denied rehearing and rehearing *en banc*, and this petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The question presented is the subject of an irreconcilable three-to-two circuit conflict openly acknowledged by the courts of appeals. The Third and Ninth Circuits have held that Section 330 does not deprive debtors' attorneys of their right to compensation, *In re Top Grade Sausage, Inc.*, 227 F.3d 123, 127-30 (CA3 2000); *In re Century Cleaning Servs., Inc.*, 195 F.3d 1053, 1057-61 (CA9 1999), a conclusion the Ninth Circuit recently reaffirmed, *In re Smith*, 305 F.3d 1078, 2002 U.S. App. LEXIS 20091, at *13 (CA9) ("This panel, of course, may not overrule a prior panel of this court, and if we could, Smith offers no persuasive reason why we should."). The Second Circuit has also stated its agreement in dictum. *In re Ames Dep't Stores*,

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[2] Petitioner does not challenge that determination in this Court.

76 F.3d 66, 71-72 (CA2 1996). The Fourth Circuit, by contrast, joined the Fifth and Eleventh Circuits in reaching the opposite conclusion. *In re Am. Steel Prod., Inc.*, 197 F.3d 1354, 1355-56 (CA11 1999); *In re Pro-Snax Distrib., Inc.*, 157 F.3d 414, 424-26 (CA5 1998).

Only this Court can resolve the conflict. The circuits have openly acknowledged the split but refused to follow other courts with which they disagree. After the Fifth Circuit ruled against the debtor's attorney in *Pro-Snax*, the Ninth Circuit avowedly rejected that conclusion, labeling the decision of the Fifth Circuit an "error." *Century Cleaning Servs.*, 195 F.3d at 1058. The Eleventh Circuit next addressed the question and, acknowledging that "[b]oth the Fifth and the Ninth Circuits have considered this identical issue and have reached contrary results," it sided with the Fifth Circuit. *Am. Steel Prod., Inc.*, 197 F.3d at 1356. The Third Circuit then entered the fray, noted the split, *Top Grade Sausage, Inc.*, 227 F.3d at 128, and cast its lot with the Ninth Circuit, *id.* at 130. Finally, the Fourth Circuit agreed with the Fifth and Eleventh Circuits, despite taking note of the growing problem: "Regretfully, this decision also widens the split on this issue with three other circuits." Pet. App. 2a (rejecting holdings of the Third and Eleventh Circuits and dictum of the Second).

The conflict is furthermore intractable because petitioner urged the Fourth Circuit to reconsider its decision *en banc*, but the court of appeals refused. See Pet. App. 45a.

The circuit split brings the overall conflict in the federal courts to an extraordinary *twelve-to-ten*, because there is a nine-to-eight split among other federal courts. The decision below is consistent with the holdings of courts located within the jurisdiction of three circuits – the Second, Eighth, and Tenth – which have not decided the issue. *In re Ramey*, 266 B.R. 857 (Bankr. S.D. Iowa 2001); *In re Redding*, 242 B.R. 468 (Bankr. W.D. Mo. 1999); *In re Thomas*, 195 B.R. 18 (Bankr. W.D.N.Y. 1996); *In re Friedland*, 182 B.R. 576, 578-

79 (Bankr. D. Colo. 1995); *In re Kinnemore*, 181 B.R. 520, 521 (Bankr. D. Idaho 1995); see also *In re Skinner*, 240 B.R. 225 (Bankr. W.D. Va. 1999); *In re Johnson*, 234 B.R. 671 (Bankr. S.D. Tex. 1999); *In re Keller Fin. Servs., Inc.*, 243 B.R. 806, 817 (Bankr. M.D. Fla. 1999); *In re Fassinger*, 191 B.R. 864, 865 (Bankr. D. Or. 1996). But the decision below conflicts with decisions of courts located within the jurisdiction of four circuits – the First, Sixth, Eighth, and Tenth – that have not decided the issue. *In re Eggleston Works Loudspeaker Co.*, 253 B.R. 519, 524 (BAP CA6 2000); *In re Hodes*, 235 B.R. 93, 98 (Bankr. D. Kan. 1999); *In re Bottone*, 226 B.R. 290, 297 (Bankr. D. Mass. 1998); *In re Miller*, 211 B.R. 399, 400-02 (Bankr. D. Kan. 1997); *In re Melp Ltd.*, 179 B.R. 636, 639 (E.D. Mo. 1995); see also *In re Taylor*, 250 B.R. 869, 870-71 (E.D. Va. 2000); *In re Brierwood Manor, Inc.*, 239 B.R. 709 (Bankr. D.N.J. 1999); *In re Stroudsburg Dyeing & Finishing Co.*, 209 B.R. 648, 650 (Bankr. M.D. Pa. 1997).

3. Certiorari is also warranted because the Fourth Circuit's construction of Section 330(a) is wrong. Congress did not intend to enact such an abrupt departure from longstanding bankruptcy practice that would bring incoherence and inequity to the Bankruptcy Code. The leading treatise on bankruptcy law thus urges courts to acknowledge that the omission in Section 330(a)(1) is a drafting error and to treat it as such:

> [S]ection 330(a)(1) of the Code deletes the reference to "the debtor's attorney" as a party who may be allowed compensation. Clearly this result was unintended * * *. [It] would represent a fundamental change in the law. * * * Because the change is inconsistent with current case law and the legislative history of section 330 does not support such a drastic change, courts should construe the deletion as unintended.

Collier, *supra*, ¶ 330.LH[5].

The Fourth Circuit rested its contrary decision on the fact that the 1994 revision to Section 330(a) omits "the debtor's attorney" from the list of persons to whom the court may award "reasonable compensation." The court of appeals erred, however, in rejecting the Third and Ninth Circuits' view that the omission was an inadvertent scrivener's error.

a. The original proposal to amend Section 330(a) in the Bankruptcy Reform Act of 1994 retained the words "or the debtor's attorney." It simply added a provision permitting the U.S. Trustee to object to the size of any fee award under the statute – and, importantly, that new provision was inserted *immediately after* the words "or the debtor's attorney."[3] What happened next is crucial. Senator Metzenbaum introduced a further amendment that deleted the provision for review by the U.S. Trustee immediately following the phrase "or the debtor's attorney" and transferred the review provision to a later subsection of Section 330. See 140 Cong. Rec. S4741 (daily ed. Apr. 21, 1994) (statement of Senator Heflin for Senator Metzenbaum).

To implement this "amendment to the amendment," it was necessary to delete the last twenty-nine words of Section

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[3] The proposal thus stated (with the proposed amendment italicized):

> (1) After notice to the parties in interest and the United States trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103, or the debtor's attorney, *after considering comments and objections submitted by the United States Trustee in conformance with guidelines adopted by the Executive Office for United States Trustees pursuant to section 586(a)(3)(A) of title 28 —*
>
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney * * *.

S. 540, 103d Cong. § 309 (1994) (emphasis added).

330(a)(1) – from "after considering" through "pursuant to section 586(a)(3)(A) of title 28." However, when the amended Section 330 appeared, the last *thirty-three* words had been deleted: Instead of starting at the end of Section 330(a)(1) and crossing out twenty-nine words, the drafter inadvertently crossed out thirty-three words, thereby deleting the phrase "or the debtor's attorney." These four extra words have nothing to do with the other deleted text or with the purpose for which the other twenty-nine words were deleted. See *Century Cleaning Servs.*, 195 F.3d at 1059 ("Coincidentally, the language providing for objections, which Senator Metzenbaum's amendment removed from § 330(a)(1) in the reorganization, was contained in a clause that happened to fall immediately after the term 'debtor's attorney,' although the two subject matters were entirely unrelated.").

b. That Congress did not intend to eliminate the settled right of debtors' attorneys to be compensated for their services is furthermore clear from the fact that the Fourth Circuit's interpretation of Section 330(a) wreaks havoc on the orderly scheme for compensating debtors' attorneys in Sections 329, 330, and 331.

First, the decision below renders meaningless Section 330(a)'s provision for compensation for "services rendered by the * * * attorney." Even the Fourth Circuit felt compelled to concede that, on its construction, "the reference in § 330(a)(1)(A) to 'attorney' may be superfluous." Pet. App. 9a. Section 330(a) is structured as a series of parallel references: "a trustee" may receive compensation for services by "the trustee"; "an examiner" may receive compensation for services by "the * * * examiner"; and "a professional person employed [by the trustee]" may be compensated for services by "the * * * professional person." Section 330(a) also permits compensation for services by "the * * * attorney," but the Fourth Circuit's decision that "the * * * attorney" may not receive compensation deprives those words of any meaning. See *Top Grade Sausage*, 227 F.3d at 129 ("The use of 'the' in

§ 330(a)(1)(A) * * * refers to the universe of officers listed in § 330(a)(1), thereby leaving the word 'attorney' in § 330(a)(1)(A) without prior reference.").

The Fourth Circuit nonetheless contended that Section 330(a)'s authorization for payment to a "professional person employed [by the trustee]" "could be the antecedent to 'attorney' as used in § 330(a)(1)(A)." Pet. App. 8a. But that reading contravenes the principle that this "Court will avoid a reading which renders some words altogether redundant." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995). Section 330 already provides that such a "professional person" will be compensated for the services of "the * * * professional person," such that the Fourth Circuit's reading renders the phrase "the * * * attorney" wholly duplicative.

Second, the Fourth's Circuit's decision renders meaningless Section 329 of the Bankruptcy Code, which "permits the debtor's attorney to receive a reasonable retainer for services rendered in contemplation of, or to be rendered in connection with, a case under the Bankruptcy Code." Collier, *supra*, ¶ 330.LH[4]. The statute requires that attorneys' retainers be detailed in a submission to the bankruptcy court, which "may cancel any such agreement, or order the return of such payment, to the extent excessive." 11 U.S.C. 329. "Section 329 * * * would be superfluous if the deletion in section 330(a) is construed as excepting debtors' counsel from compensation under section 330." Collier, *supra*, ¶ 330.LH[5].

Third, the Fourth Circuit's decision brings Section 330(a)(1) into conflict with Sections 331 and 330(a)(5). Section 331 permits not only a "professional person employed [by a trustee]" but also "a debtor's attorney" to receive interim compensation while bankruptcy proceedings are ongoing. 11 U.S.C. 331. "Obviously, if a debtor's attorney is eligible to apply for interim payments, she must be eligible for payments in the first place." *In re Taylor*, 250 B.R. at 871. And, indeed, Section 330(a)(5) specifically

contemplates that the interim compensation to a debtor's attorney will be considered in measuring the fees to be paid under Section 330(a)(1): "The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331." 11 U.S.C. 330(a)(5).

