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In re Equipment Services: Why the Court was Forced to Reach a Result Unintended by Congress

Timothy R. Halbach

I. Introduction

A financially troubled individual comes to your office seeking advice. You review his situation, explain his options, and recommend that he file a Chapter 7 bankruptcy petition. You inform him you will represent him for an hourly fee and that you will require $500 as a retainer. He agrees and pays you. You prepare and file his petition. It is clear that you should be able to keep this $500 as long as you have performed $500 worth of services by the time the bankruptcy petition has been filed.

After the petition has been filed and a trustee has been appointed, the § 341 meeting is held, where it is often beneficial for the debtor to have an attorney present to ensure that his personal interests are protected. You attend and for your time and effort at the meeting, determine that you are owed an additional $500. At this point, all of the debtor’s property, including his cash, is property of the bankruptcy estate. You ask the trustee and the court to pay you the $500 you are owed, but the court denies your request because § 330 of the Bankruptcy Code (“Code”), which is the statute that authorizes compensation, does not allow a debtor’s attorney to receive fees from the bankruptcy estate after the petition is filed.

Let’s look at another scenario. You help a small business prepare and file a petition for bankruptcy in Chapter 11, which allows for a reorganization of the business and sets up a payment plan. Initially, the business remains with the debtor, deeming the debtor a debtor-in-
You continue to act as an attorney for the business in helping it with its bankruptcy. At this point, you have a total bill of $5,000. However, the business is no longer able to continue to make payments as part of the reorganization plan and is forced to transfer its petition into a Chapter 7 liquidation proceeding where a trustee is automatically appointed. Again, the § 341 meeting is held where the debtor often benefits from having his personal attorney present. You attend and determine that for your services you are owed an additional $1,000. You make a motion with the court and the trustee for your $1,000 as a reasonable attorney’s fee, and you are denied because once again the court holds that § 330 does not allow an attorney to receive compensation.

The latter scenario is similar to the situation that occurred to the debtor’s attorney, John M. Lamie, in In re Equipment Services, Inc. (“Equipment Services”). After analyzing § 330, the court in Equipment Services found that it was unclear as to whether Congress intended to allow the debtor’s attorney to receive his fees from the bankruptcy estate after the appointment of a trustee. However, the court felt since the statute was not ambiguous, it was bound to follow the language of the statute and deny Lamie his attorney’s fees.

This note asserts that the court in Equipment Services reached the only possible outcome. However, a solution needs to be found in the determination of whether a debtor’s attorney can receive compensation under § 330 of the Code.

Prior to when the Code was amended in 1994, a debtor’s attorney was specifically included in the language of § 330 as eligible for compensation; however, after the amendments, a debtor’s attorney is no longer included. Nothing in the legislative history of § 330 appears to support this result. While this note contends that Congress should resolve this problem, on March 10, 2003, the Supreme Court granted certiorari.

First, an overview of the bankruptcy laws on attorney fees will be given. Second, the note will review five other court of appeals decisions that have confronted this problem. Third, it will analyze the

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8. See infra Part III.
9. See id.
10. Id.
12. See infra Part II.A.
13. See infra Part II.B.
Fourth Circuit's opinion in *Equipment Services*. Fourth, the note will analyze the statute and the case law. Fifth, it will suggest that Congress is best able to solve this problem, but since the Supreme Court has recently granted certiorari, it will suggest an outcome for the Court to follow. Finally, the note will be summarized in the conclusion.

II. BACKGROUND

A. The History of Attorney Fees in a Bankruptcy Proceeding

The first general bankruptcy statute was the Bankruptcy Act of 1898 ("Act"), which vested jurisdiction in the United States district courts. Section 62 of the Act allowed for payment of fees for the debtor's attorney. Section 64 of the Act made fees for a debtor's attorney a fourth priority and allowed for a reasonable attorney's fee. The amount of the fee was to be determined by the character and condition of the case and the time and care required of the attorney. The Act, which failed to specify what compensation attorneys could receive, gave great deference to the courts to determine reasonable compensation. The statutory language of awarding attorney's fees had remained virtually unchanged and was still a fourth priority as of 1978.

14. *See infra* Part III.
15. *See infra* Part IV.
16. *See infra* Part V.
17. *See infra* Part VI.
19. "(a) The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved, by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred." *Bankruptcy Act of 1898*, ch. 541, § 62, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).
20. "(b) The debts to have priority . . . and to be paid in full out of bankruptcy estates . . . (3) . . . one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, . . . as the court may allow."* Bankruptcy Act of 1898*, ch. 541, § 64, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).
22. *Id.*; *see also* Guterman v. C.D. Parker & Co., Inc, 86 F.2d 546 (1st Cir. 1936). The amount of attorney fees allowed in bankruptcy cases rests with the sound discretion of the court.
23. "In advance of distribution to creditors, there shall first be paid in full, out of the moneys paid in by or for the debtor, and the order of payment shall be - (4) such reasonable fee to the attorney for the debtor as the court may allow for the professional services actually rendered by such attorney to the debtor in and in connection with the proceedings under this chapter." *Bankruptcy Act of 1898*, ch. 541 § 659, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).
On October 1, 1979, the Bankruptcy Reform Act of 1978, creating what is commonly known as the Bankruptcy Code, took effect and replaced the Act. The Code has subsequently been revised by substantial amendments in 1984, 1986, and 1994. With the recent rise in the number of bankruptcies, a strong effort has been made by many members of Congress to revise the Code again, with their most recent effort failing.

By 1986, the Code had set out the compensation that an attorney could receive and had given the court less of a duty to decide the definition of reasonableness. Under the Bankruptcy Act, the attorney had to seek approval from the court to receive his or her fees. Now under the Code, the attorney files with the court a statement of what is to be paid to the attorney. The court then does not need to approve the fees, but it has the power to not allow the fees if it feels that they are not reasonable. The statutory authority for compensating and reimbursing the services of the officers of the estate, including the debtor's attorney is found in § 330. The 1986 version of § 330 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.

28. Why Bankruptcy Reform Failed This Year, 12 CONSUMER BANKR. NEWS 8, Dec. 24, 2002. The latest reason for not reforming the Bankruptcy Code is that some members of Congress feel that fines and penalties shall not be discharged on anti-abortion protestors.
29. In re Ames Dep't Stores, Inc., 76 F.3d 66, 71 (2nd Cir. 1996) (stating that, "[i]n enacting Section 330, Congress departed from [the previous] doctrine of strict review.").
30. See supra text accompanying note 19.
31. "(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." 11 U.S.C. § 329 (2002).
As a result of the enactment of the Code, attorney's fees are given a first priority under § 507(a)(1). Note that initially under the Act, attorney's fees were given a fourth priority. Thus, this creates a greater incentive for bankruptcy attorneys to represent debtors because the attorney knows that he or she will get paid from the bankruptcy estate before anyone else.

