The International Environmental Court: Its Broad Jurisdiction as a Possible Fatal Flaw

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NOTE

THE DISCREPANCY IN BANKRUPTCY CODE SECTION 330:
CAN A CHAPTER 7 DEBTOR'S ATTORNEY COLLECT FEES
FROM THE BANKRUPTCY ESTATE?

I. INTRODUCTION

Federal bankruptcy has experienced many changes in its laws throughout its history. Some of these changes have been drastic changes while others were minor adjustments to the existing laws. The first federal bankruptcy law was passed in 1800. At that time bankruptcy relied mainly on state laws. The Federal Bankruptcy Act of 1800 allowed only creditors to initiate a bankruptcy proceeding "upon proof of [a] debtor's commission of an act of bankruptcy." Major bankruptcy action by the federal government occurred again in 1841 and 1867. However, the Bankruptcy Act of 1898 became the major starting point of permanent federal bankruptcy, staying in effect until it was replaced in 1978. "Much of the 1898 Act was directed not at debtor relief, but rather at facilitating the equitable and efficient administration and distribution of the debtor's property to creditors." There were many amendments made to the 1898 Act, particularly the Chandler Act, which in a large part was brought on by the Great Depression. The Chandler Act revised almost all provisions of the 1898 Act focusing on improving bankruptcy administration and a reworking of the organization provisions, such as having Chapter X govern corporate reorganizations.

The next major change in bankruptcy law came with the passing of the Bankruptcy Reform Act of 1978. The 1978 Act was a

2. See id. at 13.
3. Id. at 14.
4. See id.
5. See id. at 23.
6. Id. at 25.
7. See id. at 28-29.
8. See id. at 29-30.
9. See id. at 32.
comprehensive reform of federal bankruptcy law. One of the major changes was the enlargement of the bankruptcy courts’ jurisdiction, which allowed bankruptcy judges to hear almost all matters that arose or were related to bankruptcy cases. Another change concerned fees paid to lawyers and other professionals, which the 1898 Act had capped in order to preserve economy. "The drafters of the 1978 Act rejected the economy principle, concluding that bankruptcy administration would be better served if the best professionals were willing to serve in bankruptcy cases." Between 1978 and 1994 Congress conducted no major changes but instead just tinkered with bankruptcy legislation.

In 1994, Congress passed the Bankruptcy Reform Act of 1994, which included a large number of substantive amendments to the Bankruptcy Code. The Bankruptcy Reform Act amended the relevant part of § 330 to read:

(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.

This amendment differed from the original statute because it took out the term “or to the debtor’s attorney” from the list of people who may be awarded compensation. Before the 1994 amendment debtors’ attorneys were allowed to collect their attorneys’ fees from the debtors’

10. See id.
11. See id. at 34.
12. See id. at 35.
13. Id.
14. See id. at 37.
15. See id. at 42.
17. The statute originally stated that:
(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.
estate in Chapter 7, which deals with the liquidation of a bankruptcy estate. Chapter 7 establishes equitable distribution among the estates’ creditors, even though in most cases there are not enough assets to pay off the creditors. It also allows the honest debtor to obtain a new financial life by allowing a discharge of all unpaid debts.

A circuit split then emerged among five different circuit courts that have addressed the issue of whether § 330 allows the debtor’s attorney in Chapter 7 cases to collect their fees from the bankruptcy estate. The Third and Ninth circuits have found that the debtor’s attorney is allowed to recover fees from the debtor’s estate. They have taken a general view that the omission of the words “or to debtor’s attorney” in the statute was inadvertent or the result of a scrivener’s error. The Fourth, Fifth and Eleventh circuits have taken the opposite position and have said that attorneys are unable to collect their fees regardless of any benefit from their legal services that have been provided to the estate.

The Supreme Court of the United States then granted certiorari in Lamie v. United States Trustee. The Court’s recently stated opinion holds that § 330(a)(1) does not authorize payment of attorney’s fees to the debtor’s attorney unless that attorney was appointed under § 327 of the code.

This Nôte will conduct an in-depth analysis into the decisions by the Supreme Court and the circuit courts. The goal of this Note is to suggest an approach for the Supreme Court to use when interpreting unclear language under the Bankruptcy Code. It will examine how the Supreme Court has examined this issue, as well as other issues of statutory interpretation involving the Bankruptcy Code.

Part II of this Note will look at the cases that have decided that attorneys should not be awarded their attorney fees from the debtor’s estate. It will examine the courts’ reading of the statute and why it has adopted a plain meaning approach as a solution to this issue.

19. See id.
20. See id.
21. See id.
22. Id.
23. See id.
24. See id.
26. See id. at 1027.
Part III of this Note will explore the cases that have decided that attorneys should be awarded their fees from the debtor's estate. It will examine the courts' reading of the statute and why the courts feel that the statute is ambiguous. It will address the issue of a possible scrivener's error and will examine the legislative history of the amendment. It will also examine the public policy arguments in favor of allowing attorneys to collect their fees.

Part IV of this Note will look at using both a plain meaning approach and legislative history to interpret the statute, focusing primarily on how the Supreme Court has handled this situation in bankruptcy cases. It will show that the Supreme Court has almost always taken a plain meaning approach in interpreting the Bankruptcy Code, but in certain situations it has gone through the legislative history and looked at policy reasons to decide the meaning of a statute. Part IV will also explore any other options, such as retainers or liens, that an attorney may use in order to collect their fees from a court that has adopted the plain meaning of the statute.

Part V will offer the conclusion that the Supreme Court should abandon its textual approach in deciding bankruptcy cases only when there are overriding public policy concerns. It will make the assertion that the Supreme Court underestimated the policy concerns that arise if attorneys are not allowed to be compensated out of the debtor's estate. It will provide the Supreme Court and future courts with a framework from which to decide cases that include overwhelming policy concerns that come before the court. This note will highlight the relationship between this situation and the other situations where the Court has abandoned its textualist approach in interpreting the Bankruptcy Code. Part V also offers the solution that Congress should return § 330(a)(1) to its previous form in order to provide debtor's attorneys in Chapter 7 cases to receive their fees from the bankruptcy estate because this is the only solution available after the Supreme Court's decision.

II. THE PLAIN MEANING APPROACH
(THE SUPREME COURT & CIRCUITS 4, 5 & 11)

The plain meaning approach is when the court looks at the words of the statute first instead of reverting to the legislative history to determine the meaning of the statute. 27 If the words of the statute are plain then the

court will enforce the statute according to the words used in the statute only. 28

A. Lamie v. United States Trustee 29

This case came to the Supreme Court on writ of certiorari from the Court of Appeals for the Fourth Circuit. 30 The bankruptcy attorney for the debtor sought compensation for his legal services that were provided to the debtor after the case was converted to a chapter 7 proceeding. 31 The attorney originally represented the debtor, Equipment Services, Inc., during a chapter 11 proceeding pursuant to § 327 with the approval of the court. 32 Three months into the proceeding the case was converted to a chapter 7 case on motion from the United States Trustee. 33 The attorney continued to provide services to the debtor even though he did not have the trustee's authorization to do so. 34

The Petitioner advanced the argument that § 330(a) contained a scrivener's error, which mandated the Court look at the legislative history of the statute and the meaning of the Bankruptcy Code as a whole to determine the intent of Congress. 35 The Petitioner argued that Congress did not intend to eliminate the authority to compensate debtors' attorneys and if they had intended to do that then the attempt would have been made clear in the legislative history. 36 Congress also would not have made such a profound change without acknowledging the change in the statutory history. 37 The Petitioner also argues that imposing a plain meaning reading of the statute would lead to absurd results. 38 There are several postpetition services that a debtor's attorney

