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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN M LAMIE, :
Petitioner :

v. : No. 02-693

UNITED STATES TRUSTEE. :

- - - - -X

Washington, D. C.

Monday, November 10, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m

APPEARANCES:

THOMAS C. GOLDSTEIN, ESQ., Washington, D. C.; on behalf of the Petitioner.

LISA S. BLATT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Respondent.

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1 PROCEEDINGS

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 02-693, John Lami e v. the United
5 States Trustee.

6 Mr. Goldstein.

7 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

8 ON BEHALF OF THE PETITIONER

9 MR. GOLDSTEIN: Mr. Chief Justice, and may it
10 please the Court:

11 The parties to this case agree on one thing, and
12 that is that section 330(a) of the Bankruptcy Code
13 contains a mistake of some kind. Now, we disagree about
14 what the mistake is, but there clearly is one.

15 The United States Trustee, for all of its
16 rhetoric about the statute's plain text, actually says
17 that the statute contains two errors in two different
18 places, but the list of compensable providers
19 inadvertently includes a reference to the attorney and
20 that the statute's so-called payees' list inadvertently
21 omits the necessary conjunction or.

22 We say there was a different mistake, that the
23 payees' list inadvertently omits the reference to the
24 debtor's attorney, and our reading of the two is the
25 superior one. It is the one that's most consistent with

1 the -- the structure of the statute as a whole, with the
2 past bankruptcy practice, with the legislative history,
3 and frankly, with common sense.

4 QUESTION: Mr. Goldstein, who's covered by fees
5 available for a professional person employed under section
6 327 or 1103?

7 MR. GOLDSTEIN: That would be an attorney who's
8 retained by a trustee, and according to the U.S. Trustee,
9 it would also be an attorney retained by a debtor in
10 possession in a chapter 11 case.

11 The --

12 QUESTION: But not chapter 7.

13 MR. GOLDSTEIN: That's correct. The reason --
14 and let me take you through the statutory scheme, and
15 perhaps I should take you -- everyone to the text, and
16 it's in the blue brief at page 2a of the appendix.

17 QUESTION: That's, obviously, of critical
18 importance. One piece of background information please.
19 Could the chapter 11 court have authorized the debtor's
20 attorney to do this work? I mean, how does that work? I
21 -- and I -- I do agree that the chapter 7 -- the -- the
22 debtor's attorney really is often required to do some very
23 important things to get the chapter 7 filed. But if the
24 -- if it's an 11 first, as this one was, could the chapter
25 11 court have authorized the work to be done?

1 MR. GOLDSTEIN: According to the U.S. Trustee,
2 no. Let me, if I could, just step back and put this in
3 context. This is a converted case, just like, for
4 example, the Hartford Underwriters case this Court had a
5 few terms ago. And so I take it the question might be,
6 look, if they were a debtor's attorney at one point -- and
7 we all agree that for the chapter 11 proceedings, they
8 clearly were authorized to be paid under 330(a) -- could
9 that authorization have continued? And I think the answer
10 is no because at some point there will be a fee
11 application and the fee application will be under 330(a),
12 and what will happen is exactly what happened in this
13 case. The U.S. Trustee or the objector will say, look,
14 for the period that it was a chapter 7, there's a -- a gap
15 in the statute.

16 QUESTION: Even if you tell the court in the
17 chapter 11 proceeding, we're going to go to 7 and we need
18 the debtor to do some work, the -- the court just has no
19 power to authorize that work I guess is your position.

20 MR. GOLDSTEIN: Oh, no, no, no. Our position is
21 to the contrary. The U.S. Trustee's position is that it
22 -- they're without power. I think it's an important
23 point.

24 We view the structure of the statute to operate
25 just as it has for -- the Bankruptcy Code has for 100

1 years, and that is, that the bankruptcy court is a
2 gatekeeper. It has to decide, in what are now the literal
3 terms of the statute, whether the services of the debtor's
4 attorney are both necessary and beneficial to the estate.

5 The position of the U.S. Trustee is that even
6 when the services are both necessary and beneficial to the
7 estate -- that is to say, even when they produce more
8 money for the creditors, which is the whole point, after
9 all -- you still can't perform the services and be
10 compensable --

11 QUESTION: Well, why can't the -- I mean, their
12 argument is the trustee can do it. The trustee's object
13 is the maximize the -- the value for the estate and so on,
14 and -- and therefore there's no built-in conflict there.
15 Why isn't that a way out of this drafting mess?

16 MR. GOLDSTEIN: Because there are things that
17 the Bankruptcy Code assigns as responsibility to the
18 debtor, not the trustee. And second, the provision that
19 -- and so let me -- let me separate --

20 QUESTION: No, but is there any conflict in the
21 trustee saying, look, you can do these things for the
22 debtor and I'll pay you?

23 MR. GOLDSTEIN: Yes. Let me take you to the
24 relevant statutory provision. This one is in the gray
25 brief in the appendix. That's 327(e). There is a passing

1 suggestion in the Government's brief -- and, Mr. Chief
2 Justice, that is at 1a of the gray brief. It's at the
3 bottom. There is a suggestion by the U.S. Trustee that if
4 the debtor's attorney really needs to do something, the
5 trustee's lawyer will hire the debtor's lawyer, and so it
6 all will work out in the end, and I take it that's a point
7 you're picking up.

8 The statute is much more limited than that. It
9 says the trustee, with the court's approval, may employ
10 for a specified special purpose, other than to represent
11 the trustee, and it goes on to say, an attorney that has
12 represented the debtor.

13 The way this works -- and we have tried very
14 hard to find out how often this happens. Mr. Lami e's
15 firm, for example, has been doing bankruptcy for 23 years
16 and has represented the debtor in more than 4,000 cases.
17 In that entire time, the trustee has hired the debtor's
18 counsel two times.

19 QUESTION: Maybe -- not to -- not to be cute
20 about it, but maybe those are the only times he should
21 have.

22 MR. GOLDSTEIN: Well, we know that that's not
23 the case, Justice Souter, because the Bankruptcy Code
24 does, as Justice Kennedy has suggested, give important
25 responsibilities to the debtor qua debtor, not that are

1 distinct from the duties of the trustee. And let me give
2 you an example of that. And so those are jobs that can't
3 be handled by the trustee. They're the responsibility of
4 the debtor.

5 QUESTION: But is there any conflict -- any
6 conflict of -- of -- you know, ethical or quasi-ethical
7 conflict if the -- if the trustee says, look, these
8 responsibility -- you've got to shoulder these
9 responsibilities. It's very difficult for somebody who's
10 not a lawyer to do it. Okay, I -- I will employ a lawyer
11 to help you. Is there -- is there any conflict between
12 the trustee and the lawyer there?