In 1994, Congress made sweeping changes to many sections of the Code. One of those affected was § 330. The primary purpose for overhauling this section was to give clearer guidance as to how a court should determine compensation by giving some parameters for the definition of reasonableness because some members of Congress felt that attorneys were charging excessive amounts in bankruptcy cases and abusing their power. The factors to be looked at are now listed in § 330.

Senate Bill 540, amending § 330, as originally introduced in the Senate contained the following language:

(a)(1) After notice to the parties 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.

Later, on April 21, 1994 Senator Howard Metzenbaum proposed amendment 1645 to Senate Bill 540. The amendment omitted the

34. See supra text accompanying note 20.
36. Bankruptcy Reform Act § 224(b). See also William L. Norton, Jr., Norton Bankruptcy Law and Practice § 25:6 (2d ed. 2002) (stating that, “[t]he purpose of these amendments was to foster greater uniformity in the application, processing and approval of fees.”).
37. See 11 U.S.C. § 330(a)(3)(A) (2002). The court now looks at such factors as the amount of time spent on services, the customary rates charged for such services, whether the services were necessary and beneficial to the estate, and whether the services were performed in a reasonable amount of time.
The phrase "or the debtor’s attorney" from § 330(a) and the twenty-nine words that followed the phrase. These remaining twenty-nine words were combined with another section dealing with objections to attorney’s fees and placed into a new § 330(a)(2). Mysteriously, the phrase "or the debtor’s attorney" was not placed in another section of § 330. In proposing this amendment, Senator Metzenbaum acknowledged that attorneys were charging too much. Later that day, the Senate passed Senate Bill 540, as modified by Senator’s Metzenbaum’s Amendment. The bill was then referred to the House of Representatives.

On August 17, 1994, the House Subcommittee on Economic and Commercial Law met and the National Association of Consumer Bankruptcy Attorneys ("NACBA") commented on the proposed text of § 330, now contained in House Bill 5116:

This provision appears to have some minor drafting errors, including the apparently inadvertent removal of debtors’ attorneys from the list of professionals whose compensation awards are covered by section 330(a). NACBA does not oppose this provision, since it contains language ensuring that chapter 12 and 13 individual debtors’ attorneys may be awarded compensation for their work in protecting the debtor’s interests in a bankruptcy case.

The House of Representatives passed House Bill 5116, which included the text of § 330 as passed by the Senate. The Senate later passed House Bill 5116, and the Metzenbaum Amendment became part of the final language of the statute.

As the 1994 Amendment finally emerged from Congress following several floor amendments, the final relevant portion § 330 as it looks today states:

(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—

40. "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." 11 U.S.C. § 330(a)(2) (2002).
42. See 140 CONG. REC. S4666-02 (daily ed. Apr. 21, 1994).
44. See 140 CONG. REC. H10917-03 (daily ed. Oct. 5, 1994).
(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.\textsuperscript{46} Thus, the phrase “or to the debtor’s attorney” was omitted. Also, note that in the 1994 Amendment the conjunction “or” is missing after examiner, thus making the sentence seemingly grammatically unsound.\textsuperscript{47} Also under (A), notice that it allows for reasonable compensation for the same three individuals as mentioned in part (a)(1) but “attorney” is included in (A), which quite possibly could have been originally put in to correspond with the “debtor’s attorney” in (a)(1).

Thus, no principled reason appears in any of the legislative history for the removal of the critical phrase “or to the debtor’s attorney” from the 1986 version of § 330. In 1997, two bills were introduced that included provisions that would have put that phrase back into § 330(a).\textsuperscript{48} It is unclear as to why neither of these measures passed; thus, it is possible that Congress purposely left the phrase out and has no intention of putting it back into the statute.

Other discrepancies in the Code exist. Specifically, § 329 allows the attorney of a debtor to file with the court a statement for compensation for his or her services.\textsuperscript{49} This section does not expressly authorize any such compensation, but it suggests that a debtor’s attorney should receive reasonable fees. Section 330 is the section of the Code that expressly authorizes compensation.

Also, Section 331, which is of course, directly after § 330, starts off by saying, “A trustee, an examiner, a debtor’s attorney, or any professional person . . . .”\textsuperscript{50} Note that these are the exact same four persons included in § 330(a) before the 1994 amendments. Section 330(a)(1)(A) includes almost exactly these same four persons as well.\textsuperscript{51} Logically, it would make sense that since these two sections are next to each other in the Code that they would correspond to each other. Prior to the 1994 amendments they did, but now no explanation exists for why they no longer do.

\textsuperscript{47} To make (a)(1) grammatically sound, a conjunction, preferably an “or,” should be placed after “examiner.” Thus, the phrase would read “a trustee, an examiner or a professional person . . . .”
\textsuperscript{49} “(a) Any attorney representing a debtor . . . shall file with the court a statement of the compensation paid or agreed to be paid . . . 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.” 11 U.S.C. § 329 (2002).
In addition, the 1994 Amendments added a separate provision, which provided for the allowance of reasonable compensation for attorneys for Chapter 12 or Chapter 13 bankruptcies. A Chapter 12 bankruptcy is reserved for family farmers. A Chapter 13 bankruptcy sets up a repayment plans for individuals with small debts. Therefore, attorneys for Chapter 12 or 13 bankruptcies are unaffected by the discrepancy in the language in § 330(a). It is important to note that in a Chapter 12 or 13 bankruptcy, a trustee’s role is more limited than that of a trustee in Chapter 7 or 11. The debtor in a Chapter 12 or 13 bankruptcy retains control of the estate. Of course, in a Chapter 7 or a Chapter 11 bankruptcy with a trustee, the trustee gains control of the estate.

It is also important to note that other sections of the Code besides § 330 allow for compensation to attorneys. These sections enable attorneys to collect their fees from any wrongdoers involved in the bankruptcy. Whenever a group of bidders at a sale of property from the estate engage in collusive bidding, the trustee may then be entitled to a reasonable attorney’s fee from such parties for recovering such property. Whenever a creditor requests a dischargeability determination of a consumer debt and such debt is discharged, the debtor shall be entitled to a reasonable attorney’s fee from the creditor for the proceeding, however this is only if the court finds that the position of the creditor was not substantially justified. After notice and a hearing, an entity shall be entitled to payment of administrative expenses, including reasonable compensation for and reimbursement of actual and necessary expenses incurred by an entity’s attorney. Whenever an involuntary bankruptcy case is commenced under Chap-

52. “In a chapter 12 or chapter 13 case... 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.” 11 U.S.C. § 330(a)(4)(B).

53. See 11 U.S.C. 109(e) (2002). To qualify for a Chapter 13 bankruptcy, the debtor must have unsecured debts of less than $250,000 and secured debts of less than $750,000.

54. In re Ramey, 266 B.R. 857, 861 (Bankr. S.D. Iowa 2001) (stating that, “when Congress revised § 330, it included a new subsection expressly providing for payment to attorneys for Chapter 12 and Chapter 13 debtors in certain circumstances, but not those of Chapter 7 debtors.”).


58. “[T]he court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney’s fee for, the proceeding . . . .” 11 U.S.C. § 523(d) (2002).

