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A Reappraisal of Attorneys' Fees in Bankruptcy

Michelle Arnopol Cecil¹

INTRODUCTION

2007 and 2008 saw an unprecedented rise in the number of home mortgage foreclosures across the country,² and this trend is likely to continue for some time.³ These numerous foreclosures, brought on largely by the failure of the sub-prime mortgage market, have had a crippling effect on the United States economy.⁴ One significant outcome of this economic disaster is its crushing impact on the country's bankruptcy system. In fact, experts predict that the housing crisis will force consumers to file for bankruptcy protection in greater numbers than ever before.⁵ Some commentators have even suggested that recent changes in bankruptcy law may have played a role in precipitating the mortgage loan crisis.⁶

In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act.⁷ The act was designed to reduce abuse of the bankruptcy process by forcing more debtors to pay their debts rather than having them discharged in bankruptcy.⁸ Yet despite this sweeping

1 Curator's Distinguished Teaching Professor and William H. Pittman Professor of Law, University of Missouri School of Law. B.A., J.D., University of Illinois. Thanks go to Clay Cundiff, Jeffrey Erickson, Brandon Hill, and Josephine Pottebaum for their invaluable research assistance and to Cheryl Poelling for her indispensable administrative assistance.

2 Stephanie Armour, *2008 Foreclosure Filings Set Record*, USA TODAY, Jan. 15, 2009, at 1B; Richard Simon, *Senators to Try to Drive Bill Down Different Street*, L.A. TIMES, Apr. 2, 2008, at A1.

3 See Editorial, *Foreclosures and the Election*, N.Y. TIMES, June 15, 2008, at WK11.

4 David Leonhardt, *Can't Grasp Credit Crisis? Join the Club*, N.Y. TIMES, Mar. 19, 2008, at A1; Jonathan Peterson, *FDIC Chairwoman Is Right on the Money*, L.A. TIMES, Dec. 23, 2007, at C2.

5 See, e.g., Susan Herendeen, *Increase in Bankruptcies is Predicted: Court Official Says Slump in Housing May Fuel Rise*, MODESTO BEE, Jan. 5, 2007, at A1; Julie Vorman, *Growing Bankruptcy Filings A Grim Omen*, L.A. TIMES, Mar. 4, 2008, at C6.

6 See Gail Appleson, *New Rules Slowed Filings, For a While*, ST. LOUIS POST-DISPATCH, Apr. 6, 2008, at C1; *Is the BAPCPA Increasing Foreclosure Gloom?*, 50 No. 6 Bankr. Ct. Dec. (LRP) 4 (Aug. 5, 2008); Dan Margolies, *U.S. Mortgage Meltdown Linked to 2005 Bankruptcy Law*, KAN. CITY STAR, Jan. 12, 2009, at A1.

7 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23 (2005).

8 WILLIAM HOUSTON BROWN & LAWRENCE R. AHERN III, 2005 BANKRUPTCY REFORM LEGISLATION WITH ANALYSIS 2D, § 8:1 (Thomson/West 2006). See also Press Release, White House Press Office, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act (Apr. 20, 2005), available at 2005 WLNR 6178099 ("In recent years, too many people

bankruptcy reform legislation, more debtors are filing bankruptcy each year.⁹ In April, 2008, for example, consumer bankruptcy filings had increased by more than forty–seven percent over the same time in 2007.¹⁰ Similarly, 2007 saw a thirty–eight percent increase in consumer bankruptcy filings over 2006,¹¹ while business bankruptcies increased forty–four percent during the same period.¹² It is no surprise, then, that bankruptcy courts face an ever increasing caseload burden, which results in decreased efficiency and skyrocketing administrative costs.¹³ With such a burden facing the country’s bankruptcy courts, it is imperative that Congress step in to resolve many of the complex issues of statutory interpretation in the Bankruptcy Code¹⁴ with which the courts are grappling.

One issue of major significance is how debtors’ attorneys are compensated in bankruptcy. Over the past several years, the Supreme Court has twice had occasion to visit the issue of attorneys’ fees in bankruptcy. In *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*,¹⁵ the Supreme Court overruled the Ninth Circuit’s decision in *Fobian v. Western Farm Credit Bank (In re Fobian)*,¹⁶ in which the Ninth Circuit had held that unsecured creditors could not collect post–petition attorneys’ fees incurred in litigating issues of federal bankruptcy law, even though they could collect fees for litigating issues of state statutory law or contract law.¹⁷ The Supreme Court held that the Bankruptcy Code provided no statutory basis for such a distinction and struck down the long–standing *Fobian* rule.¹⁸

have abused the bankruptcy laws. They’ve walked away from debts even when they had the ability to repay them . . . Under the new law, Americans who have the ability to pay will be required to pay back at least a portion of their debts.”)

9 Appleson, *supra* note 6.

10 *Consumer Bankruptcies Up 47.7% From April 2007*, KAN. CITY STAR, May 3, 2008, at C5.

11 *Bankruptcy Filings Rise 38% in U.S. in 2007*, L.A. TIMES, Apr. 16, 2008, at C2.

12 *Business Filings Up 44% in 2007*, 49 No. 21 Bankr. Ct. Dec. (LRP) 1, 4–5 (Apr. 29, 2008).

13 See, e.g., Matt Evans, *Bankruptcy Reform May Hinder Court, Pro Bono Work*, BUS. J. OF THE GREATER TRIAD AREA, July 29, 2005, <http://www.bizjournals.com/triad/stories/2005/08/01/story5.html> (“[N]o additional funds have been allocated to the courts to help absorb the increased demands.”). In addition to skyrocketing court costs, BAPCPA has been predicted to nearly double the fees that attorneys charge to file a bankruptcy petition on behalf of a debtor. See Lorene Yue, *Bankruptcy Reform Toughens Consumers’ Exit From Debt*, CHI. TRIB., Mar. 27, 2005, at Bus. 5.

14 Unless otherwise stated, references in this Article to the “Bankruptcy Code” or the “Code” are to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101–1532 (West 2004 & Supp. 2008)).

15 *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443 (2007).

16 *Fobian v. W. Farm Credit Bank (In re Fobian)*, 951 F.2d 1149 (9th Cir. 1991), *cert. denied*, 505 U.S. 1220 (1992).

17 *Fobian*, 951 F.2d at 1153.

18 *Travelers*, 549 U.S. at 453–54. The Supreme Court refused, however, to address whether other principles of bankruptcy law disallowed unsecured creditors’ post–petition attorneys’

In its second case addressing the treatment of attorneys' fees in bankruptcy, the Supreme Court handed down its decision in *Lamie v. United States Trustee*,¹⁹ in which it resolved a conflict among the circuits on the proper priority to be granted to debtors' attorneys' fees in bankruptcy.²⁰ In reaching its decision, the Court was forced to grapple with whether a 1994 congressional amendment to section 330 of the Code was intentional, or instead was merely a scrivener's error.²¹ The amendment eliminated priority treatment for debtors' attorneys' fees in Chapter 7 and 11 bankruptcy proceedings, but not in Chapter 12 or 13 proceedings.²² The Supreme Court held that the attorneys' fees were not entitled to administrative priority treatment under the Bankruptcy Code.²³ The *Lamie* decision has had a significant impact on how debtors' attorneys are compensated in bankruptcy.

Much has been written about the post-petition attorneys' fees issue that the Court addressed in *Travelers*,²⁴ yet there is a void in the academic literature regarding the priority granted attorneys' fees in the aftermath of *Lamie*.²⁵ This Article seeks to fill that void. Part I details the statutory provisions governing the administrative priority, with special emphasis on the amendments made to section 330 of the Bankruptcy Code in 1994. Part II then addresses the conflicting case law on the priority issue, examining the three court of appeals cases that held that the 1994 amendments to the Code were the result of a scrivener's error, and the three court of appeals cases that enforced the statutory changes as drafted.

fees to be added to the creditors' unsecured claims against the bankruptcy estate. *Id.* at 454–55. See also Mark S. Scarberry, *Interpreting Bankruptcy Code Sections 502 and 506: Post-Petition Attorneys' Fees in a Post-Travelers World*, 15 AM. BANKR. INST. L. REV. 611, 612 (2007).

19 *Lamie v. U.S. Tr.*, 540 U.S. 526 (2004).

20 *Id.* at 531; see *infra* notes 125–145 and accompanying text.

21 *Lamie*, 540 U.S. at 530–39; see also *infra* notes 128–145 and accompanying text.

22 See 11 U.S.C. §§ 330(a), 330(a)(4)(B) (2006); see also *infra* notes 137–138 and accompanying text.

23 *Lamie*, 540 U.S. at 538–39; see also *infra* notes 144–145 and accompanying text.

24 See, e.g., Richard J. Corbi, *Update: Postpetition Attorney's Fees Following the Supreme Court Decision of Travelers Casualty and Surety Co. of America v. Pacific Gas and Electric Co.*, 17 NORTON J. OF BANKR. L. & PRAC. 2 ART. 6 (2008); Kelly E. McDonald, *Unsecured Claims for Contract-Based Attorney's Fees: Fobian Is Dead, But Does Justice Holmes' Decision In Randolph & Randolph v. Scruggs Have Continuing Vitality?*, 5 NORTON BANKR. L. ADVISER, May, 2007, at 1; Scarberry, *supra* note 18; Jennifer M. Taylor & Christopher J. Mertens, *Travelers and the Implications on the Allowability of Unsecured Creditors' Claims for Post-Petition Attorneys' Fees Against the Bankruptcy Estate*, 81 AM. BANKR. L.J. 123 (2007).

25 Two short articles discussing *Lamie* appeared in the American Bankruptcy Institute Journal shortly after the Supreme Court handed down its decision in *Lamie*, but there is a dearth of academic literature about the far-reaching implications of the case since that time. See C.R. "Chip" Bowles, Jr., *Watching Sausage Being Made—The Supreme Court, Not the FDA*, AM. BANKR. INST. J., May 2004, at 30–31; Dillon E. Jackson, *Lamenting Lamie and the Appointment of the Chapter 11 Trustee*, AM. BANKR. INST. J., Nov. 2004, at 28.

Part III of the Article examines the Supreme Court's decision in *Lamie* from a statutory interpretation standpoint. Part IV traces the history of the administrative priority, as well as the policy justifications for the Bankruptcy Code's priority rules. Arguing that debtors' attorneys' fees fall outside the policy underpinnings of the administrative priority, the Article proposes a statutory amendment to the Bankruptcy Code to clarify the treatment of attorneys' fees in bankruptcy and resolve this thorny issue of statutory interpretation. The Article concludes that congressional adoption of this amendment will be a small step toward easing the burden on the country's bankruptcy courts so that they can operate more efficiently during these difficult economic times.

I. A STATUTORY FRAMEWORK FOR THE PRIORITY AFFORDED ATTORNEYS' FEES IN BANKRUPTCY

When a debtor files for bankruptcy protection under any chapter of the Bankruptcy Code, an estate is created by operation of law.²⁶ The estate includes all of the debtor's pre-petition property, with certain very limited exceptions.²⁷ The bankruptcy trustee sells this property, which is referred to as "property of the estate," in a Chapter 7 bankruptcy proceeding, and distributes the proceeds to creditors in a specified order.²⁸ In Chapter 11 and 13 bankruptcy proceedings, the debtor generally retains property of the estate and uses post-petition assets to pay its creditors in accordance with the debtor's plan of reorganization.²⁹ In Chapter 7 proceedings, the debts of unsecured creditors are paid pro rata, unless those creditors hold claims entitled to priority under section 507 of the Bankruptcy Code.³⁰ The trustee pays creditors holding priority claims before general unsecured creditors, in accordance with their specified order of priority.³¹ Thus, unsecured creditors holding first priority claims are entitled to full payment of their claims before unsecured creditors holding lower priority claims receive any payment. If there are insufficient assets to pay a class of priority claimants in full, they are entitled to payment pro rata based on the amount of their claims.³² Because debtors rarely have enough assets to pay all of their creditors in full, it is very important that a creditor establish that it holds a claim entitled to priority under the Bankruptcy Code.

