FILED

AUG 18 2006

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: ALEKSANDAR P. RADULOVIC, Debtor. _____ ALEKSANDAR P. RADULOVIC, Appellant, v. NANCY L. JAMES, Trustee, Appellee. _____	BAP No. WW-05-1142-SDK Bk. No. 04-24771 **MEMORANDUM**[1]

Argued and Submitted on October 21, 2005
at Seattle, Washington

Filed - August 18, 2006

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Samuel J. Steiner, Bankruptcy Judge, Presiding

_____

Before: SMITH, DUNN[2] and KLEIN, Bankruptcy Judges.

---

[1] This disposition is not appropriate for publication and may not be cited except when relevant under the doctrine of law of the case or rules of res judicata, including claim preclusion and issue preclusion. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Randall Dunn, United States Bankruptcy Judge for the District of Oregon, sitting by designation.

Aleksandar P. Radulovic ("Debtor") appeals a final order by the bankruptcy court, entered April 7, 2005, requiring his attorney, Shulkin Hutton Inc., P.S. (the "Firm"), to turn over to the chapter 7 trustee, Nancy L. James, a prepetition retainer fee that the Firm held in trust for postpetition chapter 7 legal services. We AFFIRM.

I. FACTS

The facts are undisputed. Two days prior to filing a chapter 7[3] bankruptcy petition, Debtor, on November 15, 2004, entered into a fee arrangement with the Firm. According to one of the terms of the agreement, the Firm was to hold in trust approximately $7,300 to cover postpetition chapter 7 legal services and costs (the "retainer").

Debtor filed his bankruptcy on November 17, 2004, and listed all the funds retained by the Firm on his schedules.[4] A few months thereafter, on February 24, 2005, the trustee filed a motion for turnover of the retainer on the ground that it was nonexempt property of the estate.

Relying principally on In re Advanced Imaging Technologies, Inc., 306 B.R. 677 (Bankr. W.D. Wash. 2003), Debtor opposed the motion, arguing that the Firm held a perfected attorney's lien on the retainer as of the petition date under Washington state law. Debtor asserted that because a valid lien remains unaffected

[3] Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

[4] Debtor disclosed in schedule B that the Firm held in trust $11,765.16, of which $3,615 was Debtor's exempt cash and the balance was for employing the Firm for postpetition defenses and/or for the trustee as the court may direct.

throughout the bankruptcy, the Firm should be allowed to apply charges against the funds postpetition. Debtor conceded that the retainer remained property of the estate, but only until the Firm actually applied charges against it.

The trustee countered that Advanced Imaging was not applicable to this case because in that case the debtor provided its attorneys with a prepetition engagement letter which authorized a security interest against the retainer in the attorney's trust account. Only after notice to creditors and a hearing was the debtor's attorney's employment pursuant to the terms of the engagement letter approved by the court. According to the trustee, this case is distinguishable as no order was entered approving the Firm's employment.

The bankruptcy court declined to follow Advanced Imaging, and instead, ruled that because the Firm was owed no fees as of the petition date, it did not hold a lien against the retainer. The court opined

> From the briefing, it appears that there are two precedents which bear on the problem. First, there is my unreported opinion in the 1995 case of Coleman Associates Limited Partnership and the reported ruling of Judge Overstreet in the 2003 case of Advanced Imaging Technologies, Inc., which is cited as 306 BR 677.
>
> In Advanced Imaging Judge Overstreet held that the debtor's attorneys had a prepetition security interest in the retainer funds which had been perfected under state law. In the Coleman Associates case, I concluded that under state law, the attorney's possessory lien in the client's funds is limited by Washington Rule of Professional Conduct 1.14(b)(4), which requires an attorney to deliver any funds in his or her possession which the client is entitled to receive to the client on the client's demand.

> Based on that, I concluded that the extent of the attorney's lien was therefore measured by the amount of compensation owed by the client at any given time. I also concluded that the attorneys held no prepetition lien because the debtor owed no fees on the petition date.
>
> At this time, I conclude that my analysis in the Coleman case was correct; that it applies here; and that it disposes of the argument that there was a perfected prepetition security interest in the funds for services to be rendered in the future.