59. “(b) After notice and a hearing, there shall be allowed, . . . including (4) reasonable compensation for professional services rendered by an attorney . . . .” 11 U.S.C. § 503(b)(4) (2002).
ter 7 or Chapter 11 against a qualified debtor and the petition is subsequently dismissed by means other than on consent of all petitioners and the debtor, the debtor may be entitled to a reasonable attorney's fee from the petitioners. Finally, whenever a person willfully violates an automatic stay provision, an injured individual shall be entitled to a reasonable attorney's fee from the violator. Thus, these situations make it clear that Congress wants attorneys to be compensated for their services. However, Congress has been unclear as to why it no longer allows for a debtor's attorney to be compensated from the bankruptcy estate in a Chapter 7 or Chapter 11 case where a trustee has been appointed.

The history of fees for a debtor's attorney has been interesting. While the Act was in enforcement, a debtor's attorney was entitled to fees, but the court had great discretion in determining what was reasonable. With the enactment of the Code, Congress has created guidelines for the courts to follow when construing the definition of reasonableness. With the 1994 amendments, it is unclear as to whether a debtor's attorney is entitled to compensation from the bankruptcy estate in cases where a trustee has been appointed in Chapter 7 or Chapter 11. This problem has troubled the courts for the last nine years, including the Fourth Circuit in Equipment Services.

B. Court of Appeals Cases That Have Construed § 330(a)
After the 1994 Amendments

Prior to the Fourth Circuit's decision in Equipment Services, five other circuit courts had confronted the language of § 330(a). Three of the circuits concluded that a debtor's attorney should be allowed to receive reasonable compensation. Two of the circuits ruled, as did the Fourth Circuit in Equipment Services, that a debtor's attorney should not be compensated.

1. In re Ames Department Stores, Inc.

The first court to confront the irregular language of § 330(a) after the 1994 amendments was the Second Circuit. It disagreed with the

60. There cannot be an involuntary bankruptcy under Chapter 12 or 13.
61. "If the court dismisses a petition under this section (involuntary bankruptcy) ... the court may grant judgment-(I) against the petitioners and in favor of the debtor for-(B) a reasonable attorney's fee." 11 U.S.C. § 303(i)(1)(B) (2002).
63. In re Ames Dep't. Stores, 76 F.3d 66 (2nd Cir. 1996).
court in *Equipment Services* and felt that Congress mistakenly omitted the phrase "or to the debtor's attorney."

Skadden, Arps, Slate, Meagher & Flom ("Skadden") represented Ames Department Stores, its affiliates, and subsidiaries ("Ames") in a reorganization under Chapter 11. During the Chapter 11 proceeding, a dispute arose over terms of a contract, and thus, Skadden's fees totaled $35,000. A trustee was never appointed.

The bankruptcy court held that Skadden was not entitled to its attorneys' fees\(^6\) and the district court affirmed.\(^6\) The court of appeals reversed and remanded, holding that the omission of the phrase "or to the debtor's attorney" was "inadvertent."\(^6\) Since a trustee was never appointed, the real issue in this case was whether Skadden was charging excessive fees. The court held that the firm was not. The court went beyond the facts of its case and asserted, in dictum and relying on *Collier*,\(^6\) that § 330(a) allows for compensation of a debtor's attorney.\(^6\) The court remanded ordering the bankruptcy court to redetermine attorney fees based on whether counsel's services are reasonably likely to benefit the debtor's estate, not whether counsel is able to show an actual benefit to the estate.

2. *Pro-Snax Distributors, Inc v. Family Snacks, Inc.*\(^6\)

The next court to analyze the amended version of § 330(a) was the Fifth Circuit. This court's outcome and reasoning is shared with the court in *Equipment Services* in holding that the court is bound to follow the language of the statute.

Pro-Snax Distributors, Inc. ("Pro-Snax") was forced into a Chapter 7 bankruptcy that was later converted to a Chapter 11, and then reconverted to a Chapter 7. The law firm of Andrews & Kurth, L.L.P. ("Andrews") represented Pro-Snax in its bankruptcy proceedings.

The bankruptcy court concluded that Andrews could be awarded compensation from the bankruptcy estate under § 330 for the work it did as the corporation's attorney after the appointment of the Chapter

\(^6\) *In re Ames Dep't. Stores*, No. 93 Civ. 2192 (S.D.N.Y. June 7, 1995).

\(^6\) 1995 WL 338253 (S.D.N.Y. 1995), vacated by 76 F.3d 66 (2d Cir. 1996). The court denied fees not due to the language of § 330(a) but because Skadden had requested excessive fees.

\(^6\) *Ames Dep't. Stores*, 76 F.3d at 71.

\(^6\) *See infra* Part IV.B.2.

\(^6\) "Where 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." *Ames Dep't. Stores*, 76 F.3d at 71.

\(^6\) *In re Pro-Snax Distribs., Inc.*, 157 F.3d 414 (5th Cir. 1998).
The court felt that although § 330 did not explicitly award fees to the debtor’s attorney, the language of the statute was vague and did not preclude an award in favor of Andrews. However, the court felt that by relying on language in § 330(a)(4)(A), Andrews was entitled to most of the fees and expenses that it asked for. The district court reversed the bankruptcy court concluding that Andrews was not entitled to fees after the Chapter 11 trustee was appointed. The district court also remanded the case in order for it to recalculate the amount of fees that Andrews should receive under the American Rule.

The Fifth Circuit Court of Appeals affirmed the district court. Andrews made two arguments. First, it argued that when looking at the congressional intent of the 1994 Amendment to § 330(a), Congress did not intend to deny the debtors’ attorneys their fees. The court examined the statute and concluded that it was unclear at this juncture what Congress intended. Andrews’ second argument was that public policy suggests a broad reading of § 330(a) to encourage attorneys to represent debtors. The court did not examine this issue because it concluded that it is bound by its canons of construction and simply cannot alter the meaning of a statute. However, the court did not necessarily feel that this result was the one intended when Congress amended § 330.

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71. “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.” 11 U.S.C. § 330(a)(4)(A) (2002).
72. Andrews asked for $44,638 in fees and $10,725.37 in expenses and the court reduced those numbers to $30,000 for fees and $7500 for expenses.
73. Family Snacks, Inc. v. Andrews & Kurth, L.L.P., 212 B.R. 834, 838 (N.D. Tex. 1997), aff'd, 157 F.3d 414 (5th Cir. 1998) (stating that, “[t]his court disagrees with the analysis of the bankruptcy court. Its award is contrary to the plain language of § 330(a) in its current version and must find support, if at all in the concept that Congress did not mean what it said in the 1994 amendments to the Bankruptcy Code or, alternatively, that the bankruptcy court has inherent authority to make exceptions to the American Rule. Neither of these positions is persuasive.”).
74. The American Rule is that each party generally bears its own litigation expenses unless a statute authorizes the fees to be shifted.
75. Pro-Snax Distribs., 157 F.3d 414 (5th Cir. 1998).
76. Id. at 423.
77. “[W]e must commence our analysis by examining the plain language of the relevant statute, . . . and here our reading of § 330(a) begins and ends our inquiry.” Id. at 425.
78. “We decide the issue before us bound by our conventions of statutory construction, even though common sense might lead the lay observer to conclude that a different result is perhaps more appropriate. The law and the rules to which we adhere in order to interpret it, does not always conform to the dictates of common sense.” Id. at 423.
3. *In re Century Cleaning Services, Inc.*

The next court to confront the problem of interpreting the language of § 330(a) was the Ninth Circuit. This court disagreed with *Equipment Services* and held that an attorney can be compensated from the bankruptcy estate for services rendered after the appointment of a trustee. The Ninth Circuit recently reaffirmed this conclusion.