26 11 U.S.C. § 541 (2000).

27 *Id.* § 541(b), (c)(2).

28 *Id.* §§ 541, 726.

29 *See id.* §§ 1115, 1129, 1306, 1325.

30 *Id.* § 726.

31 For a complete list of priority claims, see § 507. *See also infra* notes 198–216 and accompanying text.

32 11 U.S.C. § 726(a) (2006); *see also* *Begier v. IRS*, 496 U.S. 53, 58 (1990).

The Code establishes ten classes of priority claims.³³ This Article will focus on the second category of priority claims, which includes “administrative expenses allowed under section 503(b) of this title.”³⁴ The policy justification for allowing administrative expenses high priority is because the bankruptcy estate must pull its own weight, and granting administrative expenses second priority will ensure that the trustee is able to expend sums to administer the estate in a manner that maximizes value for the benefit of all creditors.³⁵ Thus, administrative expenses enumerated in section 503(b) of the Bankruptcy Code include wages to employees for services that they render to the debtor after the bankruptcy proceeding is filed; taxes incurred by the estate, including penalties on such taxes; expenses incurred by creditors in recovering assets hidden by the debtor; and “compensation and reimbursement awarded under section 330(a).”³⁶

Section 330(a) is the subject of this Article. As originally enacted in 1978, section 330(a)(1) provided that “the court may award to a trustee, to an examiner, or 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 . . . and (2) reimbursement for actual, necessary

33 11 U.S.C. § 507(a)(1)–(10) (West 2004 & Supp. 2008). The first category of priority claims includes domestic support obligations. Second priority is granted to administrative expenses of the bankruptcy estate. Creditors holding claims for debts arising after a debtor is forced into an involuntary bankruptcy proceeding but before the case is determined to have been properly filed are entitled to third priority. Fourth priority is granted to certain employee wages earned within 180 days before an employer’s bankruptcy filing, within certain monetary limits. Certain contributions to employee benefit plans are accorded fifth priority, and claims of farmers and fishermen, up to a specified statutory maximum, are granted sixth priority. Individuals holding unsecured claims of up to \$2425 (indexed for inflation) on certain types of security deposits are entitled to seventh priority. Eighth priority claims include a wide variety of tax claims, including income taxes, property taxes, excise taxes, and trust fund taxes. Ninth priority is granted to certain claims of federal depository institutions, and personal injury and wrongful death claims arising out of a debtor’s use of a motor vehicle or boat while the debtor was intoxicated from alcohol or drugs are entitled to tenth priority. *Id.*

34 *Id.* § 507(a)(2) (West Supp. 2008). Second priority administrative expenses also include “charges assessed against the estate under chapter 123 of title 28.” *Id.* Expenses falling within this category are not the subject of this Article.

35 *See, e.g.*, 6 JAMES M. HENDERSON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 2633 (5th ed. 1952); *Hall v. Perry* (*In re Cochise Coll. Park, Inc.*), 703 F.2d 1339, 1355 (9th Cir. 1983); *In re Tebo*, 101 F.419, 420 (D. W. Va. 1900).

36 11 U.S.C. § 503(b)(1)–(8) (West 2004 & Supp. 2008). Section 503(b)(4) provides for administrative priority treatment for compensation of attorneys, but only those who render services to creditors or those who act in a manner that benefits the bankruptcy estate, such as prosecuting a criminal offense with respect to the debtor’s business or property, because such actions benefit all creditors and not merely the creditor incurring the costs of prosecution. *Id.* at § 503(b)(4). Accordingly, attorneys’ fees awarded under section 503(b)(4) do not encompass the attorneys’ fees for the debtor.

expenses.”³⁷ Case law under section 330(a) was nearly uniform in holding that a debtor’s attorneys’ fees were entitled to administrative priority under the Bankruptcy Code, so long as the fees either benefited the bankruptcy estate or were necessary for the proper administration of the bankruptcy case.³⁸

Congress amended section 330(a) dramatically in 1994, deleting the debtor’s attorney from the list of professionals entitled to administrative priority treatment under the Code.³⁹ As amended in 1994, section 330(a) stated that “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.”⁴⁰ Although any reference to the debtor’s attorney was removed from the general language of section 330(a)(1), Congress retained a reference to an attorney in section 330(a)(1)(A). There is a missing disjunction between “examiner” and “professional person” in section 330(a)(1). These disparities have provided debtors’ attorneys with ammunition for arguing that Congress’s elimination of debtors’ attorneys from the list of professionals entitled to administrative priority was inadvertent, as discussed in greater detail in the

³⁷ Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, § 330, 92 Stat. 2549 (repealed 2005) (emphasis added). Section 327 of the Bankruptcy Code now provides that “the trustee, with the court’s approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate . . . in carrying out a trustee’s duties under this title.” 11 U.S.C. § 327(a) (2006).

³⁸ *See, e.g., In re TS Indus., Inc.*, 125 B.R. 638 (Bankr. D. Utah 1991); *In re Holden*, 101 B.R. 573 (Bankr. N.D. Iowa 1989); *In re Brady*, 20 B.R. 936 (Bankr. N.D. Ohio 1982).

³⁹ Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, § 224, 108 Stat. 4106, 4130 (1994).

⁴⁰ *Id.* (emphasis added). These provisions were amended again in 2005, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, to add certain ombudsmen to the list of professionals entitled to administrative priority treatment under the Bankruptcy Code. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, §§ 232, 1104, 119 Stat. 23, 73–74, 191–192 (2005). Section 330(a)(1) now states:

(a)(1) [T]he court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 —

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

(B) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a)(1)(A)–(B) (2006). This amendment, however, does not affect the attorneys’ fees issue discussed in this Article.

following section.

Another provision added by the 1994 amendments works against attorneys' arguments that the elimination of the phrase "or the debtor's attorney" was inadvertent. As part of the 1994 changes, Congress significantly expanded section 330, providing that a bankruptcy court cannot allow compensation for services not "(I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case."⁴¹ It carved out an exception to this rule, however, for reasonable compensation of an individual debtor's attorney in Chapter 12 and 13 cases.⁴² This provision suggests that Congress intended that only Chapter 12 and 13 attorneys be entitled to administrative priority for their fees in representing a debtor in bankruptcy, and then only if the debtor is an individual.⁴³

Following the bankruptcy amendments of 1994, there have been two attempts to amend section 330 to include the debtor's attorney in the list of administrative priority claimants. In 1996 Senate Bill 1559, entitled the Bankruptcy Technical Corrections Act of 1996,⁴⁴ passed the Senate on August 2, 1996, by unanimous vote.⁴⁵ It was then received into the House of Representatives, but no action was taken on the bill in the House.

The following year, two bills were introduced in the House: House Resolution 120⁴⁶ and House Resolution 764.⁴⁷ Both proposed that the

⁴¹ 11 U.S.C. § 330(a)(4)(A)(ii)(I)–(II) (2006).

⁴² *Id.* § 330(a)(4)(B). The provision states:

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 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.

Id.

⁴³ Cases decided since the 1994 amendments have found that Congress expressly intended this result. *See, e.g., In re Gutierrez*, 309 B.R. 488, 501 (Bankr. W.D. Tex. 2004) (Section 330(a)(4)(B) "creates an independent standard for paying debtor's counsel in chapter 13 cases, quite different from the newly revised standards for professionals employed under section 327 found in section 330(a)(3) and (4)(A)"); *see also In re Busetta-Silvia*, 314 B.R. 218, 224 (B.A.P. 10th Cir. 2004) ("We find § 330(a)(4)(B) to be unambiguous and hold that it provides the requisite basis to allow prepetition fees as an administrative claim.").

⁴⁴ S. 1559, 104th Cong. § 4 (1996). Section 4 of the Act proposed that section 330 of the Bankruptcy Code be amended to insert the phrase "or the debtor's attorney" after "1103."

⁴⁵ 143 CONG. REC. D1272–01, D1274 (daily ed. Nov. 13, 1997).

⁴⁶ H.R. 120, 105th Cong. § 7 (1997). House Bill 120 was drafted by the minority party and was introduced and sponsored by Representative John Conyers. H.R. REP. NO. 105–845, at 116 (1999).

⁴⁷ H.R. 764, 105th Cong. § 4 (1997). House Bill 764 was drafted by the House's majority party and was sponsored by Representatives Henry Hyde, George Gekas, and Bill McCollum. H.R. REP. NO. 105–845, at 116 (1999). The purpose of H.R. 764 was primarily to make "technical corrections which are intended to clarify original intent, correct drafting defects, and improve grammar and cross-references in the Bankruptcy Code." 143 CONG. REC. H10660–02

language “or the debtor’s attorney” be added back into section 330(a)(1) of the Bankruptcy Code. In June of 1997, the House Subcommittee on Commercial and Administrative Law amended House Resolution 764 to reconcile the differences between it and its sister bill, House Resolution 120.⁴⁸ House Resolution 764 passed the House by voice vote,⁴⁹ but died when it reached the Senate.

It is interesting to note that later in 1997 Senator Grassley introduced Senate Resolution 1301, which incorporated much of House Resolution 764, but did not include the amendment to add debtors’ attorneys’ fees back into section 330. It appears from Senator Grassley’s remarks in introducing the bill that this omission was intentional:

I believe that Congress needs to look long and hard at the way attorneys are compensated in bankruptcy. It seems to me, from the reports I receive from around the country, that attorneys are using up the assets of the bankruptcy estate without really contributing very much. And attorney’s fees are paid ahead of *and at the expense of* schools, workers, and children entitled to support. I think that’s something we need to change.⁵⁰

Thus, not only did the 1994 amendments to the Bankruptcy Code raise significant issues of statutory interpretation, but subsequent Congressional action (or inaction in this case) served to exacerbate the problems caused by these amendments. It is not surprising, then, that courts attempting to interpret section 330 after 1994 have reached conflicting conclusions, as discussed below.

II. CONFLICTING CASE LAW ON THE ATTORNEYS’ FEES ISSUE

The issue of the priority of a debtor’s attorneys’ fees in bankruptcy has resulted in a classic split among the circuit courts of appeals. The Fourth, Fifth, and Eleventh Circuits have held that the 1994 amendments to the Bankruptcy Code preclude first priority treatment to a debtor’s attorney in both Chapter 7 and 11 proceedings.⁵¹ Conversely, the Second, Third, and Ninth Circuits have treated debtor’s attorneys’ fees in Chapter 7 and

(daily ed. Nov. 12, 1997) (statement of Rep. Gekas).

⁴⁸ H.R. REP. NO. 105-845, at 117 (1999).

⁴⁹ *Id.* at 118.

⁵⁰ 143 CONG. REC. S9406-01 (daily ed. Sept. 16, 1997) (remarks of Sen. Grassley) (emphasis added).

⁵¹ See *U.S. Tr. v. Equip. Servs., Inc. (In re Equip. Servs., Inc.)*, 290 F.3d 739, 745 (4th Cir. 2002), cert. granted, *Lamie v. U.S. Tr.*, 538 U.S. 905 (2003); Inglesby, Falligant, Horne, Courington & Nash, P.C. v. Moore (*In re Am. Steel Prod., Inc.*), 197 F.3d 1354, 1356 (11th Cir. 1999); *Andrews & Kurth L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distributions, Inc.)*, 157 F.3d 414, 423, 425 (5th Cir. 1998).

11 proceedings as first priority administrative expenses on the grounds that the 1994 amendments to the Bankruptcy Code, which excluded such attorneys' fees from priority treatment, were the result of a scrivener's error.⁵² Each of these positions will be examined in further detail below.