28. See id. at 1834-35.
29. 124 S. Ct. 1023.
30. See id. at 1027.
31. See id. To find a full description of the facts surrounding the filing for bankruptcy and the lower courts proceedings see infra Part II. Sec. B.
32. See id. at 1029.
33. See id.
34. See id.
36. See id. at 20, 25. There was no principle reason for the removal of the words "or to the debtor's attorney" that appeared in the record of any debate. See id. They also advanced the theory that due to the wide number of areas that the Bankruptcy Reform Act of 1994 covered, technical errors were to be expected. See id. at 27.
37. See id. at 36. The Court has indicated that they "will not presume that Congress intended to overturn an established bankruptcy rule sub silentio, but will instead require any intent to change the law to be 'unmistakably clear.'" Id. 36-37 (quoting Cohen v. De La Cruz, 523 U.S. 213, 222 (1998)). Congress in the past has expressly authorized the payments of fees in these instances and there is nothing in the history to show they intended such a change. See id. at 39.
38. See id. at 30.
will commonly perform in a Chapter 7 proceeding and the possibility of not having counsel may lead to increased errors.39 Taking out compensation also goes against the design of the statute, which was to ensure comparable compensation for bankruptcy attorneys as opposed to non-bankruptcy attorneys.40 A plain reading of the statute may also cause attorneys to pass on Chapter 11 cases for the fear that they may not be compensated for their work if the case is converted to a Chapter 7 petition.41

The Respondent countered the Petitioner’s arguments by stating that the plain language of § 330(a)(1) does not authorize fees to be paid to the debtor’s attorney out of the bankruptcy estate.42 The deletion of the term was intentional and that is evidenced by the fact that compensation was made available to Chapter 12 and 13 attorneys’ in the same statute.43 The reasoning behind this was to provide an incentive for debtors’ attorneys to educate their clients about the advantages of filing a Chapter 13 petition rather then a Chapter 7 petition.44 Respondent also presented that there is no statement or piece of legislative history that shows Congress unquestionably wished for the debtors’ attorneys to continue to receive compensation from the estate.45 Enforcing the plain language reinforces policy objectives.46 While the Code allows attorneys to be awarded fees in Chapter 7 cases when appointed by the trustee, a case under liquidation is fundamentally different and the goal of the trustee is to maximize the estate, and the attorney can still receive payment either from a pre-petition flat rate, post-petition funds from the debtor’s own pocket in an individual case or from the shareholders own pocket in a corporate liquidation.47

The Court stated that the starting point in discerning Congress’s intent in a statute is the statutory text and not predecessor statutes.48 It is established that when a statute’s language is plain, the court is to enforce

39. See id. at 31.
40. See id. at 32.
41. See id. at 33.
43. See id. at 26.
44. See id. This is based on Senator Metzenbaum’s view that Chapter 13 is the best overall process for debtors but it is not that widespread throughout the country. See id. However, there was no affirmative statement that the intention of Congress was to force attorneys to educate their client by taking away their fees.
45. See id. at 31.
46. See id. at 33.
47. See id. at 34-37.
the statute according to its terms. The Court went on to hold that "[t]he statute is awkward, and even ungrammatical; but that does not make it ambiguous in the point at issue." A debtor's attorney not engaged in representing the debtor pursuant to § 327 is not included within the class of persons eligible for compensation under § 330.

The Court then went on to address the awkward language in the statute. It stated that the missing "or" does not change the Court's conclusion as numerous federal statutes inadvertently lack a conjunction and are read for their plain meaning. In this instance the conjunction does not alter the substance of the text or obscure the meaning of the statute. The Court also held that in subsection (A) the extra attorney who falls under the category of people allowed to render compensable services does not cloud the statute's meaning. It is argued that reference to attorney in § 330(a)(1)(A) refers to debtors attorneys in § 330(a)(1) because § 331 provides for debtors' attorneys and § 327 professional persons to receive compensation after an order of relief is entered but before an application for § 330 is filed, even though attorneys go unmentioned in § 330(a)(1). The Court held that § 330(a)(1)(A) can be read in a straightforward manner as including attorneys qualified as § 327 professional persons. Under the Court's reading of the text, "the word attorney in subsection (A) may well be surplusage." The Court states that "[s]urplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute." The Court here decides to read the word attorney as surplusage because that would make the text unambiguous and would allow the Court to "avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history."

The Court went on to hold that the plain meaning of § 330(a)(1) does not lead to absurd results. Compensation is still available to debtors attorneys in Chapter 7 cases from estate funds through § 327 and § 330 when an attorney is appointed by the trustee and approved by the court and that is the only way for a Chapter 7 attorney to receive fees.

49. See id.
50. Id.
51. See id.
52. See id.
53. See id.
54. See id. at 1030-31.
55. See id. at 1031.
56. Id. (emphasis added).
57. Id.
58. Id.
59. See id.
from the estate.\textsuperscript{60} This advances the trustees responsibility for preserving the estate.\textsuperscript{61} However, the Court also holds that § 330(a)(1) does not prevent an attorney from receiving reasonable compensation in advance of a Chapter 7 proceeding.\textsuperscript{62}

The Court briefly commented on the legislative history finding that they found the legislative history unnecessary to rely on because it "creates more confusion then clarity about the congressional intent."\textsuperscript{63} The Court addressed the argument that omitting the word attorney from § 330(a)(1) was a scrivener error and held that the deletion furthered a reform by Congress to ensure that Chapter 7 debtors' attorneys would not receive compensation without approval of the trustee.\textsuperscript{64} They supported this reasoning by stating that the National Association of Consumer Bankruptcy Attorneys had the opportunity to object to the deletion but did not, even though they were most likely to be affected by the change.\textsuperscript{65} That Act "followed by the Legislature's nonresponse should support a presumption of legislative awareness and intention."\textsuperscript{66} However, the Court is still unsure to Congress's intent in changing this particular statute.\textsuperscript{67}

\textbf{B. In re Equipment Services, Inc.}\textsuperscript{68}

Equipment Services retained counsel to represent them and prepare a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.\textsuperscript{69} They paid counsel a $6,000 retainer, $1,000 of which was used to pay the fees and filing costs of Chapter 11, while the other $5,000 was placed in an escrow account to be drawn by the attorney as he earned fees.\textsuperscript{70} On March 17, 1999, the proceeding was converted from a Chapter 11 to a Chapter 7 proceeding and a trustee was appointed to administer the bankruptcy estate.\textsuperscript{71} The attorney filed an application seeking recovery of fees that were earned while representing Equipment Services during the Chapter 7 proceeding.\textsuperscript{72} The trustee objected to the fee

\textsuperscript{60. See id. at 1031-32.}
\textsuperscript{61. See id. at 1032.}
\textsuperscript{62. See id. at 1031-32.}
\textsuperscript{63. Id. at 1033.}
\textsuperscript{64. See id.}
\textsuperscript{65. See id. at 1034.}
\textsuperscript{66. Id.}
\textsuperscript{67. See id.}
\textsuperscript{68. 290 F.3d 739 (4th Cir. 2002).}
\textsuperscript{69. See id. at 742.}
\textsuperscript{70. See id.}
\textsuperscript{71. See id.}
\textsuperscript{72. See id.}
because it included compensation for services that occurred after the case was converted and 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." The trustee also asserted that the application of fees did not state what benefit the estate had received that was distinct from the work the attorney provided Equipment Services. The bankruptcy court agreed with the trustee that the debtor's attorney is not allowed to receive funds for services from the bankruptcy estate after the case is converted to a Chapter 7 proceeding, but held that the "prepetition retainer held by [the attorney] 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 all services rendered after the Chapter 7 conversion." The matter was appealed to the district court by the trustee and the attorney cross-appealed the part of the ruling that prohibited the debtor from obtaining compensation from a Chapter 7 estate. The district court then affirmed the bankruptcy court's ruling.