13 MR. GOLDSTEIN: Yes, actually there is. The --
14 the problem is that the debtor and the trustee sometimes
15 have divergent interests. That's why the legislative
16 history to 327(e) says we want to limit the times that the
17 trustee will hire the debtor's lawyer. But --

18 QUESTION: Would you give me -- just give me an
19 example, a garden variety example --

20 MR. GOLDSTEIN: An exemption fight.

21 QUESTION: -- of a conflict situation?

22 MR. GOLDSTEIN: An exemption fight.

23 QUESTION: Yes, okay.

24 MR. GOLDSTEIN: When you're trying to -- to
25 decide whether or not the debtor gets to claim an

1 exemption.

2 And so let me give you a couple more examples
3 just about how this operates.

4 QUESTION: Before you do, Mr. Goldstein, is it
5 true that in most chapter 7's, this is an academic
6 question because there's not any money to pay even the --
7 any -- the administrative creditors?

8 MR. GOLDSTEIN: Yes, but the fact that in
9 relative terms, in terms of the percentage of chapter 7's,
10 it's not that big a deal does not mean in absolute terms
11 it's not. We know, for example, that there are at least
12 40,000 asset cases. In particular, we have complicated
13 business cases. Hartford Underwriters, which you all had
14 as a case, is an example.

15 QUESTION: These end up as chapter 7 cases?

16 MR. GOLDSTEIN: Yes, Mr. Chief Justice. There
17 are a lot of converted business cases. Generally when we
18 believe there's going to be an asset, they are pursued as
19 a 11's, but lots of times the ability to keep up with the
20 creditors breaks down and they can get converted to 7's.
21 And --

22 QUESTION: Mr. Goldstein, you know, Congress had
23 this problem brought to its attention a number of times
24 and -- and has chosen not to enact something, putting that
25 language back in. That I find somewhat persuasive.

1 MR. GOLDSTEIN: In all candor, Justice O'Connor,
2 I think that's a point in their favor. It's just not one
3 that's going to overcome the other indications of
4 Congress' intent. So let me speak to that and then what
5 the other --

6 QUESTION: Before you get to the intent of
7 Congress, I'm rather stuck with the language. I mean,
8 what we'd have to do, in order to come out your way, is to
9 read the words, the court may award to a trustee, an
10 examiner, a professional person employed under 327 or
11 1103, and the lawyer. Is there one case that you've found
12 -- I'm sure you've looked because you're very thorough --
13 in the history of the world --

14 (Laughter.)

15 QUESTION: -- where -- I couldn't find any, but
16 I don't know all the cases in the history of the world --
17 where -- where, in fact, a court, when faced with a
18 definite list like this and unable to say, and other such
19 persons or -- fool with the language. Maybe you'll think
20 of some way of doing it -- where a court is simply stuck
21 in words of insignificance that weren't there because they
22 thought the legislature had made a mistake. Can you give
23 me a list of the most relevant such cases, if there are
24 such?

25 MR. GOLDSTEIN: Yes, and then I will come back

1 to Justice O' Connor.

2 The point here is that there are a number of
3 cases -- and we cite these in our brief -- that the
4 expressio unius canon, on which you're -- to which you're
5 adverting --

6 QUESTION: No. I'm not adverting to any canon.

7 MR. GOLDSTEIN: Well --

8 QUESTION: I am adverting to the fact that the
9 words aren't there.

10 MR. GOLDSTEIN: Justice Breyer, let me explain
11 to why I think you are, and then you can tell me why I'm
12 misguided, I'm sure.

13 (Laughter.)

14 QUESTION: No. All I want is the name of a case
15 where a court --

16 MR. GOLDSTEIN: United States v. Wilson.

17 QUESTION: All right.

18 MR. GOLDSTEIN: United States v. Wilson, and
19 then I'll come back to why I think their argument is an
20 expressio unius one, and then I'll explain to you U.S. v.
21 Wilson. It's on page 10 of the yellow brief that we
22 discuss it.

23 The statute says that the court may award to a
24 trustee, an examiner, or professional person employed
25 under section 327. I'm back on 2a of the blue brief. It

1 has a list. It doesn't say only, and there are many
2 cases. There are legions of cases in which a list is not
3 regarded as exclusive when -- I think there's a
4 presumption of exclusivity, but when the contrary
5 indications in the text or the history of the drafting or
6 something else tells you that Congress didn't intend the
7 list to be exclusive, and this is such a case.

8 The reason I cite U.S. v. Wilson to you is
9 that's a case in which the statute referred specifically
10 to the Attorney General. The Attorney General, before the
11 statute was revised, was supposed to compute the amount of
12 time that is given as credit from pretrial detention.
13 Congress, as it did with section 330, rewrote the statute
14 entirely, and this Court said, look, we admit that the
15 reference to the Attorney General is gone, but it looks
16 like it just got lost in the shuffle if we look at the
17 other indications of Congress' intent.

18 Now, let me just make one other important --

19 QUESTION: Well, you think this just got lost in
20 the shuffle?

21 MR. GOLDSTEIN: Yes.

22 QUESTION: That's why I'm asking you a question
23 that I hope --

24 MR. GOLDSTEIN: Yes.

25 QUESTION: -- you'll be allowed to answer --

1 (Laughter.)

2 QUESTION: -- about what about Congress'
3 opportunity to correct it --

4 MR. GOLDSTEIN: Yes.

5 QUESTION: -- which they didn't --

6 MR. GOLDSTEIN: Well, this Court has never
7 really taken that view of subsequent legislative history,
8 Justice O'Connor, but let me turn to the events.

9 In 1997, there were two bills that were proposed
10 in the Congress that were a part of general correction
11 legislation that had a variety of different provisions,
12 including one fix for this one. I think the important
13 point is that at that time, the only case in the circuits
14 interpreting the statute as it then stood went our way.
15 It was the 1996 decision of the Second Circuit in Ames.
16 And so I don't think you can infer from the fact that
17 Congress didn't change the statute to confirm the rule in
18 the circuits means that they intended to reject it.

19 QUESTION: Isn't there a current -- isn't there
20 a current correction -- bankruptcy technical correction
21 bill pending, and isn't this absent from it?

22 MR. GOLDSTEIN: It is, but Justice Ginsburg --
23 so now we have not just the failure to enact legislation
24 exists, but the U.S. Trustee is relying on the failure to
25 enact legislation that doesn't even exist.

1 The point, I think, is that, look, if you read
2 the statute, if you look at it right now, it's simply
3 ambiguous. There's a reference to the attorney that's in
4 there, and a reference to the attorney that's missing.

5 This is not a case -- and this is absolutely
6 critical -- in which there was a reference to the
7 attorney, there was only one, and it disappeared, and
8 we're asking you to read it back in. Our position is that
9 the statute, as written, stands essentially in equipoise.
10 The two references to the attorney in the 1978 version of
11 the statute were inextricably intertwined, and so if you
12 look at the text right now, the fact that Congress hasn't
13 changed it doesn't tell you anything about whether or not
14 they intend it to be in there or not to be in there
15 because the split is almost even. There's one --

16 QUESTION: But now it has been called to their
17 attention and it isn't in the bill making other technical
18 corrections.