A. Cases Allowing Priority Treatment to Attorneys' Fees

The first court of appeals to reach the issue of whether attorneys' fees are entitled to administrative priority treatment in bankruptcy was the Second Circuit in *In re Ames Department Stores, Inc.*⁵³ The facts of *Ames* are somewhat complicated. In the course of representing Ames Department Stores in a Chapter 11 reorganization, the highly regarded firm of Skadden, Arps, Slate, Meagher & Flom sought to terminate the company's group life insurance plan.⁵⁴ Although Ames possessed the contractual right to terminate the plan, section 1114 of the Bankruptcy Code made it difficult to terminate such plans, establishing specific procedures for the modification of employee benefits in bankruptcy.⁵⁵ Skadden filed the motion to terminate the plan without regard to section 1114, and the bankruptcy court denied its motion, stating that there was no doubt that section 1114 applied to the plan's termination.⁵⁶ Skadden appealed the bankruptcy court's decision to the district court, which not only affirmed the ruling, but also stated that Skadden should not receive any fees for its work on the appeal because it was frivolous and was designed merely to raise Skadden's fees in the bankruptcy proceeding artificially.⁵⁷

After the reorganization plan for Ames was approved by the bankruptcy court, Skadden filed a fee application for its services rendered during the reorganization. Following the instructions of the district court, the bankruptcy court disallowed \$35,000 in fees associated with the earlier appeal. Skadden appealed the bankruptcy court's order to the district court, which, again, affirmed the order.⁵⁸ Skadden then appealed the issue to the Second Circuit Court of Appeals regarding the propriety of the district court's refusal to grant its attorneys' fees. The Second Circuit

⁵² See *In re Top Grade Sausage, Inc.*, 227 F.3d 123, 130 (3d Cir. 2000), *abrogated by* *Lamie v. U.S. Tr.*, 540 U.S. 526 (2004); *U.S. Tr. v. Garvey, Schubert & Barer (In re Century Cleaning Servs., Inc.)*, 195 F.3d 1053, 1061 (9th Cir. 1999), *abrogated by* *Lamie v. U.S. Tr.*, 540 U.S. 526 (2004); *In re Ames Dep't Stores, Inc.*, 76 F.3d 66, 71–72 (2d Cir. 1996), *abrogated by* *Lamie v. U.S. Tr.*, 540 U.S. 526 (2004).

⁵³ *In re Ames Dep't Stores, Inc.*, 76 F.3d 66 (2d Cir. 1996).

⁵⁴ *Id.* at 68.

⁵⁵ 11 U.S.C. § 1114 (2006).

⁵⁶ *Ames*, 76 F.3d at 69. The bankruptcy court issued its ruling from the bench, and the ruling was not published.

⁵⁷ *Id.* The district court's ruling was also unpublished.

⁵⁸ *In re Ames Dep't Stores, Inc.*, No. 93 Civ. 2192, 1995 WL 338253, at *3 (S.D.N.Y. June 7, 1995).

found that the district court failed to specify any authority for imposition of sanctions on Skadden or to provide due process by way of notice and opportunity to be heard.⁵⁹ The Second Circuit also found that Skadden's conduct was not sanctionable because the applicability of section 1114 of the Bankruptcy Code to the company's group life insurance plan was "a wide open question."⁶⁰

The Second Circuit next addressed Skadden's request that its fees be granted first priority as administrative expenses under section 330 of the Code. The court acknowledged that "debtors' attorneys were not specifically included in the coverage of the amended section 330," but then agreed with *Collier on Bankruptcy* that the omission was inadvertent.⁶¹ The Second Circuit ultimately held, however, that its decision did not turn on whether the omission of debtors' attorneys from section 330 was inadvertent, because if the facts of the case before it indicated that Skadden's services benefited the bankruptcy estate, they would have been compensable as administrative priority expenses under section 330 of the Bankruptcy Code even if the omission was not inadvertent.⁶²

Three years after the Second Circuit's decision in *Ames*, the Ninth Circuit had occasion to revisit the issue in *United States Trustee v. Garvey, Schubert & Barer (In re Century Cleaning Services, Inc.)*.⁶³ In the case, Century Cleaning Services filed a Chapter 11 bankruptcy petition and hired the law firm of Garvey, Schubert & Barer to represent it in the proceeding.⁶⁴ Garvey petitioned the bankruptcy court to serve as counsel for Century as debtor-in-possession, and its application was granted.⁶⁵ At the time of the Chapter 11 filing, Garvey had already been compensated fully for its pre-petition services. The case was then converted to a Chapter 7 proceeding and the bankruptcy court appointed a trustee to administer the debtor's bankruptcy estate, but Garvey continued to provide legal services for its client, Century, "including filing the conversion petition, preparing schedules, amended reports, a statement of affairs, and a Rule 2015 report, communicating with creditors, and participating in 2004 examinations."⁶⁶ Garvey failed to apply to the court for reappointment in Century's Chapter 7 proceeding.

When Garvey filed its fee application for services performed during

⁵⁹ *Ames*, 76 F.3d at 70.

⁶⁰ *Id.* at 71.

⁶¹ *Id.* at 71-72. See also 3 COLLIER ON BANKRUPTCY ¶ 330.02 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.) (2009); *id.* ¶ 330.04.

⁶² *Id.* at 71-72 (citing *In re Taxman Clothing Co.*, 49 F.3d 310, 315 (7th Cir. 1995)).

⁶³ *U.S. Tr. v. Garvey, Schubert & Barer (In re Century Cleaning Servs., Inc.)*, 195 F.3d 1053 (9th Cir. 1999).

⁶⁴ *Id.* at 1054.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1055.

the pendency of the Chapter 7 proceeding, the trustee objected to its application, and the bankruptcy court ruled in favor of the trustee, holding that the plain language of the statute did not authorize payment.⁶⁷ The Bankruptcy Appellate Panel affirmed the bankruptcy court's decision,⁶⁸ and Garvey appealed the decision to the Ninth Circuit.

After reviewing the 1994 amendments to section 330 of the Bankruptcy Code, the Ninth Circuit overturned the decisions of the lower courts, holding that Garvey was eligible for compensation as an administrative priority under the Bankruptcy Code.⁶⁹ The court determined that the statute was ambiguous because there was an internal conflict between section 330(a)(1), which excluded the phrase "or to the debtor's attorney" and section 330(a)(1)(A), which included the debtor's attorney within the ambit of compensable administrative priority expenses.⁷⁰ This ambiguity, according to the court, allowed it to examine the statute's legislative history. The court concluded that the legislative history supported the proposition that the omission of a debtor's attorney fees in section 330(a)(1) was a drafting error. The court noted that, before the amendment, the sentence was not ambiguous and both portions of the provision included reference to the debtor's attorney, as was true with the original version of the 1994 amendments when they were first introduced in Congress.⁷¹ After examining the history of the amendment to section 330(a)(1), the court noted that the section was amended by Senator Metzenbaum to consolidate the new subsection that provided for objections by the United States Trustee with another similar provision, and not to eliminate a debtor's attorney from the list of compensable professionals.⁷² The court observed that the material that was moved was directly before the words "or to the debtor's attorney" and that the deletion of that phrase when the words preceding it were moved was most likely an "unintended slip of the pen" and not a deliberate omission.⁷³

The Ninth Circuit also noted that, as a policy matter, eliminating a debtor's attorney from the list of compensable officers would make it more difficult for Chapter 7 debtors to obtain counsel. Moreover, the court concluded that such a significant change in the bankruptcy law would not have occurred without a mention of the change during the enactment of

67 *In re Century Cleaning Servs., Inc.*, 202 B.R. 149, 151 (Bankr. D. Or. 1996).

68 *U.S. Tr. v. Garvey, Schubert & Barer (In re Century Cleaning Servs., Inc.)*, 215 B.R. 18, 22 (B.A.P. 9th Cir. 1997).

69 *Century Cleaning Servs.*, 195 F.3d at 1054.

70 *Id.* at 1057 (citing *In re Miller*, 211 B.R. 399, 401–02 (Bankr. D. Kan. 1997)).

71 *Century Cleaning Servs.*, 195 F.3d at 1058.

72 *Id.* at 1059; *see also* 140 CONG. REC. S4741–01 (daily ed. Apr. 21, 1994); 140 CONG. REC. S4405–06 (daily ed. Apr. 19, 1994).

73 *Century Cleaning Servs.*, 195 F.3d at 1059–60.

the 1994 amendments.⁷⁴ Accordingly, the Ninth Circuit allowed Garvey to receive its fees as an administrative priority under section 330 of the Bankruptcy Code.⁷⁵

The final circuit to address the priority issue was the Third Circuit in *In re Top Grade Sausage, Inc.*⁷⁶ Top Grade Sausage, Inc. and Forist Distributors, Inc. were both New Jersey businesses owned and managed by the Lipari family. When the family patriarch amassed considerable debt defending himself from criminal prosecution, Top Grade and Forist voluntarily filed separate Chapter 11 petitions.⁷⁷ The bankruptcy court administered the cases together, primarily because of the commonality of the parties involved and because the issues were substantially the same in both cases.⁷⁸ The bankruptcy court granted the debtors' application for retention of Hellring, Lindeman, Goldstein & Siegal as their counsel. Because there was significant acrimony during the reorganization, Hellring was required to address many conflicts that arose. When the reorganization was unsuccessful, the bankruptcy court converted both cases to Chapter 7 proceedings. Hellring later filed an application for over \$80,000 in attorneys' fees as an administrative priority, and the bankruptcy trustee objected to the motion.⁷⁹ After a hearing, the bankruptcy court disallowed the payment of fees or expenses by the estate to Hellring for services rendered during the attempted reorganizations, but did allow compensation for services rendered after the cases were converted to Chapter 7.⁸⁰ The bankruptcy court reasoned that Hellring's services in the Chapter 11 proceeding duplicated the services rendered by the bankruptcy trustee.⁸¹

After the district court affirmed the bankruptcy court's decision, Hellring appealed the decision to the Third Circuit, which examined section 330 of the Bankruptcy Code in great detail, noting that the 1994 amendments were remarkable for two reasons.⁸² First, the debtor's attorney was removed from the list of officers eligible to receive compensation as an administrative priority.⁸³ Second, the list of compensable officers was separated not by the

⁷⁴ *Id.* at 1060.

⁷⁵ *Id.* at 1061. Judge Thomas dissented, arguing that the statute's plain language indicated that Congress intended to eliminate debtors' attorneys from the list of compensable officers under section 330 of the Bankruptcy Code. *Id.* at 1061-62 (Thomas, J., dissenting)(citations omitted).

⁷⁶ *In re Top Grade Sausage, Inc.*, 227 F.3d 123 (3d Cir. 2000).

⁷⁷ *Id.* at 125-26.

⁷⁸ *Id.* at 126.

⁷⁹ *Id.*

⁸⁰ *Id.* The bankruptcy court issued its ruling from the bench, and the ruling was not published.

⁸¹ *See id.*

⁸² *Id.* at 127. The district court's ruling was also unpublished.

