

Bankruptcy and Free Speech: New Bankruptcy Code Provisions Restrict Attorneys' Right to Properly Advise Clients

by ROBIN HUFFMAN*

I. Introduction

The Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”), signed into law by President George W. Bush in April of 2005, went into effect October 17 of that year.¹ This sweeping legislation, the result of more than seven years of Congressional debate and compromise, marked the most significant overhaul of the Bankruptcy Code since it was first enacted in 1978.² As the title of the Act indicates, Congress passed BAPCPA primarily in an effort to combat perceived abuses of the bankruptcy process, particularly among consumer filers.³ Congress noted in enacting BAPCPA that bankruptcy filings had increased to the point where they were exceeding one million per year, and expressed concern that consumers viewed bankruptcy as a first, rather than a last resort.⁴ In passing BAPCPA, Congress sought to, “restore[] personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.”⁵

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1. H.R. REP. NO. 109-31, pt. 1, at 1 (2005).

2. *Id.* at 3.

3. *Id.* at 4-5. Perceived abuses include: multiple filings; filings by consumers with above average income and primarily consumer debt; and fraudulent conveyances of property prior to filing.

4. *Id.* at 4.

5. *Id.* at 2.

Since BAPCPA became effective, numerous cases have been filed across the country challenging various sections, and the courts have been left to interpret the new provisions and sort out congressional intent. Cases challenging the new requirements for consumer credit counseling,⁶ new limitations on the automatic stay for multiple filings,⁷ and the Means Test for Chapter 7 filers,⁸ among others, have all been decided since BAPCPA became effective in October 2005.

One of the earliest and most significant challenges to BAPCPA has been to the constitutionality of certain provisions which apply to debt relief agencies. The term “debt relief agency” did not exist in the world of bankruptcy prior to the recent BAPCPA amendments.⁹ BAPCPA defines “debt relief agency” as “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110.”¹⁰ BAPCPA created this new classification, and then simultaneously placed restrictions upon what debt relief agencies can and cannot do. Section 526(a)(4) of the amended bankruptcy code now prohibits a debt relief agency to “advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a

6. See *In re Murphy*, 342 B.R. 671 (Bankr. D.D.C. 2006) (holding that BAPCPA does not simply require debtors to obtain credit counseling prior to filing; the counseling must be obtained, at the latest, the date prior to filing); *In re Salazar*, 339 B.R. 622 (Bankr. S.D. Tex. 2006) (holding that failure to obtain required credit counseling rendered bankruptcy petition ineffective and precluded application of the automatic stay); *In re LaPorta*, 332 B.R. 879 (Bankr. D. Minn. 2005) (holding that credit counseling is a non-waivable prerequisite to filing bankruptcy under BAPCPA).

7. See *In re Kurtzahn*, 337 B.R. 356 (Bankr. D. Minn. 2006) (holding BAPCPA creates presumption that successive bankruptcy filings are filed in bad faith, and the presumption can only be rebutted by clear and convincing evidence to the contrary); *In re Taylor*, 334 B.R. 660 (Bankr. D. Minn. 2005) (holding in cases where debtor seeks to extend the automatic stay on showing of good faith filing, notice must be given to creditors 10 days prior to the hearing if delivered by hand or 14 days prior by mail); *In re Galanis*, 334 B.R. 685 (Bankr. D. Utah 2005) (holding that a totality of the circumstances test must be used to determining whether a debtor's successive filing is in good faith).

8. See *In re Paret*, 347 B.R. 12 (Bankr. D. Del. 2006) (holding that even absent a presumption of abuse under the means test, court must still consider each debtor's case under a totality of the circumstances test, including consideration of the debtor's ability to repay debts, to determine if abuse exists); *In re Barraza*, 346 B.R. 724 (Bankr. N.D. Tex. 2006) (holding debtor can not overcome presumption of abuse under the means test by claiming ownership deduction on a vehicle that is neither financed nor leased); *In re Walker*, No. 05-15010-WHD, 2006 WL 1314125 (Bankr. N.D. Ga. May 1, 2006) (holding that in calculating current monthly income under the means tests, debtors are permitted to deduct average payments on debts secured by surrendered collateral).

9. *Milavetz v. United States*, 355 B.R. 758, 762 (Bankr. D. Minn. 2006).