19 MR. GOLDSTEIN: Justice Ginsburg, I agree, and I
20 -- I'm obviously not making this point well enough. What
21 I'm saying is that the inference that would be normally
22 drawn from the failure to fix a statutory error doesn't
23 cut in either direction here because, as I began in the
24 introduction, both sides believes there -- believes that
25 there's an error. But we both think there's a mistake in

1 the statute. The fact that Congress hasn't corrected the
2 mistake doesn't tell us anything about what the mistake
3 was.

4 QUESTION: But, Mr. Goldstein, you're
5 overlooking one -- one other argument I think. Before
6 this statute was enacted, the Association of Bankruptcy --
7 whatever the name of it is -- called their attention to
8 this drafting error and said we think it's a drafting
9 error.

10 MR. GOLDSTEIN: We -- yes.

11 QUESTION: And nothing was done.

12 MR. GOLDSTEIN: Justice Stevens, let me put that
13 series of events in slightly more context, and that is
14 that in the House, when the bill was not pending there,
15 there was a hearing, and there is one line in a 718-page
16 record of just written materials submitted that says there
17 is an inadvertent omission.

18 The -- the one canon of construction that runs
19 through this Court's bankruptcy cases --

20 QUESTION: Let me just add one thought. They
21 said this appears to have been some minor drafting errors,
22 including the apparently inadvertent removal of debtors'
23 attorneys from the list of professionals whose
24 compensation awards are covered by 330(a). NACBA does not
25 oppose this provision since it contains language and so

1 forth and so on. So they -- it's -- one can read that as
2 saying even with the error, we don't -- we don't oppose
3 the provision.

4 QUESTION: Right. We actually -- that
5 reference, we do not oppose this provision, we believe, in
6 the context of those remarks, to be referring to the
7 addition of section (a)(4)(B). Congress in 1994 added a
8 provision that's much debated in the briefs about chapter
9 12 and 13 bankruptcies. Remember, this is the National
10 Association of Consumer Bankruptcy Attorneys, and what
11 they were not objecting to is the addition of a provision
12 that relates to consumer bankruptcies.

13 But let's be perfectly clear. The -- the
14 United States has scoured the legislative record of this
15 change and has found one sentence in one House hearing,
16 and it says that it was a mistake. The principle in
17 bankruptcy is if there's a statutory change and it's not
18 clear on the text or at least in the legislative history,
19 it's presumed not to change --

20 QUESTION: But isn't -- isn't it possible also
21 to read this as saying, yes, you made a mistake, but even
22 so, it's still a good bill and we think even with the
23 mistake, we're in favor of it, and then -- and then
24 Congress looks at it and says, yes, we did make a mistake,
25 but -- but the -- our -- we'll stick to that decision

1 because the United States' position now is that that's a
2 wise -- the provision is a wise one?

3 MR. GOLDSTEIN: It is important to note, of
4 course, that when the Department of Justice and the U.S.
5 Trustee commented on the bill at the time, they did not
6 say that this would be the result of the statute or that
7 they proposed it.

8 But I don't -- Justice Stevens, I don't think
9 that when someone says there's a mistaken omission -- and
10 remember, it's of course at the time when the U.S. Trustee
11 says language is mistakenly included at the same time.
12 When someone says there's a mistake, that's a very
13 different thing from Congress -- let's engage in all of
14 the false assumptions that people actually read this thing
15 in the Senate and people paid attention -- that Congress
16 actually acknowledged, yes, we're changing bankruptcy
17 policy. The standards for changing bankruptcy policy,
18 particularly a policy as settled as this one, are much
19 higher --

20 QUESTION: Well, are the standards for changing
21 bankruptcy policy in Congress different from the standards
22 of changing other kinds of policy?

23 MR. GOLDSTEIN: Mr. Chief Justice, the
24 indications in this Court's precedents -- the answer to
25 that question is yes.

1 QUESTION: And what -- what precedents are
2 those?

3 MR. GOLDSTEIN: Those would be principally the
4 line of cases that begin with *Midatlantic*. We cite
5 several of them, *Hartford Underwriters*, *Ron Pair*, that
6 sort of thing. The Court has recognized, going back to
7 well before the '78 code and subsequent to the '78 --

8 QUESTION: Well, but some of the -- the
9 *Midatlantic*, for example, was shortly after the Bankruptcy
10 Code was adopted succeeding the 1898 act, and there, there
11 was probably a good reason for saying when you have that
12 sort of a comprehensive revision, the presumption is that
13 if something -- it's not clear where something was
14 changed, we meant to retain the old. But this wasn't that
15 sort of thing.

16 MR. GOLDSTEIN: That's correct, Mr. Chief
17 Justice, but I think that the relevant answer would be
18 that *Cohen v. de la Cruz*, which deals with a much more
19 minor revision of the Bankruptcy Code than even this one,
20 the 1984 revision applies the same principle and that is
21 this Court has recognized that the provisions of the
22 Bankruptcy Code are incredibly interrelated. There's a
23 longstanding practice that has built up over time, and
24 that Congress doesn't lightly change it.

25 And let me talk about why this would have to be

1 the --

2 QUESTION: At some point, will you go back to my
3 first question?

4 MR. GOLDSTEIN: Yes.

5 QUESTION: I just -- you have just a few --

6 MR. GOLDSTEIN: Yes.

7 QUESTION: I mean, why -- because I looked at
8 United States v. Wilson. It doesn't seem like this at
9 all. The statute there said a defendant shall be given
10 credit towards his sentence for time previously spent in
11 prison. It's in the passive voice. It doesn't say
12 whether it shall be given credit by the AG or also by a
13 district court. Well, obviously, you could read the
14 language either way.

15 What I'm having problems here with is that I
16 don't see any way to read this language so that it comes
17 out with your favor without putting in three words that
18 aren't there. And I haven't heard from Justinian -- the
19 time of Justinian, a court ever having done that, and if
20 there is a court that did it, it wasn't Wilson.

21 MR. GOLDSTEIN: Okay. I think I'm responding
22 to --

23 QUESTION: You can have --

24 MR. GOLDSTEIN: I -- I think -- I think we have
25 a new thread. Perhaps the best answer to your point is

1 Green v. the Bach Laundry, which is not a case that's
2 discussed in the -- in the briefs, but I will explain how
3 this arises. And that is, Federal Rule of Evidence 609
4 said, look, if there's going to be -- if you're going to
5 impeach a defendant, you get to use prior convictions, and
6 the Court looked at it and said, really, it says
7 defendants, and we acknowledge it means all -- you know,
8 the plain language of that is all defendants, and the
9 Court inserted the word criminal and said from the --

10 QUESTION: Inserted the word what?

11 MR. GOLDSTEIN: Inserted the word criminal. It
12 said that rule 609 would only apply to criminal
13 defendants.

14 QUESTION: But that's -- you're not missing --
15 you're missing my point. There are millions of ways --

16 MR. GOLDSTEIN: Yes.

17 QUESTION: -- to read language in a statute --

18 MR. GOLDSTEIN: Yes.

19 QUESTION: -- so that it has a limited scope or
20 a scope over here or only applies there. That's so common
21 every day of the week, and very often I look at the policy
22 and I see if the statute is possibly construed in that way
23 through that kind of limitation. What I've never seen is
24 a statute which you just can't word by -- read by limiting
25 the scope or saying other things like this, et cetera.