Finally, the Fourth Circuit's decision renders nonsensical Section 330(a)(4)(B), which governs the compensation of debtors' attorneys in cases under Chapters 12 and 13. The pivotal provision of Section 330 is subsection (a)(1), which lists the types of persons expressly authorized to be compensated for their work on the bankruptcy proceedings. Section 330(a)(4), in turn, designates the circumstances in which courts may award compensation. Among other things, it prohibits compensation for services that are not "reasonably likely to benefit the debtor's estate." 11 U.S.C. 330(a)(4)(A)(ii)(I). Subsection (a)(4) includes an exception to that rule, however: in personal bankruptcies under Chapters 12 and 13, "the court may allow reasonable compensation to *the debtor's attorney* for representing the interests of the *debtor*." *Id.* § 330(a)(4)(B) (emphasis added).

The obvious premise of this exception is that debtors' attorneys may receive compensation under subsection (a)(1). If that were not so, it would be inconsistent to include a special provision permitting their compensation in Chapter 12 and 13 bankruptcies, for the only classes of persons eligible for compensation in bankruptcy proceedings would be trustees, examiners, and professionals employed by trustees.

4. The Fourth Circuit's decision is furthermore untenable because it is implausible to believe that Congress intended to enact such a dramatic departure from settled practice – eliminating even the less generous compensation that was available under the Bankruptcy Act by 1898 – particularly a departure with such negative consequences for the bankruptcy system. By authorizing fee awards, Congress in Section 330 aimed to ensure "that attorneys [would] be reasonably

compensated and that future attorneys [would] not be deterred from taking bankruptcy cases due to a failure to pay adequate compensation. * * * The important thing is to provide compensation in bankruptcy equivalent to that outside it." *In re UNR Indus., Inc.*, 986 F.2d 207, 210 (CA7 1993); see also *In re Pontiac Hotel Assocs.*, 92 B.R. 715, 716 (E.D. Mich. 1988) ("Bankruptcy judges may award compensation to a debtor's attorney pursuant to 11 U.S.C. § 330. This statute was designed to ensure that bankruptcy counsel would command fees comparable to non-bankruptcy counsel, and thus that competent professionals would be attracted to the bankruptcy field." (citing H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 329-30 (1977))). For Congress to reverse that purpose 180 degrees, without any discussion of the change, would be bizarre; and an interpretation to that effect is disfavored by this Court. See *Dewsnup* v. *Timm*, 502 U.S. 410, 419-20 (1992) ("When Congress amends the bankruptcy laws, it does not write 'on a clean slate.' * * * This Court has been reluctant to accept arguments that would interpret the Code * * * to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.").

Such a reversal of the purpose for Section 330 would surely have garnered Congress's attention because of its extremely harmful consequences. If lawyers cannot be paid for representing debtors in bankruptcy proceedings, then the debtors will go unrepresented, adversely affecting the orderly administration of the bankruptcy laws:

> There are several postpetition services commonly performed by the debtor's attorney in chapter 7 proceedings that are necessary to the administration of the estate. If debtors' attorneys' compensation is not permitted, this may have the effect of denial of counsel, or at the very least, lead to debtors representing themselves. This possibility may lead to increased errors and time spent to correct those

> errors, thereby further extending the time necessary to adjudicate all parts of the case.

Joseph G. Minias, *Text and Context: Discerning the Basis for Debtor's Attorneys' Fees Under Chapter 7 and 11 of the Bankruptcy Code*, 18 BANK. DEV. J. 201, 219-20 (2001).

Even a judge who felt compelled by the text of Section 330(a)(1) to deny attorneys' fees lamented the deeply unfair results of that interpretation: "Categorical exclusion of fees can only result in denial of access to justice, with debtors unrepresented or under-represented. The increase in *pro se* cases, and in cases which become *pro se* after the petition is filed, does not aid the administration of our bankruptcy system." *Century Cleaning Servs.*, 195 F.3d at 1064 (Thomas, J., dissenting); *see also id.* at 1060 ("Policy considerations * * * counsel in favor of allowing attorneys to receive reimbursement under § 330. There are several post-petition services commonly performed by the debtor's attorney in Chapter 7 proceedings that are necessary to the administration of the estate."). Depriving debtors of representation deals a devastating blow to companies and individuals who have gone bankrupt.

Not only are the consequences negative, but also they are sweeping. The question presented in this case is vitally important to the administration of the bankruptcy laws. It potentially affects every Chapter 7 bankruptcy and every Chapter 11 bankruptcy in which a trustee has been appointed. In 2001, there were 1,054,975 Chapter 7 filings alone, more than twice the number for all other forms of bankruptcy combined. *2001 Year-End Totals for Filings Reach New High*, THE BANKRUPTCY STRATEGIST, Apr. 2002, at 1.

Moreover, the question presented implicates many Chapter 11 bankruptcies in which no trustee has been appointed because, as in this case, such proceedings are often converted into Chapter 7 cases. If attorneys know that they cannot be compensated for work done under Chapter 7, then they will be loath to take on a Chapter 11 case. The

construction of Section 330(a)(1) adopted below thus increases the risk that the attorney will be left "working for free," in part because "state law ethical obligations may require an attorney to continue to perform as counsel, regardless of the potential prohibition of payment." Bruce H. White & William L. Medford, *Compensation for Debtor's Counsel After a Chapter 11 Trustee Is Appointed: When Should Debtor's Counsel Stop Working*, 1999 ABI JNL. LEXIS 79, at *7-*8 (June 1999). Fearing that the canons of ethics would prevent them from abandoning their client once the case was converted to Chapter 7, attorneys will stay away from the outset. *Cf.* Model Rules of Professional Conduct Rule 1.16(b) (permitting attorneys to withdraw from representing a client only "if withdrawal can be accomplished without material adverse effect on the interests of the client" or if other unusual circumstances exist).

The importance of the issue is highlighted by the fact that it has been decided squarely by five courts of appeals and *seventeen* other federal courts since 1995. Without guidance from this Court, a rapidly deepening divide is virtually assured. Bankruptcies occur in every jurisdiction, debtors need representation in those proceedings, and no consensus on this issue is in sight.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 4, 2002

In re EQUIPMENT SERVICES, INCORPORATED, Debtor.
United States Trustee, Plaintiff-Appellant,
v.
EQUIPMENT SERVICES, INCORPORATED,
Defendant-Appellee.

Nos. 01-1779, 01-1780

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Argued April 2, 2002.
Decided May 31, 2002.

Appeals from the United States District Court
For the Western District of Virginia, at Abingdon.
James P. Jones, District Judge.
(CA-00-143, BK-98-4851)

COUNSEL

ARGUED: P. Matthew Sutko, Office of the General Counsel, Executive Office for United States Trustees, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant, John Michael Lamie, BROWNING, LAMIE & GIFFORD P.C., Abingdon, Virginia, for Appellee. ON BRIEF: Joseph A. Guzinski, Acting General Counsel, Office of the General Counsel, Executive Office for United States Trustees, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.: Margaret K. Garber, Trial Attorney, Office of the United States Trustee, UNITED STATES DEPARTMENT OF JUSTICE, Roanoke, Virginia: David R. Duncan, Regional Assistant United States Trustee, Office of the United States Trustee, UNITED STATES DEPARTMENT OF JUSTICE, Columbia, South Carolina, for Appellant.

Before NIEMEYER, WILLIAMS, and MICHAEL, Circuit Judges.

OPINION

NIEMEYER, Circuit Judge:

John M. Lamie, an attorney retained to represent Equipment Services, Inc. in bankruptcy, applied to the bankruptcy court for the payment of his legal fees incurred (1) pre-petition, (2) during the Chapter 11 proceeding, and (3) after conversion to a Chapter 7 proceeding. Applying the current version of the Bankruptcy Code (as amended in 1994), 11 U.S.C. § 330(a) (2000), we affirm the district court's approval of fees incurred before the conversion to Chapter 7 and reverse its approval for fees incurred after. In reaching this conclusion, we reject Lamie's argument that § 330(a) included a "scrivener's error" when it was amended in 1994 to delete the "debtor's attorney" from the list of persons eligible to be paid from bankruptcy estate, and we join two circuits that have reached the same conclusion. Regretfully, this decision also widens the split on this issue with three other circuits.

I

Equipment Services, Inc. retained John Lamie to prepare for the company a voluntary petition for relief under Chapter 11 of the Bankruptcy Code and to represent the company in the bankruptcy proceedings. Equipment Services paid Lamie a $6,000 "retainer," of which $1,000 was used to pay the fees and costs of filing the Chapter 11 petition. Consistent with the arrangement reached with Equipment Services, Lamie deposited the remaining $5,000 in his client escrow account, to be drawn upon as Lamie earned fees. This retainer arrangement was not documented, but Lamie explained it to the bankruptcy court as follows:

> The Court: What was your understanding, as far as the retainer was concerned?
>
> Mr. Lamie: Well, the retainer was to pay me in advance for fees that I would earn during the case, Your Honor. And it was to assure some payment of those fees. That is the reason. That is the way we explained to the client.
>
> The Court: Was it your understanding that any unused fees at the end of the case would be, in effect, refunded back to the Debtor?
>
> Mr. Lamie: Oh, it would be the Debtor's property at the end of the case, yes, Your Honor.
>
> The Court: So, the effect it [sic] to protect you . . . you know, your ability to get paid, is that what you were doing?
>
> Mr. Lamie: Yes. Yes, the money was put into trust and is billed against it. That is the way we have handled it.

Lamie filed the Chapter 11 petition on December 24, 1998, and, pursuant to Federal Rule of Bankruptcy Procedure 2016(b), he informed the bankruptcy court that he had received the remaining $5,000 from Equipment Services. He also obtained the bankruptcy court's permission to represent Equipment Services as the debtor-in-possession. Thereafter, during the Chapter 11 proceeding and before it was converted into a Chapter 7 proceeding, Lamie earned $1,325 in fees and incurred $3.85 in costs.

