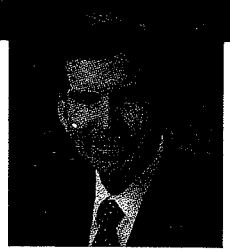
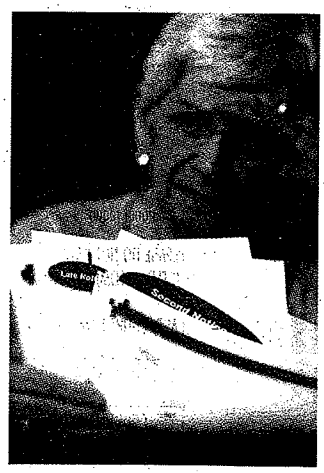


The BAPCPA as it Impacts Consumer Bankruptcy Lawyers

By Jeffrey P. Lewis

Jeffrey P. Lewis is a member in the West Chester office of the Pittsburgh-based law firm of Eckert Seamans Cherin & Mellott L.L.C. He is co-vice chair of the PBA Professional Liability Committee and a member of the PBA House of Delegates.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), added a section to the Bankruptcy Code to govern, with certain exceptions, any "debt relief agency," a defined term under the act, with respect to any "assisted person," i.e., consumer debtor. Section 101(12A) of the act defines "debt relief agency," but it does not expressly include or exclude attorneys. Instead, the definition includes, with limited exceptions, "any person who provides any bankruptcy assistance to an assisted person in return for ... payment ..., or who is a bankruptcy petition preparer." Specifically, Section 528 of the act requires, among other things, that all "debt relief agencies" must so state conspicuously "in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public ... that the services or benefits ... may involve bankruptcy relief." Moreover, Section 526(a)(4) of the act provides that any "debt relief agency" shall not "advise an assisted person ... to incur more debt in contemplation of such person filing [for bankruptcy]. ..."



One reason that this legislation was enacted was to address perceived abuses in the area of consumer bankruptcy. Two examples of such abuses are deceptive advertisements that promise to wipe out debts without mentioning bankruptcy as a means of accomplishing this goal and consumers loading up on debt immediately before filing for bankruptcy. Violations of this act can carry stiff penalties, including the creation of a private cause of action by the debtor against the "debt relief agency" and its involved employees. But does it apply to bankruptcy lawyers who represent consumer debtors? And, if so, what are the consequences? The U.S. Supreme Court recently weighed in on these issues.

In *Milavetz, Gallop & Milavetz, P.A. v. United States*, ___S.Ct.___, 2010 WL 757616 (U.S.), the plaintiffs were a law firm, its bankruptcy attorneys and two clients, who brought a pre-enforcement action in federal district court to seek declaratory relief with respect to the interpretation of BAPCPA as it may apply to attorneys. Based upon a First Amendment freedom of speech argument, the plaintiffs convinced the district court that two sections of the act are unconstitutional as they apply to attorneys and, based upon this premise, the court held that the definition of "debt relief agency," therefore, does not include attorneys.

A panel of the 8th Circuit affirmed in part and reversed in part. In its unanimous view, the plain language of the definition includes attorneys within its scope. It also rejected the district court's finding that the disclosure requirements were unconstitutional. It found "that the disclosures are intended to prevent consumer deception and are 'reasonably related' to that interest." A majority only, however, found that the act's restriction on the advice to incur more debt when contemplating bankruptcy was unconstitutional, agreeing with the district court, because, in its view, the restriction could not withstand either strict or intermediate scrutiny. It held that Section 526(a)(4) " 'broadly prohibits a debt relief agency from advising an assisted person ... to incur any additional debt when the assisted person is contemplating bankruptcy,' even when the advice constitutes prudent prebankruptcy planning not intended to abuse the bankruptcy laws. ...". The dissent opined that Section 526(a)(4) should be narrowly construed to apply only to instances of "abuse to the bankruptcy system."

The Supreme Court granted the plaintiffs' petition for writ of certiorari because there was a conflict among the circuits with respect to the proper interpretation of Section 526(a)(4). It decided also to "consider the threshold question [of] whether attorneys who provide bankruptcy assistance to assisted persons are 'debt relief agenc[ies]' within the meaning of §101(12A) and the related question [of] whether §528's disclosure requirements are constitutional."

Justice Sonia Sotomayor wrote the majority opinion in which six other justices joined without exception. Agreeing with the circuit court, the majority finds that "debt relief agency" includes attorneys. In doing so, the court rejects several statutory construction arguments proffered by the petitioners (plaintiffs), including the argument that it "impermissibly trenches on an area of traditional state regulation. ..." Instead, the court notes that "Congress and the bankruptcy courts have long overseen aspects of attorney conduct in this area of substantial federal concern."

The court notes the potential harm to both the creditors and to the debtor, which could result in instances where a debtor "loads up" on debt in contemplation of bankruptcy. For the creditors, this practice can lead to a dilution of the bankruptcy estate. For the debtor, it could cause the court to hold these debts nondischargable, convert this case to another chapter under the Bankruptcy Code or even dismiss it altogether, leaving the debtor to his or her self-created plight. In light of these potential harms, the court considers that a narrow interpretation to the Section 526(a)(4) language would support the goal of preventing these harms without handcuffing the lawyer with respect to what advice he or she can or cannot give.

Therefore, the court holds that the Section 526(a)(4) language "refers to a specific type of misconduct designed to manipulate the protections of the bankruptcy system." Therefore, it "prohibits a debt relief agency only from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose." Such a narrow interpretation of this language allowed it to survive the First Amendment challenge in the form of petitioners' characterization of "the statute as a broad, content-based restriction on attorney-client communications that is not adequately tailored to constrain only speech that the Government has a substantial interest in restricting."

Finally, in rejecting petitioners' free speech and statutory construction arguments, the court reverses the circuit court, finding that Section 528 is constitutional. It also holds that the disclosure requirements under Section 528 "govern only professionals who offer bankruptcy-related services to consumer debtors." In so doing, it found that it

continued on Page 14

Avoiding Liability

Continued from Page 4

applies only to "misleading commercial speech" and was also impressed with the fact that it "impos[es] a disclosure requirement rather than an affirmative limitation on speech. ..."

The Supreme Court was unanimous in its result although not in its reasoning. Two justices, Antonin Scalia and Clarence Thomas, filed concurring opinions. Justice Scalia takes Justice Sotomayor to task for her citation in a footnote to the legislative history in an instance where the court had determined what the statute unambiguously says. In his view, citation to the legislative history under these circumstances is inappropriate because it suggests that lawyers must now research the legislative history, even in instances where the statutory language is clear. Justice Thomas' concurrence was only to take issue with the reasoning, not the conclusion, that the advertising disclosure requirements under Section 528 are constitutional.

It appears we now have a definitive answer to the questions raised concerning BAPCPA's application to lawyers representing consumer debtors.