1 MR. GOLDSTEIN: Right.

2 QUESTION: I've never seen a court just take
3 three words out of the blue and insert them in that way in
4 a statute.

5 MR. GOLDSTEIN: All right. Justice Breyer, I
6 think that I probably am not going to have a case that
7 satisfies you, but I think that I can dispute successfully
8 the premise, and that is, I do believe that your premise
9 is that *expressio unius* applies. I promised I would come
10 back to that point. And the text says, the court may
11 award to a trustee, an examiner, or professional person.
12 It doesn't say to only those people. What I'm telling you
13 is that the other -- the remaining indications of
14 Congress' intent indicate that Congress did not intend to
15 limit the payment to go to those people.

16 And second, this is not a case in which only we
17 have a textual problem. Remember that the U.S. Trustee,
18 just as you say we have to read in a -- a word, they have
19 to read out a word.

20 QUESTION: Well, they don't have to read it out.
21 They just say the word is superfluous. There's -- there's
22 no explanation for why it's there. But, you know, there
23 are a lot of statutes that have superfluous words, and
24 that does a lot less violence certainly to the statute to
25 leave in a word that doesn't have to be there than -- than

1 to insert a phrase, which is what you're asking us to do.

2 MR. GOLDSTEIN: I think you and Justice Breyer
3 may be making a similar point here, and that is, look, if
4 we had the text and all we had was the text, it would do
5 less violence you say, and I think I can concede it would
6 do less violence to read in the -- the word rather than to
7 render the other one superfluous or read it out. But I
8 don't think that's the question before you because you
9 don't just have the text. If you -- this was all that
10 there was, you could apply a canon like that one. It
11 would do less harm, you know, the principle of sort of do
12 no harm.

13 But what I'm telling you is that there is an
14 ambiguity in the statute, that the provisions of the
15 payees' and the providers' lists are inextricably
16 intertwined, that the trustee can be paid for the services
17 of the trustee, the examiner for services of the examiner,
18 the professional person for services of the professional
19 person. And then there's this gap for services of the
20 attorney. There's an ambiguity. And so just like any
21 other case in which you have to resolve a statutory
22 ambiguity, you look to other things.

23 QUESTION: Why don't you just say the first
24 correction, which is -- or the first, in -- in your view,
25 slip is the elimination of four words? That's really what

1 they wanted to do because that's the lead provision, and
2 then in the subsidiary provision, there's only one word
3 that they left in. So if you -- just looking at the
4 statute, I assume you would say the lead provision is the
5 main one and the other, the subsidiary provision, four
6 words in one case, one word in the other.

7 MR. GOLDSTEIN: I don't think that we have to
8 get down to the number of words or syllables or anything
9 like that. I think perhaps a more fair -- if we're --
10 again, in the world of tie-breakers looking only at the
11 text, it's that the U.S. Trustee's position requires you
12 to conclude that there are mistakes in two different
13 places, in both the payees' list, the missing conjunction
14 or, and the providers' list, the inadvertent --

15 QUESTION: But there were umpteen illustrations
16 of missing or's. I mean, we really can't put much weight
17 on that.

18 MR. GOLDSTEIN: Well, Justice Ginsburg, I don't
19 think there's any greater canon that says we find errors
20 presumptively in second provisions rather than first ones.
21 There are much greater indications of Congress' intent
22 than that. We have a lot more to work with.

23 I do think I need to make two points. The first
24 is Justice O'Connor has, to some extent, focused on what
25 happened here, you know, what did Congress know. I think

1 it's important to recognize, as I started to say, this
2 would be a change without any consideration by Congress at
3 all. This statute started --

4 QUESTION: But how can you say that if this
5 material I called to your attention was called to the
6 attention at least of the staff of the committee? Surely
7 the staff would have recognized that because I presume
8 they read it, and presumably they would have discussed it
9 with the Congressmen and said, do you think we ought to
10 make a change, and somebody said no.

11 MR. GOLDSTEIN: Right, Justice Stevens, let me
12 distinguish two different periods of time. I was about to
13 talk about -- and we'll come back to when this -- the
14 words got dropped out. You're focusing later, and so let
15 me answer your question with -- try and answer it in a
16 somewhat different way, and that is, the only thing that
17 was pointed out to them was that there was a mistake. And
18 if you look at the text, you don't know what Congress'
19 intent was. Was it to leave the language in or to delete
20 it? Because there are two parallel, intertwined
21 references to the attorney.

22 I had said that I would come back to the '84 --
23 the '94 change. This is what the Fourth Circuit thought
24 was so important. That is, it mistakenly thought --

25 QUESTION: May I just get one other thought out?

1 What is the parallel provision that you say remains in?

2 MR. GOLDSTEIN: That is the reference in -- I'm
3 on 2a of the blue brief, 11 U.S.C. 330(a), subsection
4 (1)(A), what we've called the providers' list. And this
5 providers' list parallels the one in section 331.

6 QUESTION: Right.

7 MR. GOLDSTEIN: Reasonable compensation for
8 actual, necessary services rendered by the trustee,
9 examiner, professional person, or attorney. So what
10 happened is that --

11 QUESTION: Why -- why couldn't that refer to an
12 attorney appointed by the trustee?

13 MR. GOLDSTEIN: Well, it -- as has been
14 suggested, literally it could. You could render it
15 surplusage or you could say it's the attorney of the
16 trustee. But a few things about that.

17 We know it really is surplusage because there's
18 already a reference to the attorney of the trustee.
19 That's the professional person. This was one of the first
20 questions --

21 QUESTION: No, but it -- not -- the -- the --
22 there's another possibility: any attorney employed by the
23 trustee. And that's not surplusage. You have given me a
24 reason why there may be a conflict involved if the trustee
25 does employ an attorney for the debtor, but whatever it

1 is, it's not surplusage.

2 MR. GOLDSTEIN: It is, Justice Souter. The
3 reference in this line to a professional person is the
4 professional person employed under section 327. That's
5 the trustee's attorney. The -- and the United States
6 doesn't dispute this. It acknowledges that it is
7 surplusage.