Transcript of Proceedings, March 18, 2005, p. 4-5. Further, the court noted that to the extent a lien attached postpetition, such lien would be in violation of the automatic stay, and therefore, be void as a matter of law.

Debtor appeals.

II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. § 1334 and §§ 157(b)(1) and (b)(2)(A). We have jurisdiction under 28 U.S.C. § 158(c)(1).

III. ISSUE

Whether the attorney for the chapter 7 debtor in this case can assert a lien against a prepetition retainer held by it in its trust account for potential future postpetition services.

IV. STANDARD OF REVIEW

The interpretation and application of the Bankruptcy Code and state law are questions reviewed de novo. In re Networks Elec. Corp., 195 B.R. 92, 96 (9th Cir. BAP 1989). The proper construction of Code sections regarding the compensation of attorneys is reviewed de novo. In re Monument Auto Detail, Inc., 226 B.R. 219, 224 (9th Cir. BAP 1998).

V. DISCUSSION

Debtor believes that the bankruptcy court erred in granting the trustee's motion for turnover of the retainer fee held by the Firm because 1) the Firm had a perfected security interest against the full amount of the retainer under Washington state law; 2) the retainer was property of the estate only until the Firm applied charges against it; and 3) the fee agreement created a trust as to the retainer, whereby the Firm could draw upon the funds with court authorization after giving notice to creditors.

A. The Retainer Fee is Property of the Estate

Funds paid to an attorney by a client for services "become property of the estate only if, under applicable state law, the debtor has an interest in the [funds] at the time of filing the bankruptcy case." In re GOCO Realty Fund I, 151 B.R. 241, 250 (Bankr. N.D. Cal. 1993)(emphasis added).

Washington law distinguishes fees collected by attorneys as either "classic" or "true" retainers and "advance fee deposits."[5] See Washington State Bar Ass'n, Ethics Opinion 186 (1990); In re Bigelow, 271 B.R. 178, 187 (9th Cir. BAP 2001). A "classic" retainer is a sum of money paid by a client to secure an attorney's availability over a given period of time and is considered earned by the attorney upon receipt whether or not

[5] Other jurisdictions also distinguish between an "advance fee retainer" and a "security retainer" with the latter belonging to the client, even though in the attorney's possession. In re McDonald Bros. Constr., Inc., 114 B.R. 989, 997-99 (Bankr. N.D. Ill. 1990). However, as the Ninth Circuit has yet to recognize these distinctions, SEC v. Interlink Data Network of Los Angeles, Inc., 77 F.3d 1201, 1205 n.4 (9th Cir. 1996), and because Washington only distinguishes between "retainers" and "advance fee deposits," Washington State Bar Ass'n, Ethics Opinion 186 (1990), we conform our analysis between them.

services are actually provided. Baranowski v. State Bar, 24 Cal. 3d 153, 164 n.4 (1979); SEC v. Interlink Data Network, 77 F.3d 1201, 1205 (9th Cir. 1996); In re Bigelow, 271 B.R. at 187. As these funds are the attorney's funds, and because a client has no interest in such funds, the bankruptcy estate has no interest in a "classic" retainer upon the filing of bankruptcy. In re McDonald, 114 B.R. 989, 999 (Bankr. N.D. Ill. 1990); In re C & P Auto Transport, Inc., 94 B.R. 682, 687 (Bankr. E.D. Cal. 1988).

"Advance fee deposits" are refundable funds given to a lawyer for providing future services, as necessary, and are to be held in trust for the client until such services are rendered. See Washington State Bar Ass'n, Ethics Opinion 186 (1990); In re Bigelow, 271 B.R. at 188 ("The fee is a one-time or periodic advance payment for certain well-defined legal services and is not earned until the services are actually performed.").