Century Cleaning Services ("Century") obtained the law firm of Garvey, Schubert & Barer ("Garvey") to represent it in its Chapter 11 bankruptcy proceeding. Century's petition was later converted to a Chapter 7. Garvey then applied for fees totaling $12,770.87 for services that it performed after the petition was changed to a Chapter 7. The bankruptcy court held that the language of § 330(a) did not authorize payment to Garvey. The Bankruptcy Appellate Panel affirmed.

The court of appeals reversed after conducting an extensive review of the language and legislative history of § 330. The court found that the statute was ambiguous because the conjunction "or" was not inserted before "professional person" in § 330(a). Since the court found the statute ambiguous, it took an extensive look at the legislative history of § 330. The court determined that there was no intent by Congress to change the substantive meaning of the statute.

The court found three reasons why the omission of the phrase, "or to the debtor's attorney" was inadvertent. First, there is an absence of any effort to have the questioned sentence parallel with the sentence that includes the word "attorney" in the next sentence of § 330. Sec-

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79. *In re Century Cleaning Servs.*, 195 F.3d 1053 (9th Cir. 1999).
80. *In re Smith*, 305 F. 3d 1078 (9th Cir. 2001) (stating that "[t]his panel, of course, may not overrule a prior panel of this court, and if we could, *Smith* offers no persuasive reason why we should.").
81. See *Century Cleaning Servs.*, 195 F.3d at 1055. Garvey filed petition papers, prepared schedules, amended reports, a statement of affair, a Rule 2015 request, communicated with creditors and participated in 2004 examinations.
83. Century Cleaning Servs., v. Garvey, Schubert & Barer (In re Century Cleaning Servs., Inc.), 215 B.R. 18 (B.A.P. 9th Cir. 1997), vacated by 195 F.3d 1053 (9th Cir. 1999). The court simply looked at the language of § 330(a) and felt that it did not allow for the payment of fees to a debtor's attorney once a trustee has been appointed. However, the court allowed Garvey to receive most of its fees under state lien law because of the lien that Garvey held.
84. *Century Cleaning Servs.*, 157 F.3d at 1057.
85. "A careful examination of § 330(a)(1) reveals an unavoidable and substantial ambiguity . . . ." *Id.* The court felt that since phrase "trustee, examiner, professional person, or attorney" from § 330(a)(2) does not correspond to the language in § 330(a)(1), which includes only "trustee, examiner, professional person."
86. See *id.* at 1058-60.
ond, the disputed sentence omits the conjunction, "or" which would make the sentence grammatically correct. Third, the court said that if Congress deliberately intended to amend § 330, there would have been some sign in the legislative history of § 330, and this court found none.

Judge Thomas wrote an often-cited and convincing dissent. He felt that the statute was not ambiguous and should therefore "end the discussion." He also noted that the majority placed too much emphasis on the omission of the phrase "or to the debtor's attorney" when it is equally as likely that the inadvertent error was the omission of the word "or."

4. *In re American Steel Product, Inc.*

The fourth circuit attempt to resolve the problem of § 330(a) was the Eleventh Circuit. This court agreed with *Equipment Services* by adopting the plain meaning of § 330(a).

American Steel Product, Inc. ("American") was involuntarily placed into Chapter 7 bankruptcy. The bankruptcy court converted it to a Chapter 11 proceeding; subsequently it was converted back to a Chapter 7. Inglesby, Falligant, Horne, Courington & Nash, P.C., ("Inglesby") a law firm, was appointed as counsel for American. When the bankruptcy proceedings concluded, Inglesby asked for court approval of its attorney's fees in the total amount of $30,141.87. Part of this amount, $19,600.00, had already been paid as a retainer prior to the filing of the initial petition.

The bankruptcy court looked at the plain language of § 330 and decided that Inglesby was not entitled to the $10,541.87, which was still owed for work done after the filing because a trustee was automatically appointed when American's creditors in Chapter 7 involuntarily filed the petition. The district court affirmed.

The court of appeals upheld the district court decision. The court examined the statute and determined that it was not ambiguous; thus, the court felt it must follow the plain meaning of the statute. The court disregarded the legislative history and grammatical evaluation of § 330 because it felt that "our cannons of construction do not re-

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87. See *id.* at 1061-65.
88. *Id.* at 1062.
89. *Century Cleaning Servs., Inc.* 157 F.3d at 1063.
90. *In re American Steel Prod.*, 197 F.3d 1354 (11th Cir. 1999).
92. *American Steel Prod.*, 197 F.3d at 1355.
93. *Id.* at 1356.
quire nay, do not permit-us to consider these exogenous sources when the statute is clear textually on its face.”94

5. *In re Top Grade Sausage, Inc.*95

The final circuit court to analyze § 330(a), before the Fourth Circuit in *Equipment Services*, was the Third Circuit. This court sided with the Second and Ninth Circuits and felt that after the appointment of a trustee a debtor’s attorney is entitled to his or her fees from the bankruptcy estate.

The Lipari family owned two businesses, Top Grade Sausage, Inc. (“Top Grade”) and Florist Distributors, Inc. (“Florist”). Top Grade and Florist were forced to file separate voluntary Chapter 11 bankruptcy petitions. The bankruptcy court combined the cases, and a trustee was appointed shortly after the filing.

As efforts to form a reorganization plan under Chapter 11 for Top Grade and Florist failed, it was forced to convert into a Chapter 7 liquidation bankruptcy. The bankruptcy court did not allow the attorney to receive compensation for services rendered after the debtors’ petitions were converted to Chapter 7 because it found the attorney’s services were solely for the benefit of the debtor and not for the bankruptcy estate.96 It did not touch on the language of § 330(a).

The attorney appealed to the district court, which raised for the first time the issue of whether a bankruptcy court may award fees to the debtor’s attorney under § 330(a) from the bankruptcy estate.97 The district court held that the omission of “debtor’s attorney” was inadvertent and the attorney could still recover.