The Fourth Circuit held that all fees the attorney earned before the conversion of the case were allowed but any fees earned after the case was converted from a Chapter 11 to a Chapter 7 proceeding were disallowed because of the plain language of 11 U.S.C. § 330. The court, while noting the circuit split, determined that they "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 statute now clearly omits the prior authorization for the debtor's attorney to collect fees from the Chapter 7 estate. The reference to attorney in the second part of the statute does not make the statute ambiguous. "[A] professional person employed under section 327 or 1103, [of U.S.C. § 330], could be the antecedent to 'attorney' as used in the [pre-1994 statute], because the trustee is authorized to hire an attorney as a professional person." Section 327 states "the trustee, with the court's approval, may employ one or more

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73. Id. at 742-43 (internal quotations omitted).
74. See id. at 743.
75. Id.
76. See id.
77. See id.
78. See id. at 747.
79. Id. at 745.
80. See id.
81. See id.
82. Id.
attorneys, accountants, appraisers, auctioneers, or other professional persons . . . to represent or assist the trustee in carrying out the trustee's duties under this title."83 "While the reference in § 330(a)(1)(A) to 'attorney' may be superfluous, it does not render the statute ambiguous."84 The court held that the omission of the word "or" after the word "examiner" in the statute was an "oversight that is . . . consistent with the deliberate deletion of the words '[or to] debtor's attorney' as it is with the inadvertent deletion of those words from that section[:][t]hus, [the] oversight does not render the language ambiguous."85

The court presumes that Congress intended what it said when it deleted the provision awarding attorneys fees for the debtor attorney from § 330.86 "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."87 The court then goes on to state that the current version of the statute has been in effect for eight years and Congress has not addressed the issue of whether it made a scrivener's error with the 1994 amendments.88 The court concludes that "[i]f Congress did indeed make an error, the error should be corrected by Congress, not by [this court and since] the plain language . . . is unambiguous and is reasonable in application, we are constrained to enforce the language as written."89

The court then awarded the attorney his fees for the amount charged while working on the proceedings during the Chapter 11 part of the case.90 However, the court held that after the case was converted to Chapter 7 the remaining amount of money left in the retainer escrow became part of the debtor's estate; thus, the attorney could not recover his fees from the escrow account because of § 330(a).91

The court, though, noted some of the trustee policy arguments supporting the 1994 change in the statute. The trustee first points out that

84. Equip. Servs., 290 F.3d at 745.
85. Id. (emphasis in original).
86. See id.
87. Id. (citing In re Am. Steel Prod., Inc., 197 F.3d 1354, 1356 (11th Cir. 1999); Pro-Snax Distrbs., Inc. v. Family Snack, Inc., 157 F.3d 414, 425 (5th Cir. 1998)).
88. See id.
89. Id. at 745-46.
90. See id. at 747.
91. See id. In order to determine property interests like Equipment Services' at the time it filed its petition courts generally look to state law. Here the state law of Virginia applies, which is the law of contracts dealing with fee arrangements between lawyers and their clients. Virginia law and disciplinary rules require an attorney to hold the type of retainer that was held in this case in a trust. See id. at 746.
in Chapter 7 proceedings unlike Chapters 11, 12, and 13 the creditors and debtors do not act like a team. The trustee asserts that in Chapter 7 cases, the trustee is allowed “to hire attorneys at estate expense as needed to help liquidate the estate, negating the need for the assistance of the debtor’s attorney.” Also, in a Chapter 7 proceeding the debtor’s attorney cannot do the type of work that would enlarge an estate in a Chapter 11 case because a Chapter 7 proceeding is a zero-sum game. The court found that that argument was based on the fact that unlike a Chapter 11 proceeding, where the debtor in-possession is the trustee of the estate, in Chapter 7 proceedings the debtor and the trustee are distinct. “In sum... Congress deliberately, and for good reason, excluded the debtor’s [estate]... in a Chapter 7 proceeding."

C. In re American Steel Product, Inc.

American Steel Product was placed in involuntary Chapter 7 by its creditors. The bankruptcy court converted it to a Chapter 11 proceeding and then reconverted it back to a Chapter 7. At the end of the proceedings the law firm submitted a fee for compensation of services in the amount of $30,141.87. As part of the fee, $19,600.00 had been paid as part of a retainer. The bankruptcy court originally awarded the fee but reserved ruling on whether it could come from the bankruptcy estate. After looking at authority concerning the issue, they vacated their prior order and decided not to allow attorney fees to be taken out of the estate. The bankruptcy court based its decision on the plain language of § 330.

The circuit court followed the district court’s ruling in stating that “the plain reading of the [statute] precludes an award of attorney’s fees
to a debtor’s attorney in a Chapter 7 or Chapter 11 proceeding.” 105 The court then goes on to say that:

It is well-settled that courts are required to apply the plain meaning canon of statutory construction in interpretation of the Bankruptcy Code. “[A]s 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.” 106

The court found that the statute is textually clear and since the plain meaning is conclusive they should not award attorney fees from the debtor’s estate. 107

The court then notes the split among the circuits and holds that the unambiguous language of the statute ends the discussion and since the statutory language is plain, the court’s sole function is to enforce the language according to its terms. 108 The court concludes its decision by stating that “[m]oreover, this case does not present compelling circumstances which warrant departure from this general rule.” 109 This leaves open the idea that even though the Eleventh Circuit abides by the plain meaning of the statute, they may be open to interpretation of the legislative history or a different reading of the statute if certain compelling circumstances existed. It could be argued that since this case is similar to most cases that arise under § 330 the compelling circumstances the court speaks of would never exist. However, this suggests that the court may be looking for a sympathetic case in order to trump their reading of the statute.

D. In re Pro-Snax Distributors, Inc. v. Family Snack, Inc. 110

On August 10, 1995, the creditors filed an involuntary petition under Chapter 7. 111 The debtor consented to relief and converted the proceeding to Chapter 11. 112 Prior to the filing of the involuntary petition and through the conversion to Chapter 11 the law firm of Andrews & Kurth (“A&K”) provided legal services. 113 The bankruptcy court:

105. Id. at 1356.
107. See id.
108. See id. at 1356-57.
109. Id. at 1357.
110. 157 F.3d 414 (5th Cir. 1998).
111. See id. at 416.
112. See id.
113. See id.
After acknowledging that 11 U.S.C. § 503(b)(2) provides an administrative priority (i.e., over unsecured creditors) for fees awarded under 11 U.S.C. § 330, ... concluded—on the basis of extensive findings on the record—that A&K could be awarded compensation from the bankruptcy estate under § 330(a)(1) for work done as “the debtor’s attorney” after the appointment of the Chapter 11 trustee.114

The bankruptcy court noted that the current version of the statute did not explicitly provide for an award of fees but concluded that the statute was vague and did not preclude an award of compensation towards A&K.115 The bankruptcy court was reluctant to interpret vague statutory language, which would cause a major change in bankruptcy practice that was not the subject of some discussion in the legislative history.116 The bankruptcy court [awarded fees based] on the standard that “‘has evolved to determine when an attorney should be allowed compensation from the estate.’”117 The court held that “an attorney’s work must benefit the estate before compensation is payable, and that any fee request should be reduced for work that is duplicative of the trustee’s efforts; obstructs or impedes the administration of the estate; or is inconsistent with the debtor’s duties.”118 The court concluded that A&K benefited the estate in the areas of business operations, claims objections and liquidation of inventory.119

The district court then reversed the bankruptcy court’s holding stating that § 330 “does not include an explicit provision allowing fees to a ‘debtor’s attorney’—cannot sustain an award to A&K for work done as

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114. Id. at 417. (quoting In re Pro-Snax Distribs., Inc., 204 B.R. 492, 495-97 (Bankr. N.D. Tex. 1996)). The pertinent part of § 503 reads:

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause. (b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including—(1) (A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case; (B) any tax—(i) incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title; or (ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and (C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; (2) compensation and reimbursement awarded under section 330(a) of this title; (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph . . . .


115. See Pro-Snax Distribs., 157 F.3d at 417-18.

116. See id. at 418.

117. Id. (quoting Pro-Snax Distribs., Inc., 204 B.R. at 496).

118. Id.

119. See id. at 419.
The court relied on the American Rule of attorney's fees; and the only indication that Congress intended to set aside the American Rule was in the previous language of § 330(a), which explicitly allowed for attorneys fees.

The circuit court affirmed the district court's ruling that the plain meaning of the statute was controlling. The court started its examination by looking at the plain meaning of the statute. The reading of the statute begins and ends their inquiry stating that "'[i]n the absence of any ambiguity, our examination is confined to the words of the statute, which are assumed to carry their ordinary meaning.'"