⁸³ *Id.*

term “or,” but merely by a comma.⁸⁴ The court stated that “[t]his omission renders the section grammatically unsound.”⁸⁵ The court found that the omission of the phrase “or the debtor’s attorney” from section 330 was ambiguous and inconsistent with other provisions within the same section of the Bankruptcy Code.⁸⁶ It noted that the “most striking effect caused by the omission is on the internal consistency of § 330 itself. . . . As § 330 now reads . . . , the second half of the sentence seems to partially permit what the first half prohibits.”⁸⁷

The Third Circuit also noted that section 330(a)(4)(B) allows for attorneys’ fees for debtors in Chapter 12 and 13 proceedings if the debtor is an individual, and it discussed whether that provision limited the compensation of attorneys in Chapter 7 proceedings.⁸⁸ The court held that the provision allowing attorneys’ fees in Chapter 12 and 13 proceedings merely set forth a different standard for determining whether debtors’ attorneys were entitled to reimbursement in those cases and did not suggest that other attorneys were not entitled to reimbursement.⁸⁹ The court ultimately concluded that debtors’ attorneys were entitled to receive their fees as a first priority administrative expense, but only if the attorneys’ services were “reasonably likely to benefit the debtor’s estate.”⁹⁰ The court concluded that Hellring’s services could have been performed by the trustee instead, and therefore were not compensable.⁹¹

B. Cases Disallowing Priority Treatment to Attorneys’ Fees

The Fifth Circuit was the first court of appeals to hold that fees incurred by a debtor’s attorney were not entitled to administrative priority treatment under the Bankruptcy Code after it was amended in 1994. In *Andrews & Kurth L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distributors, Inc.)*,⁹² creditors of Pro-Snax Distributors forced the company into an involuntary Chapter 7 bankruptcy proceeding on August 10, 1995.⁹³ The court appointed an

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 128.

⁸⁷ *Id.* at 128–29.

⁸⁸ *Id.* at 129–30. The Third Circuit suggested that other courts have concluded, based on section 330(a)(4)(B), that Chapter 7 and 11 attorneys are precluded from administrative priority treatment based on the statutory construction canon, *expressio unius est exclusio alterius*. *Id.* at 130 (citing *U.S. Tr. v. Garvey, Schubert & Barer (In re Century Cleaning Servs., Inc.)*, 195 F.3d 1053, 1057 n.3 (9th Cir. 1999)).

⁸⁹ *In re Top Grade Sausage, Inc.*, 227 F.3d at 130.

⁹⁰ *Id.* at 132.

⁹¹ *Id.*

⁹² *Andrews & Kurth L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.)*, 157 F.3d 414 (5th Cir. 1998).

⁹³ *Id.* at 416. Involuntary bankruptcy proceedings are governed by section 303 of the

interim Chapter 7 trustee on August 31, 1995.⁹⁴ Shortly thereafter, Pro-Snax Distributors converted the case to Chapter 11, and on October 16, 1995 the court appointed a permanent Chapter 11 bankruptcy trustee to oversee administration of the case.⁹⁵ The debtor filed a plan of reorganization with the court; however, the court refused to confirm the reorganization plan based upon the objections of certain creditors.⁹⁶ Thereafter, the creditors petitioned successfully to have the case reconverted to a Chapter 7 bankruptcy proceeding.⁹⁷ The debtor's attorneys, Andrews & Kurth, filed a fee application with the bankruptcy court seeking payment of over \$55,000 in fees and expenses for its representation of the debtor after the filing of the involuntary bankruptcy petition against it.⁹⁸ The creditors maintained that the fees paid to the law firm should not be granted first priority as administrative expenses because such preferential treatment was barred by statute.⁹⁹ The bankruptcy court ruled in favor of Andrews & Kurth on its fee application and awarded the firm its fees for the entire period that the case was in Chapter 11, including the time billed after the trustee was appointed, and for the time after the case was reconverted to a Chapter 7 proceeding.¹⁰⁰ The creditors then filed an appeal in the United States District Court for the Northern District of Texas, which reversed the bankruptcy court's decision, holding that fees could not be awarded for the time after the Chapter 11 trustee had been appointed by the court.¹⁰¹ The district court held that the statute expressly precluded compensation of attorneys after the appointment of a trustee, and remanded the case to the bankruptcy court to determine whether the fees awarded to Andrews & Kurth before the appointment of the Chapter 11 trustee resulted in a material and tangible benefit to the bankruptcy estate.¹⁰²

The Fifth Circuit affirmed the district court's decision.¹⁰³ It first addressed Andrews & Kurth's argument that the 1994 Act's removal of "the debtor's attorney" from the list of professionals entitled to compensation from the bankruptcy estate was inadvertent because such a sweeping amendment to the Bankruptcy Code would have been discussed in the

Bankruptcy Code. See 11 U.S.C. § 303 (2006).

94 *Family Snacks*, 157 F.3d at 416.

95 *Id.*

96 *Id.* at 416-17.

97 *Id.* at 417.

98 *Id.*

99 *Id.*

100 *In re Pro-Snax Distribs., Inc.*, 204 B.R. 492, 493, 497 (Bankr. N.D. Tex. 1996).

101 *Family Snacks, Inc. v. Andrews & Kurth, L.L.P. (In re Pro-Snax Distribs., Inc.)*, 212 B.R. 834, 837-39 (N.D. Tex. 1997).

102 *Id.* at 839.

103 *Andrews & Kurth L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.)*, 157 F.3d 414, 426 (5th Cir. 1998).

Act's legislative history, and in fact the legislative history was silent on the issue.¹⁰⁴ Andrews & Kurth cited both the Second Circuit's decision in *In re Ames Department Stores, Inc.*¹⁰⁵ and the preeminent bankruptcy treatise, *Collier on Bankruptcy*,¹⁰⁶ in support of its position.¹⁰⁷

The Fifth Circuit refused to examine the legislative history, however, stating that the statute was clear on its face and excluded attorneys from its catalog of compensable officers.¹⁰⁸ "Although the legislative history and, indeed, a brief syntactical evaluation of the clause at issue suggest that Congress inadvertently neglected to include attorneys, our canons of construction do not require—nay, *do not permit*—us to consider these exogenous sources when the statute is clear textually on its face."¹⁰⁹ Accordingly, the Fifth Circuit affirmed the district court's decision and precluded Andrews & Kurth's application for attorneys' fees as a first priority administrative expense from the debtor's bankruptcy estate.¹¹⁰

The following year, the Eleventh Circuit followed the Fifth Circuit in holding that a debtor's attorneys' fees were not entitled to priority treatment under the Bankruptcy Code.¹¹¹ In *Inglesby, Falligant, Horne, Courington & Nash, P.C. v. Moore (In re American Steel Product, Inc.)*, the debtor, American Steel Product, Inc., was forced into an involuntary Chapter 7 bankruptcy proceeding.¹¹² The case was then converted to a Chapter 11 proceeding and later reconverted to a Chapter 7 proceeding.¹¹³ Originally, American Steel Product acted as debtor-in-possession, but when the case was converted to a Chapter 11 proceeding, a trustee was appointed and remained as trustee

¹⁰⁴ *Id.* at 421.

¹⁰⁵ *In re Ames Dep't Stores, Inc.*, 76 F.3d 66, 71–72 (2d Cir. 1996).

¹⁰⁶ *Family Snacks*, 157 F.3d at 421 (the court further discussed the deletion by examining former sections of *Collier on Bankruptcy*, noting "[b]ecause the change is inconsistent with current case law and the legislative history of § 330 does not support such drastic change, courts should construe the deletion as unintended").

¹⁰⁷ *Family Snacks*, 157 F.3d at 421.

¹⁰⁸ *Id.* at 425.

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ *Id.* at 426. The Fifth Circuit also decided the standard to be applied in determining whether Andrews & Kurth's fees for services rendered before the trustee was appointed were entitled to priority. *Id.* Andrews & Kurth had argued that the standard should be whether the services were "objectively beneficial toward the completion of the case at the time they were performed." *Id.* Conversely, the creditors argued that the appropriate standard to be used was whether the services "resulted in an identifiable, tangible, and material benefit to the bankruptcy estate." *Id.* (citing *In re Melp, Ltd.*, 179 B.R. 636, 640 (E.D. Mo. 1995)). The court determined that the stricter "material benefit" test was the appropriate measure to be used. *Family Snacks*, 157 F.3d at 426.

¹¹¹ *See Inglesby, Falligant, Horne, Courington & Nash, P.C. v. Moore (In re Am. Steel Prod., Inc.)*, 197 F.3d 1354, 1357 (11th Cir. 1999).

¹¹² *Id.* at 1355.

¹¹³ *See id.*

after the case was converted back to a Chapter 7.¹¹⁴ The Inglesby firm submitted its fee application to the bankruptcy court upon the conclusion of the proceedings, and the court refused to pay the firm's fees out of the bankruptcy estate, holding that section 330 of the Bankruptcy Code precluded a debtor's attorney from being granted an administrative priority for its fees in a Chapter 7 or 11 proceeding.¹¹⁵ The district court affirmed the bankruptcy court's decision, and the case was appealed to the Eleventh Circuit. The court refused to follow the Inglesby firm's suggestion that section 330 contained a drafting error because it allowed for attorneys' fees as a first priority administrative expense only in Chapter 12 and 13 proceedings.¹¹⁶ In doing so, the court stated, "Where the statute's language is plain, as here, our sole function is to enforce it according to its terms."¹¹⁷ Accordingly, the Eleventh Circuit denied the Inglesby firm's petition to have its fees paid as a first priority administrative expense.¹¹⁸

The final court of appeals case holding that debtors' attorneys' fees are not entitled to administrative priority was the Fourth Circuit's decision in *United States Trustee v. Equipment Services, Inc. (In re Equipment Services, Inc.)*.¹¹⁹ In the case, Equipment Services filed a Chapter 11 bankruptcy proceeding and retained John Lamie, an attorney, to prepare its bankruptcy petition and represent the company during its Chapter 11 proceedings.¹²⁰ Lamie received a retainer and represented Equipment Services as debtor-in-possession. Approximately three months later, upon the motion of the United States Trustee, the bankruptcy court converted the Chapter 11 proceeding to a Chapter 7 proceeding and appointed an administrator. Lamie continued to represent Equipment Services after the conversion.¹²¹ Upon the conclusion of the bankruptcy proceeding, Lamie filed a fee application for his work while the case was in Chapter 11 and after it was converted to Chapter 7. The trustee objected to the fees earned while the case was in Chapter 7 because the application for fees did not specify that the bankruptcy estate benefited from Lamie's services.¹²²

¹¹⁴ *Id.*

¹¹⁵ Inglesby, Falligant, Horne, Courington & Nash, P.C. v. Moore (*In re Am. Steel Prod., Inc.*), No. 96-60525, 1997 WL 33475574, at *3 (Bankr. S.D. Ga. July 1, 1997).

¹¹⁶ Inglesby, Falligant, Horne, Courington & Nash, P.C. v. Moore (*In re Am. Steel Prod., Inc.*), 197 F.3d 1354, 1356 (11th Cir. 1999).

¹¹⁷ *Id.* at 1357 (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)).

¹¹⁸ *Moore*, 197 F.3d at 1357.

¹¹⁹ *U.S. Tr. v. Equip. Servs., Inc. (In re Equip. Servs., Inc.)*, 290 F.3d 739, 742 (4th Cir. 2002).

¹²⁰ *Id.* at 742.

¹²¹ Lamie's services after the case was converted to a Chapter 7 proceeding included amending the debtor's asset schedules, appearing at hearings on adversary matters, and monitoring the debtor's post-petition assets and debts. *Id.* at 743.

¹²² *Id.* at 742-43. The trustee did not object to Lamie's fees for the period that he represented Equipment Services as debtor-in-possession, because those fees were authorized

Like the Fifth and Eleventh Circuits before it, the Fourth Circuit found that the plain language of section 330(a) of the Bankruptcy Code clearly omits a debtor's attorney from the ambit of that section, and therefore any consideration of the amendment's legislative history would be inappropriate.¹²³ The Court stated that, if the statute was a result of a scrivener's error, it was up to Congress to correct it, noting "[b]ecause 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."¹²⁴

After the Fourth Circuit handed down its decision in *Equipment Services*, the corporation's attorney, John Lamie, appealed the decision to the United States Supreme Court. The Court granted certiorari to resolve the growing conflict among the circuits.