The court of appeals held that a Chapter 7 debtor’s attorneys could receive compensation because the language of § 330(a) is ambiguous.98 The court analyzed the language of the statute and felt the omission of the phrase “or to the debtor’s attorney” and the lack of the conjunction “or,” “render the section grammatically unsound.”99 After finding the statute ambiguous, the court then found that the legislative history of the statute does not manifest an intent of Congress to change the long-standing practice of compensating debtor’s attorneys from the bankruptcy estate.100

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94. *Id.*
95. *In re Top Grade Sausage, Inc.*, 227 F.3d 123 (3rd Cir. 2000).
98. *Top Grade Sausage*, 227 F.3d at 127.
99. *Id.*
100. *Id.* at 130.
Therefore, including the decision from *Equipment Services*, the circuit courts have split three to three. It is interesting at this point to note that in the circuits where the court of appeals has not decided the issue, the federal courts are split nine to eight. Nine have held that the statute must be given its plain meaning;\(^1\) eight have found § 330 to be ambiguous.\(^2\)

III. **Subject Opinion: *In re Equipment Services, Inc.*\(^3\)**

This note will now analyze the Fourth Circuit’s decision in *Equipment Services*. It is the sixth case in the line of circuit court cases that have examined the language of § 330(a). The Fourth Circuit sided with the Fifth and Eleventh Circuits in holding that the court is bound to follow the plain meaning of a statute. Thus, creating the current three to three split among the circuits that have attempted to solve the discrepancy of the language of § 330(a).

*Equipment Services, Inc.* (“Equipment”) filed a Chapter 11 bankruptcy petition on December 24, 1998 and was represented by John M. Lamie (“Lamie”). Equipment paid Lamie a $6,000 retainer of which $1,000 was used to pay the fees and costs of filing the Chapter 11 petition. Lamie then deposited the remaining $5,000 in his client escrow account. Prior to the conversion of the Chapter 11 petition to Chapter 7, Lamie earned $1,325 in fees and $3.85 in costs.

On March 17, 1999, on a motion by the United States Trustee, Equipment’s Chapter 11 petition was converted to a Chapter 7 proceeding during which Lamie earned another $1,000. On June 5, 2000, Lamie filed an application with the bankruptcy court, seeking approval of attorney’s fees for $2,325 and the $3.85 in costs. The United States Trustee objected to the $1,000 earned during the Chapter 7 pro-

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ceeding because § 330(a) "makes no provision for counsel of the debtor to be compensated by the estate."\footnote{104}{Id. at 743.}

The bankruptcy court agreed with the trustee holding that § 330(a) does not authorize a debtor’s attorney to be paid funds from the bankruptcy estate for services rendered after the case is converted to a Chapter 7 proceeding.\footnote{105}{In re Equip. Servs., Inc., 253 B.R. 724 (Bankr. W.D. Va. 2000), aff’d, 260 B.R. 273 (W.D. Va. 2001), aff’d in part and rev’d in part In re Equip. Servs., Inc., 290 F.3d 739 (4th Cir. 2002), cert. granted, 2003 WL 891324.} First, the court said that such a "ruling is based on the most logical and apparent interpretation of the effect of the 1994 amendment of § 330 of the Bankruptcy Code."\footnote{106}{Id. at 728.} Second, the court thought that this was the best alternative that it could use to achieve consistency throughout its district.\footnote{107}{Id. at 729-733.} However, the bankruptcy court held that Lamie was entitled to his fees because the retainer was not part of the bankruptcy estate.\footnote{108}{Id. at 729-733.}

The district court affirmed the bankruptcy court on both grounds.\footnote{109}{Id. at 743.} The court examined the legislative history of § 330, but it determined that it must follow the plain meaning of the statute.\footnote{110}{Id.} The court also agreed with the bankruptcy court that Lamie was still entitled to his fees from the retainer because it was not property of the estate.

The Fourth Circuit affirmed on the first ground and reversed on the second ground.\footnote{111}{See id.} It began by noting that the previous circuits that decided this issue have split three to two. Lamie argued that the omission of the phrase "or to the debtor’s attorney" from the 1986 version of § 330(a) of the Code was inadvertent and the result of a scrivener’s error and thus, renders the statute ambiguous, permitting courts to look at the legislative history when interpreting the statute.

Meanwhile, the trustee argued that one has to read § 330(a) as it is written and give the statute its plain meaning. The trustee also argued that policy reasons support this conclusion. First, he noted that in a Chapter 7 proceeding, the debtors and the creditors do not work as a team. Second, in a Chapter 7 proceeding, the trustee is authorized to hire attorneys at the estate’s expense as needed to help liquidate the estate, negating the need for the assistance of the debtor’s attorney. Finally, he pointed out that in a Chapter 7 proceeding, a debtor’s at-
attorney cannot do the type of good work that could enlarge the estate like in a Chapter 11 proceeding because a Chapter 7 proceeding is a zero-sum game.\textsuperscript{112}

The court recognized both sides of the argument but decided to rule for the trustee. It felt that the statute must be given its plain meaning. The court also noted that when § 330(a) was revised, the courts must presume that Congress intended to make the change that it did; otherwise, Congress would have changed it by now. It has had eight years to make such a change and nothing has come of it. The court noted that if Congress did indeed make the change in error, it should correct it and not this court.\textsuperscript{113} As to the second issue in the case, the court reversed the district court holding that the leftover portion of the retainer became part of the bankruptcy estate when the Chapter 11 petition was filed.

Justice Michael filed a short, dissenting opinion expressing that he agreed with the other circuits that felt the omission was an error.\textsuperscript{114} He cited and agreed with the reasoning used in *Pro-Snax* and *American Steel*.

IV. Analysis

The court in *Equipment Services* made the correct decision although it was not the one that Congress intended. The meaning of § 330(a) is not ambiguous in that it does not include the debtor's personal attorney in the list of those eligible for compensation from the bankruptcy estate in a Chapter 7 or 11 proceeding where a trustee has been appointed. However, there is strong evidence that Congress did not intend to make a substantive change to § 330. Congress simply made a huge error and should be responsible in resolving its own mistake. However, since Congress has been slow in doing so, it is necessary for the Supreme Court to step in and resolve this problem.

As a result of the omission of the phrase "or to the debtor's attorney," § 330(a) has been read by three circuits as providing that a debtor's attorney in a Chapter 7 or Chapter 11 bankruptcy proceeding is not entitled to any compensation from the bankruptcy estate.\textsuperscript{115} Thus, these circuits have interpreted § 330(a) to mean that a debtor's

\begin{footnotes}
\item[112] See id. at 728.
\item[113] "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." Id. at 745.
\item[114] "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." Id. at 748.
\item[115] See supra notes 69-78 and accompanying text; notes 90-94 and accompanying text; and notes 103-114 and accompanying text.
\end{footnotes}
attorney is not entitled to any fees earned after the filing of the petition and appointment of a trustee because then the attorney would be requesting fees from the bankruptcy estate. They find that § 330(a) is not ambiguous; thus, they are confined to follow the plain meaning of the language of the statute.

Alternatively, three circuits have held that a debtor's attorney after the appointment of a trustee is entitled to reasonable compensation from the bankruptcy estate. These circuits hold that the statute is ambiguous, and since it is, the court could solve the ambiguity by looking to the legislative history of the statute to determine the intent of Congress; these courts have found that Congress never intended the change.