On March 17, 1999, on the motion of the United States Trustee, Equipment Services' Chapter 11 proceeding was converted into a Chapter 7 proceeding, and Robert E. Wick, Jr., was appointed to administer the bankruptcy estate. Lamie earned another $1,000 representing Equipment Services during the Chapter 7 proceeding. On June 5, 2000, Lamie filed an application with the bankruptcy court, seeking

approval of attorneys fees in the amount of $2,325 ($1,325 earned during the Chapter 11 proceeding and $1,000 earned during the Chapter 7 proceeding) and $3.85 in costs incurred during the Chapter 11 proceeding. The United States Trustee objected to the award of fees to the extent that they included compensation for services rendered after the case was converted to a Chapter 7 proceeding. The Trustee argued that 11 U.S.C. § 330(a) "makes no provision for counsel of the debtor to be compensated by the estate" in a Chapter 7 proceeding. Moreover, the Trustee asserted that the application for fees did not specify what benefit the estate, as distinct from Equipment Services, received as the result of Lamie's work.

The bankruptcy court agreed with the Trustee that, under 11 U.S.C. § 330(a), a debtor's attorney is not authorized to be paid funds from the bankruptcy estate for services rendered after the case is converted to a Chapter 7 proceeding. The court nonetheless awarded Lamie all of his requested fees, in the amount of $2,325, plus $3.85 in costs, concluding that the prepetition retainer held by Lamie was property of the bankruptcy estate only to the extent that it exceeded the *total fees* allowed to the debtor's counsel for *all services* rendered in the case, including services rendered after the Chapter 7 conversion.

The United States Trustee appealed this ruling to the district court, and Lamie cross-appealed the bankruptcy court's ruling that 11 U.S.C. § 330(a) prohibits a debtor's attorney from obtaining compensation from a Chapter 7 estate. The district court affirmed the bankruptcy court on both issues, and the parties filed these cross-appeals, raising two issues: (1) whether 11 U.S.C. § 330(a) (2000) allows a Chapter 7 debtor's attorney to be compensated from the estate; and (2) whether Lamie was entitled to deduct his post-Chapter 7 fees from the retainer notwithstanding any lack of authorization from § 330(a) to pay the debtor's attorney from the bankruptcy estate.

II

We first resolve whether 11 U.S.C. § 330(a) (2000) allows a Chapter 7 debtor's attorney to be compensated from the bankruptcy estate, an issue on which the courts of appeals have split. Both the bankruptcy court and the district court concluded that the plain language of § 330(a) does not authorize a debtor's attorney to be compensated from the estate in a Chapter 7 proceeding. Lamie contends that these courts' conclusions fail to recognize that when the Bankruptcy Code was amended in 1994, Congress made a scrivener's error in omitting authorization to pay fees to the debtor's attorney from a Chapter 7 estate--an authorization that existed prior to the 1994 revisions.

The 1986 version of § 330(a) stated in relevant part:

> (a) After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, *or to the debtor's attorney*—
>
> > (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title.

11 U.S.C. § 330(a) (1988) (emphasis added). The Bankruptcy Reform Act of 1994 amended § 330(a) to read in relevant part as follows:

> (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an

> examiner, a professional person employed under section 327 or 1103
>
> > (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person.

11 U.S.C. § 330(a) (2000). Thus, § 330(a), as revised in 1994, omits the phrase "or the debtor's attorney" from the list of persons to whom a court may award "reasonable compensation" from the bankruptcy estate for services rendered in a Chapter 7 proceeding.

Lamie argues that the deletion of the reference to debtor's attorneys was inadvertent and that the omission renders the statute ambiguous, permitting courts to look to the legislative history in interpreting the statute. He maintains that the ambiguity arises from the fact that the 1994 version, while omitting "debtor's attorney" from its enumeration of persons whom bankruptcy courts can compensate from the estate, nonetheless retains a reference to attorneys in subpart (A). *See* 11 U.S.C. § 330(a)(1)(A) (2000) (allowing "reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney ..."). Lamie also argues that a grammatical error supports his conclusion that the 1994 version of § 330(a) is ambiguous. He notes that there is no conjunction "or" between "examiner" and "a professional person" in the list of persons authorized to receive fees in § 330(a), supporting the conclusion that the deletion of "or the debtor's attorney" was inadvertent. Based on this ambiguity, he maintains that the court should look to the legislative history and conclude that Congress expressed no intent to omit debtor's attorneys from § 330(a) when it enacted the Bankruptcy Reform Act of 1994. Lamie's argument is supported by decisions in three circuits. *See In re Top Grade Sausage, Inc*., 227 F.3d 123, 130 (3d Cir. 2000) (holding that Chapter 7 debtor's attorneys may be compensated from the estate because the current version of

§ 330 is ambiguous and "the legislative history does not manifest an intent by Congress to change the long-standing practice of compensating debtors' attorneys"); *In re Century Cleaning Servs., Inc.*, 195 F.3d 1053, 1056-61 (9th Cir. 1999) (finding § 330 to be "substantially ambiguous" and concluding that Chapter 7 debtor's attorney may be compensated from the estate based on legislative history and policy considerations); *see also In re Ames Dep't Stores, Inc*., 76 F.3d 66, 72 (2d Cir. 1996) (holding that the omission of debtor's attorney from § 330 was inadvertent and noting that "[w]here the benefits of services to the estate are the same, it makes no sense to treat performances of such benefits by debtors' attorneys differently than performances by other retained professionals").

On the other hand, the Trustee argues that the plain language of § 330, as it is now written, does not authorize compensation from the estate for the debtor's attorney in a Chapter 7 proceeding and that we should enforce the statute in its current form. As written, § 330(a)(1) plainly limits recovery of fees to "trustees," "examiners," and "professional persons employed under section 327 and 1103." While an attorney may be compensated from the estate as a professional person *employed by the Trustee under § 330(a)(1)(A)*, he is not directly payable as the *debtor's* attorney.

The Trustee also asserts that there are policy reasons supporting the 1994 change. He points out that in Chapter 7 proceedings, unlike proceedings under Chapters 11, 12, and 13, the debtors and creditors do not act like a team. Moreover, in a Chapter 7 proceeding, the Trustee is authorized to hire attorneys at estate expense as needed to help liquidate the estate, negating the need for the assistance of the debtor's attorney. Finally, the Trustee points out that in a Chapter 7 proceeding, a debtor's attorney cannot do the type of good work that could enlarge the estate in a Chapter 11 proceeding because a Chapter 7 proceeding is a zero-sum game. Inherent

in the Trustee's argument is the fact that, unlike a proceeding under Chapter 11, where the debtor-in-possession is the trustee of the estate, in a Chapter 7 proceeding the debtor and the Trustee are distinct. In sum, the Trustee argues that Congress deliberately, and for good reason, excluded the debtor's attorney from the list of parties that may be compensated from the debtor's estate in a Chapter 7 proceeding. The Trustee's argument is supported by decisions in two circuits. *See In re Am. Steel Products, Inc.*, 197 F.3d 1354, 1355-56 (11th Cir. 1999*)* (finding § 330 to be unambiguous and holding that a debtor's attorney cannot be compensated from the estate in a Chapter 7 proceeding); *In re Pro-Snax Distributors, Inc.*, 157 F.3d 414, 424-26 (5th Cir. 1998) (recognizing the likelihood that Congress inadvertently deleted debtor's attorneys from § 330, but nonetheless finding the language of the statute to be unambiguous in its exclusion of debtor's attorneys from those parties that may be compensated from the estate).

While we recognize that the circuits are split and that arguments may reasonably be made that Congress made an inadvertent error in amending § 330(a), we conclude that we should follow the plain language of the 1994 version of § 330(a), particularly because application of that plain language supports a reasonable interpretation of the Bankruptcy Code. The 1994 version clearly omits the prior authorization to compensate the debtor's attorney from a Chapter 7 estate. And the reference to "attorney" in § 330(a)(1)(A) does not make the statute ambiguous. "[A] professional person employed under section 327 or 1103," 11 U.S.C. § 330(a)(1) (2000), could be the antecedent to "attorney" as used in § 330(a)(1)(A), because the Trustee is authorized to hire an attorney as a professional person. Section 327(a) specifically states that "the trustee, with the court's approval, may employ one or more *attorneys*, accountants, appraisers, auctioneers, or other professional persons . . . to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. § 327(a)

(emphasis added). While the reference in § 330(a)(1)(A) to "attorney" may be superfluous, it does not render the statute ambiguous. In addition, the omission of the conjunction "or" in § 330(a)(1) after the word "examiner," is an oversight that is as consistent with the *deliberate* deletion of the words "debtor's attorney" as it is with the inadvertent deletion of those words from that section. Thus, this oversight does not render the language ambiguous.

We agree with the Fifth Circuit, that "[w]e must presume . . . that Congress intended what it said when it revised § 330 to delete any provision for the award of compensation to a debtor's attorney in . . . a Chapter 7 . . . case." *Am. Steel Products*, 197 F.3d at 1356. When a statute is unambiguous, canons of construction prevent us from considering outside sources, such as legislative history, to attempt to discern what Congress may or may not have intended to do. *Id.*; *Pro-Snax Distributors*, 157 F.3d at 425.

The current version of § 330(a) has been in force now for eight years and Congress has not elected to recognize that it made a scrivener's error when it amended the statute in 1994. If Congress did indeed make an error, the error should be corrected by Congress, not by us. Because the plain language of § 330(a) as it is now written is unambiguous and is reasonable in application, we are constrained to enforce the language as written. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). In doing so, we join the Fifth and the Eleventh Circuits that have done likewise.

III

Despite the district court's conclusion that § 330(a) does not authorize Lamie, as the debtor's attorney, to be compensated from the bankruptcy estate, the court concluded that the prepetition retainer was property of the estate only to the extent that it exceeded the total fees and services allowed to the debtor's counsel for all services rendered in the case,

including services rendered after its conversion to a Chapter 7 proceeding.

The Trustee appeals this ruling, contending that the retainer became the property of the bankruptcy estate at the time the original Chapter 11 petition was filed because it was a "security retainer" and thus remained the property of the debtor until it was earned by Lamie. The Trustee therefore argues that any unearned portion of the retainer became property of the estate when the initial petition was filed, and Lamie was not entitled to fees *from the estate* with respect to services rendered after the Chapter 7 conversion. Lamie, on the other hand, responds by arguing that all fees with respect to the bankruptcy proceeding were paid in advance by Equipment Services in the form of the retainer. Thus, he was entitled to bill all of his fees, including those incurred after the Chapter 7 conversion, against the retainer. He asserts that only the portion of the retainer remaining after payment of all attorneys fees and costs belongs to the estate, *i.e.*, $5,000 minus $2,328.85, or $2,671.15.