III. THE SUPREME COURT'S DECISION IN *LAMIE*

In *Lamie v. United States Trustee*,¹²⁵ the Supreme Court resolved the issue of whether a debtor's attorney can receive compensation from the debtor's Chapter 7 estate as a first priority administrative expense under section 330 of the Bankruptcy Code.¹²⁶ The Court held that section 330 must be read plainly and that Congress's deletion of the phrase "or the debtor's attorney" from the statute must be enforced as written.¹²⁷

The Court began its analysis by identifying the differences between the wording of section 330 under the 1978 statute and its 1994 amendment.¹²⁸ The Court noted that the phrase "or to the debtor's attorney" had been deleted in 1994 and that the provision as rewritten had grammatical issues stemming from the missing word "or" before "a professional person."¹²⁹

by the court under section 327 of the Bankruptcy Code. *Id.* at 747. For a more in-depth discussion of section 327, see *supra* notes 37–38 and accompanying text. See also *infra* notes 126–144 and accompanying text.

¹²³ *In re Equip. Servs. Inc.*, 290 F.3d at 745.

¹²⁴ *Id.* at 745–46. It should be noted that the Fourth Circuit allowed Lamie's fees while the case was in Chapter 11 to be paid out of the bankruptcy estate because he served as attorney for the debtor-in-possession, which benefited the bankruptcy estate. *Id.* at 747.

¹²⁵ *Lamie v. U.S. Tr.*, 540 U.S. 526 (2004).

¹²⁶ In *Lamie*, the Supreme Court noted that an attorney could be compensated for her legal work in a bankruptcy proceeding as an administrative priority expense under section 327 of the Bankruptcy Code if the attorney was hired by the trustee on behalf of the estate, and not for the benefit of the debtor or any individual creditor. *Id.* at 529; see also 11 U.S.C. § 327 (2006). Lamie acknowledged that he was not appointed by the trustee to render services on behalf of the estate; accordingly, his fee application was not eligible for first priority treatment under section 327. *Lamie*, 540 U.S. at 529.

¹²⁷ *Lamie*, 540 U.S. at 538–39.

¹²⁸ *Id.* at 529–30.

¹²⁹ *Id.*; see also *supra* notes 39–40 and accompanying text.

The Supreme Court stated, “The deletion created an apparent legislative drafting error. It left current § 330(a)(1) with a missing ‘or’ that infects its grammar.”¹³⁰ Moreover, the Court explained that “the Act’s inclusion of the word ‘attorney’ in § 330(a)(1)(A) defeats the neat parallelism that otherwise marks the relationship between §§ 330(a)(1) and 330(a)(1)(A).”¹³¹

The Court then established that under its general rule of statutory construction, if a statute is plain on its face, the sole purpose of the courts is to enforce the statute in accordance with its terms, unless enforcing the statute as written would lead to an absurd result.¹³² The Court explained that, even if “[t]he statute is awkward, and even ungrammatical,” the statute must still be read in accordance with the plain meaning rule.¹³³

Addressing the substance of Lamie’s claim, the Court held that a debtor’s attorney was simply not listed in section 330(a) as a party who could receive compensation from a Chapter 7 bankruptcy estate as a priority claimant, unless the attorney’s fees fell within the ambit of section 327.¹³⁴ The Court also explained that the “missing conjunction ‘or’” would make a difference only if it affected the substance of the Act or obscured its meaning.¹³⁵ Because the missing conjunction merely rendered the statute awkward, without changing its underlying meaning, the grammatical error was irrelevant to the outcome of the case.¹³⁶

The Court added that enforcing the statute as written would not produce absurd results because a debtor’s attorney has other avenues to receive compensation for her services.¹³⁷ For example, attorneys for a debtor in Chapter 12 and 13 proceedings would continue to receive their fees as administrative priority expenses under section 330(a)(4)(B) of the Code, which was added as part of the 1994 amendments.¹³⁸ In addition, attorneys

¹³⁰ *Lamie*, 540 U.S. at 529–30.

¹³¹ *Id.* at 530; *see also supra* notes 39–40 and accompanying text.

¹³² *Lamie*, 540 U.S. at 534 (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). The Court also noted that “the starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes.” *Lamie*, 540 U.S. at 534 (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)).

¹³³ *Lamie*, 540 U.S. at 534.

¹³⁴ *Id.* The Court reasoned that it was irrelevant whether a debtor’s attorney was listed in section 330(a)(1)(a) because the Court’s analysis did not reach that section until it was established that the debtor’s attorney was in the class of persons set forth in section 330(a)(1). *Id.*

¹³⁵ *Id.* at 534–35.

¹³⁶ *Id.* The Court conceded that the reference to an attorney in section 330(a)(1)(A) was “surplusage” under its interpretation of the statute. It noted, however, that while canons of statutory construction suggest that statutes should be construed to avoid surplusage, those canons were not absolute. *Id.* at 536 (citing *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001)).

¹³⁷ *Lamie*, 540 U.S. at 537.

¹³⁸ *Id.* at 537 (“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.”); *see also supra* note 42

for Chapter 7 debtors could receive administrative priority treatment if they are appointed by the trustee under section 327.¹³⁹ It concluded that, even though the interpretation of the statute might lead to a harsh outcome, such a reading was necessary to give proper deference to the legislative process.¹⁴⁰

Although the Court stated that it was not necessary to look to the statute's legislative history because the statute was plain on its face, it nevertheless examined it, concluding that although it was plausible that the deletion of the debtor's attorney phrase was a mistake,¹⁴¹ it was also plausible that it was intentional.¹⁴² Accordingly, the Court determined that the statute's legislative history was not helpful in resolving the issue before it.¹⁴³

Finding that *Lamie* was not entitled to administrative priority treatment for his attorneys' fees in Equipment Services' Chapter 7 proceeding, the Court held that "§ 330(a)(1) does not authorize compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by § 327. If the attorney is to be paid from estate funds under § 330(a)(1) in a Chapter 7 case, he must be employed by the trustee and approved by the court."¹⁴⁴ The Court suggested that, if Congress intended

and accompanying text.

¹³⁹ *Lamie*, 540 U.S. at 537.

¹⁴⁰ *Id.* at 538 (citing *United States v. Locke*, 471 U.S. 84, 95 (1985)).

¹⁴¹ *Lamie*, 540 U.S. at 534. The Court explained that in the legislative history of section 330(a)(1)(A), it is clear that the primary reason for deleting language from that section was because the provision granting the government's right to object to a fee application was moved to new section 330(a)(2). *Id.* at 539–40 (citing S. REP. NO. 103–168 (1993)). Thus, it was possible that Congress may have deleted too many words from that section during the course of moving the objection provisions. In such a case, the deletion of "or to the debtor's attorney" from section 330(a)(1)(A) could have been a mistake. *Lamie*, 540 U.S. at 540.

¹⁴² *Lamie*, 540 U.S. at 540. The Court suggested that the amendment that deleted a portion of section 330(a)(1)(a) and added section 330(a)(2) was part of an attempt by Congress to curb abuses in awarding professional fees. *See* 140 CONG. REC. S14597–02 (daily ed. Oct. 7, 1994) (statement of Sen. Metzenbaum). Therefore, deleting the debtor's attorney from the list of administrative priority claimants could advance that purpose. *Lamie*, 540 U.S. at 540. Moreover, at the same time that Congress deleted "or to the debtor's attorney" from section 330(a)(1), it added language in section 330(a)(4)(B) that provided administrative priority to a debtor's attorneys' fees in a Chapter 12 or Chapter 13 bankruptcy proceeding. Thus, the Court concluded, Congress could have intended to continue priority treatment to attorneys in Chapter 12 and Chapter 13 proceedings despite the statute's broad exclusion of debtors' attorneys from the list of compensable professionals in section 330(a)(1). *Id.* at 541.

¹⁴³ *Lamie*, 540 U.S. at 540–41. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Id.* at 538 (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

¹⁴⁴ *Lamie*, 540 U.S. at 538–39. The Supreme Court concluded its opinion by stating that, although the National Association of Consumer Bankruptcy Attorneys brought the 1994 change to the attention of Congress during its deliberations, the Association did not object to the change. Congress went on to pass the statute unchanged. *Id.* at 541. For cases following

a different result, it was up to Congress to amend the statute to conform it to legislative intent.¹⁴⁵

IV. THE ADMINISTRATIVE PRIORITY: A PROPOSAL FOR CHANGE

Whether the Supreme Court reached the correct result in *Lamie* and, indeed, whether the Bankruptcy Code itself is flawed in its treatment of priority claims turns on the proper scope and purpose of the administrative priority. This section examines the history of the priority rules, together with their underlying policy justifications. Concluding that section 330 of the Bankruptcy Code, as it is currently drafted, deviates from the historical purpose and policy behind the administrative priority, this Article offers a modest proposal for change.

A. *The History and Policy Underlying First Priority Administrative Expenses*

Since 1841, courts have recognized the importance of granting special priority to expenses that directly benefit the bankruptcy estate.¹⁴⁶ Both bankruptcy statutes and court decisions since that time have consistently allowed debtors' attorneys' fees as administrative priority expenses only if they provide an express benefit to the bankruptcy estate or to the debtor's unsecured creditors. Thus, in order to evaluate whether section 330 of the Bankruptcy Code properly defines the scope of the administrative priority, it is imperative to examine the history and policy underlying this priority.

1. *The Bankruptcy Act of 1800.*— The first major bankruptcy act in the United States was the Bankruptcy Act of 1800.¹⁴⁷ For the most part, it followed English bankruptcy law and provided only for involuntary bankruptcy.¹⁴⁸ Under the Act, all creditors who duly proved their debts received a pro rata share of the debtor's assets, with no priority accorded to one creditor over another.¹⁴⁹ Congress repealed the Act after three years because it was too difficult for the average person to bring his case and witnesses to the distant

Lamie, see *Redmond v. Lentz & Clark, P.A. (In re Wagers)*, 514 F.3d 1021, 1026–27 (10th Cir. 2007), and *In re Weinschneider*, 395 F.3d 401, 403–04 (7th Cir. 2005).

¹⁴⁵ *Lamie*, 540 U.S. at 542 (“It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.”) (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994)).

¹⁴⁶ See *infra* notes 155 – 188 and accompanying text.

¹⁴⁷ Bankruptcy Act of 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248; 1 HAROLD REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES 14 (3d ed. 1923).

¹⁴⁸ 1 FRANK O. LOVELAND, A TREATISE ON THE LAW AND PROCEEDINGS IN BANKRUPTCY § 5 (4th ed. 1912).

¹⁴⁹ Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 §§ 29–30 (1800), *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248 (1803).

federal courts in the early 1800s.¹⁵⁰

2. *The Bankruptcy Act of 1841*.—When Congress passed the Bankruptcy Act of 1841,¹⁵¹ it included both voluntary and involuntary bankruptcy¹⁵² and, for the first time, recognized “the justice of granting to the honest debtor . . . a discharge and release from his remaining debts.”¹⁵³ It was repealed less than two years later for the same reason as the Bankruptcy Act of 1800: access to bankruptcy courts was extremely limited for the average person.¹⁵⁴

The Bankruptcy Act of 1841 again provided for a pro rata distribution of the debtor’s assets to creditors with bona fide debts, but, for the first time, it granted priority to a small number of debts, including debts owed to the government, debts held by sureties, and wage claims up to twenty-five dollars.¹⁵⁵

The first case to address the issue of whether attorneys’ fees were entitled to priority treatment in bankruptcy was *Ex parte Hale*,¹⁵⁶ which was decided under the Bankruptcy Act of 1841. In *Hale*, the debtor’s attorneys assisted the debtor in filing a voluntary bankruptcy petition and were able to secure a discharge of his debts as a result.¹⁵⁷ At the conclusion of the bankruptcy proceeding, the attorneys sought to collect their fees from the assets of the estate as a priority claim.¹⁵⁸

The court rejected the attorneys’ claim, holding that their labor benefited only the debtor, and therefore he should be responsible for

150 REMINGTON, *supra* note 147, at 14–15; WILLIAM H. OPPENHEIMER, BRANDENBURG ON BANKRUPTCY § 6 (4th ed. Chicago, Callaghan 1917).