Here, Debtor concedes that the Firm did not receive a classic retainer. In examining the fee arrangement, Debtor and the Firm agreed that approximately $7,300 would be held in the Firm's trust account for postpetition legal services, or for distribution "as the court may order." Neither the trust language, nor the reference to the possible necessity of court approval, is suggestive of a present intent to transfer ownership of the retainer to the Firm. Moreover, there is no indication that the funds were transferred to the Firm's account as belonging to it, but as evidenced by Debtor's brief, they were held in trust to secure payment for future anticipated litigation. As such, we conclude that the retainer fee was an advance fee deposit that became property of the estate within the

meaning of § 541[6] upon the filing of the bankruptcy case.

B. The Effect of the Bankruptcy on the Advance Fee Deposit

In Washington, an advance fee deposit is the client's property and held in trust until earned.[7] In re Escalera, 171 B.R. at 111. The Escalera court held

> In bankruptcy, such a retainer constitutes a trust fund held for the benefit of the estate. As estate funds, counsel may draw against them only upon court authorization, and only after notice to all the creditors with opportunity to object.

Id.

Here, at the time the bankruptcy petition was filed, there was no underlying debt owed to the Firm because all prepetition

---

[6] Section 541(a)(1) provides

> The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all of the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541(a)(1).

[7] Washington Rule of Professional Conduct 1.14(a) requires that "[a]ll funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable interest-bearing trust accounts." In re Escalera, 171 B.R. 107, 111 n.6 (Bankr. E.D. Wash. 1994); see also Lester Brickman, The Advance Fee Payment Dilemma: Should Payments Be Deposited to the Client Trust Account or to the General Office Account?, 10 CARDOZO L. REV. 647, 655 n.48 (1989), cited by In re McDonald Bros. Constr., Inc., 114 B.R. 989, 1001 n.15 (Bankr. N.D. Ill. 1990)(ranking Washington as among those jurisdictions holding that all retainers must be treated as client funds).

fees and costs had been paid. Therefore, the entire retainer fee of $7,300 became estate funds upon the filing of the petition.

C. No Attorney's Lien Had Attached to the Retainer

Debtor asserts that the Firm has a possessory attorney's lien against the retainer by virtue of the Revised Code of Washington ("RCW") 60.40.010[8] and a perfected security interest under RCW 62A.9A.[9] Before the bankruptcy court, the Firm characterized its fee agreement with Debtor differently: "The agreement between the parties, in effect, establishes that [the retainer funds are] held in trust subject to the review by the court. So, it's really not a security interest, and it's certainly not a violation of 362." Transcript of Proceedings, March 18, 2005, p. 8. The nature and extent of a security interest is determined by applicable state law.[10] In re

---

[8] Under RCW 60.40.010, "[a]n attorney has a lien for his compensation, whether specially agreed upon or implied, upon money in his hands belonging to his client." RCW 60.40.010.

[9] Under RCW 62A.9A-201(a), Washington's Uniform Commercial Code, "a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors." RCW 62A.9A-201(a).

In order for a security interest to attach, value must be given, the debtor must have rights in the collateral and at least one of the following must apply: (1) debtor has an authenticated security agreement that provides for description of collateral or (2) the collateral is not a certificated security and is in the possession of the secured party. RCW 62A.9A-203(b).

[10] The Escalera court seems to suggest that Washington law does not allow an advance fee retainer to be treated as a possessory security interest:

> Arguably, if state law allows an advance fee retainer to be treated as a possessory security interest, this court would find no

(continued...)

Worcester, 811 F.2d 1224, 1228 (9th Cir. 1987).[11]

---

[10](...continued)

> basis to distinguish between such a retainer and a mortgage given as security for future fees. A debtor's counsel would have a priority in the retainer to the exclusion of other administrative claimants. In Washington, however, retainers which are given as an advance against fees are the client's funds and are to be held in trust until earned.

In re Escalera, 171 B.R. at 111 (emphasis added). However, in In re Advanced Imaging Tech., 306 B.R. at 680-81, a bankruptcy court held that a security interest in retainer funds may be perfected under Washington state law.