At this juncture, it is important to understand the different roles of the trustee in Chapter 7 and 11 bankruptcies. In a Chapter 7 bankruptcy, a trustee is automatically appointed at the filing of the petition. In many instances, a debtor can benefit by having an attorney present at the § 341 meeting. Also, if a creditor challenges whether certain property was properly exempted, the debtor may want an attorney to represent the debtor's interests. However, the present language of the statute has been held by some courts to not allow for the attorney to be compensated.

Alternatively, the debtor would have to rely on the trustee to defend him, her or it, but the trustee and debtor have different goals. The trustee's goal is to maximize the bankruptcy estate, while the debtor's goal is to maintain as much of the property as possible. This inherent tension suggests that Congress would never intend for a debtor's attorney not to be compensated and to have the debtor's personal interests to only be represented by the trustee.

In a Chapter 11 bankruptcy, a trustee is not automatically appointed. In a majority of these cases the debtor plays the role of trustee and is called a debtor-in-possession. The debtor-in-possession has the same functions that a trustee would have. A debtor would want to remain in possession because he, she or the organization presumably knows how to effectively run the business, or at least better than the trustee would. In situations where a debtor remains in pos-

116. See supra notes 63-68 and accompanying text; notes 79-88 and accompanying text; and notes 95-100 and accompanying text.

117. See 11 U.S.C. § 341 (2002). This is referred to as the meeting of creditors and equity security holders. In a Chapter 7 case, the trustee has the duty to make sure that the debtor is aware of his, her or its rights. In most cases, an attorney is beneficial to the debtor in this situation.

118. See 11 U.S.C. § 1121(c) (2002). This section gives the debtor the first right to propose a reorganization plan. An attorney is usually beneficial to the debtor in this situation.
session of the business, an attorney for the debtor would definitely be entitled to fees that may accrue after the filing because there is no bankruptcy estate, and the debtor acting as trustee has many duties to perform.

However, sometimes a trustee is appointed at the filing of a Chapter 11 petition. In these cases there is no debtor-in-possession because the trustee is in possession of the business. He or she essentially runs the business in place of the debtor. In these situations, the plain language of § 330(a) has been interpreted by many courts to not allow the debtor's attorney to receive compensation. The trustee would handle any problems that arise with the bankruptcy because he or she is now in possession. If the trustee requires the services of an attorney, that attorney would be compensated because that person is representing the trustee and is performing beneficial services for the estate.

Also, many times a debtor will remain in possession of the business at the beginning of a Chapter 11 filing, but the business will not be able to make its required payments under the Chapter 11 reorganization plan and will be forced to transfer to a Chapter 7 proceeding. Of course, when the petition is transferred, a trustee is automatically appointed. Thus, the debtor's attorney would no longer be entitled to compensation because the case would now be in a Chapter 7 proceeding, and the trustee would manage the estate. Also, note that if the trustee requires an attorney in a Chapter 7 or 11 proceeding, that attorney is entitled to reasonable compensation under the Code.

A. Arguments Why the Fourth Circuit's Decision in Equipment Services Was Correct

There are four common arguments why the court in Equipment Services correctly decided that the debtor's attorney, John Lamie, was not entitled to compensation from the bankruptcy estate after the appointment of a trustee. First, and most importantly, § 330(a) has a clear and plain meaning. Second, it is not clear that the phrase, "or to the debtor's attorney," was mistakenly omitted. Third, many believed that bankruptcy attorneys were charging far too high fees prior to the 1994 amendments. Fourth, the fact that § 330(a)(4)(B) was included in the 1994 amendments.

1. Courts Must Follow the Plain Meaning

First of all, when a statute is not ambiguous, the court is required to follow the plain meaning of the statute. Therefore, it is unnecessary

to look to the legislative history because the case law does not support that response.¹²⁰ Several courts have followed this approach.¹²¹ If courts begin ignoring the plain meaning of a statute, then the purpose of a legislature is no longer being met. When the founding fathers met in Philadelphia in 1789, they envisioned a system of checks and balances between the legislature, executive, and judicial branches of the government. They created mechanisms within the constitution to ensure this system. After all, the legislature is elected by the people to create the laws for its society.

It is well settled that courts are required to apply the plain-meaning canon of statutory construction in interpreting the Bankruptcy Code.¹²² The Supreme Court has stated that when interpreting the Code, “as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.”¹²³ Although the legislative history and a brief syntactical evaluation of the clause at issue suggest that Congress may have inadvertently neglected to include a debtor’s attorney as one of the individuals entitled to compensation, “our cannons of construction do not require no, do not permit us to consider these exogenous sources when the statute is clear textually on its face.”¹²⁴

Authority also exists that when a bill has been reintroduced, any deletion from the prior version of the bill should be seen as a clear intention by Congress that it does not want that language in the statute. Since the deletion of the phrase “or to the debtor’s attorney” occurred after it was originally introduced to the Senate,¹²⁵ courts should infer as a matter of statutory construction that Congress intentionally rejected the earlier version of the Senate bill.¹²⁶

The main issue in deciding whether a debtor’s attorney is entitled to compensation is whether the current language of the statute is clear on its face. One can be certain that the language is clear. Section 330(a)(1) lists the individuals who can receive compensation. A debtor’s attorney is not included on this list. It only allows compensa-

¹²⁰ See Darby v. Cisneros, 509 U.S. 137, 147 (1993) (stating that “[r]ecourse to the legislative history is unnecessary in light of the plain meaning this text.”).
¹²¹ See supra note 101.
¹²² See In re American Steel Prod., Inc., 197 F.3d 1354 (11th Cir. 1999).
¹²⁴ Pro-Snax Distrbs. v. Family Snacks, 157 F.3d 414 (5th Cir. 1998).
¹²⁵ See supra note 39 and accompanying text.
¹²⁶ See Russello v. United States, 464 U.S. 16, 23-24 (1983) (holding that when a legislature reintroduces a bill and language is missing from the first time the bill was introduced, it may be presumed that the deletion was intentional) (emphasis added).
tion for the “trustee, an examiner, a professional person.” Since these three individuals are listed and a debtor's attorney is not, it is unnecessary to look beyond the language of the statute.

2. No Clear Evidence Exists that the Omission was a Mistake

Second, it is not clear whether the omission of the phrase “or to the debtor's attorney” was a mistake. It is equally possible that the scrivener's error was not the omission of that phrase, but the omission of the word “or” between “examiner” and “professional person,” which is less substantive than the clause, “to the debtor's attorney.” It is also important to note the Supreme Court's holding that courts should disregard punctuation to determine the meaning of a statute. Thus, if courts disregard the punctuation of § 330, then the statute is not ambiguous.

When the grammatical words of a statute seem awkward, the duty of the court construing the statute is to “presume that a legislature says in a statute what it means and means in a statute what it says.” Whether Congress intended debtor's attorneys to be compensated after the 1994 amendments is not what courts should look at. It is unnecessary for courts to look any further than the language of § 330.

