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11 U.S.C. § 330  
Attorney compensation  
Retainer

In re Century Cleaning Services, Inc., Case No. 395-36126-elp7

11/1/96 ELP Published

Although a Chapter 7 debtor's attorney may not be awarded compensation under 11 U.S.C. § 330, the attorney may be compensated for postpetition services from a prepetition retainer.

(See 99-10(10) - Ninth Circuit reversed)

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UNITED STATES BANKRUPTCY COURT

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FOR THE DISTRICT OF OREGON

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In Re:

) Bankruptcy Case No.

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CENTURY CLEANING SERVICES, INC., )

) 395-36126-elp7

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Debtor. )

) MEMORANDUM OPINION

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The issue in this case is whether a lawyer for a Chapter 7 debtor may be paid for postpetition legal services from a retainer that the lawyer obtained from the debtor before the bankruptcy petition was filed, in light of the 1994 amendment to 11 U.S.C. § 330, which deleted debtor's counsel from the list of entities that may be awarded compensation. For the reasons discussed below, the court determines that the lawyer may be paid from the retainer.

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FACTS

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After a short period in Chapter 11, the court converted this case to Chapter 7. The law firm of Garvey, Schubert & Barer ("the firm") has represented debtor and debtor in possession throughout this case. Prior to the commencement of the case, debtor paid the firm a retainer of \$28,301.84 for postpetition services and expenses. The firm continues to hold the retainer in its trust

1 account for that purpose. Prepetition fees and expenses were paid  
2 before debtor filed its Chapter 11 petition. Only postpetition  
3 Chapter 7 fees and expenses are at issue in this case. Before the  
4 court is the firm's first application for Chapter 7 attorney fees  
5 and expenses, in which it seeks payment of the fees from the  
6 retainer.

7 ISSUE

8 Does the 1994 amendment to 11 U.S.C. § 330, which deleted  
9 Chapter 7 debtors' counsel from the list of entities authorized to  
10 receive an award of compensation from the estate, preclude an  
11 attorney for a Chapter 7 debtor from being paid for postpetition  
12 services and expenses from a prepetition retainer?

13 DISCUSSION

14 1. Can a Chapter 7 debtor's attorney be awarded compensation  
15 under 11 U.S.C. § 330?

16 Bankruptcy Code section 330 authorizes an award of  
17 compensation from property of the estate for an attorney's services  
18 and reimbursement for expenses. Subsection (a) provides, as  
19 relevant:

20 (a) (1) After notice to the parties in interest and the  
21 United States trustee and a hearing, and subject to sections  
22 326, 328, and 329, the court may award to a trustee, an  
examiner, a professional person employed under section 327 or  
1103 --

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

26 (B) reimbursement for actual, necessary

1 expenses.

2 Section 330 does not authorize an award of a Chapter 7 debtor's  
3 postpetition attorney fees from property of the estate. In re  
4 Fassinger, 191 BR 864 (Bankr D Or 1996). Because a prepetition  
5 retainer is an asset of the Chapter 7 estate, see In re Friedland,  
6 182 BR 576 (Bankr D Colo 1995), the UST argues that a Chapter 7  
7 debtor's attorney cannot be paid from that retainer.

8 The firm argues first that the holding in Fassinger is  
9 inconsistent with the legislative intent and that I should  
10 reconsider whether section 330 applies to Chapter 7 debtors'  
11 postpetition attorney fees.

12 In Fassinger, the court considered the 1994 amendments to  
13 section 330, which deleted the Chapter 7 debtor's attorney from the  
14 list of professionals authorized to receive compensation from the  
15 estate. The court noted that it " may only award fees to the  
16 debtor's attorney to the extent it is authorized to do so by some  
17 provision of the [Bankruptcy] Code." 191 BR at 865. The court  
18 concluded that Congress's deletion of the Chapter 7 debtor's  
19 attorney from the list of professionals entitled to awards of  
20 compensation in section 330(a), along with the specific  
21 authorization in section 330(a)(4)(B) for awarding reasonable  
22 compensation to the debtor's attorney in a Chapter 12 or Chapter 13  
23 case, unambiguously indicated that section 330 does not authorize an  
24 award of attorney fees to a Chapter 7 debtor's attorney from estate  
25 funds. Id.

26 I agree with the holding in Fassinger and will not revisit

1 it. Section 330 specifically authorizes an award of compensation to  
2 specific professionals. Chapter 7 debtors' counsel are not included  
3 in the list. However, Fassinger did not address the issue that has  
4 arisen in this case, which is whether a Chapter 7 debtor's attorney  
5 may be paid from a retainer obtained prepetition for postpetition  
6 services.