The court held that § 330 excludes attorneys from its list of people who can be compensated for their work from a bankruptcy estate after the appointment of a Chapter 11 trustee. The court then stated that "[a]lthough the legislative history and... a brief syntactical evaluation of the clause... suggest that Congress inadvertently neglected to include attorneys, our canons of construction do not require [or] permit us to consider... exogenous sources when the statute is clear textually on its face." The court found that the omission of the word "or" in the 1994 Amendments made the sentence read awkwardly, but the omission did not change the meaning of the words around it.

In following the circuit's "cardinal canon of statutory construction" the court held that it must presume that what Congress intended to say in the statute they did and that by deleting the term or "'to the debtor's attorney'" they meant to disallow compensation for the debtor's attorney from the estate. The court then stated that even if the legislative history showed that Congress intended to leave the language of the

120. Id.
121. See id. The American Rule of attorney's fees states that generally attorney's fees are not a recoverable part of litigation absent explicit congressional authorization but the courts and Congress have developed exceptions to this rule for situations where overriding considerations dictate the need for an awarding of fees. See, e.g., Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598, 608 (2001); Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 391-92 (1970).
122. See Pro-Snax Distribs., Inc., 157 F.3d at 426.
123. See id. at 425.
124. Id. (quoting Stanford v. C.I.R. 152 F.3d 450, 456 (5th Cir. 1998)).
125. See id.
126. Id.
127. See id. at 425 n.14. The court signifies that the admission to an ordinary reader not familiar with the circumstance would mean that Congress just forgot the word "or" before the phrase "a professional person" and not that the entire phrase "to the debtor's attorney" was missing. See id.
128. Id.
statute intact, the statute as it now appears is unambiguous.129 This court has held in another decision regarding the Bankruptcy Code that "where one party's argument finds 'express support' in the legislative history . . . [that] is 'clearly contrary to the statutory language,' it is 'unpersuasive.'"130 The court relied on Justice Scalia's interpretation of the Bankruptcy Code that states "'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.'"131 The court determined that the statute did not include the phrase "to the debtor’s attorney" so there can be no dispute that as written, attorneys are not to receive fees from the debtor's estate.132

III. DYNAMIC INTERPRETATION

(CIRCUITS 3 & 9)

Dynamic interpretation usually occurs when the statutory language is ambiguous.133 When a statute is ambiguous or its result would lead to an absurd or impractical result most courts will look to the legislative history in order to determine what the statute was intended to mean.134 The legislative history gives one an idea of what the goals of the people who wrote the statute were and possibly what they wanted the statute to say.135

A. In re Top Grade Sausage, Inc.136

Top Grade originally filed for a Chapter 11 proceeding in order to reorganize its business.137 The Chapter 11 proceeding was then converted to a Chapter 7 proceeding after the reorganization plan proved to be unsuccessful.138 The bankruptcy court awarded fees reasoning that in order for a debtor's attorney to receive compensation from the estate the attorney must provide services that are beneficial to the estate and

129. See id.
130. Id. (quoting Gamble v. Gamble, 143 F.3d 223, 225 (5th Cir. 1998)).
131. Id. at 426 (quoting BFP v. Resolution Trust Corp., 511 U.S. 531, 566 (1994)).
132. See id.
134. See id.
135. See Wiensch, supra note 27, at 1836-37.
136. 227 F.3d 123 (3d Cir. 2000).
137. See id. at 125.
138. See id. at 126.
not duplicative of the services rendered by the trustee.\textsuperscript{139} The district court affirmed the ruling stating that "despite the omission of 'debtor's attorney' from the amended language of the statute, services by a debtor's attorney which benefit the estate are compensable and that the omission from the language of § 330(a)(1) was inadvertent."\textsuperscript{140}

The circuit court agreed with the district court and found that the current version of the statute when read to omit "debtor's attorney" is ambiguous and inconsistent with other provisions of the Bankruptcy Code.\textsuperscript{141} The court held that the omission of the phrase makes section 330 internally inconsistent.\textsuperscript{142}

The [section] begins by delineating those officers to whom the District Court may award payments . . . . [D]ebtor's attorney is no longer included in the first list[,] [b]ut when the sentence continues at subsection (a)(1)(A), the list of potential fee recipients is unchanged from the previous version of the subsection . . . . As § 330 now reads then, the second half of the sentence seems to partially permit what the first half prohibits.\textsuperscript{143}

The court then discusses the inconsistency that is created by the use of the definitive article "the" rather than the indefinite articles "a," "an," or "any" to modify the officers listed in § 330(a)(1)(A).\textsuperscript{144} The Court cites Webster's Dictionary as defining "the" as "'a function word to indicate that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance.'"\textsuperscript{145} The court then cites Black's Law Dictionary as stating that "'[i]n construing [a] statute, definite article 'the' particularizes the subject which it precedes and is word of limitation as opposed to indefinite or generalizing force 'a' or "an'."'\textsuperscript{146} This would mean that the use of the word ""the' in § 330(a)(1)(A) then refers to the universe of officers listed in § 330(a)(1) which would leave the word ""attorney" in § 330(a)(1)(A) without prior reference."\textsuperscript{147} Courts are obliged to give effect to every word Congress used in construing the statute.\textsuperscript{148} Interpreting the statute under a plain

\textsuperscript{139.} See id.
\textsuperscript{140.} Id. at 127.
\textsuperscript{141.} See id. at 128.
\textsuperscript{142.} See id.
\textsuperscript{143.} Id. at 128-29 (internal quotations omitted).
\textsuperscript{144.} See id. at 129.
\textsuperscript{145.} Id. (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1222 (1989)).
\textsuperscript{146.} Id. (quoting BLACK'S LAW DICTIONARY 1477 (6th ed. 1990)).
\textsuperscript{147.} See id.
\textsuperscript{148.} See id. The court cites In re Cohen, 54 F.3d 1108, 1115 (3d Cir. 1995) for the proposition that "'[c]ourts are obliged to give effect, if possible, to every word Congress used.'"
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reading would not give any effect to the word attorney in § 330(a)(1)(A). This reading of the statute makes it ambiguous, which would mean that recourse to the legislative history of the statute is necessary.

The court then states that the inclusion of the word attorney in § 330(a)(1)(A) works together with § 330(a)(4)(B).149 "If § 330(a)(4)(B) is read without reference to the entire text of § 330(a)(4), it could be read to provide a Chapter 12 or Chapter 13 debtor’s attorney a right to an award not shared by that attorney’s peers."150 If the two sections are read together it is clear that Congress did not intend to do that.151 Section 330(a)(4)(A) seeks to assure services that are unique, necessary or reasonably likely to benefit the debtor’s estate while section 330(a)(4)(B) sets forth a liberal standard for attorneys in Chapter 12 or 13 cases.152 Even though the statute applies different standards for compensation it does not mean that one group can be compensated while the other can not.153

Indeed, recognition by Congress that this discrete class of debtors’ attorneys need to be excepted from the regular, more stringent standards for compensation evidences Congress’s belief that debtors’ attorneys in general remained eligible for compensation under the customary standard. To then read § 330 to preclude eligibility would create a glaring inconsistency in the Bankruptcy Code.154

The statutory scheme would be inconsistent if section 330 is read to omit debtor’s attorney and ""[the] Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.""155

In light of these arguments the court held that compensation of the debtor’s attorney is still allowed under the statute because of the ambiguous nature of the statute and the fact that the legislative history

149. See id. at 129. Section 330(a)(4)(B) states that:
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 the consideration of the benefit and necessity of such services to the debtor and other factors set forth in this section.