8 QUESTION: No, but if the trustee appoints an
9 attorney not for himself, but for the debtor --

10 MR. GOLDSTEIN: Ah.

11 QUESTION: -- then it's not surplusage.

12 MR. GOLDSTEIN: I apologize. The trustee is not
13 empowered to -- I -- I think I may have confused you back
14 at the beginning of this. The trustee is not empowered to
15 hire a person to represent the debtor.

16 QUESTION: I -- let me -- let's assume I
17 misspoke. The trustee may very well be empowered to pay
18 the person employed by the debtor.

19 MR. GOLDSTEIN: No.

20 QUESTION: That's a way of reading these two
21 sections together.

22 MR. GOLDSTEIN: Okay. If so, we win.

23 (Laughter.)

24 MR. GOLDSTEIN: And there will be an explanation
25 to follow.

1 QUESTION: I did not expect that answer.

2 MR. GOLDSTEIN: Yes.

3 (Laughter.)

4 QUESTION: Why?

5 MR. GOLDSTEIN: We all should assume that all --
6 the answer to all the questions, if so, we win, because
7 what would happen is that, remember, literally the
8 debtor's attorney may be -- provides compensable services,
9 and then the ambiguity that Justice Breyer has focused on
10 and then you have is that we have the question of, okay,
11 who -- who gets the money. Does it go to the trustee, the
12 examiner, or the professional person? So if the trustee
13 gets paid for the services of the debtor's attorney --
14 remember, this is a case in which Mr. Lami e acted at the
15 request of the trustee -- then the trustee has to turn the
16 money over. The money actually belongs to Mr. Lami e. He
17 provided the services. That's how it would all work
18 together. And that is, in a case like this one, where the
19 debtor's attorney acts at the request of the trustee --
20 this case is your hypothetical. The money goes to the
21 trustee who then obviously has to turn it over the
22 attorney. That's who would have the equitable interest in
23 it.

24 If I could retain the balance of my time.

25 QUESTION: Very well, Mr. Goldstein.

1 Ms. Blatt, we'll hear from you.

2 ORAL ARGUMENT OF LISA S. BLATT

3 ON BEHALF OF THE RESPONDENT

4 MS. BLATT: Mr. Chief Justice, and may it please
5 the Court:

6 The Bankruptcy Code contains no authority to use
7 estate funds that are held for the benefit of creditors to
8 compensate the chapter 7 debtor's attorney. Before 1994,
9 the code authorized estate funds to be used to compensate
10 all debtors' attorneys, but the 1994 amendments
11 unambiguously deleted the chapter 7 debtors' attorneys
12 from the class of persons eligible to receive compensation
13 under the statute.

14 QUESTION: It eliminated them unambiguously I
15 guess from the class of persons entitled to be paid
16 directly, but did it eliminate them from the class of
17 persons who might ultimately be compensated, i.e., the
18 class in -- in -- what is it? Subsection (a).

19 MS. BLATT: Yes. Only the -- if -- an attorney,
20 including the debtor's attorney, can still be compensated,
21 but he has to be appointed by the court under section 327
22 and then he stands as a professional person that's
23 retained under 327, but that has to be retained under 327.

24 QUESTION: So -- so the -- so the reference is
25 surplusage in (a).

1 MS. BLATT: It's superfluous in this sense. Our
2 reading of the statute is the same regardless because the
3 attorney is nothing more than a subset of professional
4 persons.

5 QUESTION: Yes.

6 MS. BLATT: But Congress may -- it may have
7 failed to make a conforming change, but it's also possible
8 that Congress specifically left the word in because
9 Congress often uses overlapping terms to accomplish its
10 objectives. And it was doing no harm there, and it would
11 at least remove any doubt that even the debtor's attorney
12 could be paid as long as he qualified as a professional
13 person that was retained under 327.

14 QUESTION: But the word attorney in 330 would
15 then have a different meaning after the amendment than it
16 had before because before the amendment, it clearly
17 referred to the debtor's attorney, did it not?

18 MS. BLATT: That's correct, but there's no
19 question that the -- the code, as it now stands, has --
20 omits the debtor's attorney from one of the authorized
21 people. And what petitioner is basically seeking, Justice
22 Stevens, is a substantive enlargement of the code because
23 he wants to do something, that is, receive a --

24 QUESTION: Well, he's arguing the word attorney
25 means the same thing it always meant. In other words, in

1 330.

2 MS. BLATT: That's fine. The debtor's --

3 QUESTION: And you're saying it means something
4 different.

5 MS. BLATT: It could still mean the debtor's
6 attorney, but there's no question in this case petitioner
7 was not authorized to be retained by the trustee under
8 section 327. The debtor's attorney is unambiguously not
9 one of the list of people in 330(a) who is authorized to
10 receive compensation, just like a creditor's attorney is
11 not on that list or a debtor's spouse is not on that list.

12 QUESTION: Why does it make any sense,
13 considering that the code does give obligations, duties
14 that must be done by the chapter 7 debtor? And some of
15 them are pretty complex.

16 MS. BLATT: Well, I think it reflects the
17 fundamental distinction between chapter 7 and all other
18 codes. That's chapters 11, 12, and 13. In a chapter 7
19 case, the bulk of the work is done pre-petition. It's
20 advising the debtor about which chapter to file, filling
21 out the schedules, telling the debtor what property is
22 exempt, and so forth. And in chapters 11, 12, and 13, the
23 whole game is in doing a plan which is all post-petition,
24 and the trustee and the debtor, the -- excuse me -- the
25 debtor and the creditors work together to figure out a

1 plan.

2 QUESTION: But -- but why doesn't that help the
3 petitioner? As Justice Ginsburg is indicating, before the
4 petition is filed, a chapter 7 debtor has to comply with
5 some rather complex forms, plus be advised of -- of his
6 duties and liabilities. Don't take assets out the back
7 door and so forth. So there's a chronological problem
8 here that -- the -- the trustee can't appoint the attorney
9 until the proceeding is filed, but the attorney is really
10 required to do some advance work.

11 MS. BLATT: Justice Kennedy, there's no question
12 that both before and after the 1994 amendments, chapter 7
13 debtors retained counsel, but they do so in the
14 overwhelming majority of cases with a pre-petition flat
15 fee, usually \$750-\$850. They pay their lawyer pre-
16 petition.

17 QUESTION: And that can be paid.

18 MS. BLATT: Absolutely.

19 QUESTION: That is paid the lawyer --

20 QUESTION: Is it established that's not
21 avoidable preference?

22 MS. BLATT: Absolutely. It's in the ordinary
23 course of --

24 QUESTION: For current services?

25 MS. BLATT: Yes. This is done day in and day

1 out. The United States Trustees have supervised the
2 liquidation of a million cases each year.