7 2. Does the omission of Chapter 7 debtor's counsel from  
8 section 330 preclude counsel from being compensated from a  
prepetition retainer?

9 The firm next argues that it has an attorney's lien pursuant  
10 to ORS 87.430<sup>1</sup> in the retainer, and notes that Fassinger did not  
11 address the question of whether fees secured by a prepetition  
12 retainer could be used to satisfy an attorney's claim for  
13 postpetition services and expenses. Because security interests,  
14 including attorneys' liens, survive bankruptcy, the firm argues that  
15 it is entitled to compensation from the funds it holds for the  
16 payment of its fees, subject only to approval of those fees and  
17 expenses as "reasonable." 11 U.S.C. § 329.

18 The firm is correct that Fassinger did not address the  
19 retainer issue. The only reported decision that has addressed the  
20 issue is Friedland. In that case, the Chapter 7 debtor had paid a

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22 <sup>1</sup> ORS 87.430 provides:

23 "An attorney has a lien for compensation whether specially agreed upon  
24 or implied, upon all papers, personal property and money of the client in  
25 the possession of the attorney for services rendered to the client. The  
26 attorney may retain the papers, personal property and money until the lien  
created by this section, and the claim based thereon, is satisfied, and the  
attorney may apply the money retained to the satisfaction of the lien and  
claim."

1 prepetition retainer. The UST objected to the debtor's attorney's  
2 Attorney Fee Disclosure Statement, which indicated that one source  
3 of payment for debtor's postpetition attorney's fees was to be a  
4 prepetition retainer. The UST argued that the debtor's counsel  
5 could not appropriately rely on its prepetition retainer as security  
6 for postpetition services. 182 BR at 577.

7 The court reviewed the 1994 amendment to section 330 and  
8 concluded that the plain language of the statute

9 "allows for awards of reasonable compensation from the  
10 estate, or estate assets, to counsel for debtors in Chapters  
11 12 and 13, but does not provide for allowance of compensation  
12 to counsel for debtors in Chapter 7."

13 182 BR at 579. It held that the retainer held by debtor's counsel  
14 was not subject to any valid lien and could not be used to pay  
15 postpetition fees and expenses.

16 The UST understandably relies on Friedland for its argument  
17 that the retainer in this case likewise cannot be used to pay  
18 debtor's Chapter 7 postpetition fees and expenses. I do not find  
19 Friedland persuasive, however. In this case, the firm claims an  
20 attorney's possessory lien in the retainer, pursuant to ORS 87.430.  
21 Although the court in Friedland held that the retainer was property  
22 of the estate and not subject to a valid lien, it is not clear why  
23 the court concluded that there was no valid lien. Further, the  
24 court did not discuss the possible significance of a valid lien on a  
25 debtor's attorney's entitlement to fees and expenses.

26 The UST also cites In re Boh! Ristorante, Inc., 99 BR 971  
(BAP 9th Cir 1989) for the proposition that section 329 cannot be

1 used to circumvent the requirements of section 330(a). I do not  
2 read that opinion to stand for the proposition the UST asserts.  
3 Reading the opinion as a whole, it holds that, if a debtor's  
4 attorney fees are paid by a third party, that party may recover  
5 under section 329 the amount paid to the extent the fees are not  
6 reasonable. Read in context, it is apparent that the panel's  
7 reference to section 330 relates to reasonableness of the fees.

8         The validity of an attorney's lien in bankruptcy is  
9 determined by state law. In re Life Imaging Corp., 31 BR 101, 102  
10 (Bankr D Colo 1983). Neither the UST nor the Chapter 7 trustee  
11 disputes that ORS 87.430 provides for a possessory lien that applies  
12 to retainers.<sup>2</sup> The UST argues, however, that there can be no lien  
13 for postpetition services until the postpetition services are  
14 provided.

15         Oregon law recognizes two types of attorney's liens for  
16 services, a retaining lien and a charging lien. Crawford v. Crane,  
17 204 Or 60, 282 P2d 348, 349 (1955). A retaining lien attaches to  
18 papers, money and other personal property of a client that comes  
19 into the attorney's hands in the course of employment, and gives the  
20 attorney the right to retain that property until the attorney's fees  
21 are paid. Id.<sup>3</sup> A charging lien, on the other hand, is the right of  
22 the attorney to be paid from the judgment or other recovery in an

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24         <sup>2</sup> The Chapter 7 trustee agrees with debtor that ORS 87.430 gives the  
firm an enforceable attorney's lien for postpetition services.

25         <sup>3</sup> Section 542(e) limits the effectiveness in bankruptcy of a retaining  
26 lien on papers. It is notable that the limitation does not extend to money  
subject to a retaining lien.