150. In re Top Grade Sausage, Inc., 227 F.3d at 130.
151. See id.
152. See id.
153. See id.
154. Id.
does not show a specific intent by Congress to change the long-standing
tradition of compensating debtors’ attorneys.\textsuperscript{156}

B. \textit{In re} Century Cleaning Services, Inc.\textsuperscript{157}

In this case, Central Cleaning Services filed for a Chapter 11
bankruptcy proceeding and the law firm of Garvey, Schubert & Barer
(“Garvey”) acquired a retainer and were appointed counsel.\textsuperscript{158} The
proceeding was converted to a Chapter 7 proceeding and the court
appointed a trustee.\textsuperscript{159} Garvey stayed on as counsel but never requested a
reappointment after the conversion of the case.\textsuperscript{160} The bankruptcy court
held that the Bankruptcy Code did not allow payment of fees to the
debtor’s attorney under the statute because the 1994 amendments to the
statute omitted attorneys from the list of professionals eligible to receive
compensation from the debtor’s estate.\textsuperscript{161} The court held though that
Garvey had a valid state lien on the property because of the retainer and
would be able to recover reasonable fees and was awarded
$10,568.37.\textsuperscript{162} The trustee appealed this ruling to the Bankruptcy
Appellate Panel, which affirmed the fees awarded by the bankruptcy
court based on the state lien theory but denied compensation under
\S 330.\textsuperscript{163}

In order to understand the issue that was presented before the circuit
court the court first looks at the reasoning behind the changes to the
Bankruptcy Code.\textsuperscript{164} Prior to the passage of the 1994 amendment
attorneys were clearly allowed to receive compensation from the
estate.\textsuperscript{165} Prior to the 1994 amendment the first sentence of \S 330
included attorneys in both places of where the statute set forth the list of
people eligible to receive compensation.\textsuperscript{166} “The Reform Act amended
\S 330(a) extensively, adding, among other things, more detailed
guidance about how a court should determine the reasonableness of fee
requests.”\textsuperscript{167} After the amendments the statute did not include “debtor’s

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item 195 F.3d 1053 (9th Cir. 1999).
\item See id. at 1054.
\item See id.
\item See id. at 1055.
\item See id.
\item See id.
\item See id.
\item See id.
\item See id.
\item See id.
\item See id.
\item Id. at 1056.
\end{enumerate}
\end{footnotesize}
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attorney," where it originally appeared, in the first list of people who were able to receive compensation, but did include it in the second place where "attorney" originally appeared. Now "on the face of the statute the list of persons to whom the court 'may award' payments is different from the list of persons to whom the court may provide 'reasonable compensation.'" The circuit court held that "[a] careful examination of § 330(a)(1) reveals an unavoidable and substantial ambiguity, which stems from an internal conflict between two different portions of a single sentence." The sentence does not include "attorneys" in the section that lists the people that the court may award payments to but includes "attorneys" in the portion that allows for reasonable compensation. The court concludes that the statutory language is ambiguous and that Congress made a drafting error of some kind. In closely examining the statutory language the court found an error because the conjunction "or" does not appear before the last category of people who may be awarded fees, the "professional person." The absence of this conjunction shows, at the least, that some error was made in the drafting of the provision at issue.

The finding of the drafting error led the court into an inquiry as to whether Congress meant to exclude attorneys from the first list or include them in the second list. The court then examines the legislative history behind the amendment to section 330 because the conflicting placement of attorneys in the statute renders the statute ambiguous. During debate on the Reform Act the statute was introduced to the Senate with attorneys included in both lists, the same way the statute originally read. The statute also included a provision

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168. See id.
169. Id.
170. Id. at 1057.
171. See id.
172. See id.
173. See id. at 1058. In order for the sentence to be grammatically correct the word "or" would have to appear before professional person.
174. Id.
175. See id.
176. See id. at 1058 n.5.
177. See id. The initial version of the Reform Act read:
   (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 to 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,
that considered objections from the United States Trustee in the awarding of fees which were removed by an amendment introduced by Senator Metzenbaum.\textsuperscript{178} This amendment became part of the text of the final legislation and deleted “debtor’s attorney” from § 330(a)(1).\textsuperscript{179} “Debtor’s attorney” was not the only relevant change to the statute, nor was it the fundamental purpose of the amendment.\textsuperscript{180} The fundamental purpose of the amendment was to “consolidate, in a newly created subsection, the newly drafted language in § 330(a)(1) allowing for objections by the U.S. Trustee with another provision that also discussed objections to fee awards.”\textsuperscript{181} In order to improve the organization of the statute and eliminate any potential redundancies the discussions of objections were eliminated and placed in § 330(a)(2).\textsuperscript{182}

The language that provided for objections in the amendment, which were removed for reorganization purposes, happened to be placed immediately after the words “debtor’s attorney” even though the subject matters were unrelated.\textsuperscript{183} “Thus, the material deleted consisted solely of the newly added language that was moved to a new subsection plus the four unrelated words that directly preceded it. Unfortunately, those four words happened to be ‘or to a debtor’s attorney.’”\textsuperscript{184} A likely occurrence was that the author of the amendment might have crossed out too many words when trying to delete the part regarding trustee objections.\textsuperscript{185} The error could have easily been overlooked because it was “part of a revision that appeared simply to restore then-existing law by eliminating proposed new procedure.”\textsuperscript{186}

The likelihood that the deletion was inadvertent is further advanced by three other things one would expect to find if the deletion had been deliberate.\textsuperscript{187} There is an absence of any effort to change the list of

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\begin{quotation}
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.
\end{quotation}

\textsuperscript{178} See In re Century Cleaning Servs., Inc., 195 F.3d at 1059.
\textsuperscript{179} See id.
\textsuperscript{180} See id.
\textsuperscript{181} Id.
\textsuperscript{182} See id.
\textsuperscript{183} See id. “The material the amendment actually deleted . . . was as follows: 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[,]” Id.
\textsuperscript{184} Id.
\textsuperscript{185} See id. at 1060.
\textsuperscript{186} Id.
\textsuperscript{187} See id.
people awarded reasonable compensation to match the list of people the
court is allowed to award payments to. The second is the missing “or”
before the last person allowed to receive compensation. Third, if the
deletion were deliberate one would expect to find some evidence in the
legislative history that Congress intended to do this since it was a
substantive change to the Bankruptcy Code. Here, there is no history
to indicate that Congress intended to remove “debtor’s attorney” and in
the absence of any legislative history that shows Congress intended a
change, courts will ordinarily refuse “to find that ambiguous statutory
language significantly alters an existing statutory scheme.”

Prior to the amendment courts were clearly allowed to compensate
attorneys from the debtors’ estate. The absence of any discussion to
change the policy behind the statute in the legislative history strongly
suggest that Congress did not intend to delete “debtor’s attorneys” or to
make any substantive changes to that part of the statute. Policy
considerations also favor awarding fees to debtors’ attorneys because the
attorneys do perform several post-petition services necessary in the
administration of the estate and eliminating the possibility of
compensation would alter the ability of debtors to secure counsel to
perform these services, which would mean “a fundamental change in
bankruptcy law.” The court concludes

[That] the history of the Bankruptcy Code, the legislative history of the
Reform Act, and applicable policy considerations all point toward the
same conclusion: the drafting error in the Reform Act lies in the
deletion of ‘attorney’ for the first list in § 330(a)(1), not the retention of
that term in the second.

188. See id.
189. See id. If Congress deliberately changed the statute it would seem reasonable to think they
would have inserted an “or” before professional person. See id.
190. See id.
191. Id.
192. See id.
193. See id.
194. Id. at 1060-61. Examples of post-petition services that counsel may provide are filing of
the conversion petition, prepared schedules, amended reports, or a statement of affairs. See id.
195. Id. at 1061.
IV. TEXTUALISM: PLAIN MEANING AND INTERPRETING LEGISLATIVE HISTORY

A. Plain Meaning

Textualism looks at the language and structure of a statute as the basis of determining Congress's intent in enacting the law.196 Most textualist study is done by looking towards the plain meaning, which "requires that 'the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain ... the sole function of the courts is to enforce it according to its terms.'"197 There is a constitutional justification for the plain meaning rule.198 The Constitution separates power into three separate branches and reserves the power of making legislation solely to the legislative branch.199 Since members of Congress are only expressing their opinion they are not making law according to the prescribed method of lawmaking set forth in the Constitution.200 Secondly, the plain meaning approach is also justified for pragmatic reasons.201 If a party uses legislative history, it is argued that the user examines the statute knowing what he or she is seeking in order to force the decision towards their view.202 This is a valid consideration in bankruptcy because "[t]he legislative history of the Bankruptcy Code is particularly susceptible to misuse because the Code's history spans a ten-year period encompassing many modifications to its language."203 By not using the plain language of the statute a court may misinterpret the Code and come up with a decision that was not the intention of the drafters.