The parties do not dispute the general principle that, at the time the Chapter 11 proceeding was filed, the property of Equipment Services, "wherever located and by whomever held," became the bankruptcy estate. 11 U.S.C. § 541(a). And Equipment Services' property interests at the time it filed the petition are generally determined as a matter of state law; both parties recognize that "courts look to state law when determining a debtor's interest in property." *See In re Shearin*, 224 F.3d 346, 349 (4th Cir. 2000). In this case, the applicable Virginia law is simply the law of contracts under which fee arrangements between clients and lawyers are enforced, subject to ethical and public policy restrictions not applicable here.

Thus, the question becomes what the arrangement between Lamie and Equipment Services was, because only with that understood can we determine whether any amount of the retainer constituted property of Equipment Services at

the time the Chapter 11 petition was filed. Retainer agreements can take various forms. For example, a retainer can be paid simply to ensure an attorney's availability to represent the client, whether or not services are ever performed. Or a retainer can be a prepayment for all future services to be performed, amounting to a flat fee. Under either one of these arrangements, the attorney acquires title to the retainer fee at the time he receives it, regardless of whether he thereafter performs legal services for the client. *See Indian Motorcycle Assocs. v. Mass. Housing Finance*, 66 F.3d 1246, 1254 (1st Cir. 1995). On the other hand, if the relationship is a trust arrangement in which the attorney holds the retainer for the client as security for the payment of future fees, then the retainer so held, less any fees charged against it, constitutes the property of the client. *See Indian Motorcycle*, 66 F.3d at 1255; *see also* 11 U.S.C. § 541(a). Indeed, Virginia's disciplinary rules demand that an attorney hold a retainer of this type in trust for the client. *See In re Prudoff*, 186 B.R. 64, 67 (Bankr. E.D. Va. 1995) (citing Va. Rules Discip. P. § 9-102).

In this case, the facts relating to the fee arrangement are not in dispute. Lamie was paid $6,000 to secure fees that he thereafter earned, and under the arrangement, as he earned fees, he became entitled to pay himself from the $6,000 sum. But until he earned fees, the account remained the property of Equipment Services so that in the end, if any of the $6,000 remained, Lamie would be required to return the balance to Equipment Services.

Accordingly, at the commencement of this action, Lamie had earned, charged, and paid himself $1,000 in fees for the preparation and filing of the Chapter 11 petition. The remaining $5,000 in Lamie's trust account therefore became property of the bankruptcy estate, under 11 U.S.C. § 541(a), when the Chapter 11 petition was filed.

During the Chapter 11 proceeding, Lamie worked for the debtor-in-possession, and the bankruptcy court authorized

that arrangement. Accordingly, the sum of $1,325 in fees earned and the $3.85 in costs incurred by Lamie while Equipment Services was "in Chapter 11" was payable from the $5,000 held by Lamie as part of the bankruptcy estate. Payment of that amount has been approved by the bankruptcy court and the district court, and it is not disputed by the Trustee. Thus, at the time the Chapter 11 proceeding was converted to a Chapter 7 proceeding, the $5,000 escrow account was subject to charges of $1,328.85, leaving the remaining $3,671.15 as part of the bankruptcy estate.

When the Chapter 11 proceeding was converted to a Chapter 7 proceeding, however, the bankruptcy estate became committed to the custody and control of the United States Trustee, and the $3,671.15 in Lamie's escrow account remained part of that estate. Under 11 U.S.C. § 330(a), as we have construed it, Lamie could not be paid fees from the estate while the proceeding was under Chapter 7. Moreover, the Trustee did not exercise his authority to retain Lamie during the Chapter 7 proceeding. Accordingly, even though Lamie incurred an additional $1,000 in fees on behalf of Equipment Services after the Chapter 7 conversion, he was not entitled to recover that amount *from the estate*. *See Indian Motorcycle*, 66 F.3d at 1255; *In re Prudoff*, 186 B.R. at 67.

In sum, of the $6,000 retainer held by Lamie on behalf of Equipment Services, $1,000 was properly paid to him for prepetition work; $1,328.85 is payable to him for work performed during the Chapter 11 proceeding; and $3,617.15 belongs to the estate. The judgment of the district court is, accordingly, affirmed in its construction of 11 U.S.C. § 330(a) and insofar as it awarded Lamie fees before the Chapter 7 conversion and is reversed insofar as it awarded Lamie fees for work performed after the Chapter 7 conversion.

AFFIRMED IN PART, REVERSED IN PART.

MICHAEL, Circuit Judge, concurring in part and dissenting in part:

I respectfully dissent from part II of the majority's opinion, but otherwise concur. Specifically, I agree with the majority's conclusion in part III of its opinion that the unearned portion of Lamie's retainer became property of the bankruptcy estate when Equipment Services filed its Chapter 11 petition. It follows that if Lamie can be compensated at all for the legal services he rendered after the conversion of the company's bankruptcy proceeding from Chapter 11 to Chapter 7, his compensation must come from the bankruptcy estate. As the majority acknowledges, the question of whether 11 U.S.C. § 330(a) allows a Chapter 7 debtor's attorney to be paid professional fees from the bankruptcy estate is a close one. Because the arguments on both sides of this question have been well developed by the majority and by panels from other circuits, there is nothing left for me to do but choose a side. I cannot side with the majority. Rather, I agree with the Third and Ninth Circuits, which hold that when Congress amended § 330(a) in 1994, it inadvertently deleted debtors' attorneys from the existing statutory list of those who could be paid from the bankruptcy estate for services rendered in bankruptcy proceedings. *See In re Top Grade Sausage, Inc.*, 227 F.3d 123, 130 (3d Cir.`2000); *In re Century Cleaning Servs., Inc*., 195 F.3d 1053, 1061 (9th Cir. 1999). This drafting error should not prevent a Chapter 7 debtor's attorney from being paid with funds from the estate, just as he could be before the error occurred.

Here, Lamie is entitled to reasonable compensation from the bankruptcy estate for the legal services he rendered after the Chapter 7 conversion to the extent that those services were "reasonably likely to benefit the debtor's estate" or were "necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(ii). Because neither the bankruptcy court nor the district court regarded Lamie's post-Chapter 7 fees as compensation from the bankruptcy estate, they did not evaluate his fee application under this standard. Accordingly,

I would vacate the award of attorney's fees to Lamie for his post-Chapter 7 services and would remand for the bankruptcy court to evaluate Lamie's fee application under the proper standard. I concur in the majority's opinion insofar as it affirms the award of attorney's fees to Lamie for his services before the Chapter 7 conversion.

IN RE EQUIPMENT SERVICES, INC.,
Debtor
UNITED STATES TRUSTEE, Appellant,
v.
EQUIPMENT SERVICES, INC., Appellee.

Case No. 1:00CV0014, 7-98-04851-WSA

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

OPINION

JONES, District Judge.

The question in this bankruptcy case is whether a debtor's attorney is entitled to payment of a fee from a pre-petition retainer held by the attorney, for services rendered after the bankruptcy case had been converted to chapter 7. While I hold that a 1994 amendment to the Bankruptcy Code withdrew the power of the bankruptcy court to award a fee to a chapter 7 debtor's attorney from the funds of the bankruptcy estate, I find that it was permissible under the facts of this case for the debtor's attorney to be paid from the pre-petition retainer.

I

The debtor, Equipment Services, Inc., filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on December 24, 1998. Prior to this filing the attorney for the debtor received the sum of $6,000 from his client. Of this amount, $1,000 was used to pay certain costs in connection with the bankruptcy case, including the filing fee of $830. The remainder of $5,000 was deposited in the attorney's trust account. While there was no written agreement between the client debtor and the attorney, the attorney represented to the

bankruptcy court that this amount was a retainer, and explained the understanding concerning its use as follows:

> MR. LAMIE: Well, the retainer was to pay me in advance for fees that I would earn during the case, Your Honor. And it was to assure some payment of those fees. That is the reason. That is the way we explained to the client.
>
> THE COURT: Was it your understanding that any unused fees at the end of the case would be, in effect, refunded back to the Debtor?
>
> MR. LAMIE: Oh, it would be the Debtor's property at the end of the case, yes, Your Honor.
>
> THE COURT: So the effect it [sic] to protect you . . . you know, your ability to get paid, is what you were doing?
>
> MR. LAMIE: Yes. Yes, the money was put into trust and is billed against it. That is the way we have handled it.

(Tr. 6.) This payment to the attorney was duly disclosed at the time of the filing of the voluntary petition.[4]

After the filing of the chapter 11 petition, the attorney for the debtor was employed with the permission of the bankruptcy court to represent the debtor-in-possession. Thereafter, however, on March 17, 1999, on the motion of the United States trustee,[5] the case was converted to chapter 7

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[4] Section 329 of the Bankruptcy Code requires an attorney representing a debtor to file with the bankruptcy court a statement of compensation paid "for services rendered or to be rendered in contemplation of or in connection with the case . . . ." The section further provides that "[i]f such compensation exceeds the reasonable value of any such services," the court may cancel the fee agreement or order the return of the excessive amount. 11 U.S.C.A. § 329(a) (West 1993).

[5] United States trustees are officials of the Department of Justice and are responsible for the appointment and supervision of

and a trustee was appointed to administer the bankruptcy estate. Some fourteen months later, on June 5, 2000, the attorney for the debtor filed an application seeking approval of attorney's fees in the amount of $2,325 and expenses of $3.85 for services rendered from December 24, 1998, the date of filing of the chapter 11 petition, through May 31, 2000.

The United States trustee objected to this application to the extent that it sought payment for services rendered after the date of conversion of the case to chapter 7.[6] Following a hearing, the bankruptcy court (Stone, J.), by written opinion, sustained the objection to any payment to the attorney for services rendered after the date of conversion *only* to the extent that the funds held in retainer were insufficient to cover the total fees and expenses allowed in the case. *See In re Equip. Servs., Inc.*, 253 B.R. 724, 733-34 (Bankr. W.D. Va. 2000).

Based on this opinion, the bankruptcy court entered an order allowing the attorney a fee of $1,000 for services rendered after the date of conversion and further ordered that the attorney turn over to the trustee the balance of any funds held in retainer after deducting amounts allowed by the court for services rendered and expenses incurred in the chapter 7 case.