3. Many felt attorneys were already receiving too much compensation

Third, prior to the passage of the 1994 Amendments, courts had unilaterally imposed significant fee restrictions on attorneys for Chapter 7 debtors. Thus, it was not a universal holding that attorneys should be compensated for fees from the bankruptcy estate after the

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128. See In re Century Cleaning Servs., 195 F.3d 1053 (9th Cir. 1999) (Thomas, J., dissenting).
131. See In re Kahler, 84 B.R. 721 (Bankr. D. Col. 1988). This case involved two attorneys who were seeking pre-petition fees from the bankruptcy estate in a Chapter 7 proceeding, and also, one of them was seeking post-petition fees for services. The court denied both attorneys their pre and post-petition fees from the estate because among other reasons, the fees were not reasonable. See also In re NRG Res., Inc., 64 B.R. 643 (W.D. La. 1986). This court took a strong position in that once a trustee is appointed, no debtor's attorney should be awarded fees because he can perform no beneficial purpose unless he received prior court approval. See also In re Ames Dept Stores, Inc., 1995 WL 338253 at *2 (S.D.N.Y. 1995), vacated by 76 F.3d 66 (2nd Cir. 1996) (stating that, “[t]oo many members of the bankruptcy bar have grown accustomed to submitting 'billable hours' without regard to anything other than their own profit. It is for all of them that I now take pen in hand.”). See generally Professional Fees in Bankr.: Hearings Before the Subcomm. on Courts and Adm. Practice of the Comm. on the Judiciary, 102d Cong. (1992). These hearings discussed how attorneys were receiving too much compensation, which is where the new § 330 came from.
appointment of a trustee. Also, many feel that once a trustee has been appointed in a Chapter 7 bankruptcy, the trustee can handle any problems that arise.

This position is primarily asserted since the debtor no longer has control of the property. The debtor's property is now property of the estate. The trustee ensures that the creditors are getting paid appropriately. Essentially, the only situations where an attorney might be needed is the § 341 meeting\textsuperscript{132} or when a creditor makes a challenge to the classification of a piece of the debtor's property. Even in this latter situation though, the trustee is responsible for correctly classifying the property.

However, an attorney for a Chapter 11 debtor has different responsibilities and duties since in a majority of cases the debtor will remain in possession. Thus, the debtor takes on the role of trustee, and as described earlier, an attorney is necessary. A stronger argument is that when there is a trustee in a Chapter 11 proceeding, the debtor's attorney should not receive compensation because the trustee resolves any situations that arise during the bankruptcy, which basically leaves the debtor with very little responsibilities.

4. Added Section to § 330 for Chapter 12 and 13 Attorneys

A key amendment to § 330 from the 1994 amendments was that it added an extra section that refers only to attorneys in Chapter 12 or 13 proceedings.\textsuperscript{133} This section allows for compensation for debtors' attorneys in these types of bankruptcies even after the appointment of a trustee. Some courts have relied on this section as a specific and clear intention by Congress not to include compensation for debtors' attorneys in Chapter 7 or 11 proceedings.\textsuperscript{134}

If Congress intended for all debtors' attorneys to be compensated under § 330(a)(1), it would have been redundant to add this section because it ensures that Chapter 12 or 13 debtors are compensated. However, it is important to note again that the trustee's role in a Chapter 12 or 13 case is much less significant than that of a trustee in Chapter 7 or 11.\textsuperscript{135} Thus, the debtor's attorney has a much greater role and would be more justified in receiving compensation. This section could have been added to ensure that attorneys for Chapter 12

\textsuperscript{132} See supra note 116.
\textsuperscript{134} See In re Ramey, 266 B.R. 857, 861 (Bankr. S.D. Iowa 2001); see also In re Friedland, 182 B.R. 576 (Bankr. D. Colo. 1995).
\textsuperscript{135} See supra notes 55-56 and accompanying text.
and 13 debtors were compensated because of the extra work they perform as compared to Chapter 7 or 11 debtors' attorneys.

B. Arguments Why the Fourth Circuit's Decision in Equipment Services was Incorrect

Four arguments are commonly made as to why the Fourth Circuit in Equipment Services should have ruled in favor of Lamie. First, the statute is ambiguous. Second, the statute lacks Congressional intent. Third, § 330 does not correlate with other compensation provisions of the Code. Fourth, public policy is in Lamie's favor.

1. Ambiguity in § 330

Again, the key issue in the analysis is whether the language of the § 330(a) is ambiguous. Several courts have held that § 330 is ambiguous for two reasons. First, consider the individuals listed in back-to-back sections of §330. Section 330(a)(1) contains the phrase “a trustee, an examiner, a professional person employed under Section 327 or 1103.” Meanwhile, § 330(a)(1)(A), which is immediately following, contains the same three persons - trustee, examiner, professional person, but then adds “or attorney.” Nothing appears in the statute or in the legislative history that can logically explain why these two sections that immediately follow each other do not correlate. Section 330(a)(1) cannot be read on its own. It has to be read in conjunction with § 330(a)(1)(A) and (B), and the only purpose that seems to exist for listing the four individuals in § 330(a)(1)(A) is to reiterate those listed in § 330(a)(1). This provides strong evidence that the omission was a mistake.

Second, some courts feel that the lack of the conjunction, ‘or,’ after ‘examiner’ in § 330(a)(1) renders the statute ambiguous because the statute is then grammatically unsound. They feel that this is further proof that Congress made a mistake and accidentally left out “or to the debtor's attorney.” It is safe to say that if an 'or' had been placed in the current version of § 330 after 'examiner,' then the statute would not be ambiguous, which would have been a clear intention by Congress to not include a debtor's attorney among those who should receive compensation.

However, simply because two sections of a statute that are next to each other do not correlate and that a conjunction is missing is not

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136. See supra note 100 and accompanying text.
139. See supra note 47 and accompanying text.
enough to render a statute ambiguous. Courts holding in this manner must have had an eye on the legislative history of the statute and were looking backwards to find an ambiguity. This is an incorrect approach because courts must first look to the language of the statute.

2. Lack of Congressional Intent

If a court determines that a statute is ambiguous, only then can it look to the legislative history to determine the intent of Congress. A strong argument can be made that congressional intent to change the substantive meaning of § 330 is lacking.

Collier on Bankruptcy ("Collier") agrees with this position giving it extra weight. A citation to Collier carries far more weight in bankruptcy litigation than a citation to a secondary authority in other litigation.\(^{140}\) Collier argues that to construe the change in language of § 330(a) as not allowing a debtor's attorney to be compensated would represent a fundamental change in the law.\(^{141}\) It suggests that since the change is inconsistent with current case law and that the legislative history of § 330 does not support such a drastic change, courts should construe the deletion as unintended.\(^ {142}\) Collier is not the only authority in bankruptcy to take this position. Norton, although lacking the same amount of authoritative weight as Collier, also agrees with this position.\(^ {143}\)

Collier also states that since the Bankruptcy Reform Act of 1994 covers a wide range of bankruptcy provisions and amendments, technical errors are to be expected.\(^ {144}\) Although this may all be true, one cannot simply ignore the language of the statute and decide not to follow it. Ignoring the language would defy the reasoning behind having a legislature create laws to only have the courts construe their own meaning. If the change was simply the result of a scrivener's error, then Congress should correct the problem. It could be that Congress does not want to own up to its mistake considering all of the litigation that already has taken place over this issue. Collier even goes on to say that in most instances, the amendments are well drafted, and the defects noted should not detract from the overall usefulness of the


\(^{141}\) Collier on Bankruptcy § 330.06 (15th ed. 1995).