3 QUESTION: It would be avoidable preference if
4 it's too high, wouldn't it?

5 MS. BLATT: If it's too high, but I'm talking
6 about the standard, routine fee of under \$1,000 if
7 somebody walks in because they've been overwhelmed by
8 credit card debts or gambling debts or had a divorce, they
9 need representation on how to fill out the schedules, what
10 types of property are exempt, and they retain counsel, the
11 counsel takes that money, gets the standard flat fee, that
12 -- and all the services are earned pre-petition with one
13 exception.

14 QUESTION: What if the -- what if the check
15 bounced and there's now been a conversion to 7 and the --
16 and the lawyer says, I ought to be paid for my 11 work?
17 On your theory, does he get paid?

18 MS. BLATT: Not out of estate funds. He should
19 probably clear -- have the check cleared before he
20 performs the services.

21 QUESTION: He clears the check.

22 QUESTION: Yes.

23 MS. BLATT: Bankruptcy counsel do this --

24 QUESTION: So you're saying at this point,
25 regardless of chapter 11 work, chapter 7 work, no payment

1 out of the -- the estate funds.

2 MS. BLATT: Not out of estate funds, but it's --
3 it's critical to understand that in chapter 7, unlike all
4 other chapters, the -- the estate is frozen at the time of
5 petition. 98 percent of all chapter 7 debtors are
6 individuals. If they have a job or any post-petition
7 income or there are exempt assets, they can use that money
8 to pay the -- pay counsel to assist them in completing
9 bankruptcy.

10 And I want to -- do want to address one very --
11 one class of very important services that came up that I
12 think, Justice Souter, you raised, and that is when the
13 debtor and the trustee or creditors are fighting over
14 objections to exemption. They could also be fighting over
15 objections to discharge. These are serious matters where
16 often the debtor is accused of misconduct and the debtor
17 will need a lawyer. There's no question that even before
18 the 1994 amendments, the overwhelming majority of courts
19 would have held that those are services that benefit the
20 personal -- that go to the personal benefit of the debtor
21 and not the estate. And they would not have been
22 compensable even before 1994, and if this -- if this Court
23 is going to take the extraordinary step of writing it back
24 in, it will not affect those cases. And so --

25 QUESTION: Let me ask you about --

1 MS. BLATT: Sure.

2 QUESTION: -- a provision of the statute you
3 didn't include in your brief, or at least in the appendix.
4 Section 329 --

5 MS. BLATT: Yes.

6 QUESTION: -- specifically authorizes the
7 debtor's attorney to receive a retainer, as I understand
8 it.

9 MS. BLATT: That's for the code as it -- what --
10 this is a -- a pro-creditor provision that recognizes that
11 debtors will often go to counsel before they file
12 bankruptcy, and anyone, whether or not you seek
13 compensation under the statute, any lawyer for any debtor
14 who ultimately files for bankruptcy has to disclose their
15 fee arrangement, and the court can order the cancellation
16 of it or return of the fee if it's excessive or
17 unreasonable.

18 QUESTION: But -- but if the court does not
19 order a cancellation of it, it seems to me that provision
20 contemplates a payment to the debtor's attorney for his
21 services to the debtor.

22 MS. BLATT: Pre-petition. This is for a -- any
23 type of fee arrangement that's pre-petition whether or not
24 you apply for compensation. There are many cases where
25 the chapter -- excuse me -- the debtor's counsel will, in

1 fact, be paid under 12, under 13, under 11, and those --

2 QUESTION: This refers to 7. I think 329
3 applies to chapter 7 cases.

4 MS. BLATT: Right. Any -- any debtor. Even if
5 there was an express prohibition for money for the estate
6 to be paid, section 329 would still independently operate
7 to require the counsel to disclose his fee agreement. It
8 applies whether or not compensation is ever sought under
9 330.

10 QUESTION: Well, in section (b), it authorizes
11 the court to cancel it -- cancel the agreement if it's
12 unreasonable compensation. So it seems to me it applies
13 that if the compensation was reasonable, they could
14 approve it.

15 MS. BLATT: Right, but that's -- that's pre-
16 petition.

17 QUESTION: Well, I understand, but the money has
18 to be paid pre-petition. Here, of course, it was, but he
19 kept it in escrow instead of putting it in his pocket.

20 MS. BLATT: That's right. So it remained the
21 funds of the estate and it had to be paid under 330 and it
22 was -- it was not a question of 329.

23 But the other -- other point I want to get back
24 on why this serves reasonable policy objectives, not only
25 does the individual debtor have the ability to pay counsel

1 with either his exempt assets, his post-petition income,
2 or a pre-petition flat fee, but chapter 7, unlike all
3 other cases, it is the trustee and not the debtor who
4 manages, represents, and liquidates the estate. And the
5 code gives the trustee the explicit authority under
6 section 327 of the code to retain counsel, including the
7 debtor's counsel, to take actions that further the benefit
8 -- the best interests of the estate.

9 QUESTION: But not that would assist the debtor
10 in the exemption example.

11 MS. BLATT: No. That's exactly right. If the
12 -- if for some reason the trustee could not read an
13 accounting form and the debtor's counsel couldn't answer
14 it, the trustee can go retain a professional person like
15 an accountant, and if the trustee needs a lawyer to take
16 actions to further the best interests of the estate, it is
17 true that that lawyer represent the -- represents the
18 estate, but there's no reason he can't meet with the
19 debtor and help him explain something.

20 But 96 percent of all chapter 7 cases, there are
21 no assets in the estate to begin with. These are the kind
22 of cases I was talking about, where they are covered by a
23 routine flat fee that covers --

24 QUESTION: I really don't understand that
25 argument because this case just involves the other 4

1 percent, and there are a lot of cases in the 4 percent,
2 aren't there? Several thousand.

3 MS. BLATT: That's true, and in those cases --

4 QUESTION: So what difference does it make that
5 96 percent -- it doesn't make any difference. I don't
6 understand that argument.

7 MS. BLATT: I think it goes to the idea that
8 given that there's a plain absence of any statutory
9 authority to do this, the question is, is this some sort
10 of absurd result that Congress could not have plausibly
11 intended? And in the 4 percent of categories where there
12 are assets, Justice Stevens, the trustee represents the
13 estate. He manages it and he liquidates it. And if
14 there's money to be paid to -- for counsel and the
15 counsel's services are needed, the trustee can use that
16 money and retain counsel. At the same time, the chapter 7
17 debtor --

18 QUESTION: Has retained counsel to do work to
19 benefit the estate, not retained counsel to represent the
20 debtor.

21 MS. BLATT: That's right. And at the same time,
22 there is --

23 QUESTION: Which he could have done before 1996.

24 MS. BLATT: Right. And there's nothing in the
25 1994 amendments that prevents the debtor from taking his

1 post-petition salary, his exempt assets --

2 QUESTION: Not if he's a company, as in this
3 case.

4 MS. BLATT: Right. In a -- in a company, Your
5 Honor, it's important, Justice Ginsburg, to keep in mind
6 everything like objections to discharge, exempt assets --
7 none of that applies to corporations. Corporations,
8 unlike individuals, do not survive bankruptcy, and so they
9 don't have issues like exempt assets and objections to
10 discharge. You have a defunct corporation that's
11 liquidating.