The United States trustee timely noted an appeal from this order and the debtor thereafter noted a cross-appeal.[7] The

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bankruptcy trustees and the supervision of the administration of bankruptcy cases. *See* 28 U.S.C.A. § 586 (West Supp. 2000). A United States trustee may raise, appear and be heard on any issue. *See* 11 U.S.C.A. § 307 (West 1993).

[6] Without objection, the bankruptcy court approved a fee of $1,325 and expenses of $3.85 for services rendered *prior* to the date of conversion of the case to chapter 7. The remaining requested amount of $1,000 represented services rendered *after* the date of conversion.

[7] The debtor objects to the bankruptcy court's holding that the Bankruptcy Code does not permit compensation for the debtor's

issues have been briefed and argued and the case is ripe for decision.[8]

II

The bankruptcy court held, as urged by the United States trustee, that the Bankruptcy Code, by virtue of its 1994 amendment, does not permit the attorney for a debtor to be compensated from funds of the bankruptcy estate in a chapter 7 case. Nevertheless, the bankruptcy court held that the bankruptcy estate has a property interest in a pre-petition attorney's retainer only to the extent that there are any funds left over after all of the attorney's fees and expenses have been paid from the retainer. Accordingly, the bankruptcy court found that it was proper for it to approve attorney's fees and expenses to be paid from the pre-petition retainer, even for services performed for the debtor after conversion of the case to chapter 7.

It is first necessary for me to determine whether the bankruptcy court was correct in its holding that the Bankruptcy Code does not allow a chapter 7 debtor's attorney to be paid from the funds of the bankruptcy estate. If the bankruptcy court was in error in this regard, then further analysis of the nature of the estate's property interest in the pre-petition retainer is unnecessary.

This court reviews the bankruptcy court's decisions on questions of law de novo. *See Chmil v. Rulisa Operating Co.*

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attorney in chapter 7 case to be paid from the funds of the bankruptcy estate.

[8] No stay of the bankruptcy court's order was obtained and the attorney's fee has now been paid from the attorney's trust account. Based on this payment, the debtor has moved to dismiss the appeal as moot. However, all of the parties are before the court and the court thus has the power to undo the payment. Accordingly, the appeal is not moot and the motion to dismiss will be denied. *See In re Harborview Dev. 1986 Ltd. P'ship*, 149 B.R. 378, 383 (D.S.C. 1993).

(In re Tudor Assocs., Ltd., II), 20 F.3d 115, 119 (4th Cir. 1994).

III

The first question for resolution involves the mysterious disappearance from the Bankruptcy Code of the language that expressly authorized a fee award to the debtor's attorney in chapter 7 cases. As originally adopted in the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978)--which established the present Bankruptcy Code--the statute in question provided, in pertinent part, as follows:

> (a) After notice to any parties in interest and to the United States Trustee and a hearing, and subject to sections 326, 328 and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, *or to the debtor's attorney*--
>
> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and
>
> (2) reimbursement for actual, necessary expenses.

11 U.S.C.A. § 330(a) (West 1994) (emphasis added).

In an effort to accommodate contemporary economic developments, Congress amended the Bankruptcy Code by the Bankruptcy Reform Act of 1994 ("the 1994 Act"). *See* Pub. L. No. 103-394, 108 Stat. 4106 (1994).[9]

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[9] The 1994 Act, among other things, established a bankruptcy review commission, amended the code in certain respects regarding its application to cases involving commerce, credit, and individual debtors, and added a temporary chapter to govern reorganization of

In its markup of the 1994 Act, designated S. 540, the Senate Judiciary Committee replaced the original language of § 330(a) and inserted the following:

> (a)(1) After notice to the parties in interest and the United States trustee and a hearing, and subject to sections 326, 328 and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103, *or the debtor's attorney*, after considering comments and objections submitted by the United States Trustee in conformance with guidelines adopted by the Executive Office for United States Trustees pursuant to section 586(a)(3)(A) of title 28 --
>
> > (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
> >
> > (B) reimbursement for actual, necessary expenses.

S. Rep. No. 103-168, 1993 WL 444315, at *247 (emphasis added). A new subsection, designated § 330(a)(3), articulated the manner in which a "reasonable" fee was to be calculated. *See id.*

On April 21, 1994, Senator Metzenbaum introduced a floor amendment that deleted the last clause from § 330(a)(1) regarding comments and objections by the United States trustee to fee awards and moved the language to a new subsection (a)(2). *See* 140 Cong. Rec. S4741 (daily ed. Apr. 21, 1994), WL 140 Cong. Rec. S4741-01, at *4741. The amendment also deleted the preceding four words, "or the debtor's attorney." *See id.* The amendment was adopted and S. 540, as amended, was approved by the Senate that day. *See* 140 Cong. Rec. S4676 (daily ed. Apr. 21, 1994), WL 140 Cong. Rec. S4666-02, at *4676.

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small business. *See* S. Rep. No. 103-168 (1993), 1993 WL 444315, at *1.

During consideration later that year of the 1994 Act by the House of Representatives, the issue of the deletion of the "debtor's attorney" clause was specifically brought to the attention of legislators by the National Association of Consumer Bankruptcy Attorneys. Addressing the Metzenbaum amendment, the Association called the clause's deletion "apparently inadvertent" and a "drafting error[]." *Bankruptcy Reform: Hearing on H.R. 5116 Before the Subcomm. on Econ. and Commercial Law of the House Comm. on the Judiciary*, 103d Cong. 550-51 (1994). Nevertheless, the Metzenbaum amendment became part of the text of the final legislation passed by the House. *See* Pub. L. 103-394, § 225(b), 108 Stat. at 4130.

Accordingly, the version of § 330 that became law reads in part as follows:

> (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328 and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103-
>
> > (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
> >
> > (B) reimbursement for actual, necessary expenses.

11 U.S.C.A. § 330(a)(1) (West Supp. 2000).[10]

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[10] Also enacted as part of the 1994 amendments was the following provision:

> In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

No principled reason appears in any legislative history for the removal of the crucial words, nor is there a record of any debate of the deletion. In 1997, two bills were introduced that included provisions that would have added the "debtor's attorney" language back to § 330(a). *See* H.R. 120, 105th Cong. § 7 (1997), WL 1997 CONG US HR 120; H.R. 764, 105th Cong. § 4 (1997), WL 1997 CONG US HR 764. Neither of those measures passed.

The question is whether the deletion of the "debtor's attorney" language in § 330(a)(1) was an unintended error and thus should be disregarded, or whether the language of the 1994 amendment, being plain, must be enforced. On this question judicial decisions have divided.[11]

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11 U.S.C.A. § 330(a)(4)(B) (West 2000). Sections 327 and 1103, referred to in § 330(a)(1), relate to professional persons employed by trustees and committees of creditors. Since a debtor in possession has the powers of a trustee, the attorney selected by the debtor in possession in a chapter 11 case may receive a fee award as a "professional person employed under section 327." *See* § 330(a)(1).

[11] *Compare In re Top Grade Sausage, Inc*., 227 F.3d 123 (3d Cir. 2000); *United States Trustee v. Garvey, Schubert & Barer* (*In re Century Cleaning Servs., Inc*.), 195 F.3d 1053 (9th Cir. 1999); *In re Ames Dep't Stores, Inc.*, 76 F.3d 66 (2d Cir.1996); *United States Trustee v. Eggleston Works Loudspeaker Co*. (*In re Eggleston Works Loudspeaker Co.)*, 253 B.R. 519, 524 (B.A.P. 6th Cir. 2000*)*; *Towarnicky, P.L.L.C. v. Peyton (In re Taylor*), 250 B.R. 869 (E.D. Va. 2000); *In re Brierwood Manor, Inc*., 239 B.R. 709 (Bankr. D.N.J. 1999*)*; *In re Bottone*, 226 B.R. 290 (Bankr. D. Mass. 1998); *and In re Miller*, 211 B.R. 399 (Bankr. D. Kan. 1997) (declining to enforce amendment); *with Inglesby, Falligant, Horne, Courington & Nash v. Moore (In re Am. Steel Prod., Inc.)*, 197 F.3d 1354 (11th Cir. 1999); *Andrews & Kurth, L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.)*, 157 F.3d 414 (5th Cir. 1998*)*; *In re Skinner*, 240 B.R. 225 (Bankr. W.D. Va. 1999*)*; *In re Fassinger*, 191 B.R. 864 (Bankr. D. Or. 1996); *In re Friedland*, 182 B.R. 576 (Bankr. D. Colo. 1995); and *In re Kinnemore*, 181 B.R.

Those courts declining to give effect to the 1994 amendment as a "scrivener's error" point to (1) the ambiguity created in the statute by the mention of "attorney" in § 330(a)(1)(A) when § 330(a)(1) is read to exclude the "debtor's attorney" clause; (2) the omission of a disjunctive "or" before the "professional person" clause within subsection (a)(1); and, perhaps most importantly, (3) the legislative history suggesting that the deletion of the "debtor's attorney" clause was unintentional.

The question is not free from doubt. It is easy to believe that the explanation for the disappearance of "or the debtor's attorney" in § 330(a)(1) is simply that the author of the Metzenbaum amendment inadvertently "crossed out a few too many words" when removing the United States trustee language. *In re Century Cleaning Servs., Inc.*, 195 F.3d at 1059-60. Nevertheless, the necessarily limited role of judicial interpretation of legislative acts convinces me to enforce the statute as written.[12]

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520 (Bankr. D. Idaho 1995) (enforcing language as written). The Fourth Circuit has yet to rule on the question.

[12] Unless there is some ambiguity in the language of the statute, a court's analysis must end with the language of the statute. *See Selgeka v. Carroll*, 184 F.3d 337, 342-43 (4th Cir. 1999). This rule is departed from only in those rare and "exceptional circumstances," *Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 441 (1987), where "a literal reading of [the] statute [will] produce a result 'demonstrably at odds with the intentions of its drafters,'" *United States v. Locke*, 471 U.S. 84, 93 (1985) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)), "where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute," *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (citing *Commissioner v. Brown*, 380 U.S. 563, 571 (1965)), or where "an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, [in which case] a less literal construction

There are doubtless strong policy reasons for *not* omitting a chapter 7 debtor's attorney from eligibility for fees paid from the debtor's estate, particularly since § 330 limits compensation to those services "reasonably likely to benefit the debtor's estate." 11 U.S.C.A. § 330(a)(4)(A)(ii)(I). But judges are accustomed to enforcing laws that they consider unwise.[13] It was not irrational--even if bad policy--for Congress to have decided to preclude payment of such fees altogether, even assuming that there was likely benefit to the estate.[14]

Moreover, while the resulting sentence is awkward, it is not "nonsensical," *see Andrews & Kurth, L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.)*, 157 F.3d 414, 425 (5th Cir. 1998), and it is possible that the reference to "attorney" in § 330(a)(1)(A) was simply meant to emphasize that an attorney employed by a trustee might be eligible for an award. *See In re Century Cleaning Servs., Inc.*, 195 F.3d at 1063 (dissenting opinion).