[11] We note that although the primary thrust of the parties' arguments was based on the effect of a security interest in the retainer fee under Washington state law and none of the parties advanced any arguments that the Firm violated any rules of professional conduct, the bankruptcy court concluded sua sponte based on the Washington Rules of Professional Conduct 1.14(b)(4) that the Firm held no prepetition lien on the retainer fee because Debtor owed no fees as of the petition date. The court held

> The Court: I concluded [in the Coleman Assoc. case] that under state law, the attorney's possessory lien in the client's funds is limited by Washington Rule of Professional Conduct 1.14(b)(4), which requires an attorney to deliver any funds in his or her possession which the client is entitled to receive to the client on the client's demand.
>
> Based on that, I concluded that the extent of the attorney's lien was therefore measured by the amount of compensation owed by the client at any given time. I also concluded that the attorneys held no prepetition lien because the debtor owed no fees on the petition date.

Transcript of Proceedings, March 18, 2005, p. 4-5.

We offer no comment to the bankruptcy court's determination that the Washington Rules of Professional Conduct limit the state

(continued...)

In In re Monument Auto Detail, Inc., 226 B.R. 219 (9th Cir. BAP 1998), a chapter 11 debtor provided its attorney with a prepetition retainer for legal services. Although the case converted to a chapter 7, the attorney continued to perform work, and subsequently charged the estate for post-conversion services. The trustee objected, asserting that a chapter 7 debtor's attorney is not entitled to compensation from the bankruptcy estate. The attorney argued that it held a lien that secured the full amount of the retainer. We held

> An attorneys' lien simply secures the amount of the underlying debt as determined by the bankruptcy court. In this case, the bankruptcy court determined that the [f]irm was entitled to receive attorneys' fees in an amount significantly less than the $20,000 retainer. The [f]irm's attorneys' lien secures only the amount of fees and costs specifically allowed by the bankruptcy court, not the amount of the entire retainer.[12]

Id. at 225 (emphasis added).

As it is clear that an attorney's lien secures only the amount of fees and costs owed, and because the Firm was owed nothing at the time of the bankruptcy filing, in our view no security interest attached to the retainer fee.

---

[11](...continued)
law with regard to an attorney's possessory interest in client's funds as the outcome of its decision is aligned with our own conclusion that Debtor owed the Firm no fees at the time of the filing. Accordingly, the retainer belonged to Debtor, and then to the estate upon the filing of the bankruptcy.

[12] The panel also held that "such an interpretation would render the employment and compensation requirements under the Code and Rules meaningless." In re Monument Auto Detail, Inc., 226 B.R. at 225.

D. The Automatic Stay Prohibits Postpetition Liens From Attaching to Property of the Estate

Debtor cites to In re Advanced Imaging Technologies, Inc., 306 B.R. 677 (Bankr. W.D. Wash. 2003), for the proposition that once a prepetition lien on retainer funds is perfected, an attorney may apply postpetition charges against it without violating the automatic stay. According to Debtor, a new lien is created with each postpetition application of charges.

In Advanced Imaging, a client gave its attorney a prepetition retainer for future legal services to be rendered throughout the anticipated chapter 11 case. During the chapter 11 (and before the case was ultimately converted to a chapter 7), the debtor's attorney, after notice to creditors and a hearing, became formally employed by order of the court. The court reasoned that the use of the prepetition retainer as security for chapter 11 postpetition services was proper and did not violate the automatic stay due to the satisfaction of certain procedural safeguards, i.e., employment application, notice to creditors with disclosure of the terms of engagement, and opportunity for hearing.[13] The bankruptcy court's decision in Advanced Imaging deals with the fee arrangements of chapter 11 counsel representing a debtor in possession performing the duties of the trustee and, hence, is inapposite in the chapter 7 context.[14]

---

[13] Advanced Imaging is limited in its applicability here as there is no discussion regarding the nature of a retainer fee in a subsequent conversion to a chapter 7.

[14] We recently faced a related issue in In re Dick Cepek, Inc., 339 B.R. 730 (9th Cir. BAP 2006). In that case, the issue on appeal was whether a bankruptcy court could require debtor's

(continued...)

In addition, § 362(a)(4) explicitly provides that a "petition . . . operates as a stay, applicable to all entities, of any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4)(emphasis added).