12 And we think this case is a perfect illustration
13 of what happens when you have a case with marginal assets
14 in chapter 7, and that's usually where the -- the
15 businesses with no assets or marginal assets go, is
16 chapter 7. The trustee had ample authority to retain
17 petitioner's counsel, and in fact, what happened
18 ultimately in this case is what -- the bulk of what
19 petitioner's counsel was doing was representing the estate
20 in a fight with a creditor and --

21 QUESTION: Well, he didn't have ample authority
22 to do it before the chapter 7 was filed, did he?

23 MS. BLATT: No. When the case is in chapter 11,
24 the debtor is the debtor in possession with all the powers
25 and duties of the trustee, and it's solely the debtor.

1 There is no trustee. The debtor has to take actions to
2 represent the estate. All that changes when it converts
3 to a 7. Then it's the trustee. The keys have to be
4 turned over to the trustee and the trustee runs the show.

5 QUESTION: But -- but I thought you indicated
6 that the trustee had ample authority to hire the debtor's
7 attorney, and I -- in the chapter 7 proceeding, and I
8 said, true, but does he have the authority to hire the
9 debtor's attorney before the chapter 7 is filed? That's
10 what we're talking about. He doesn't have that authority.

11 MS. BLATT: This -- I mean, I'll try to take you
12 chronologically. The case started out an 11, and then the
13 petitioner was -- was retained under section 327, had a
14 specific order, and therefore was entitled to be paid from
15 the estate. Once the case --

16 QUESTION: For work done from that time forward.

17 MS. BLATT: Work done just while it was an 11.
18 Once it's in a 7, all those duties ceased. There was
19 nothing for the corporation to do except liquidate and
20 cooperate with the trustee, who had the statutory
21 responsibility to represent and manage and liquidate the
22 estate.

23 QUESTION: Well, there's no trustee until
24 chapter 7, is there?

25 MS. BLATT: That's right. Right. Once -- once

1 it converts to chapter 7, then it's the trustee's job to
2 take over. And the trustee eventually did take over the
3 adversary proceeding and bring the -- continue the case
4 against the creditor.

5 QUESTION: And he can hire the -- and he can
6 hire the debtor's attorney to do work in the chapter 7,
7 but that doesn't compensate for what -- the work that was
8 done before chapter 7.

9 MS. BLATT: That's right.

10 QUESTION: The work that was done before chapter
11 7 was compensated in this case.

12 MS. BLATT: Yes, it was paid. There was \$2,000
13 of fees in this case and \$3 in expenses, and \$1,000 has
14 been paid for all the work in 11. And what will happen,
15 if the Court affirms the Fourth Circuit, is when cases
16 convert, the debtor's counsel will cease performing work
17 unless the trustee actually gets a court order approving
18 their retention. The trustee can hire its own lawyer to
19 assist with its -- with -- with his or her duties and can
20 hire the debtor's counsel for a special purpose. And that
21 would have been like this case where there's an adversary
22 proceeding either by or against the debtor.

23 United States Trustees have supervised and
24 overseen the liquidation of millions of chapter 7 cases in
25 the 9 years since the 1994 amendments, and it has been

1 their experience that the statute, as written, has not
2 interfered with the smooth functioning of chapter 7 cases.

3 QUESTION: Are all trustees in chapter 7 cases
4 United States Trustees? They're not, are they?

5 MS. BLATT: None of them are. The United States
6 Trustees supervise and oversee the administration of all
7 cases under 7, 11, 12, and 13, and one of their specific
8 duties is to supervise trustees, private trustees, who --
9 who perform their -- their jobs and duties as trustees.

10 QUESTION: Even if the Government isn't involved
11 in the case.

12 MS. BLATT: Right. There's always a -- there's
13 always a private trustee appointed except in 11 cases, but
14 the United States Trustees supervises and oversees, serves
15 as a watch dog, looks at things to make sure there's no
16 waste, fraud, or abuse, reviews all fee applications for
17 the -- by the trustee, the examiner, the debtor's counsel
18 in chapter 11 cases, and --

19 QUESTION: The bankruptcy judge appoints the
20 trustee.

21 MS. BLATT: I don't know if -- Justice Ginsburg,
22 I'm not sure whether it's the -- the bankruptcy court does
23 appoint the trustee. That's right. But the United States
24 Trustees within the Department of Justice manages a pool
25 of available trustees who can serve to be appointed by

1 bankruptcy courts. And so we oversee trustees and make
2 sure they're fulfilling their duties.

3 QUESTION: Does the bankruptcy court appoint a
4 U.S. Trustee in every single case?

5 MS. BLATT: No, no. There are -- no. There are
6 21 United States Trustees that oversee all the regions of
7 this country, with the exception of North Carolina and
8 Alabama, and they just overview and supervise the
9 administration of the cases in the sense of make sure that
10 the cases are actually proceeding through the court, make
11 sure that cases that need to be converted --

12 QUESTION: They -- they do that without any
13 appointment by the bankruptcy court then I take it.

14 MS. BLATT: That's right. Under 28 U.S.C. 586,
15 it's -- it's a laundry list of specific statutory duties
16 that the United States Trustees have to comply with.
17 Under the Bankruptcy Code itself, in 11 U.S.C. 307, it
18 says that the United States Trustees may be -- may raise
19 or be heard on any matter in any bankruptcy case, and
20 that's why they've been in all of these cases involving
21 fee applications because in their view, given the -- that
22 there's just complete absence of any statutory authority
23 to pay chapter 7 debtor's counsel, they've been objecting
24 to fee requests.

25 The one thing I just want to get back to on the

1 statute is petitioner says that the statute is ambiguous,
2 and we could not disagree more. There is no language in
3 the code that authorizes the chapter 7 to be paid. What
4 petitioner has relied on is a missing or and this
5 overlapping or redundant reference to attorney. But it's
6 critical to understand that nothing about the missing or
7 or the reference to attorney in (a)(1)(A) affects the
8 substantive meaning of the statute or in any way prohibits
9 the Court from applying the literal language of the code
10 or requires the code to do -- requires the Court to do
11 something the code prohibits.

12 By contrast, what petitioner is seeking is a
13 substantive enlargement, and as far as we can tell, there
14 is no case of this Court's jurisprudence where the Court
15 has added back language in a statute and where -- in a
16 substantive way that Congress has specifically taken out
17 when there's no language that will bear that
18 interpretation.

19 If there --

20 QUESTION: If you're through, let me just --

21 MS. BLATT: Sure.

22 QUESTION: Maybe this is a little repetitious,
23 but I want to read you two sentences from Collier on
24 Bankruptcy, the treatise that most of us rely on perhaps
25 too much in this area.