Finally, legislative history is generally irrelevant when the words of a statute are plain. *See Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 304-05 (4th Cir. 2000*)*. In any event, the passage of the 1994 Act by the House of Representatives after it was apparent that the Senate had removed the "debtor's

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must be considered." *United States v. Compos-Serrano*, 404 U.S. 293, 298 (1971).

[13] As the Fourth Circuit recently observed when faced with similar question: "What we are being asked to do is improve the statute—to amend it, really. The [proponent's] reading of the statute may be appealing in terms of its logic, but we cannot adopt it as our own without trespassing on a function reserved for the legislative branch." *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 308 (4th Cir. 2000).

[14] For example, "[o]ne of the primary considerations in passing the [1994] Act was the perceived problems with professional fees." *In re Century Cleaning Servs., Inc*., 195 F.3d at 1064 (dissenting opinion).

attorney" language, and the failure of later legislative efforts to put the words back into the statute, do not support the theory of a scrivener's error.

For these reasons, I find that the bankruptcy court was correct in finding that the debtor's attorney here was not entitled to an award of attorney's fees for services rendered after the case was converted to chapter 7.

IV

Since I find that the Bankruptcy Code does not allow the debtor's attorney here to be awarded a fee from the bankruptcy estate, the remaining question is whether the attorney may satisfy any fee attributable to services after the chapter 7 conversion from the pre-petition retainer held by him. The bankruptcy court answered that question in the affirmative, and I agree.

The Bankruptcy Code broadly defines property of the estate, *see* 11 U.S.C.A. § 341(a(1) (West 1993 & Supp. 2000), but the nature of the property interest must be generally determined by reference to state law, *see Butner v. United States*, 440 U.S. 48, 54-55 (1979*)*, and any limitations on that interest imposed by state law may be applicable in bankruptcy. *See Bd. of Trade of Chicago v. Johnson*, 264 U.S. 1, 12 (1924).

The bankruptcy court reasoned that since the debtor had the right under state law only to the return of any unearned portion of the retainer, and since the attorney had continued to represent the debtor after the conversion of the case to chapter 7, thus continuing to "earn" the retainer, the attorney was entitled to be compensated.

There is no doubt that under the contractual arrangement between the debtor and his attorney here, the attorney is obligated to return any unearned portion of the retainer. Indeed, under Virginia law, an attorney, by virtue of professional obligation and even absent any agreement, must return any portion of a fee unearned at the termination of

employment. *See* Va. Rules of Prof. Conduct 1.16(d) (Michie 2000).

In the present case, however, the fee paid to the attorney was not unearned simply because the case was converted to chapter 7. While a chapter 7 debtor's attorney may not be entitled under the Bankruptcy Code to compensation from the estate, the debtor is not prohibited from being represented and until such representation is ended, the debtor--and hence, the debtor's bankruptcy estate--is not entitled to a refund.[15]

Section 329 of the Bankruptcy Code clearly anticipates that pre-petition legal fees will be paid by debtors, and because of the potential for overreaching in such circumstances, gives the bankruptcy court broad power to cancel the agreement or order the return of any excessive payment. *See* 11 U.S.C.A. § 329(b) (West 1993). This provision, together with the trustee's power to avoid fraudulent transactions, helps insure that debtors' attorneys will only receive proper payments from pre-petition retainers.[16]

For these reasons, I find that the bankruptcy court was correct in allowing the debtor's attorney to receive fees from the pre-petition retainer.

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[15] The United States trustee has not argued that the retainer agreement with the attorney here was rejected pursuant to the trustee's power to reject executory contracts. *See* 11 U.S.C.A. § 365 (West 1993 & Supp. 2000).

[16] In the objection to the application for attorney's fees, the United States trustee alternatively relied on the ground that the application "does not state what, if any, benefit the services rendered by the Applicant were to the estate." (R. at 13.) The bankruptcy court did expressly rule on this objection, but the United States trustee did not designate that failure as an issue on appeal (R. at 7) and has not urged reversal on that ground in brief or oral argument.

V

In accord with this opinion, a final judgment will be entered affirming the order of the bankruptcy court.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE: CHAPTER 7 EQUIPMENT SERVICES, INC.,
DEBTOR

IN RE: CHAPTER 7 NANCY STARR, DEBTOR

Nos. 7-98-04851, 7-99-00905

JOINT MEMORANDUM OPINION

The matters before this Court are the motions of Debtors' counsel for compensation for services rendered by counsel after these cases had been converted from Chapter 11.

BACKGROUND

In re: Equipment Services, Inc.

On December 24, 1998, Equipment Services, Inc. ("Debtor") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* Debtor's counsel, Mr. John Lamie, was counsel for the Debtor-in-Possession at the time of filing the petition and his continued employment was approved by Order of this Court dated January 26, 1999. In the Rule 2016 Disclosure, Debtor's counsel certified that he had received a $5,000 retainer.[17]

On March 17, 1999, by motion of the United States Trustee ("U.S. Trustee"), this case was converted to one under Chapter 7. After conversion, the U.S. Trustee appointed Robert E. Wick, Jr., as interim trustee. No trustee

[17] No written retainer agreement appears to have been entered into between the Debtor and Debtor's counsel.

was elected at the meeting of creditors and Mr. Wick became the permanent Chapter 7 Trustee. Mr. Wick continues to administer the Debtor's case.

On June 5, 2000, Debtor's counsel filed an Application for Fees seeking compensation for services rendered and expenses incurred from December 24, 1998, the filing date of the Debtor's Chapter 11 petition, through May 31, 2000, a date more than fourteen months after conversion of the Debtor's case to one under Chapter 7. The U.S. Trustee objected to the Application for Fees to the extent that the Application sought compensation for services rendered after the case was converted to one under Chapter 7 on March 17, 1999.[18] A hearing was held on this matter on July 6, 2000. At the hearing, the parties were provided an opportunity to submit written arguments to this Court.

In re Nancy Starr

On March 16, 1999, Nancy Starr ("Starr") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. 11 U.S.C. §§ 101 *et seq.* Mr. Lamie was counsel for Starr at the time of filing the petition and his employment continued after conversion of Starr's case to one under Chapter 7. In the Rule 2016 disclosure, Starr's counsel certified that he had received a $950 retainer.[19] At the time of filing his Application for Fees, Starr's counsel held $880 in trust.

On December 8, 1999, by motion of the U.S. Trustee, this case was converted to one under Chapter 7. On February

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[18] In the absence of objection to the Application for Fees to the extent that it sought compensation for services rendered and expenses incurred prior to the conversion of this case to one under Chapter 7, this Court approved the Application for Fees by Order dated July 10, 2000. Accordingly, Debtor's counsel has been awarded $1,325.00 for services rendered plus costs in the amount of $3.85.

[19] No written retainer agreement appears to have been entered into between Starr and Starr's counsel.

23, 2000, William E. Callahan, Jr., was appointed Chapter 7 Trustee at the meeting of the creditors pursuant to 11 U.S.C. § 341.

On June 28, 2000, Starr's counsel filed an Application for Fees seeking compensation for services rendered from March 12, 1999, a date prior to the filing date of Starr's Chapter 11 petition, through June 28, 2000, a date more than six months after conversion of Starr's case to one under Chapter 7. The Trustee objected to the Application for Fees to the extent that the Application sought compensation for services rendered after the case was converted to one under Chapter 7 on December 8, 1999.[20] A hearing was held on this matter on August 8, 2000.

ARGUMENTS OF COUNSEL[21]

The U.S. Trustee raises two objections to an award of attorney's fees to Debtor's counsel for services rendered after conversion of the Debtor's case to one under Chapter 7. First, the U.S. Trustee, citing the exclusion of debtors' attorneys from the list of persons eligible for compensation from the property of the estate under 11 U.S.C. § 330(a)(1),[22] disputes

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[20] In the absence of objection to the Application for Fees to the extent that it sought compensation for services rendered and expenses incurred prior to the conversion of this case to one under Chapter 7, this Court approved the Application for Fees by Order dated August 9, 2000. Accordingly, Starr's counsel has been awarded $3,600.00 for services rendered plus costs in the amount of $15.84.

[21] Because the arguments of the U.S. Trustee and Trustee that are relevant to this decision are the same, and because the arguments of the U.S. Trustee have been fully briefed, this Court will refer to the arguments of the U.S. Trustee and the response of counsel for the Debtors thereto in rendering its decision in both matters before this Court.

[22] 11 U.S.C. § 330(a)(1) provides, "After notice to the parties in interest and the United States Trustee and a hearing, and subject to Sections 326, 328, and 329, the court may award to a trustee, an

the claim of Debtor's counsel that he is entitled to be compensated for services rendered after the conversion of the Debtor's case to one under Chapter 7. Second, the U.S. Trustee denies the right of Debtor's counsel to be compensated for services rendered after conversion from the funds held in trust by Debtor's counsel from the pre-petition retainer. The U.S. Trustee contends that the funds held in retainer were property of the Debtor prior to conversion and accordingly, became property of the estate at the time of conversion of the Debtor's case to one under Chapter 7. Because awards of compensation from property of the estate are governed by 11 U.S.C § 330, the U.S. Trustee asserts that Debtor's counsel is not eligible to be compensated from the funds held in retainer.

Conversely, Debtor's counsel contends that § 330(a)(1) does not preclude his being compensated for services rendered after the conversion of the Debtor's case to one under Chapter 7. Additionally, Debtor's counsel denies that the funds held in retainer at the time of conversion of the Debtor's case were rendered property of the estate at the time of conversion and therefore not available to compensate Debtor's counsel. Instead, Debtor's counsel claims the funds held in retainer remained property of the Debtor. Therefore, the award of compensation to Debtor's counsel is governed by § 329,[23] which allows the awarding of fees to counsel from property held by debtors, rather than by § 330.

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examiner, a professional person employed under section 327 or 1103- (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by such person; and (B) reimbursement for actual, necessary expenses."