---

[14](...continued)
counsel to disgorge fees drawn from a prepetition retainer in which it held a security interest in order to equalize distributions to all administrative claimants under § 726(b). Id. at 736. The panel held that "a professional with a valid prepetition security retainer that has been properly documented, disclosed and approved by the bankruptcy court cannot be required to surrender it in the interest of equal treatment under section 726(b)." Id. at 732. The matter was remanded to the bankruptcy court in order to determine

> whether the security interest coveted by counsel can be tolerated under the particular circumstances. In so doing, the court should consider the full panoply of events and elements: the reasonableness of the arrangement and whether it was negotiated in good faith, whether the security demanded was commensurate with the predictable magnitude and value of the foreseeable services, whether it was a needed means of ensuring the engagement of competent counsel, and whether or not there are telltale signs of overreaching. . . . Perceptions are important; how the matter likely appears to creditors and to other parties in legitimate interest should be taken into account. . . . Prudence, ethical considerations and general proof requirements all suggest that an arrangement whereby a professional is granted a security interest in a debtor's funds be adequately documented.

Id. at 740-41.

In the instant matter, the bankruptcy court considered the fee agreement between Debtor and the Firm and concluded that under Washington state law there was no "prepetition security interest in the funds for services to be rendered in the future." Transcript of Proceedings, March 18, 2005, p. 5. Accordingly, the trustee was entitled to turnover of the estate funds upon demand.

The postpetition creation or attachment of a lien against property of the estate clearly violates § 362(a)(4) and renders any such lien void as a matter of law. In re Schwartz, 954 F.2d 569, 571 (9th Cir. 1992) (actions taken in violation of the automatic stay are void, not voidable). Therefore, we are unpersuaded by Debtor's argument.

E. The Effect of the Bankruptcy on the Trust Created by the Fee Agreement

Finally, Debtor argues that when he entered into a fee agreement with the Firm, a trust was created whereby the trustee (the Firm) was to disburse the funds for the limited purpose of defending against any objection to Debtor's discharge. As it acted accordingly, the Firm, as its beneficiary, is entitled to the retainer fee. Debtor relies on In re Escalera, 171 B.R. 107 (Bankr. E.D. Wash. 1994), to support his position.

Again, we do not disagree with the Escalera holding that a trust is created as to a prepetition retainer in a chapter 11 case, which can only be drawn against after court approval and notice to creditors. See In re C & P Auto Transport, Inc., 94 B.R. 682, 689-92 (Bankr. E.D. Cal. 1988) ("[T]he interest of an attorney employed under § 327 in the retainer does not become sufficiently fixed to permit withdrawal from the retainer fund until the bankruptcy court makes a fee award and authorizes withdrawal."). Escalera and C & P Auto Transport, as chapter 11 decisions dealing with the employment of counsel under § 327, are readily distinguished from the present situation involving chapter 7 counsel who is not being employed under § 327.

VI. CONCLUSION

We conclude

1) The retainer was an advance fee deposit that became property of the estate once the bankruptcy petition was filed.
2) The Firm was not owed anything for fees or costs on the petition date. Consequently, no security interest attached to the retainer funds for the benefit of the Firm prepetition.
3) The automatic stay prohibits the creation or attachment of new liens postpetition.
4) A fee arrangement that purports to create a trust may not overcome express provisions of the Code.

We conclude that the bankruptcy court did not err in ruling that the funds under the control of debtor's counsel were property of the estate eligible for turnover and were not the subject of an enforceable security interest. We AFFIRM.

KLEIN, Bankruptcy Judge, CONCURRING:

I concur because our decision in this appeal narrowly affirms the bankruptcy court's fact-based ruling that an enforceable security interest was not created under Washington law. I write separately to comment on an important issue that was addressed during oral argument of this appeal but that is not necessary to our decision.

The chapter 7 trustee urged to us at oral argument that the decision of the United States Supreme Court in Lamie v. United States Trustee, 540 U.S. 526 (2004), means that every lawyer representing a debtor in a chapter 7 case must turn over to the trustee any retainer (howsoever termed) that the lawyer has received from the debtor that would, if not provided as a retainer, have been property of the estate. It means no such thing.