10. 11 U.S.C. § 101(12A) (2006).

case under this title”¹¹ Section 526(c) then creates civil liability for violations of the enumerated duties of this section.¹² Section 527(b) requires specific written disclosures be made by debt relief agencies to “assisted persons.”¹³ The required disclosures include notifying the “assisted person” that they have a right to hire an attorney and giving them written information regarding their rights and responsibilities when filing for bankruptcy.¹⁴ Section 528(b)(2) requires debt relief agencies to include specific language in advertisements for their services.¹⁵

This note focuses on the constitutional challenge to these BAPCPA provisions, and contends that at least two of the provisions in question, sections 526(a)(4) and 528(b)(2), constitute a violation of attorneys’ First Amendment free speech rights. These sections of BAPCPA have already been challenged numerous times in the less than two years since their enactment. The multiple challenges to these provisions have achieved mixed success, and more cases challenging these provisions are still pending.¹⁶ Courts have split on the issue of whether attorneys have standing to challenge BAPCPA, and those courts that have found standing have split as to whether or not these provisions apply to attorneys at all. Those courts that hold these sections do apply to attorneys have further split as to whether they violate the First Amendment.

The inconsistency in judicial interpretations of these sections of BAPCPA leads to uncertainty among bankruptcy attorneys as to whether or not they are required to comply with the provisions, or if they may be subject to sanctions for non-compliance. This uncertainty prevents attorneys from providing debtor clients with the best possible counsel. The disparity needs to be resolved by the Supreme Court in order to allow bankruptcy attorneys to confidently provide clients with the best possible advice.

This note asserts that Congress intended for the provisions regulating debt relief agencies to apply to attorneys, and bankruptcy attorneys have standing to challenge the constitutionality of these provisions because of the potentially chilling effect they have on attorney speech. Although sections requiring attorneys to make certain disclosures to clients do not unconstitutionally compel speech because they advance a compelling government interest and do not create an undue burden, the provisions

11. 11 U.S.C. § 526(a)(4) (2006).

12. 11 U.S.C. § 526(c) (2006).

13. 11 U.S.C. § 527(b) (2006).

14. *Id.*

15. 11 U.S.C. § 528(b)(2) (2006).

16. *See, e.g., Conn. Bar Ass’n v. United States*, No. 06-729 (D. Conn. May 11, 2006).

requiring certain statements in advertisements fail an intermediate scrutiny test for commercial speech because they do not narrowly advance a compelling interest. Finally, and most alarmingly, the section restricting attorney speech clearly violates attorneys' First Amendment rights, to the detriment of attorneys, debtors, and the interests of the government, because it fails constitutional consideration under either a strict scrutiny test or a more lenient balancing test.

II. Attorneys Have Standing to Challenge BAPCPA Provisions

In considering whether attorneys are subject to these BAPCPA provisions, and if so, whether the provisions are constitutional, courts must first determine that attorneys have standing to challenge BAPCPA in the first place. The fundamental consideration for constitutional standing arises out of Article III, Section 2, which restricts federal courts to issuing decisions involving "cases" or "controversies."¹⁷ Standing requirements have been thoroughly considered by the Supreme Court, and the Court has held that standing is satisfied where the complainant has suffered actual injury that is redressable by a favorable decision of the court.¹⁸

The Supreme Court has defined three requirements that must each be satisfied to establish constitutional standing. The plaintiff must demonstrate (1) actual injury, (2) a causal link between the injury and the challenged conduct, and (3) that the injury will be addressed by a decision in their favor.¹⁹ Courts hearing cases challenging these BAPCPA provisions have split on whether attorneys satisfy these standing requirements.

The Bankruptcy Court for the Middle District of Georgia, in a January 2006 decision, dismissed the plaintiff's claim challenging BAPCPA for lack of standing.²⁰ In the case *In re McCartney*, the attorney, representing a pair of debtors, sought a determination by the court that he was not subject to BAPCPA's regulation of debt relief agencies.²¹ The court did not come to a decision on the merits, however, instead finding that there was no case or controversy to satisfy a facial constitutional challenge because the BAPCPA provisions were not being enforced against the plaintiff.²² The

17. U.S. CONST. art. III, § 2.

18. *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983) (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

19. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

20. *In re McCartney*, 336 B.R. 588, 592 (Bankr. M.D. Ga. 2006).

21. *Id.* at 589.