[23] 11 U.S.C § 329 provides, "(a) Any attorney representing a debtor in a case under this title, or in connection with such case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after

DISCUSSION

In answering the question of whether Debtor's counsel is entitled to compensation for services rendered after conversion of the Debtor's case to one under Chapter 7 from the funds held in retainer, the Court must decide two questions:

1. Whether an attorney can be paid from the bankruptcy estate for services rendered to the Debtor in Chapter 7; and
2. If not, whether the unearned balance of a pre-petition retainer, as of the time of conversion, is part of the bankruptcy estate.

The Court will address these two questions in the order stated.

I. An attorney may not be paid from the bankruptcy estate for services to be rendered to the Debtor in a Chapter 7 case.

While this Court notes with respect the recent opinion of Judge Brinkema of the United States District Court of the Eastern District of Virginia in *In re Taylor*, 250 B.R. 869 (E.D. Va. 2000), which held that a debtor's attorney in a Chapter 7 case can be compensated from property of the estate for services which are beneficial to the estate, and the decisions to such effect of the Second Circuit Court of Appeals[24] and the Ninth Circuit Court of Appeals,[25] the latter

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one year before the date of filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to —

(1) the estate if the property transferred— (A) would have been property of the estate; or (B) was to be paid by or on behalf of the debtor under a plan under Chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment."

[24] *In re Ames Dep't Stores, Inc.*, 76 F.3d 66 (2nd Cir. 1996).

having rendered its decision subsequent to the decision of Chief Bankruptcy Judge Ross W. Krumm of this Court in the case of *In re Skinner*, 240 B.R. 225 (Bankr. W.D. Va. 1999), which held to the contrary, the Court believes it should adhere to the *Skinner* ruling. It concludes that it should do so for two good reasons: first, such ruling is based on the most logical and apparent interpretation of the effect to the 1994 amendment of § 330 of the Bankruptcy Code, and second, uniformity of result within this District in an issue of importance in almost every Chapter 7 case, whether originally filed as such or converted from another chapter, is an important and worthy goal in and of itself. While the Court will treat the value of the second reason, uniformity of decision within this District, as self-evident, it believes that some comment on the correct meaning of § 330 is warranted.

To understand fully the conclusions of those courts which have held that an attorney rendering services to a Chapter 7 debtor cannot be paid from the bankruptcy estate, it is helpful to compare the language of § 330 of the Code before and after the 1994 amendment of that section. Both before and after the 1994 amendment of § 330, such section provided and continues to provide express authority for payment of counsel to a Chapter 12 or 13 debtor from the estate "based on a consideration of the benefit and necessity of such services to the debtor and other factors set forth in this section." 11 U.S.C. § 330(a)(4)(B). To state the obvious, Congress could have provided that a debtor's attorney in any bankruptcy proceeding could be paid from the estate.[26] It did not choose to do so even though compelling policy arguments

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[25] *In re Century Cleaning Services, Inc.*, 195 F.3d 1053 (9th Cir. 1999).

[26] The authority for payment of counsel for a Chapter 11 debtor to be compensated from the estate while the debtor is a "debtor-in-possession" is based on the right of the debtor-in-possession as trustee to retain legal counsel. 11 U.S.C. §§ 327(a) and 1107(a).

might be marshaled in support of such a provision. With regard to a Chapter 7 debtor's attorney, prior to 1994 § 330(a)(1) provided as follows:

> After notice to any parties in interest and to the United States Trustee and a hearing and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, an examiner, to a professional person employed under section 327 or 1103 of this title, *or to a debtor's attorney* –
>
> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, *or attorney*, as the case may be, based on the nature, the extent, and the value of such services other than in a case under this title; and
>
> (2) reimbursement for actual, necessary expenses. (emphasis added)

After the 1994 amendment to such section, it read and still reads as follows:

> After notice to the parties in interest and the United States Trustee and a hearing subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103- (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, *or attorney* and by any professional person employed by an such persons; and (B) reimbursement for actual, necessary expenses. (emphasis added)

11 U.S.C. § 330(a)(1).

In *Taylor*, the District Court chose to adopt the minority position rejected by the Bankruptcy Court in *Skinner*, finding § 330(a)(1) to be ambiguous in its exclusion of debtors' attorneys from "the list of persons in § 330(a)(1) to whom compensation may be awarded" due to the missing

conjunction 'and' or 'or' "before the penultimate person listed." The District Court further supported its finding by noting that the "logical inconsistency" between § 330(a)(1)(A) allows those persons specified in (a)(1) to be awarded "reasonable compensation for actual, necessary services rendered by a trustee, examiner, professional person, or attorney. . ." This inconsistency, the District Court concluded, created a further ambiguity in the Bankruptcy Code because § 331 permits payments from the bankruptcy estate of interim compensation for "[a] trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103." 11 U.S.C § 331. Based upon these apparent ambiguities, the District Court chose to look beyond the statute itself to the legislative history of the statute. Prior to the Bankruptcy Reform Act of 1994, Section 330 provided for the award of fees to debtors' attorneys. Nothing in the legislative history of the Act explains why such provision was omitted from the current version of § 330(a)(1). The District Court chose to grasp this absence of legislative history as an opportunity to define the omission as inadvertent and therefore appropriate to disregard in its effort to interpret the present language of § 330(a)(1). Accordingly, the District Court, upon holding that § 330(a)(1) did not preclude the Bankruptcy Court from awarding the debtor's attorney post-petition fees, remanded the matter to the Bankruptcy Court for determination of which fees were of benefit to the estate and therefore eligible for compensation.

In addition to the reasoning expressed by Chief Judge Krumm in *Skinner*, this Court rejects the District Court's holding in *Taylor* and the minority position adopted therein for the following reasons. First, though grammatically awkward and arguably internally inconsistent with § 330(a)(1)(A), the current version of 330(a)(1) is the result of a deletion by Congress that resulted in a statute which is clearly at odds with its pre-amendment version. *See In re American Steel Product, Inc.*, 197 F.3d 1354, 1356 (11th Cir. 1999); *In re Pro-Snax Distributors, Inc.*, 157 F.3d 414, 425

(5th Cir. 1998). Although the absence of legislative history and a brief review of the syntax of the statute might indicate that such deletion was inadvertent, the governing canons of construction do not allow this Court to consider extrinsic sources in interpreting § 330(a)(1).[27] *In re Pro-Snax Distributors, Inc.*, 157 F.3d at 425. Even if this Court were to conclude, however, that the deficiencies noted by Judge Brinkema in *Taylor* rendered the statute ambiguous, the absence of legislative history is open to two equally plausible interpretations, that the deletion of the language relating to the "debtor's attorney" was the result of clerical error, or that it was intentional on the part of the person or persons who directed its deletion for reasons known to him, her, or them and that such deletion simply passed through the legislative process without being particularly noticed or commented upon by those members of Congress who might have decided either to support or oppose such change. In the absence of legislative history or other evidence which would suggest clearly that the deletion was simply the result of clerical error, this Court cannot conclude that it should treat the statutory change as if it had not occurred. Furthermore, this Court notes the absence of a subsequent technical correction by Congress during the six years since the revision of § 330(a)(1),[28] despite substantial commentary on the subject

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[27] This Court's finding that § 330(a)(1) is clear and unambiguous on its face preclude this Court form giving persuasive weight to the absence of legislative history regarding the deletion of debtor's attorney from the list of persons eligible for compensation pursuant to § 330(a)(1). *See In re Pro-Snax Distributors, Inc.*, 157 F.3d at 425.

[28] This Court notes that the current proposed Bankruptcy Reform Act of 2000, H.R. 833, 106th Cong. (2000), pending in the House of Representatives, makes no correction to § 330(a)(1) but does propose to amend § 330(a)(1) to read, "[I]n determining the amount of reasonable compensation to be awarded, to an examiner, trustee under Chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services,

and a general willingness of Congress to adopt such corrections when deemed necessary.[29]

Second, Section 330(a)(1) and § 331 are not inconsistent so as to render § 330(a)(1) ambiguous. The District Court cites § 331's allowance for debtors' attorneys to receive interim fees as support for the proposition that debtors' attorneys must be eligible for fees generally. However, the District Court failed to quote the pertinent language of § 330. Specifically, Section 331 states, in relevant part:

> A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such application or reimbursement for expenses incurred before such date *as is provided under section 330 of this title*. (emphasis added)

11 U.S.C. § 331.

Upon a further reading of § 331, it becomes apparent that § 331 cannot be read independently of § 330. *See* 3 Collier on Bankruptcy ¶ 331.01[4] at 331-7. Because § 330(a)(4)(B) expressly allows for compensation of attorneys representing individual debtors in case under Chapters 12 and 13, Section 331 must include debtors' attorneys so as not to bar awards of

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taking into account all relevant factors. . ." Bankruptcy Reform Act of 2000, H.R. 833, 106th Cong. § 409 (2000).

[29] For example, Congress has enacted subsequent corrective legislation to cure errors in the Internal Revenue Code that arose from prior amendments and revisions thereof. One such piece of corrective legislation, aptly titled the Technical Corrections Act of 1982, Pub. L. No 97-448, 96 Stat. 2365 (codified as amended in scattered sections of 26 U.S.C.), served to cure errors in the Internal Revenue Code that arose from the Economic Recovery Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (codified as amended in scattered sections of 26 U.S.C.).

interim compensation to individual debtors' attorneys in cases under Chapters 12 and 13. Also, it is worth noting that some courts have denied the applicability of § 331 to Chapter 7 and Chapter 11 liquidation cases altogether, making any reference thereto irrelevant in matters of the sort at hand. *See In re Glados*, 83 F.3d 1360, 1365-66 (11th Cir. 1996) (dicta); *In re Regan*, 135 B.R. 216, 218-19 (Bankr. E.D.N.Y. 1992) (holding that professionals for a chapter 11 debtor-in-possession, which had been displaced by a Chapter 7 trustee, could not request interim compensation for services rendered while the case was under Chapter 11 to be paid during the pendency of the Chapter 7). *See also In re Domino Investments, Ltd.*, 82 B.R. 608, 609 (Bankr. S.D. Fla. 1988).

II. The unearned balance of a pre-petition retainer, as of the time of conversion to Chapter 7, is not part of the bankruptcy estate.

Subject to § 329, a retainer is an arm's length pre-petition transfer for services being rendered currently and to be rendered in the future. While a client may terminate an attorney's representation and recover back the unearned portion of funds held in retainer, the client cannot retain the benefit of the services being rendered and yet to be rendered by the attorney and at the same time demand a refund of the current unearned balance of the retainer. Only to the extent that a balance remains in the retainer after all services have been rendered and fees have been allowed under § 329 does the reversionary interest of the debtor in that balance become property of the bankruptcy estate.