I

The narrow holding of the Supreme Court in Lamie, 540 U.S. 526 (2004), is limited to a determination that counsel for the debtor is ineligible for payment of administrative expenses under § 503(b)(2) because counsel is ineligible for an "award" of compensation and reimbursement under § 330. In Lamie, the Supreme Court construed the estate's obligations to the debtor's attorney in light of a 1994 amendment to § 330(a) in which Congress deleted reference to "the debtor's attorney" from the list of those eligible for a § 330(a) fee award.

The deletion by Congress of the authority to pay counsel for a debtor under § 330(a) did not accomplish anything other than, as narrowly held in Lamie, making the debtor's counsel ineligible for payment of fees by the trustee as an administrative expense of the estate under § 503(b)(2). Lamie should not be understood to have held anything other than that.

The language of the Bankruptcy Code supports this narrow view of Lamie. The operative verb in § 330(a) is "award" or "awarded" and the verb "pay" does not appear. The mechanism for

"payment" of fees actually "awarded" is in § 503. Subsection (a) authorizes a "request for payment of an administrative expense." 11 U.S.C. § 503(a). Subsection (b)(2) defines the administrative expenses that are allowed to be paid under § 503(a) to include "compensation and reimbursement awarded under section 330(a) of this title." 11 U.S.C. § 503(b)(2). This is the statutory mechanism by which counsel employed under § 327 are paid.

II

The trustee's theory of broader implications for Lamie regarding § 330 suffers from two main defects. First, it reads § 329 out of the Bankruptcy Code. Second, it admits of no limiting principle to prevent the consequence that debtors would be systematically stripped of the ability to be represented by counsel in defense against various bankruptcy causes of action prosecuted by, as in this instance, creditors.

A

In my view, the Bankruptcy Code is an integrated statutory scheme in which § 329 regulates the prepetition retainer in the hands of debtor's counsel in cases where the debtor does not perform the duties of the trustee. That section regulates debtor relations with attorneys regarding the bankruptcy case "after one year before the filing of the petition." 11 U.S.C. § 329(a). It applies to payments for "services to be rendered in" connection with the case and authorizes the court, "if such compensation exceeds the reasonable value of any such services," to order the "return of any such payment, to the extent excessive, to the

estate if the property transferred would have been property of the estate [otherwise, to the payor]." 11 U.S.C. § 329(b).

Elementary rules of construction, which the Supreme Court was invoking in Lamie, require that a statute be read to give effect to all provisions. It follows, then, that the Supreme Court in Lamie was not reading § 329 out of the Bankruptcy Code.

The Supreme Court in Lamie recognized the integrated nature of the statutory scheme and expressly noted the role of § 329 that I emphasize in this concurrence:

> Compensation for debtors' attorneys working on Chapter 7 bankruptcy, moreover, is not altogether prohibited. ... It appears to be routine for debtors to pay reasonable fees for legal services before filing for bankruptcy to ensure compliance with statutory requirements. See generally Collier Compensation, Employment and Appointment of Trustees and Professionals in Bankruptcy Cases ¶ 3.02[1], p. 3-2 (2002) ("In the majority of cases, the debtor's counsel will accept an individual or joint consumer chapter 7 case only after being paid a retainer that covers the 'standard fee' and the cost of filing the petition"). So our interpretation accords with common practice. Section 330(a)(1) does not prevent a debtor from engaging counsel before a Chapter 7 conversion and paying reasonable compensation in advance to ensure that the filing is in order. See, e.g., § 329 (debtors' attorneys must disclose fees they receive from a debtor in the year prior to its bankruptcy filing and courts may order excessive payments returned to the estate).

Lamie, 540 U.S. at 537-38.

According to the identical statements in the House and Senate Judiciary Committee reports supporting the original enactment of the Bankruptcy Code in 1978, § 329 was "derived in large part from current Bankruptcy Act [Bankruptcy Act of 1898] § 60d." H.R. Rep. No. 95-595, at 40 (1977); S. Rep. No. 95-989, at 329 (1978).