\(^{142}\) Id.

\(^{143}\) See William L. Norton, Jr., Norton Bankruptcy Law and Practice 2d § 26:5 (2d ed. 2002) (stating that "it seems that at the very least ambiguity exists, and in view of the lack of legislative history evidencing an intent by Congress to revise the treatment of attorney compensation under § 330(a)(1), the courts should interpret the statute in the same manner that existed prior to the 1994 Amendments.").

\(^{144}\) Collier on Bankruptcy § 330.06 (15th ed. 1995).
This argument by Collier seems to say that one should follow most of the Code but not necessarily all of it, which is not an appropriate approach.

3. Section 330 as Compared to § 329 and § 331

Section 329 directly precedes § 330 in the Code. It "permits the debtor’s attorney to receive a reasonable retainer for services rendered in contemplation of, or to be rendered in connection, a case under the bankruptcy code."146 Section 329 requires that the attorney submit to the bankruptcy court a detailed description of the retainer which the court "may cancel any such agreement, or order the return of such payment, to the extent excessive."147 Thus, according to Collier, "Section 329 . . . would be superfluous if the deletion in section 330(a) is construed as exempting debtors’ counsel from compensation under 330."148 This is even more evidence that the omission of "or to the debtor’s attorney" was a mistake.

If one takes a look at § 331, one would notice that it starts off by saying, "A trustee, an examiner, a debtor’s attorney, or any professional person. . . ."149 Note that these are the exact same four persons included in § 330(a) before the 1994 amendments. As mentioned earlier,150 in § 330(a)(1)(A) it includes these same four persons as well.151 Mentioning almost the exact same four people suggests that they correspond to one another throughout these sections, which means that the omission of the phrase "or the debtor’s attorney" after the 1994 amendments was simply a scrivener’s error.

4. Public Policy

Public policy supports allowing a debtor’s attorney to receive compensation from the bankruptcy estate after the appointment of a trustee. An attorney would be extremely reluctant to represent a debtor in this situation because he or she knows that it would be difficult to receive compensation. A debtor, just as anyone else, has the right to have an attorney represent his or her personal interests.

Also, special policy problems exist when looking only at a Chapter 7 bankruptcy. A debtor’s attorney in a Chapter 7 cannot do the same

145. Id.
146. See id.
148. COLLIER, supra note 144, ¶ 330.05.
150. See supra Part IV.B.1.
good work that a Chapter 11 attorney could do to enlarge the estate. The trustee and the debtor are working against each other in a Chapter 7 case because each has different goals and objectives. The trustee wants as much of the debtor’s property to be part of the estate as possible. Meanwhile, the debtor wants to keep as much of his or her property out of the estate as possible allowing him or her to keep more of the property. Because of these different objectives, it makes sense that a debtor’s attorney should be compensated.

V. IMPACT

The biggest impact that the decision by the court in Equipment Services will serve is to create an even three to three split between the circuit courts that have ruled on this issue. This creates a greater urgency for either the Supreme Court or Congress to act and to resolve this problem before other courts needlessly waste more time determining how to interpret § 330(a). Since Congress has done nothing for over nine years, the Supreme Court has felt that it must step in and provide clarity to the situation.\textsuperscript{152}

Throughout the history of bankruptcy law in the United States, attorneys have been compensated for their services even after a trustee has been appointed. Denying such fees may result in attorneys refusing to help clients once a trustee has been appointed in their case. This would result in more pro se proceedings which would be unintended by Congress because it harms debtors and makes it more difficult for their interests to be protected.

A. \textit{The Supreme Court Should Not Have Granted Certiorari}

First of all, this is not an issue for the Supreme Court to decide.\textsuperscript{153} Although an obvious circuit split exists, it involves the reading of a statute that is mistakenly written. However, because of the recent failure of Congress to reform the Code yet again, the Supreme Court must have felt that it was left with no choice but to step in and resolve this problem.

The Supreme Court has two options. First, it can adopt the plain meaning of the statute and hold that a debtor’s attorney is not entitled to attorney’s fees. When a statute is clear on its face, it is not the place of a court to interpret it any other way. By reaching this result, the Court may force Congress to act and fix this problem.

\textsuperscript{152} See Lamie v. United States Trustee, 123 S.Ct 1480 (2003).

\textsuperscript{153} See, e.g., Kevin H. Smith, Certiorari and the Supreme Court Agenda: An Empirical Analysis, 54 Okla. L. Rev., 727 (2001) (discussing how the Court decides which cases to hear).
Second, it can accept the fact that Congress made an error and interpret the statute as if the phrase, "or to the debtor's attorney," still existed in the statute. This would be the appropriate result because the evidence favors the position that Congress never intended to make a substantive change to the law. However, in order to make this determination, the Court has to conclude that the statute is ambiguous, which it seemingly is not.\footnote{See supra Part IV.B.1.}

B. Congress Should Address this Problem

Congress created this problem, so it is the appropriate vehicle to resolve and fix its "little" mistake. Congress has two options. First, if it decides that it did make a scrivener's error when it left out the phrase "or the debtor's attorney," it could simply put the words back into the statute, which is precisely what Congress should do. It would give the statute the meaning it had prior to the 1994 amendments.

Second, if Congress intended for debtor's attorneys not to receive compensation, then it needs to make the language of the statute clear. Congress could simply place the conjunction "or," after "examiner" into the current version of § 330(a)(1).\footnote{Id.} The legislative history does not clearly reveal that Congress intended to change the substantive meaning of § 330. It is odd and unusual that Congress would make this type of change without providing any reasoning as to why it did so.

VI. Conclusion

If the omission of the phrase, or to the debtor's attorney, was an accidental omission from § 330(a), then why hasn't Congress owned up to and corrected its mistake? Six circuit courts' decisions have struggled with this omission; three of them deciding that it was simply a scrivener's error and three saying that Congress made the change and the courts have no choice but to follow the plain meaning of the statute. Courts are expounding unnecessary time and money deciding this issue. Since Congress has not passed any bankruptcy reform within the last nine years, the Supreme Court must have finally felt that it should do something about it. It must decide whether § 330 is ambiguous. If it is not, then the Court should follow the plain meaning of the statute and hold that a debtor's attorney is not allowed compensation. If the Court does decide that the statute is ambiguous, then it would look at whether Congress intended the change. Once
the Court has looked at the legislative history of the statute, it would assuredly hold that the intent to change the substantive nature of § 330 was lacking. Perhaps Congress will act before the Supreme Court hears the case.