However, the plain meaning rule is not always followed by the Supreme Court. There are three major decisions that are often used to show examples of when the Court has not used the plain meaning approach.204 These cases show the rationale that the Court uses to support an outcome that is different from the plain meaning of the

196. See Wiensch, supra note 27, at 1834.
197. Id. (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).
198. See id. at 1835.
199. See id.
200. See id.
201. See id.
202. See id. at 1836.
203. Id.
These cases all demonstrate the tension between the use of a plain meaning approach and the preferences of the Court in seeking different outcomes. In *Tennessee Valley Authority v. Hill*, a near completed federally funded dam was stopped because workers found a snail that was considered an endangered species. The Endangered Species Act of 1973 required the Court to enjoin the building of a dam when the Secretary of the Interior determined that the operation of the dam would destroy the endangered species. The Court relied on the plain meaning of the statute and found that construction on the dam must be stopped. However, it is the dissent’s argument in this case that gives a good example of not applying the plain meaning of the statute. The dissent argues that it is not possible that Congress meant the act to produce such an “absurd result” to a project that was nearly completed. It goes on to state that “where the statutory language and legislative history . . . need not be construed to reach such a result . . . it [is] the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public weal.”

A good example of the Court not following the plain meaning of the statute is *Church of the Holy Trinity v. United States*. This case dealt with a statute that disallowed people from bringing immigrants into the United States to perform labor of any kind. Here, the Church tried to bring in a pastor to perform services. The Court held that the Church was allowed to have the pastor work there even though it is against the plain meaning of the statute. The Court stated that “[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”

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205. See id.
206. See id.
208. See id. at 158-61.
209. See id. at 172-73.
210. See id. at 194.
211. See MIKVA & LANE, supra note 204, at 12.
212. See *Tennessee Valley*, 437 U.S. at 196 (Powell, J., dissenting).
213. Id.
214. 143 U.S. 457 (1892).
215. See id. at 458.
216. See id.
217. See id. at 459.
218. Id.
A third case that is cited when offering the proposition not to follow the plain meaning is *United Steelworkers of America, AFL-CIO-CLC v. Weber.* This case challenged the legality of an affirmative action plan that reserves fifty percent of the openings in training programs for black people until the amount of black people in the plant is equal to the amount of black people in the local labor force. The question is whether Title VII of the Civil Rights Act of 1964 applies to the private sector in making these race conscious choices to include minorities. The Court held that Title VII did not prohibit such affirmative action plans. Title VII prohibited employers or organizations from discriminating against any individual for race, color, religion, sex or national origin in any program established to provide apprenticeship or other training. The complaint alleged that junior black employees were getting training over senior white employees, thus discriminating against the white employees. The Court held that no such discrimination took place because finding discrimination would be based on a literal interpretation of the statute. The purpose of this statute is “an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation.” The Court then cited the principle of *Holy Trinity* and found that the statute must be read against the background of the legislative history of Title VII. The Court concludes that looking at the statute this way would bring an end to the complete purpose of the statute.

After finding that the plain meaning of a statute does not apply a court will then turn towards legislative history in order to determine the meaning of the statute.

### B. Interpreting Legislative History

There are two tools that are used when the court does not follow the plain meaning of the statute. A court can either use canons of construction or they can use legislative history. “Canons of

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220. See id. at 197.
221. See id.
222. See id.
223. See id. at 200 nn.1-3.
224. See id. at 199.
225. See id. at 201.
226. Id.
227. See id.
228. See id. at 202.
229. See MIKVA & LANE, supra note 204, at 23.
construction are judicially crafted maxims for determining the meaning of statutes.\footnote{Id.} Legislative history involves examining the steps that the legislature goes through in order to pass the statute.\footnote{See id. at 28.}

Scholars have generally looked down on the use of canons of construction for two reasons.\footnote{See id. at 25.} "[F]irst, that canons are not a coherent, shared body of law from which correct answers can be drawn, and, second, that, viewed individually, many canons are wrong."\footnote{Id.} It is also said that canons are individual rules that a judge can use to support his or her view of the case and that for every canon one can use, there is an equal and totally opposite canon that can be used for the other side.\footnote{See id.} Despite the criticism of canons, many are still used by judges as tools for interpretation, particularly when the legislative history is slim or not easily accessible.\footnote{See id.} Legislative history is a more accurate determination of the intent of the legislature because one is examining what actually occurred during the enactment of the statute.\footnote{See id.}

A court will generally reach its decision to use legislative history when the meaning of the statute is ambiguous or clouded, or if the construction of a clear statute leads to an absurd result or impracticable consequence.\footnote{See id. at 27.} A statute is usually unclear for one of several reasons. First, is that words can be understood differently by different audiences.\footnote{See id. at 29.} Second, statutes are usually drafted in general terms that address categories of conduct and no matter how carefully it was drafted a dispute to how it is applied in certain fact patterns may occur.\footnote{See id. at 27.} Also, legislatures may use general language so that the general language can be further defined by agencies.\footnote{See id.} Fourth, statutes can be unclear because of compromises in the legislature to get the necessary votes in order for

\begin{itemize}
\item \footnote{Id.} Id.
\item \footnote{See id. at 28.} See id. at 28.
\item \footnote{See id. at 25.} See id. at 25.
\item \footnote{Id.} Id.
\item \footnote{See id.} See id.
\item \footnote{See id. An example of this type of canon is "'[a] statute cannot go beyond its text' except '[t]o effect its purpose a statute may be implemented beyond its text.'" See id. (quoting Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 401-06 (1950)).} See id. An example of this type of canon is "'[a] statute cannot go beyond its text' except '[t]o effect its purpose a statute may be implemented beyond its text.'" See id. (quoting Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 401-06 (1950)).
\item \footnote{See id. at 29.} See id. at 29. Certain criticism has been directed at legislative history because of the overuse of it over the past several decades. It has also been criticized for not following the democratic process and for its reliability because people can plant legislative history by making certain speeches to get on the record. See id. at 30-31.
\item \footnote{See Lam, supra note 133, at 112-13.} See Lam, supra note 133, at 112-13.
\item \footnote{See MIKVA & LANE, supra note 204, at 20.} See MIKVA & LANE, supra note 204, at 20.
\item \footnote{See id.} See id.
\item \footnote{See id.} See id.
\end{itemize}
the statute to pass. Lastly, a statute can be ambiguous because the legislature did not give sufficient thought to the words of the statute or the questions that could be litigated.

A court will also look to the legislative history when the reading of the plain language of the statute will lead to a decision that is inconsistent with the purpose of the statute or because the court does not agree with the policy outcome that the plain meaning dictates. When looking towards legislative history the court should examine any legislative materials that accompany the statute including any discussions that bear a significant relationship to the enactment process. The legislative history of a statute gives insight into what decisions were made in enacting the statute and also what some of the goals were of the people working on the statute. "[T]he Court has frequently looked to the legislative history . . . to ensure that its decision is not 'demonstrably at odds with the intentions of [the Code's] drafters.'"

"The Court has been remarkably consistent in deciding Bankruptcy Code cases in that, almost without exception, it has used a textualist approach for statutory interpretation." The textualist approach in bankruptcy cases "is supported by the character of the Bankruptcy Code, the nature of [the] bankruptcy, and the Court's narrow view of the equitable powers of the bankruptcy courts." However, in two cases the Supreme Court has abandoned the traditional textualist approach and instead relied on public policy and pre-Code law. The two case are Midlantic National Bank v. New Jersey Department of Environmental Protection and Kelly v. Robinson.