Former Bankruptcy Act § 60d, as quoted by the Supreme Court in In re Wood & Henderson, 210 U.S. 246 (1908), wherein it

construed the provision, provided:

> 60d. If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney or counsellor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be rëexamined by the court on the petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

Wood & Henderson, 210 U.S. at 250.

When re-enacted as § 329 in 1978, its language was clarified to encompass both prepetition and postpetition transactions. The statutory phrase in § 329, "after one year before," is generally construed to encompass the postpetition period. E.g., Am. Law Center PC v. Stanley (In re Jastrem), 253 F.3d 438, 442-43 (9th Cir. 2001).

In principle, § 329 does not depend upon the precise terms of the arrangement under state law and, under an overriding rule of reasonableness, operates to preempt the vagaries of state law with regard to attorney's fees. While I have no quarrel with the bankruptcy judge's conclusion that there was not a security interest that was enforceable under Washington law, I doubt that the answer to that question would trump § 329. Cf. Door, Cooper & Hayes v. Wyle (In re Pac. Far E. Line, Inc.), 644 F.2d 1290, 1293-94 (9th Cir. 1981), citing Wood & Henderson, 210 U.S. at 256. In other words, I question the viability of undue focus on the vagaries of state law in those areas in which § 329 operates.

In reality, the effect of the bankruptcy court's decision was a conclusion that the fee arrangement was not reasonable under the circumstances in which the amount in the trust consisted of all of the non-exempt funds that would otherwise

have been available to the trustee and none of the debtor's exempt property. Simple § 329 analysis would tend to support that conclusion.

To the extent that the trustee's argument does not read § 329 out of the Bankruptcy Code, it would force an impermissible amendment. Specifically, the trustee's construction of § 330 would effectively rewrite the § 329 statutory phrase from "after one year before the filing of the petition" to "within one year before the filing of the petition." Only Congress writes statutes.

B

The second problem with the trustee's theory of Lamie is even more troubling because it could operate systematically to deprive debtors of the assistance of counsel during a bankruptcy case.

It takes little imagination to perceive that stripping a litigant (a debtor in a bankruptcy case is a litigant) of the effective right to counsel in federal court poses troubling questions of potentially constitutional dimensions.

The Supreme Court, in Wood & Henderson, noted the appropriateness of having a balance between the "right" of a debtor to have the assistance of counsel for whom there are provisions for reasonable compensation and the rights of creditors and trustee to have property to distribute:

> Section 60d is sui generis, and does not contemplate the bringing of plenary suits or the recovery of preferential transfers in another jurisdiction. It recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect

> him in view of financial reverses and probable failure. It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And in view of the circumstances that act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, reëxamine it with a view to a determination of its reasonableness.

Wood & Henderson, 210 U.S. at 253 (emphasis supplied). It is plain that it viewed § 60d and, perforce, § 329 as providing an appropriate balance

Nothing in Lamie suggests that the Supreme Court was in any way changing its view of the balance that is central to the intellectual underpinnings of § 329. Indeed, the specific reference in Lamie to § 329 that I quote above, suggests that it was reiterating the importance of § 329. It follows that we cannot construe Lamie in a fashion that leaves the debtor without counsel for whom there are provisions for reasonable compensation. Since § 330 no longer authorizes payment from the estate for services of debtor's counsel that benefit the estate, it is even more important that debtor's counsel be able to provide in advance of bankruptcy for reasonable compensation.

***

In sum, I submit that § 329 has more importance than the parties or the bankruptcy court realized. From the time of the enactment of the Bankruptcy Code of 1978 until the Lamie decision, § 329 attracted little attention because the understanding was that debtor's counsel could be compensated under § 330 for services that benefitted the estate. After the elimination of that authority from § 330 in the 1994 Amendments,

as confirmed by Lamie, the role for § 329 is no longer in partial eclipse.

Because § 329 preempts state law, I submit that the crucial question of law was the reasonableness of the appellant's fee arrangement with the debtor. As indicated, the record supports a conclusion that the fee arrangement was not, in this instance, reasonable under § 329. Moreover, since appellant neither raised nor argued the issue before the bankruptcy court, it is waived.

Thus, I CONCUR.