1 action in which the attorney's services are rendered. Id. The two  
2 types of attorney's liens are codified at ORS 87.430 and ORS 87.445,  
3 respectively.

4 In order for a charging lien to be effective, or perfected,  
5 an attorney claiming such a lien must file a notice of claim of lien  
6 within a certain time. ORS 87.455. The retaining lien statute, ORS  
7 87.430, does not contain any similar requirement; it requires only  
8 that the attorney be in possession of the property. There are no  
9 Oregon cases that address when an attorney's retaining lien becomes  
10 effective. In In re Reinhardt, 81 BR 565 (Bankr DND 1987), the  
11 court considered an attorney lien statute similar to Oregon's and  
12 concluded that, because no notice was required to perfect a  
13 retaining lien, it was effective by virtue of active possession of  
14 the property. 81 BR at 567. I conclude that, similarly, under the  
15 Oregon statute a retaining lien is effective upon the attorney's  
16 possession of the client's money or other property. Because a lien  
17 can secure an obligation consisting of a contract for performance of  
18 an obligation in the future, 51 Am Jur 2d Liens § 15 (1970), it is  
19 not necessary that the services have been actually performed before  
20 the lien becomes effective.<sup>4</sup>

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22 <sup>4</sup> That is not to say that state law could not impose such a requirement.  
23 In Colorado, for example, the retaining lien statute provides that the attorney  
24 has a lien for a "general balance of compensation" on papers of the client. The  
25 Colorado Supreme Court has concluded that "[t]his language can only be construed  
26 to mean that a lien attaches to the client's papers once an attorney has completed  
compensable work." People ex rel MacFarlane v. Harthun, 195 Colo 38, 42, 581 P2d  
716 (1978). (Emphasis supplied.) The Oregon statute, in contrast, says only that  
the attorney has a lien on property in the attorney's possession "for services  
rendered to the client." That language is consistent with the common law rule

(continued...)



1           It is well settled that an attorney's retaining lien survives  
2 bankruptcy, Matter of Innkeepers of New Castle, Inc., 671 F2d 221,  
3 230 (7th Cir), cert denied 459 US 908 (1982); Browy v. Brannon, 527  
4 F2d 799, 801 (7th Cir 1976), unless the trustee avoids the lien  
5 under one of the trustee's avoiding powers. The trustee does not  
6 seek to avoid the lien.<sup>5</sup>

7           As the firm recognizes, under section 329 debtor's counsel  
8 cannot be paid excessive fees, and a retainer that exceeds the  
9 reasonable value of the services must be returned to the estate.<sup>6</sup>

10           Although the firm has filed an application for interim  
11 compensation, this court will treat the application as a request for  
12 a declaration that the fees are reasonable and not recoverable under  
13 section 329, and a request that the firm is authorized to apply the  
14 retainer to satisfy the fees to the extent they are reasonable.  
15 Because the firm has a valid, unavoids lien on the retainer for the  
16 amount of its postpetition services and expenses, it is entitled to

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18           <sup>4</sup>(...continued)  
19 that a lien can secure future services.

20           <sup>5</sup> The facts before the court do not raise the question of whether the  
21 trustee may request and obtain an order terminating employment of debtor's  
22 counsel in order to obtain return of the unearned portion of a retainer.

23           <sup>6</sup> The UST argues that allowing the fee obligation to be satisfied from  
24 the retainer creates the possibility that counsel for a debtor in possession can  
25 circumvent the disinterestedness requirement by skipping the employment process  
26 and looking to a prepetition retainer for compensation. That argument overlooks  
the fact that a debtor in possession would have no obligation to pay such fees. 2  
Collier on Bankruptcy ¶ 327.02 (1996). Absent a debt, a security interest  
provides no right to payment. Boh! Ristorante, on which the UST relies, is  
distinguishable. In that case, no employment order had been entered, and it was a  
third party, not the debtor in possession, who was obligated to pay for services  
to the debtor in possession.

1 look to that collateral to satisfy its lien for reasonable fees and  
2 expenses.

3 CONCLUSION

4 Although section 330 does not authorize an award of  
5 compensation to counsel for Chapter 7 debtors, if counsel has a  
6 valid attorney's lien on a retainer for payment of postpetition  
7 attorney fees, counsel's reasonable postpetition fees and expenses  
8 are secured by that retainer. Section 330 does not preclude counsel  
9 from looking to its collateral for payment of the debt secured by  
10 its lien.

11 This Memorandum Opinion shall constitute Findings of Fact and  
12 Conclusions of Law as required by Fed. R. Bankr. P. 7052 and 9014  
13 and they shall not be separately stated.

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16 ELIZABETH L. PERRIS  
17 Bankruptcy Judge  
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