1. Midlantic National Bank

Midlantic National Bank involved the question of whether section 554(a) of the Bankruptcy Code authorizes a trustee in bankruptcy to abandon property in contravention of state laws or regulations that are

241. See id.
242. See id. at 22.
243. See id. at 10.
244. See id. at 36. The authors then suggest a rough pecking order of legislative history as follows: 1. Committee reports (including conference reports); 2. Markup transcripts; 3. Committee debates and hearing transcripts; and 4. Transcripts of floor debates. See id.
245. Wiensch, supra note 27, at 1836-37.
246. Id. at 1832.
247. Id. at 1863.
248. See id. at 1832-33.
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Described to protect the public's safety or health. Section 554(a) reads: "After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." In *Midlantic*, Quanta Resources Corporation ("Quanta") processed two waste oil facilities, one in Long Island City, New York and the other in Edgewater, New Jersey. In June 1981, Quanta acquired a $600,000 loan secured by its inventory, accounts receivable and certain other equipment from Midlantic National Bank. Shortly after the loan it was discovered that Quanta had violated a prohibition in its operating permit by accepting over 400,000 gallons of contaminated oil. Quanta was ordered by the New Jersey Department of Environmental Protection to cease operations at Edgewater and then to begin cleanup of the site. Quanta, which was in financial trouble filed for Chapter 11 reorganization that was later converted to a Chapter 7 liquidation. After filing for bankruptcy it was discovered that Quanta had also stored toxic chemicals at their Long Island site. Since the mortgages on the facility's real property were more than the value of the properties, the cost of disposing the waste would render the property a burden on the estate. After unsuccessfully trying to sell the Long Island property to benefit Quanta's creditors, the trustee notified the court that he intended to abandon the property pursuant to § 554(a).

The City and State of New York opposed the abandonment of the property because it would threaten the public's health and safety, as well as violate state and federal environmental laws. The state asked that the assets of the company be used to bring the land into compliance with the applicable law. The bankruptcy court approved the abandonment and held that the state was in a better position to protect the public's

251. See id. at 496.
254. See id. at 497.
255. See id.
256. See id.
257. See id.
258. See id.
259. See id.
260. See id. The same process occurred with the Edgewater, New Jersey property shortly after a district court ruling approved the abandonment of the New York property. Since the abandonment of both facilities raised identical issues a direct appeal to the circuit court was allowed. See id. at 498-99.
261. See id. at 498.
262. See id.
health from the toxic chemicals than the trustee or the debtor. The state and city then appealed and the circuit court held that Congress had intended to codify the judge-made abandonment practice developed under the previous Bankruptcy Act even though there was little legislative history to guide it. Under the previous law, “where state law or general equitable principles protected certain public interests, those interests were not overridden by the judge-made abandonment power.” The Supreme Court going against the plain language of the statute affirmed the circuit court’s ruling.

Before the revision of the Bankruptcy Code in 1978 the power of the trustee to abandon property had been limited by the judicially developed doctrine that protected legitimate federal and state interests. “Thus, when Congress enacted § 554, there were well-recognized restrictions on a trustee’s abandonment power. In codifying the judicially developed rule of abandonment, Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws.” The Court then goes on to state that “[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.” If Congress had wanted to grant the trustee an exemption from non-bankruptcy law, “‘the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.’” The Court held that “Congress did not intend for § 554(a) to pre-empt all state and local laws.” The Court concluded that Congress did not intend for the abandonment power to supersede state and local laws and relied on a policy “goal of protecting the environment against toxic pollution.”

2. *Kelly v. Robinson* 273

This case deals with criminal restitution and a discharge of debt under § 523(a)(7) of the Bankruptcy Code. In *Kelly*, the Court

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263. See id.
264. See id. at 499.
265. Id.
266. See id. at 500.
267. See id.
268. Id. at 501.
269. Id.
270. Id. (quoting Swarts v. Hammer, 194 U.S. 441, 444 (1904)).
271. Id. at 506.
examined the question of "whether restitution obligations, imposed as conditions of probation in state criminal proceedings, are dischargeable in proceedings under Chapter 7."

Carolyn Robinson pled guilty to second degree larceny based upon a wrongful receipt of $9,932.95 in welfare benefits from the state of Connecticut. She was then put on probation for five years, but had to make restitution in the amount of $100 a month for the length of her probation to the State of Connecticut Office of Adult Probation. In February of 1981, she filed a petition under Chapter 7 listing her restitution obligation as a debt. The agency did not participate in the distribution of her estate and the bankruptcy court granted her a discharge. In 1984, the Connecticut Probation Office informed Robinson that she still owed them restitution because the obligation was nondischargeable. Robinson then filed an adversary proceeding in bankruptcy court, seeking a declaration that the debt was discharged and an injunction against the State from making her pay.

The bankruptcy court held that "even if the probation condition was a debt subject to bankruptcy jurisdiction, it was nondischargeable under §523(a)(7) of the Code." The Court of Appeals for the Second Circuit reversed, and held that the particular condition of Robinson's probation was not protected from discharge. The Supreme Court did not apply the plain meaning rule because the text was only the starting point for determining a statute. "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." The Court

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274. See id. at 41. The pertinent part of section 523(a)(7) reads:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1228(b) of this title does not discharge an individual debtor from any debt—... (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or (B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition.


276. See id.

277. See id. at 38-39.

278. See id. at 39.

279. See id.

280. See id. at 39-40.

281. See id. at 40.

282. Id. at 41.

283. See id. at 43.

284. See id.

does "'not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction.'" 286

"Despite the clear statutory language, most courts refused to allow a discharge in bankruptcy to affect the judgment of a state criminal court." 287 The reasoning behind this is that a bankruptcy proceeding is civil in nature and is intended to relieve the honest debtor of his debt and give him a chance to have a fresh start. 288 The Court held that restitution orders operate for the benefit of the state and not for the victim and those interests put restitution orders within the meaning of § 523(a)(7). 289

In construing the statute the language itself is only a starting point. 290 The statutory language clearly provides that courts should allow a discharge in bankruptcy to effect the judgment of a state criminal court but most courts do not interpret the Act this way. 291 "If Congress had intended, by § 523(a)(7) or by any other provision, to discharge state criminal sentences, "'we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage.'" 292 The Court held that "'[i]n light of the strong interests of the States, the uniform construction of the old Act over three-quarters of a century, and the absence of any significant evidence that Congress intended to change the law in this area, we believe this result best effectuates the will of Congress." 293 The Supreme Court reversed the Second Circuit ruling and held that discharges are not allowed in criminal cases. 294

C. Pre-Petition Retainers

One alternative theory that may allow attorneys to collect their fees from the debtor's estate is to receive a pre-petition retainer from their client before filing for bankruptcy. Pursuant to § 328(a) a pre-petition retainer must be reasonable, disclose all the facts and the only way it would be denied is if it is found to be excessive. 295 If the attorneys were

286. Id. at 49 (quoting Bank of Marin v. England, 385 U.S. 99, 103 (1966)).
287. Id. at 45.
288. See id. at 46.
289. See id. at 53.
290. See id. at 43.
291. See id. at 45.
292. Id. at 51 (quoting TVA v. Hill, 437 U.S. 153, 209 (1978) (Powell, J., dissenting)).
293. Id. at 53.
294. See id.
295. See Joseph Gleason Minias, Note, Text and Context: Discerning the Basis for Debtor's
paid before the filing for bankruptcy then they would be allowed to keep their fees. The problem is with getting paid for the attorneys' services in Chapter 7 proceedings. Here, the money would still be in the retainer and many courts, including *Equipment Services*, hold that a pre-petition retainer is property of the estate. Section 542(a) states that a party holding property of the estate must give it to the trustee. Property of the estate includes all interests in the debtors' property at the commencement of the case and any interest received after the commencement of the case. Therefore, an attorney who has been denied compensation by a court that relies on the plain meaning of the statute will likely be denied compensation through a pre-petition retainer. This occurs because the retainer would be considered property of the estate and pursuant to § 330 attorneys will not be able to collect their fees from the retainer. However, the Supreme Court has stated that § 330(a)(1) does not prevent an attorney from receiving reasonable compensation in advance of a conversion to a Chapter 7 case but also held that being authorized by the trustee under § 327 is the only way to receive compensation from the estate. It seems that a pre-petition payment for filing would be allowed but that still would not

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1. *Attorneys' Fees Under Chapter[ sic] 7 and 11 of the Bankruptcy Code*, 18 BANKR. DEV. J. 201, 220 (2001). Section 328(a) reads:
   
   (a) The trustee, or a committee appointed under section 1102 of this title, with the court’s approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.


