

## NINTH CIRCUIT RESCUES DEBTORS' ATTORNEYS

In adopting a revised Section 330 of the Bankruptcy Code in 1994, which omits the debtor's attorney from the list of those professionals authorized to receive compensation for services and reimbursement of expenses from a Chapter 7 bankruptcy estate, did Congress commit a legislative drafting error, or make a deliberate policy decision? Such is the issue examined by the Ninth Circuit Court of Appeals in *In re Century Cleaning Services, Inc.*, 195 F.3d 1053 (9<sup>th</sup> Cir. 1999).

In *Century Cleaning*, the bankruptcy court, 202 B.R. 149 (Bankr. D. Or. 1996), and the Bankruptcy Appellate Panel, 215 B.R. 18 (9<sup>th</sup> Cir. B.A.P. 1997), concluded that the debtor's attorney, who had performed substantial services for the debtor company after conversion of its bankruptcy case to Chapter 7, was not entitled to payment of compensation from the bankruptcy estate. The decisions denying the debtor's counsel compensation were in line with a significant body of case law. This case law focuses on changes made to Section 330(a)(1) by Congress in 1994. Prior to the amendment to the statute, compensation from a bankruptcy estate was available to "a trustee, to an examiner, to a professional person employed under Section 327 or 1103 of [Title 11], **or to the debtor's attorney . . .**" In the revised Section 330(a)(1), the highlighted reference to "the debtor's attorney" was deleted. In addition, a new Section 330(a)(4)(B) is added providing that in "a Chapter 12 or 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of a debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and other factors . . ." What was the effect of these changes?

The majority in *Century Cleaning* (Judges Stephen Reinhardt and Betty Fletcher) finds the changes made to the language of the amended Section 330(a)(1) ambiguous. After examining legislative history, applying principles of statutory construction, and discussing policy considerations, the majority concludes that the deletion of debtor's attorneys from the compensation statute "resulted from an unintended slip of the pen and not from a deliberate change." 195 F.3d at 1060.

The dissent (Judge Sidney Thomas, formerly a Montana lawyer with considerable bankruptcy experience) disagrees noting that while "[t]he majority may well have identified the best policy for compensating debtors' attorneys in Chapter 7 cases, . . . it is not the policy choice that Congress made." 195 F.3d at 1061. The dissent finds the language of amended Section 330 unambiguous, and therefore perceives no need to inquire into the legislative history. However, even if the history is consulted, the dissent concludes that the omission of debtor's attorneys from payment from the bankruptcy estate was an election intentionally made by Congress.

Like many decisions, *Century Cleaning* likely leaves important questions unanswered. For example, assuming debtors' attorneys are now covered by Section 330(a)(1), judicially if not legislatively, it would seem Section 330(a)(1)(A) and (B) would continue to limit the amounts that could be paid to an attorney to compensation for "actual, necessary services" and reimbursement to "actual, necessary expenses." But "actual and necessary" to the bankruptcy estate or to the debtor? While it may be necessary from

the debtor's perspective for its attorney to contest an objection to a debtor's exemption claim or to defend an objection to discharge, will those services be compensable under Section 330(a)(1) after *Century Cleaning*? In addition, while Section 330(a)(4) seems to limit compensation to Chapter 12 and 13 debtor's attorneys to cases involving individual debtors, as opposed to corporations or partnerships, is compensation now available under Section 330(a)(1)?

*Century Cleaning* changes the law in this District, effectively overruling the decision of Chief Judge Pappas in *In re Kinnemore*, 95 I.B.C.R. 157, 181 B.R. 520 (Bankr. D. Idaho 1995). (In addition, our late Judge Hagan was the author of the BAP decision reversed by the Circuit in *Century Cleaning*). There is now a split in the circuits on this issue. The Ninth Circuit's decision is in line with *In re Ames*, 76 F.3d 66, 71-72 (2<sup>nd</sup> Cir. 1996). The Eleventh Circuit recently refused to follow the result in *Century Cleaning*. *In re American Steel Product, Inc.*, \_\_F.3d\_\_, 1999 WL 1186416 (11<sup>th</sup> Cir. 1999). For another contrary view, see *In re Pro-Snax Distribs., Inc.*, 157 F.3d 414, 425-26 (5<sup>th</sup> Cir. 1998). Perhaps the Supreme Court will resolve the dispute, unless Congress attempts to do so first.