151 Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

152 LOVELAND, *supra* note 148, § 6, at 10.

153 REMINGTON, *supra* note 147, at 15; *see* Bankruptcy Act of 1841 § 9.

154 LOVELAND, *supra* note 148, § 6, at 12–13.

155 Section 5 of the Act provides:

And be it further enacted, That [sic] all creditors coming in and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona fide debts, shall be entitled to share in the bankrupt’s property and effects, pro rata, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid moneys as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars.

Bankruptcy Act of 1841 § 5.

156 *Ex parte Hale*, 11 F. Cas. 178 (C.C.D.N.H. 1842).

157 *Id.* at 179.

158 *Id.*

paying the fees.¹⁵⁹

I can perceive no ground, upon which payment can be decreed therefor out of the assets of the bankrupt. They were incurred for his sole personal benefit, and not for the benefit or at the instance of his creditors. He, and he only, therefore, ought to bear them. It would, or at least might, have been different, if the costs and expenses had been incurred by a creditor in prosecuting a petition against a bankrupt, in invitum, to have him decreed a bankrupt; for then and in such a case the proceedings and decree might be said to be for the benefit of all the creditors. But, here, there is no ground upon which the court can say that the costs and expenses are to be a charge upon the assets in bankruptcy.¹⁶⁰

Thus, *Hale* is an important case because it represents the first instance in which a court would establish that a debtor's attorneys' fees were entitled to priority treatment only to the extent that they benefited the bankruptcy estate.

3. *The Bankruptcy Act of 1867*.— The Bankruptcy Act of 1867,¹⁶¹ which lasted eleven years, was a pivotal piece of legislation because it was the first act to establish a full priority system for the distribution of a debtor's assets in bankruptcy.¹⁶² The Act's priority scheme granted first priority status to the administrative expenses of the bankruptcy estate.¹⁶³ It provided: "In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order: First. The fees, costs, and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided."¹⁶⁴

The Act suffered from three major structural problems. First, critics argued that it was too easy for creditors to force a debtor into bankruptcy involuntarily.¹⁶⁵ Second, it was too difficult for the debtor to obtain a discharge of his debts after being forced into bankruptcy.¹⁶⁶ Finally, the Act allowed bankruptcy attorneys and court officers to obtain excessive fees in debtors' bankruptcy proceedings.¹⁶⁷

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Bankruptcy Act of 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99.

¹⁶² LOVELAND, *supra* note 148, § 7, at 12.

¹⁶³ Bankruptcy Act of 1867 § 28.

¹⁶⁴ *Id.*

¹⁶⁵ REMINGTON, *supra* note 147, at 16.

¹⁶⁶ *Id.*

¹⁶⁷ *See, e.g., In re Oakland Lumber Co.*, 174 F. 634, 637 (2d Cir. 1909) ("Nothing contrib-

Under the Bankruptcy Act of 1867, courts did, however, draw a distinction between the attorneys for the debtor and the attorneys for the estate when examining whether their fees were entitled to priority under the statute. For example, in *In re Handell*,¹⁶⁸ the court refused to grant administrative priority status to the debtor's attorneys' fees for the preparation and filing of his bankruptcy petition and schedules.¹⁶⁹ The court concluded that the administrative priority provision "has been construed to include only the costs due the register, clerk, marshal, and assignee; and not any expenses incurred by the bankrupt, or for services rendered by attorneys for the bankrupt in preparing the petition and schedules of the bankrupt."¹⁷⁰

In addition, some courts made a distinction between debtors' attorneys' fees incurred before the bankruptcy petition was filed, and those incurred after the filing of the petition. In general, courts held that the former fees were not entitled to administrative priority, but the latter could be granted administrative priority treatment if they benefited the bankruptcy estate or unsecured creditors.¹⁷¹ For example, the court in *In re Jaycox* held: "In order to justify an order that the assignee pay such claim [as an administrative priority], it must be clearly shown that the alleged services were properly and necessarily rendered for the purpose of benefiting or preserving the estate of the bankrupts, in the interest of the general creditors, and not in the interest of any creditor or class of creditors."¹⁷²

A small number of courts, however, granted administrative priority to the full amount of the debtor's attorneys' fees, even if those fees were incurred to prepare the debtor's bankruptcy petition. These courts reasoned that the debtor was entitled to keep very little property as exempt, and the exempt property that the debtor did retain was insufficient to cover his attorneys' fees.¹⁷³

uted so much to bring about the repeal of the act of 1867 as the large expense of administration, the small estates being entirely absorbed in fees."); *In re Wells*, 114 F. 222, 224 (W.D. Mo. 1902) ("The act of 1867 carried with it many evils, real or supposed. One of such evils was its oppressive and expensive features. The estates were eaten up by a most vicious fee system. The litigation was all or practically all, in the federal courts, generally sitting at a great distance from the debtor, the claimants, and the witnesses. It was the purpose of the present statute [1898] to correct this, and limit the fees and expenses, and have the greater part of the litigation where the parties resided."); see also *In re Beck*, 92 F. 889, 892 (S.D. Iowa 1899) ("One of the strongest objections urged against the bankruptcy statute of 1867 was what was claimed by many to be the excessive fees possible thereunder, in whose payment the estate was largely consumed, leaving to the creditors little, if any, desirable dividends.").

¹⁶⁸ *In re Handell*, 11 F. Cas. 420 (W.D. Tex. 1876).

¹⁶⁹ *Id.* at 420.

¹⁷⁰ *Id.*

¹⁷¹ *In re Jaycox*, 13 F. Cas. 398, 399 (N.D.N.Y. 1873).

¹⁷² *Id.*

¹⁷³ In *In re Comstock*, 6 F. Cas. 239 (W.D. Mich. 1871), the court stated:

When a party is declared bankrupt in a proceeding in invitum, a war-

Under the Bankruptcy Act of 1867, courts had a difficult hurdle to overcome before even reaching the priority issue because of the Supreme Court's General Order No. 30. The Order stated that "no allowance shall be made against the estate of the bankrupt for fees of attorneys, solicitors, or counsel, except when necessarily employed by the assignee, when the same may be allowed as disbursements."¹⁷⁴ Accordingly, attorneys' fees incurred to prepare a debtor's bankruptcy petition and accompanying schedules were not entitled to an administrative priority under General Order No. 30, even if the services resulted in some benefit to the creditors of the bankruptcy estate.¹⁷⁵ Thus, while some cases decided under the Bankruptcy Act of 1867 allowed reasonable compensation for a debtor's attorney, that practice was abrogated by the Supreme Court's pronouncement in General Order No. 30.¹⁷⁶

rant issues at once to the marshal to take possession of the bankrupt's property and effects; he is thereby deprived of all control over his estate, save such as is exempt; he is practically without means with which to pay his attorneys for services in defending against the petition. The amount which the bankrupt gets by exemption is, in most cases, trifling, and in no case is it so much but that he or his family are dependent for support on his personal efforts and earnings. . . .

. . . .

. . . I will not believe, nor will I hold, that congress [sic] intended to deprive a party of the right to have enough of his own property appropriated to his use, to enable him to contest the doubtful questions which may be, and frequently are, involved as to the charge of acts of bankruptcy.

Id. at 240. See also *In re Olds*, 18 F. Cas. 644, 644 (W.D. Mich. 1870) (holding that the estate should pay the debtors' costs from assets of the estate, noting that "[t]he bankrupts having, by force of law, surrendered all their property to be disposed of for the benefit of their creditors, it seems just and right that the avails of such property shall, so far as necessary, be used to give the bankrupts that relief when, upon conformity to the requirements of the law, they are entitled to claim, viz., a discharge from their debts").

¹⁷⁴ *In re Gies*, 10 F. Cas. 339, 340 (E.D. Mich. 1875).

¹⁷⁵ *In re Hamburger*, 11 F. Cas. 317, 317 (S.D.N.Y. 1875) ("The principle adopted by the register is, that the services for which he thinks an allowance should be made were more or less beneficial to the creditors and the assignee, and were services proper and necessary to be rendered, on the procurement of the bankrupts. This would be a very proper consideration were it not for the express language of general order No. 30, which was manifestly intended to exclude the exercise of all discretion by the court in cases of this kind.")

¹⁷⁶ *In re Lloyd*, 7 F. 459 (W.D. Pa. 1881), the court stated:

"It is a settled rule in this court never to allow counsel on either side to be paid out of the funds in dispute." In the spirit of this rule, and to guard against abuses which threatened to creep into the administration of the bankrupt law, the supreme court [sic], as I conceive, so amended the general orders in bankruptcy as to put an end to allowances out of the bankrupt's estate to the petitioning creditors' attorneys, solicitors,

4. *The Bankruptcy Act of 1898*.— The precursor to current bankruptcy law was the Bankruptcy Act of 1898.¹⁷⁷ Section 64 of the Act addressed the issue of priority, and granted first priority to the actual and necessary costs of preserving the estate after the bankruptcy filing.¹⁷⁸ The main purpose of the 1898 Act was to allow for equitable distribution of the debtor's estate among creditors, with priority being given to one creditor over another only when the purpose of the priority was clear from the statute.¹⁷⁹

The Act granted third priority to attorneys' fees in involuntary bankruptcies, but provided that, in voluntary bankruptcies, the court

or counsel.

Id. at 460–61 (quoting *Hauenstien v. Lynham*, 100 U.S. 483, 491 (1879)) (citation omitted). Some lower courts, however, carved out an exception to General Order No. 30 for services rendered by the debtor's attorney that clearly benefited the bankruptcy estate. *See In re Beck*, 92 F. 889, 892 (S.D. Iowa 1899). In *Beck*, the court stated:

If, meanwhile, legal services are actually needed for preservation of the property, pending the appointment of the trustee, and such necessity clearly appears, and, as well, that such services were rendered which were beneficial to the general creditors, . . . this court is authorized to allow a reasonable fee therefor. In other words, fees for legal services rendered for [the] bankrupt . . . in proceedings instituted by the bankrupt for his own benefit, will not be allowed as a debt having the priority given under the clause under consideration. Such fee, if allowable at all, must be presented as a claim against the estate, and take its place with other general claims. But, if legal services are rendered under circumstances and of a nature which constitute a special benefit to the estate generally, . . . the court may allow therefor, when such necessity and benefit clearly appear.

Id. at 892.

¹⁷⁷ Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

¹⁷⁸ Section 64 stated, in pertinent part:

(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

(b) The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be

(1) the actual and necessary cost of preserving the estate subsequent to filing the petition

§ 64 (headings & footnote omitted).

¹⁷⁹ *See Nathanson v. NLRB*, 344 U.S. 25, 29 (1952); *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 227 (1930).

should use its discretion in whether to grant third priority for the fees of the debtor's attorney.¹⁸⁰ The rationale for this distinction appeared to be twofold: first, in an involuntary proceeding, the debtor did not choose to file for bankruptcy protection, and therefore had no control over whether to incur attorneys' fees; and second, if the debtor's property was sold by the trustee for the benefit of creditors, the debtor would have no assets remaining with which to pay his attorney.¹⁸¹

Under the 1898 Act, administrative expenses were granted first priority because the estate was required to pull its own weight. In doing so, the Act stated, "The costs of the administration of an estate are always chargeable against the assets of the estate."¹⁸² Moreover, bankruptcy law "expressly provides for the cost of administration as a prior lien upon the assets of the bankrupt's estate before there is any distribution of it to creditors."¹⁸³

The leading case discussing the priority afforded attorneys' fees under the 1898 Act was *In re Erie Lumber Company*.¹⁸⁴ *Erie* involved an attorney who represented a debtor in an involuntary bankruptcy proceeding. The court held that the attorney's fees were part of the cost of administering the estate. "[T]he professional services of attorneys are essential to the proper administration of a bankrupt's estate, and are second only in dignity to the wages of labor exerted in its creation."¹⁸⁵

180 Section 64 provided for third priority in the following situations:

(3) [T]he cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow

Bankruptcy Act of 1898 § 64; *see also Beck*, 92 F. at 890.