4. Section 542(a) reads:
   
   (a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.


7. *See Minias, supra note 295, at 221-22.*

8. *See id. at 1031-32.*
allow payment for services rendered after the filing through a pre-petition retainer without going through § 327.

Another possible way to secure compensation is a lien. However in Johnson, the court decided that a lien "simply secures the amount of the underlying debt as determined by the bankruptcy court." That lien can only attach to the fees allowed by the Court and, under Pro-Snax, that fee is limited to pre-appointment services only. Thus, when a court determines that a retainer or a lien is property of the estate the attorney most likely has lost his chance of receiving compensation.

V. CONCLUSION

The Supreme Court's recent decision in Lamie v. United States Trustee does not put an end to the issue of whether or not Chapter 7 debtors' attorneys can collect their fees from the bankruptcy estate. The Supreme Court has held that the plain meaning of § 330(a)(1) governs and that the only way that attorneys in this situation can collect their fees from the estate is through § 327 with the approval of the trustee and the court. However, this leaves attorneys out in the cold if they are not able to receive authorization from the trustee after a case has been converted into a Chapter 7 proceeding. These attorneys may have provided valuable services to the debtor but then have to wait for conformation by the trustee and the court in order to receive compensation for their services. This could possibly leave attorneys out to dry if the trustee feels another party could better use the money left in the estate.

The Supreme Court decided to use the plain meaning approach in order to decide this issue. This was not the only option for the Court to use. The Supreme Court could have held that the statute is ambiguous and by examining the legislative history it could have reached the conclusion that debtors' attorneys should be allowed to collect their fees from the debtors' estate. A third option is that the Court could have held that while the statute is plain on its face, public policy would dictate that debtors' attorneys should still be allowed to collect their fees from the debtors' estate, as was done in Midlantic and Kelly involving different issues in bankruptcy cases. This is an option that can be used in future

301. See id. at 222.
303. See Minias, supra note 295, at 222-23.
305. See id. at 1025.
306. Midlantic and Kelly as described earlier are two examples of the Supreme Court in a bankruptcy case going against the plain meaning of the statute. The Court could also rely on Church
cases that come before the Court or lower courts when there is an
overwhelming policy issue and a statute that appears plain on its face.

When this type of situation arises the Court can use the path of
Midlantic and Kelly to find that even though the plain language dictates a
particular result the other result may be better. In Midlantic, the Court
held that “if Congress intends for legislation to change the interpretation
of a judicially created concept, it makes that intent specific.”307 This is
similar to the present issue because Congress has never made its
intention known that it specifically meant to exclude debtors’ attorneys
from the list of people who would be able to collect their fees from the
debtors’ estate. While in Kelly, the Supreme Court stated that “In
expounding a statute, we must not be guided by a single sentence or
member of a sentence, but look to the provisions of the whole law, and
to its object and policy.”308 The Court does “not read these statutory
words with the ease of a computer. There is an overriding consideration
that equitable principles govern the exercise of bankruptcy
jurisdiction.”309

Applying the language that is used in Kelly to the present situation,
the Court had a way to read into the statute past the plain meaning. An
overriding equitable principle that can govern bankruptcy is the
awarding of fees to the debtor’s attorney. There are measures in place
that make sure that an attorney is not providing duplicative services to
the estate and a sound policy would be to compensate those attorneys
who do represent the bankruptcy estate. If you do not compensate these
attorneys then it is very likely that they will move to another field and
you will not get new attorneys into the field of bankruptcy. It is
important to attract not only good attorneys who would want to work in
bankruptcy but also new attorneys who will be able to excel in this area
of the law. Not allowing attorneys to collect their fees or leaving the law
in its current state of limbo will push attorneys into other areas of
practice and keep new attorneys out of this particular area. The statute
read alone is plain on its face but finding the statute to not allow
bankruptcy lawyers to collect their fees from the debtor’s estate will hurt
the profession. Sound equitable policy would dictate that lawyers in the
field should receive their fees from the debtor’s estate in order to assure
payment. Attorneys should be able to collect their fees because they

477 U.S. 207, 221 (1986)) (other citations omitted).
309. Id. at 49. (quoting Bank of Martin v. England, 385 U.S. 99, 103 (1966)).
provide assistance to the debtor and the debtor's many duties.\footnote{\cite{note 310}} Debtors need and desire the assistance of attorneys in such functions as attending a creditors meeting and answering questions posed by the creditors regarding the assets and liabilities of the estate, filing a list of creditors, surrendering the relevant books and records, appearing at discharge hearings and cooperating in examining proofs of claim.\footnote{\cite{note 311}} Conditioning the rewarding of attorney's fees upon trustee approval is not only unfair to the attorney but also to the debtor who may desire an attorney's assistance on one of the above matters. The debtor may not be able to pay for the attorney out of his own pocket, so then the debtor would have to await trustee approval in order to receive advice of counsel, an approval that is not even guaranteed.

Using the reasoning found in \textit{Kelly} and \textit{Midlantic} is beneficial to the court system because it will allow an equitable result when one may not be read into the statute. However, I do not assert that this type of logic should be used in every case as it would thus render the Bankruptcy Code meaningless and base claims upon what is equitable. The Code is set up to strike a balance between gathering the estate's assets for the dual purpose of maximizing the creditor's recovery as well as rehabilitating the debtor.\footnote{\cite{note 312}} Thus, this type of logic should only be used in cases that would have a wide effect across the bankruptcy community.

The Supreme Court may have the final word as to this issue as it pertains to the court system, but it does not have the final overall word. This word belongs to Congress. Congress should amend 11 U.S.C. § 330(a) to include the words "or debtor's attorney" as it did before the 1994 amendments. Congress could also enact a Technical Corrections Act. Congress has previously used the Technical Corrections Act to correct federal statutes in the Tax Code.\footnote{\cite{note 313}} This process was started in 1997 but Congress refused to vote on the bills that were known as the "Bankruptcy Law Technical Corrections Act of 1997."\footnote{\cite{note 314}}

In light of the public policy issues concerning the collection of fees the best way to solve this problem is to allow attorneys to collect their fees from the debtor's estate. That was the way the system worked before the changes in the Bankruptcy Code in 1994, which did not give

\footnote{\cite{note 310}} Reply Br. for Pet'r at 18, Lamie v. U.S. Trustee, 124 S. Ct. 1023 (2004) (No. 02-693).
\footnote{\cite{note 311}} See id.
\footnote{\cite{note 312}} See Precision Indus. v. Qualitech Steel SBQ, LLC \textit{(In re Qualitech)}, 327 F.3d 537, 548 (7th Cir. 2003).
\footnote{\cite{note 314}} See Minias, \textit{supra} note 295, at 227; \textit{see also In re Eggleston Works Loudspeaker Co.}, 253 B.R. 519, 524 (B.A.P. 6th Cir. 2000); Cong. Rec. H.R. 120, 105th Cong. (1997).
any indication that the change was intended or would be for the benefit of either attorneys or parties in the bankruptcy proceedings.

Having Congress amend the Bankruptcy Code would be in the best interests of bankruptcy attorneys. Congress should allow attorneys to collect their fees from the debtors’ estate. Allowing the attorneys to collect their fees is a good policy to undertake. Section 330 contains other language that would make sure that the attorneys’ fees collected were for services that are actual and necessary to benefit the estate.315 There are also strong public policy concerns towards compensating attorneys in bankruptcy cases the same way that attorneys in other cases would be compensated. If the attorneys are not able to receive consistent and adequate compensation, the quality of attorneys participating in bankruptcy will decrease. This would not be good for bankruptcy litigation because good lawyers would no longer practice in this field which would be followed by a decrease in the quality of services offered to clients.

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