Section 541(a) of the Bankruptcy Code states in relevant part that, "[t]he commencement of a case under section 301, 302, or 303 of this title creates an estate . . . comprised of all the following property, wherever located: . . . all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The Fourth Circuit Court of Appeals stated in *Mid-Atlantic Supply Co. of VA v. Three Rivers Aluminum Co. (In re Mid-Atlantic*

Supply Co.), 790 F.2d 1121, 1124 (4th Cir. 1986), that "property of the estate" should be construed broadly. Property of the estate has been interpreted to include "property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced." *United States v. Whiting Pools, Inc.*, 462 U.S. 195, 205 (1983) (holding that the bankruptcy estate included property of the debtor which the Internal Revenue Service had lawfully seized before bankruptcy but had not sold prior to filing, noting that the property continued to be owned by the taxpayer until the sale had been effected). However, Section 541(a), while defining "property of the estate" to include all interests of the debtor, does not define those specific interests. To make that determination, it is necessary to examine relevant state law. *In re Prudoff*, 186 B.R. 64, 66 (Bankr. E.D. Va. 1995). The *Prudoff* case dealt with a note which a debtor had assigned pre-petition to an attorney to represent the debtor in a domestic relations case. The amount of the note exceeded $80,000 and the retainer agreement provided that the note was assigned absolutely to the attorney and the client's only interest was to any balance collected and not used for legal fees or expenses. The obligor of the note prepaid it and the attorney disbursed to the debtor post-petition in excess of $25,000 from the proceeds of the note. The Trustee brought a turnover action against the debtor and the court ruled that the debtor's interest in any refund from the retainer was property of the estate and the debtor was obliged to pay over the money received from the attorney to the trustee.

Virginia law offers no exception to the general rule that a retainer taken by a debtor's attorney for services to be rendered during the bankruptcy is to be held in trust for the debtor. Pursuant to Rule 1.16(d) of the Virginia Rules of

Professional Conduct,[30] an attorney is required, upon termination of representation, to refund any advance payment of fees that has not been earned. Rules of the Supreme Court of Virginia Part 6, § II. Additionally, Rule 1.15(a)[31] requires that all funds received or held by an attorney or law firm on behalf of a client, including refundable retainers, be deposited into an escrow account. In furtherance thereof, Rule 1.15(d)(3)[32] mandates first, that an attorney maintain complete records of all funds of a client coming into possession of the attorney and render appropriate accounts to the client regarding those funds and second, promptly pay or deliver to the client as requested the funds in possession of the attorney to which the client is entitled. *Id.* Although these Rules of Professional Conduct appear to indicate that property held by an attorney is held in trust for the benefit of the client, giving the client an equitable interest therein, these Rules do not state or imply that the client's equitable interest extends to funds which have been earned by the attorney. *Compare In re Downs*, 103 F.3d 472 (6th Cir. 1996) (holding that property held by an attorney is held in trust for the client's benefit, and the debtor's equitable interest in the trust is property of the estate).

This Court believes that a debtor's interest in a pre-petition retainer might be appropriately compared with other property interests a debtor may have as of the filing date which become assets of the bankruptcy estate. For example, if a debtor has paid, immediately preceding his filing, an annual insurance premium, the unearned portion of the premium as of the filing date may well be an asset of the

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[30] Paragraph (d) of Rule 1.16 is based on DR 2-108(D) of the Virginia Code of Professional Responsibility, the predecessor to the Virginia Rules of Professional Responsibility.

[31] Paragraph (a) of Rule 1.15 is substantially the same as DR 9-102(A) of the Virginia Code of Professional Responsibility.

[32] Paragraph (d) of Rule 1.15 has no counterpart in the Virginia Code of Professional Responsibility.

bankruptcy estate, but unless some action is taken to cancel the policy prior to the end of the period of coverage in question, the estate cannot obtain a refund from the insurer, regardless of whether the policy in question or the property or interest it insured was an asset of the bankruptcy estate. Similarly, if a debtor has obtained pre-petition a line of credit secured by a lien against the debtor's property, such property becomes an asset of the estate subject to the existence of the lien. Assuming any necessary court approval for post-petition continued use of such line of credit, the bankruptcy estate's interest in the property would be in its residual value after the total amount of the debt, whether pre-petition or post-petition in nature, has been paid.[33] Even without any new principal advances under such a loan arrangement, however, Section 506(b) of the Bankruptcy Code recognizes that a secured creditor, to the extent of the available value of its collateral, is entitled to recover from that property, even though such property is clearly an asset of the bankruptcy estate, post-petition interest ("earnings," if you will) upon its principal balance. Even though an attorney may be required by ethical obligations to hold a retainer in escrow or trust until the contracted-for legal services have been rendered, the court does not believe that such requirement creates any greater property interest in the bankruptcy estate than if the attorney had been free simply to deposit the retainer in his general account subject to a potential refund obligation to the extent that the funds received from the retainer were not later fully earned. The ethical obligation imposed upon the attorney as a professional licensed by the state is for the protection of the client and should not furnish a basis to disallow in bankruptcy to an attorney the benefit of his arm's length and fair agreement with his client, subject to the Court's review authority under § 329 of the Bankruptcy Code. With due respect to the opinions of other courts that have drawn a

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[33] The Court notes that any approved post-petition borrowing could properly be paid from other property of the estate.

distinction between "advance fee retainers" and "retainers for security"[34] this Court concludes that in either case it is the client's residual interest, if any, in the retainer after satisfaction of all contracted-for fees that becomes an asset of the bankruptcy estate. *See In re Feiler*, 218 F.3d 948 (9th Cir. 2000).

For the aforementioned reasons, this Court denies the U.S. Trustee's claim that a retainer, to the extent it exceeds the amount earned and allowed for Chapter 11 services rendered by Debtor's counsel, becomes property of the bankruptcy estate. The Court observes that while the U.S. Trustee's argument that a retainer is property of the bankruptcy estate is made in these cases which originally commenced as Chapter 11 cases but were later converted to Chapter 7, the same rationale would appear to be applicable to any original Chapter 7 case where the debtor's attorney has received a pre-petition retainer from the debtor. If such a retainer were to be subject to turnover to the Chapter 7 Trustee to the extent that it was not absorbed by filing fees and pre-petition services, a very powerful disincentive would be provided to attorneys to accept Chapter 7 cases in the first place, or to provide anything beyond the most perfunctory required post-petition services to the client in those Chapter 7 cases that were accepted. Particularly in the context of a Chapter 7 corporate debtor without interested, willing, and financially able owners or affiliates, the likelihood of payment for post-petition services by the debtor's attorney precluded from relying on his retainer for payment would appear to be doubtful at best. Accordingly, this Court denies

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[34] *See e.g. Indian Motorcycle Assoc. III Ltd. Partnership v. Massachusetts Housing Fin. Agency*, 66 F.3d 1246 (1st Cir. 1995) (concluding that whether a retainer may be subject to turnover depends upon whether the retainer is paid simply to ensure the availability of an attorney or is held by an attorney to secure payment for legal services to be rendered). *See also* 3 Collier on Bankruptcy ¶ 329.04[1][d] at 329-20.

the U.S. Trustee's objection to payment of Debtor's counsel for services rendered after conversion of the Debtor's case to one under Chapter 7 from the funds held in retainer by Debtor's counsel pursuant to § 329 of the Bankruptcy Code.[35] While this Court recognizes the unsatisfactory potential consequences of a decision which places a premium upon a debtor's attorney obtaining a retainer large enough to cover in advance any and all legal services which might reasonably be contemplated during the entire case, and therefore rewards attorneys who may be more acutely protective of their own interests rather than those of their debtor clients, it believes to hold otherwise would be to disregard an express change by Congress of existing law prior to 1994. If that change was unintentional, it is up to Congress to correct it. If the change was intentional, it is the obligation of this Court to enforce it even if such change may appear to be misguided and disruptive of the functioning of the bankruptcy system.

CONCLUSION

For these reasons, this Court respectfully declines to follow the Eastern District Court's holding in *Taylor* and instead has chosen to apply the earlier holding of this Court as expressed in *Skinner*. It further holds that only the Debtor's reversionary interest in a pre-petition retainer paid over to his, her, or its attorney, rather than the retainer in full, is property of the bankruptcy estate. Accordingly, this Court sustains the U.S. Trustee's objection to payment of Debtor's counsel for

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[35] Section 329 of the Bankruptcy Code governs the eligibility of debtors' attorneys to be compensated from funds held in retainer when such funds are not property of the estate. *In re Redding*, 247 B.R. at 478; *See also* 3 Collier on Bankruptcy ¶ 329.04[1][d] at 329-19. By its own language, Section 329 merely requires that fees to be awarded from funds held in retainer be reasonable in amount, as determined by the court. Because the balance of the pre-petition retainer, as of the time of conversion, is not property of the bankruptcy estate, Debtor's counsel is eligible to receive an award of fees pursuant to § 329.

services rendered after conversion of the Debtor's case to one under Chapter 7 only to the extent that the funds held in retainer are insufficient to cover the total fees and expenses allowed to Debtor's counsel for all services rendered in the Debtor's case. However, in rendering this judgment, this Court expressly refrains from addressing the issue of use of a pre-petition retainer to pay for services of post-petition benefit to a debtor personally, such as objections to discharge and/or dischargeability of debt litigation such as that considered in *In re Lilliston*, *supra*, an issue not presented in either of the cases before the Court.

Orders effectuating the opinion of this Court in these two cases shall be entered contemporaneously with the signing of this Memorandum Opinion.

ENTER this the 21st day of September, 2000.

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William F. Stone, Jr.
U.S. Bankruptcy Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1779, BK-98-4851, CA-00-143

In Re: EQUIPMENT SERVICES, INCORPORATED
Debtor

UNITED STATES TRUSTEE
Plaintiff – Appellant

v.

EQUIPMENT SERVICES, INCORPORATED
Defendant – Appellee

No. 01-1779, BK-98-4851, CA-00-143

In Re: EQUIPMENT SERVICES, INCORPORATED
Debtor

UNITED STATES TRUSTEE
Plaintiff – Appellee

v.

EQUIPMENT SERVICES, INCORPORATED
Defendant – Appellant

On Petition for Rehearing and Rehearing En Banc

Appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.