181 *Beck*, 92 F. at 890-91.

182 *In re Tebo*, 101 F. 419, 420 (D.W. Va. 1900).

183 *Id. Tebo* directly addressed the issue of compensation to the attorney of a debtor out of the property of the estate, even though that issue was never appealed. "The court is of opinion that the allowance to counsel [for the debtor] rests largely in the discretion of the referee in bankruptcy, and, there being no evidence filed before the judge of this court that the allowance made by the referee was unjust, excessive, and exorbitant, I am of opinion not to disturb it . . ." *Id.* at 421. State bankruptcy law was also greatly affected by the Bankruptcy Act of 1898. *John Deere Plow Co. v. McDavid (In re John Deere Plow Co.)*, 137 F. 802, 812 (8th Cir. 1905) established the principle that state preferences could not interfere with federal preferences.

184 *In re Erie Lumber Co.*, 150 F. 817 (S.D. Ga. 1906).

185 *Id.* at 825.

5. *The Chandler Act Amendments.*— The Chandler Act amended the priority section of the Bankruptcy Code significantly, specifically allowing trustees to recover their fees in opposing the bankruptcy discharge as an administrative priority. One of the most significant changes, however, allowed attorneys for debtors in voluntary bankruptcy proceedings to recover their fees as administrative priority expenses as well.¹⁸⁶ In order to receive priority, the fees had to arise during the administration of the bankruptcy estate. Accordingly, generally only post-petition expenses were granted administrative priority treatment.¹⁸⁷ The attorneys seeking priority had the burden of establishing that their fees fell within the intended class of priority claimants and benefited the bankruptcy estate.¹⁸⁸

6. *The Bankruptcy Reform Act of 1978.*— Beginning in 1978, the claims that were entitled to priority treatment were enumerated much more clearly in the Bankruptcy Code.¹⁸⁹ First priority claims included primarily administrative expenses specified in section 503(b).¹⁹⁰ As established in Part I of this

¹⁸⁶ Chandler Act, ch. 575, 52 Stat. 840 (1938) (repealed 1978). The amendments provided, in pertinent part:

a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estates of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow

§ 64.

¹⁸⁷ See, e.g., *In re Fuzzy Thurston's Eau Claire Left Guard, Inc.*, 33 B.R. 579, 581 (Bankr. W.D. Wis. 1983).

¹⁸⁸ *St. Paul Fire & Marine Ins. Co. v. REA Express, Inc.* (*In re REA Express, Inc.*), 442 F. Supp. 71, 73 (S.D.N.Y. 1977). It is also important to note that, in pre-1978 cases, although the priority section was included in what is now the Chapter 7 provisions of the Bankruptcy Code, they have been held equally applicable in Chapter 11 proceedings. *Id.* "The purpose of according first priority to administrative expenses in a Chapter XI proceeding is to encourage current employees and current suppliers to deal with the debtor while it is attempting to survive and arrive at an arrangement as provided by law." *Id.* at 74.

¹⁸⁹ Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

¹⁹⁰ 11 U.S.C. § 507(a)(1) (1978) (current version at 11 U.S.C. 507 (2006)). Under the 1978 Code, attorneys who were unsuccessful in receiving administrative priority treatment

Article, section 503(b) included compensation and reimbursements that were awarded under section 330 of the Code.¹⁹¹ For the first time, debtors' attorneys' fees were granted first priority treatment irrespective of whether their services conferred any specific benefit on the bankruptcy estate. "The debtor's attorney is included among the professionals compensated under section 330 on the theory that his services, while not performed for the direct benefit of the estate, may be helpful to the bankruptcy process because they facilitate orderly administration of the estate."¹⁹²

Yet despite this radical change in the treatment of attorneys' fees in bankruptcy, some remnants of pre-1978 policy still remained. For example, courts facing the issue of whether contingent attorneys' fees could be treated as administrative expenses were reluctant to allow them because they did not benefit the bankruptcy estate. One court stated that "[s]uch a result would flatly contradict the policy reason for granting administrative expense priorities, which is that the estate as a whole is benefited if general creditors subordinate their pre-bankruptcy claims in order to secure goods and services necessary to an orderly and economical administration of the estate after the petition is filed."¹⁹³

7. *The 1994 Amendments.*— As discussed in part I, the 1994 amendments to the Bankruptcy Code¹⁹⁴ significantly altered the priority granted to a debtor's attorneys' fees in bankruptcy. The amendments deleted the debtor's attorney from the list of parties entitled to administrative priority treatment under section 330(a)(1).¹⁹⁵ Although the amendments made to the Code in 1994 amended section 330 dramatically, the purpose of the administrative priority remained the same: to allow parties whose services benefited the bankruptcy estate to be paid ahead of other creditors.¹⁹⁶ Moreover, because

for their fees in representing the debtor often sought to establish their fees as third priority expenses for "wages, salaries, or commissions." § 507(a)(3); see also *In re Hutchison*, 223 B.R. 586, 588 (Bankr. M.D. Fla. 1998).

191 11 U.S.C. § 507(a)(1) (current version at 11 U.S.C. 507 (2006)). "Section 330 is designed to secure for the estate the services of competent professional persons, including a trustee, an attorney for the trustee, accountants, appraisers, and others who may be needed in order best to operate, reorganize, or liquidate the estate." *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1469-70 (9th Cir. 1983) (citing S. REP. NO. 95-989, at 40-41 (1978), reprinted in 1978 U.S.C.A.N. 5787, 5826-27); see also *supra* notes 34-38 and accompanying text.

192 *Yermakov*, 718 F.2d at 1470. "Because 'economy in administration is the basic objective,' Section 330 limits the compensation payable to the debtor's attorney as well as other professionals to a reasonable amount for 'actual' services that are 'necessary' in connection with the bankruptcy process." *Id.* (citation omitted).

193 *Id.* (citing *Hall v. Perry (In re Chochise Coll. Park, Inc.)*, 703 F.2d 1339, 1355-56 (9th Cir. 1983)).

194 Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994).

195 See *supra* notes 39-40 and accompanying text.

196 See, e.g., *Pope v. Vu (In re Vu)*, 366 B.R. 511, 516-17 (D. Md. 2007); see also *Xifaras v.*

every priority claim decreases the assets that are available to the debtor's general unsecured creditors, courts have continued the tradition of strictly construing priority claims in bankruptcy.¹⁹⁷

B. Policy Justifications Underlying Priority Claims

When paying creditors' claims in bankruptcy, the Code starts with a general presumption "favoring equality in distribution such that 'if one claimant is to be preferred over others, the purpose should be clear from the statute.'"¹⁹⁸ All of the priority rules in the Bankruptcy Code can be justified on one of two policy grounds.¹⁹⁹ Either the priority debts increase the value of the bankruptcy estate for the benefit of all creditors, or they preserve the social safety net provided by the government and, thus, benefit society as a whole. A brief examination of the debts afforded priority treatment under the Code serves to illustrate this point.

Domestic support obligations, such as child support, are granted first priority treatment under the Bankruptcy Code.²⁰⁰ This provision was added in 2005 because Congress recognized that spouses and dependent children often did not receive payments necessary for their survival when the payor filed for bankruptcy protection.²⁰¹ As a result, they were often forced to file for bankruptcy themselves. Thus, the purpose behind affording domestic support obligations first priority is to prevent this domino effect, thereby easing the government's burden of providing for the welfare of spouses and

Morad (*In re Morad*), 328 B.R. 264, 271 (B.A.P. 1st Cir. 2005).

197 *In re Hutchison*, 223 B.R. 586, 588 (Bankr. M.D. Fla. 1998). Attorneys have continued to attempt to squeeze their claims within the ambit of section 507(a)(3) as wage claims if they are denied first priority treatment as administrative expenses, but few have been successful in doing so. "The key distinction entitling claimants to priority pursuant to § 507(a)(3) is whether claimants are truly engaged in a master/servant relationship with the Debtor versus those who are engaged in a contractual relationship with the Debtor." *Id.* It is important to note that, if a case has been converted to Chapter 7 from Chapter 11, 12, or 13, then section 726 of the Code provides that administrative priority expenses arising in the Chapter 7 proceeding have priority over administrative expenses arising in the subsequent Chapter 11, 12, or 13 proceeding. 11 U.S.C. § 726 (2006).

198 *Total Minatome Corp. v. Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling, Inc.)*, 258 F.3d 385, 387–88 (5th Cir. 2001) (quoting *Nathanson v. NLRB*, 344 U.S. 25, 29 (1952)).

199 For a more complete discussion of the priority rules generally, see *supra* notes 31–36 and accompanying text.

200 11 U.S.C. § 507(a)(1)(A)–(B) (West Supp. 2008); see also H.R. REP. NO. 109–31, pt. 1, at 16–17 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 102–03.

201 In the Senate debates on BAPCPA, one senator referred to debtors' failure to pay child support obligations as one of the "worst abuses in the consumer bankruptcy system." See 151 CONG. REC. E704–03 (daily ed. Apr. 14, 2005) (statement of Rep. Moore); see also 151 CONG. REC. H1974–05 (daily ed. Apr. 14, 2005) (statement of Rep. Gingrey) ("Spousal and child support protections . . . help single parents and their children by closing a loophole used by some spouses currently avoiding their child support responsibilities.").

children of debtors.

Administrative expenses are granted second priority in bankruptcy.²⁰² As the previous discussion of the history of the administrative priority demonstrates, this priority category is designed to encourage the trustee and other professionals to work diligently to preserve and enhance the value of the bankruptcy estate for all creditors. In addition, it recognizes the need for the bankruptcy estate to pull its own weight.²⁰³ For example, insurance needed to preserve estate assets is an administrative priority expense, as are the fees for the trustee and other professionals working with the trustee, such as appraisers and accountants for the estate. Thus, the primary policy justification for the administrative priority is that the expenses incurred thereunder enhance the value of the bankruptcy estate for the benefit of all creditors. Courts have consistently held that administrative priority expenses should be narrowly construed “to honor ‘the traditional presumption favoring ratable distribution among all holders of unsecured claims.’”²⁰⁴

Third priority expenses include claims made by so-called involuntary gap creditors.²⁰⁵ When a debtor is forced into bankruptcy involuntarily by the debtor’s creditors, there is a period of time between the filing of the involuntary petition and the hearing by the bankruptcy court to determine whether the debtor properly belongs in bankruptcy. The intervening period is called the involuntary gap period.²⁰⁶ If creditors are unwilling to loan money or provide goods and services to the debtor during that period, the debtor will surely be ready for bankruptcy at the end of the involuntary gap period. Therefore, the Bankruptcy Code seeks to encourage creditors to deal with the debtor during this period by affording them third priority treatment should the debtor ultimately stay in bankruptcy. Thus, the policy justification for providing priority treatment to involuntary gap creditors is to enhance the value of the bankruptcy estate by allowing the debtor to continue its business operations during the gap period.

The fourth priority is reserved for employees of a debtor who provide services within the 180-day period before the bankruptcy petition is filed.²⁰⁷ If employees’ wages are protected should their employer be forced

202 11 U.S.C. § 507(a)(2) (West Supp. 2008).