1 After describing the Government's position in
2 this, it would represent a fundamental change in the law.
3 The treatise goes on. Section 329 of the code permits the
4 debtor's attorney to receive a reasonable retainer for
5 services rendered in contemplation of or to be rendered in
6 connection with a case under the Bankruptcy Code. Such a
7 provision would be superfluous if the deletion in section
8 330(a) is construed as excepting debtor's counsel for
9 compensation under section 330.

10 What's your response to that again? You've
11 partly responded, but I want to be sure you cover it all.

12 MS. BLATT: This is the reference to attorney,
13 the reference to attorney in (a)(1)(A).

14 QUESTION: Yes.

15 MS. BLATT: Your Honor, it's -- the -- the short
16 answer it's -- it's in the wrong place. The critical
17 operative list that provides the type of people who can
18 receive compensation is in (a)(1), and the reference to
19 attorney just describes the type of compensable services,
20 which also includes paralegals, para-professionals.

21 QUESTION: No. They -- they rely on section
22 329, which talks about --

23 MS. BLATT: Oh, I'm -- 329.

24 QUESTION: -- that that's -- they say section
25 329 permits all this, and they say that provision would be

1 superfluous if your reading of 330(a) is correct.

2 MS. BLATT: Collier is just wrong. The
3 provision is --

4 (Laughter.)

5 MS. BLATT: -- on this point -- is that it
6 operates independently and requires a disclosure of all
7 fee agreements whether or not there's compensation, and
8 maybe another way of putting it is whether or not the
9 Court rewrites the code, 329 is going to apply as -- as it
10 always has and require a disclosure of -- of pre-petition
11 fees.

12 QUESTION: What was the -- the fees that were
13 attributed to the chapter 11 phase, when approval was
14 sought, wasn't that under 329 when -- there -- there was
15 the -- the lump sum \$6,000, and something over \$1,000 was
16 attributed to the pre-petition chapter 11 time. Wasn't
17 the approval of that under this section 329?

18 MS. BLATT: Yes, Justice Ginsburg, by both the
19 bankruptcy court and the district court because they
20 proceeded on the erroneous assumption, as found by the
21 Fourth Circuit, that this was money that belonged to the
22 lawyer instead of the estate. And if it had been -- and
23 this was an 11 case. You don't see in chapter 7 large
24 pre-petition retainers like this because the chapter 11
25 usually contemplates ongoing work after bankruptcy.

1 But in this case, they did what most lawyers do,
2 is put the money in the trust account, and it wasn't
3 earned -- it wasn't earned by the lawyer until the
4 services were performed. But the bankruptcy court and the
5 trial court proceeded on the assumption the money belonged
6 to the lawyer, and so if the -- if the pre-petition money
7 is money of the lawyers, then it's reviewed under 329.

8 But then the Fourth Circuit said, well, no, this
9 is actually money of the estate and it has to be -- it's
10 estate funds. Those are held for the benefit of creditors
11 and there's no statutory authority to use estate funds to
12 pay the chapter 7 debtor's attorney.

13 If there are no questions, we'd ask the Court to
14 affirm the Fourth Circuit's --

15 QUESTION: Very well, Ms. Blatt. .

16 Mr. Goldstein, you have 3 minutes remaining.

17 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

18 ON BEHALF OF THE PETITIONER

19 MR. GOLDSTEIN: Mr. Chief Justice, the reason
20 that the U.S. Trustees are not finding that this ambiguity
21 creates a problem is that there has been a shift in
22 practice in those courts like the Fourth Circuit that hold
23 that you can't be compensated as a chapter 7 debtor's
24 attorney under 330, and that is people in bigger cases are
25 getting bigger and bigger retainers. What's happening is

1 the scenario that Justice Stevens described, and that is,
2 people are saying I'm not going to be paid on an ongoing
3 basis, so I've got to get more money up front. That can't
4 be a result that Congress contemplated under the U.S.
5 Trustees' vision of what Congress was up to --

6 QUESTION: But can't that be checked by the
7 court under 329 and say that's too much?

8 MR. GOLDSTEIN: Precisely, precisely. But
9 that's my point. What results is the 329 fees are subject
10 to a lessing standard. They just have to be reasonable.
11 They aren't subjected to all the laundry list of 330. So
12 the result of this change, if there was a change, would
13 only have been to decrease judicial oversight. Retainers
14 are subject to less judicial scrutiny.

15 The second point I should make is that don't
16 come away from the argument that this -- believing that
17 this case is limited to chapter 7. It applies equally to
18 chapter 11 debtor out of possession cases and chapter 12
19 and 13 cases for services that are beneficial to the
20 estate, but not the debtor. The U.S. Trustee has always
21 pitched this as somehow a case limited to chapter 7, but
22 that's not accurate. And the Pro-Snax case from the Fifth
23 Circuit, for example, is a chapter 11 debtor out of
24 possession case.

25 Third, Justice Souter, I still don't understand

1 what the answer is to your reading of the statute.

2 Justice Breyer, Justice Souter said, okay, there
3 are a list of three people who can get the check: the
4 trustee, the examiner, the professional person. Fine.
5 But we also know, as Justice Stevens has said, that the
6 statute's reference to the attorney has always been to the
7 attorney, the same reference to the attorney in 331 is a
8 reference to the attorney. 321 says a chapter 7 attorney
9 can get a retainer. Justice Souter has said isn't the
10 literal language, if we're going to follow the literal
11 language, that the money can go to the trustee, to which I
12 said, and that's -- you know, the trustee directed Mr.
13 Lami e to do these things, and therefore the trustee just
14 owes the money back to the debtor's attorney. That
15 rationalizes all of the text.

16 The important thing then in deciding whether to
17 follow the literal text is, is there anything to support?
18 Is there a whit -- a whit -- of indication in the history
19 of the statute that Congress intended to do what the U.S.
20 Trustee has hypothesized? Is there a word that from 1898
21 to 1994 Congress decided to make this choice to eliminate
22 fees that are both necessary and beneficial? Those are
23 the only fees we're talking about, those that benefit the
24 creditors. Did Congress intend to eliminate them? Is
25 there any indication of that? And the answer to that

1 question is no.

2 And that's important because the U.S. Trustee is
3 not correct to say that when a chapter 7 is initiated or
4 if the case is converted, that the debtor and the debtor's
5 attorney leaves the field. There are ongoing duties.
6 There's the 341 hearing, the meeting with the creditors.
7 There is the duty of the debtor's attorney to transfer the
8 materials to the trustee, to cooperate with the trustee.
9 Here, there was an adversary proceeding. The trustee
10 wasn't substituted as counsel for 8 months, and somebody
11 had to tell the trustee about that. There are real
12 responsibilities. And we're not talking about, in any
13 particular case, a ton of money, but it is important.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Goldstein.

16 The case is submitted.

17 (Whereupon, at 10:54 a.m., the case in the
18 above-entitled matter was submitted.)

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