203 *Xifaras v. Morad (In re Morad)*, 328 B.R. 264, 271 (B.A.P. 1st Cir. 2005) (“[T]he very essence of an administrative expense under § 503(b)(1)(A) is that it arises during the administration of the estate.”).

204 *Id.* at 269. *See, e.g., Isaac v. Temex Energy, Inc. (In re Amarex, Inc.)*, 853 F.2d 1526, 1530 (10th Cir. 1988); *In re Pre-Press Graphics Co.*, 287 B.R. 726, 730 (Bankr. N.D. Ill. 2003).

205 11 U.S.C. § 507(a)(3) (West Supp. 2008).

206 For a comprehensive discussion of the respective rights of creditors and debtors during the involuntary gap period, see Joseph Mullin, Comment, *Bridging the Gap: Defining the Debtor’s Status During the Involuntary Gap Period*, 61 U. CHI. L. REV. 1091 (1994).

207 11 U.S.C. § 507(a)(4) (West Supp. 2008). These claims are capped at \$10,950 per creditor. *Id.*

to file for bankruptcy protection, they have more incentive to continue working for a shaky company, thereby increasing the possibility that the debtor will not need bankruptcy protection.²⁰⁸ In addition, employees are dependent on their employer to provide their livelihood and support their families.²⁰⁹ If the employer eventually files a bankruptcy petition, there is a greater chance that employees might lose their jobs and be forced to rely on welfare or the bankruptcy system to survive.²¹⁰ Therefore, granting employees' wages fourth priority in bankruptcy reduces the burden on the government's social safety net.

The Bankruptcy Code provides fifth priority to claims for contributions to employee benefit plans.²¹¹ This priority protects retirement benefits in bankruptcy, again reducing the obligation of the government to provide support to individuals during their retirement.²¹²

Unsecured claims of certain farmers and fishermen are granted sixth priority treatment in bankruptcy. Protecting the debts of those who supply food to the country helps to ensure that farmers and fishermen will continue their businesses, thereby relieving the government of the burden to feed its citizens.

Seventh priority treatment is provided to individuals for deposits made for purchasing, leasing, or renting property that has not yet been received as of the time that the debtor files for bankruptcy, or for personal services that have not yet been provided.²¹³ Because most of the debts falling within this category are for security deposits for apartment rental, it is likely that this priority protects the government against having to provide a safety net for individuals who cannot afford to rent another apartment when their landlord files for bankruptcy.

One of the largest categories of priority claims, the eighth priority, is for taxes owed to governmental units.²¹⁴ These claims include income taxes, property taxes, trust fund taxes, and penalties incurred before the bankruptcy filing. It is no surprise that the purpose behind this priority is to assist the government in collecting funds with which to provide welfare and other social services to those in need throughout the country.

Ninth priority treatment is granted to claims by FDIC regulatory agencies to maintain the capital of FDIC-insured banks and financial

208 See, e.g., *In re Northwest Eng'g Co.*, 863 F.2d 1313, 1314–15 (7th Cir. 1988).

209 See Daniel Keating, *The Fruits of Labor: Worker Priorities in Bankruptcy*, 35 ARIZ. L. REV. 905, 907 (1993).

210 See Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 790 (1987) (“Employees are among the creditors least likely to have spread the risks of default.”).

211 11 U.S.C. § 507(a)(5) (West Supp. 2008).

212 See, e.g., *Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605, 607 (9th Cir. 1993), *abrogated by* *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651 (2006).

213 11 U.S.C. § 507(a)(7) (West Supp. 2008).

214 *Id.* § 507(a)(8).

institutions.²¹⁵ This priority category, which was recently added to the Bankruptcy Code, allows FDIC agencies to collect their claims ahead of general unsecured creditors because, in the absence of priority treatment, the claims would likely remain unpaid, putting a burden on the government to satisfy the claims and thereby reducing the funds available to provide welfare and other social service benefits.

The Bankruptcy Code grants tenth priority to death or personal injury claims that arise because the debtor operated a motor vehicle or boat unlawfully while intoxicated due to alcohol or drugs.²¹⁶ This priority category does not fit within either of the two general policy justifications for priority claims generally. Presumably the intent behind granting priority treatment to these claims is either to punish the debtor for illegal behavior or to serve as a deterrent to such behavior. In either case, however, it can be argued that these claims should not be granted priority treatment, but such an argument is beyond the scope of this Article.

The following section examines whether debtors' attorneys' fees fall within either of the generally accepted policy justifications for priority claims generally. Concluding that they do not, it offers a modest proposal for change.

C. A Proposal for Amending the Administrative Priority Rules

For over 150 years, United States bankruptcy laws have consistently provided that attorneys representing debtors in bankruptcy proceedings are entitled to have their fees paid as administrative priority expenses only if they can demonstrate a clear and substantial benefit to the bankruptcy estate.²¹⁷ The Bankruptcy Reform Act of 1978 sharply deviated from that long-standing practice, however, by treating debtors' attorneys' fees as administrative priority expenses without a showing that the services benefited the estate.²¹⁸ The Act offered no legislative history to support such a dramatic change. Although some courts sought to narrow this broad grant of priority for attorneys' fees, they were constrained by the statute's express language. While both the 1994 Amendments and the Supreme Court's decision in *Lamie* took important steps toward narrowing the ability of debtors' attorneys to have their fees treated as administrative priority expenses, many loopholes and difficult issues of statutory interpretation remain.

Debtors' attorneys' fees generally do not enhance the value of the bankruptcy estate for the benefit of all creditors. Certainly there might be instances in which the attorneys' services indirectly benefit the estate,

²¹⁵ *Id.* § 507(a)(9).

²¹⁶ *Id.* § 507(a)(10).

²¹⁷ See *supra* notes 146–188 and accompanying text.

²¹⁸ See *supra* notes 189–193 and accompanying text.

such as when attorneys bring actions against creditors for violations of the automatic stay. In these instances, however, the attorneys' services primarily benefit debtors, with only an indirect and incidental benefit to the estate. Moreover, debtors' attorneys' fees do not fall within the second policy justification for priority treatment, because they do not preserve or enhance the government's social safety net. Although it can be argued that the attorneys' services in filing bankruptcy petitions allow debtors to avoid welfare, thus preserving the safety net for others, the bankruptcy process is, at its core, part of the social safety net provided by the government.

Accordingly, because debtors' attorneys' fees do not fit within either of the two generally accepted policy justifications for priority treatment in bankruptcy, Congress should amend the Bankruptcy Code to eliminate their priority status generally. However, Congress should provide an exception to this general prohibition if the attorneys' fees offer a clear and substantial benefit to the bankruptcy estate, such as when the trustee hires the debtor's attorney to perform legal services on behalf of the estate. The following is a draft of the statutory language that Congress might use to implement the changes proposed by this Article.

Section 330 of Title 11 U.S.C. should be amended as follows:

1. Delete the phrase "or the debtor's attorney" from section 330(a)(1)(A) of Title 11 U.S.C.

2. Delete section 330(a)(4)(B) of Title 11 U.S.C. and replace it with the following:

The fees of a debtor's attorney are governed by this section only to the extent that the attorney is appointed by the trustee pursuant to section 327 and the services of such attorney are approved by the Court.

The first amendment removes any ambiguities regarding the application of *Lamie* to the priority afforded debtors' attorneys' fees, while the second amendment eliminates the disparity between Chapter 7 and 11 cases, on the one hand, and Chapter 12 and 13 cases, on the other. It also expands the reasoning of *Lamie* to cases filed under Chapter 12 and 13 of the

Bankruptcy Code.²¹⁹*D. Potential Criticisms of the Proposed Statutory Amendment*

Critics might argue that while the statutory amendment proposed in this Article unifies the policy underpinnings of the priority rules, it does so at the expense of debtors because they will be the parties who bear the financial burden of paying their attorneys' fees if the fees are not afforded administrative priority treatment. The response to this criticism requires an understanding of the policies underlying the United States bankruptcy system. The system is founded on the dual policy justifications of ensuring the debtor's fresh start²²⁰ while providing for a fair and equitable distribution of assets to creditors.²²¹ The current treatment of affording debtors' attorneys' fees administrative priority treatment favors the fresh start policy over an equitable distribution to creditors. There are many problems inherent in the Bankruptcy Code. Some provisions unjustly favor debtors over creditors, and others unduly burden the debtor's fresh start. The purpose of academic discourse is to approach each issue from a consistent theoretical perspective in an attempt to harmonize the competing policy justifications at the base of the Bankruptcy Code. As this Article has attempted to demonstrate, the treatment of attorneys' fees in bankruptcy unjustly favors debtors at the expense of a fair and equitable distribution of the estate's assets to creditors.

219 Since the Supreme Court's decision in *Lamie*, several bankruptcy courts have held *Lamie* expressly inapplicable to Chapter 13 cases, and have allowed debtors' attorneys to recover their fees as administrative priority expenses. *See, e.g.*, *Holland v. EMC Mortgage Corp.* (*In re Holland*), 374 B.R. 409 (Bankr. D. Mass. 2007); *In re Ramirez*, No. 03-47872, 2006 WL 3838176, at *4 (Bankr. S.D. Tex. Dec. 29, 2006); *In re Gutierrez*, 309 B.R. 488, 500-01 (Bankr. W.D. Tex. 2004). One commentator has suggested that a 2004 bankruptcy case, *Dionne v. Colvin* (*In re Moore*), 312 B.R. 902 (Bankr. N.D. Ala. 2004), conflicts with the *Gutierrez* line of cases. C.R. "Chip" Bowles, Jr., *The Other Lamie Shoe: Is Employment Regulated by 11 U.S.C. § 327(a)?*, AM. BANKR. INST. J., Oct. 2004, at 22. He argues that *Moore* requires Chapter 13 attorneys to be appointed by the trustee under section 327 of the Bankruptcy Code in order to have their fees treated as administrative priority claims. *Id.* The commentator, however, misreads *Moore*. In *Moore*, the attorneys' fees at issue in the case were not those of the attorney representing the debtor in his Chapter 13 case; rather, they were the fees of an attorney who represented the debtor in an unrelated state court action. Thus, the *Moore* court was entirely correct in holding that the fees were entitled to administrative priority only under section 327 of the Code and not under section 330(a)(4)(B). *See Moore*, 312 B.R. at 909.

220 *See, e.g.*, H.R. REP. NO. 95-595, at 125 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6086 (noting that the fresh start allows debtors "to get out from under the debilitating effects of too much debt" and that "[t]he two most important aspects of the fresh start available under the Bankruptcy laws are the provision of adequate property for a return to [a] normal [life], and the discharge, with the release from creditor collection attempts.").

221 *See, e.g.*, *Burlingham v. Crouse*, 228 U.S. 459, 473 (1913); *IRS v. Luongo* (*In re Luongo*), 259 F.3d 323, 330 (5th Cir. 2001).

CONCLUSION

With the troubling economic times facing this country today, it is imperative that the nation's bankruptcy system operate efficiently to provide a safety net for those who have lost their homes to foreclosure or who find themselves in difficult economic situations as a result of the loss of a job or a health crisis. Yet the Bankruptcy Code has so many unanswered issues of statutory interpretation that courts' attention is diverted from assisting honest but unfortunate debtors to attempting to resolve these thorny issues. It is time that Congress steps in to amend the Bankruptcy Code and eliminate many of these unresolved statutory interpretation dilemmas, such as the treatment of debtors' attorneys' fees in bankruptcy.

This Article proposes a statutory amendment to the Bankruptcy Code that establishes clear guidelines for when debtors' attorneys are entitled to have their fees treated as administrative priority expenses in a bankruptcy proceeding. It calls on Congress to adopt the proposal in order to bring the bankruptcy system one step closer to operating efficiently and effectively during these difficult economic times.