22. *Id.* at 592.

court notes that the plaintiff had not sustained any “real, actual, or direct harm or injury,” nor was he “in danger of sustaining any immediately impending harm or injury” and thus his claims could not be adjudicated.²³

In June 2006, a district court in Pennsylvania dismissed another case challenging BAPCPA’s debt relief agency provisions for lack of standing.²⁴ In *Geisenberger v. Gonzales*, an attorney filed a facial challenge to the BAPCPA provisions, claiming that he would be “irreparably harmed” by their enforcement.²⁵ The court notes, however, that the government has not yet enforced, or even threatened to enforce, these provisions against the plaintiff.²⁶ The *Geisenberger* court found that the plaintiff was actually seeking an advisory opinion, and noted that a long line of precedent prevents courts from providing one.²⁷

In *Olsen v. Gonzales*, an August 2006 decision, the court also considered the issue of whether attorneys have standing to challenge BAPCPA.²⁸ The *Olsen* court noted that the plaintiffs’ complaint did not overtly allege injury, but rather “hint[ed]” at injury in alleging that the BAPCPA provisions “chill[] speech by subjecting plaintiffs to sanctions including disgorgement”²⁹ The court accepted this allegation of the “chilling effect” the provisions have on attorney speech as sufficient indication of harm.³⁰

Looking to the decision in *New York Bar Association v. Reno*, where the court found “per se irreparable injury if enforcement of the statute deprives a party of its First Amendment rights,” the *Olsen* court stated that “a similar challenge could be made here.”³¹ The *Olsen* court finally held that many of the plaintiff’s challenges were not yet ripe because there had been no enforcement, but also held that standing did exist for the provisions of section 526(a)(4) because of the potential chilling effects on attorney speech.³²

The Bankruptcy Court for the District of Connecticut found attorneys challenging BAPCPA did have standing to bring their claims.³³ In its

23. *Id.*

24. *Geisenberger v. Gonzales*, 346 B.R. 678 (E.D. Pa. 2006).

25. *Id.* at 680-81.

26. *Id.* at 682.

27. *Id.* at 683 (citing *Magaziner v. Montemuro*, 468 F.2d 782, 784 (3d Cir. 1972)).

28. *Olsen v. Gonzales*, 350 B.R. 906 (Bankr. D. Or. 2006).

29. *Id.* at 914.

30. *Id.* at 915 (citing *Hersh v. United States*, 347 B.R. 19 (Bankr. N.D. Tex. 2006)).

31. *Id.* at 914 (citing *N.Y. Bar Ass’n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998)).

32. *Olsen*, 350 B.R. at 915.

33. *Zelotes v. Martini*, 352 B.R. 17, 21-22 (Bankr. D. Conn. 2006).

November 2006 decision in *Zelotes v. Martini*, the court considered the particular considerations involved in First Amendment challenges in finding that plaintiffs had standing to challenge BAPCPA.³⁴ The court noted that “the First Amendment challenge has unique standing issues because of the chilling effect, self-censorship, and in fact the very special nature of political speech itself.”³⁵ In finding that plaintiffs had standing to challenge BAPCPA, the *Zelotes* court also cited a Supreme Court decision, stating that “the alleged danger of [the challenged statute] is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.”³⁶

Because attorneys in these cases challenged BAPCPA based on First Amendment free speech grounds, it is appropriate for courts to find standing based on the potential chilling effects of the provisions, regardless of whether actual enforcement has commenced.³⁷ Absent judicial determination on the constitutionality of these BAPCPA provisions, attorneys may comply with the unconstitutional provisions against their better professional judgment, or may fail to comply and face potential prosecution. Attorneys have standing to challenge BAPCPA to have some final determination as to the constitutionality and enforceability of these provisions. And, as the *Zelotes* court held, the chilling affect that these provisions have on how attorneys proceed in assisting their debtor clients is sufficient to satisfy the case or controversy requirement for standing.³⁸

III. Bankruptcy Attorneys Are Debt Relief Agencies Within the Meaning of BAPCPA

In order to find that these BAPCPA provisions violate attorneys’ First Amendment rights, there must first be a threshold inquiry as to whether these BAPCPA sections restricting and compelling speech even apply to attorneys. If attorneys are not debt relief agencies within the meaning of

34. *Id.* at 21.

35. *Id.* (quoting *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006)).

36. *Id.* (quoting *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 392 (1988)).

37. *See* *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) (holding plaintiff has standing to challenge campaign finance law even absent actual enforcement of the law because the fear of civil penalties may be sufficient to chill speech); *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (holding that plaintiffs have standing to challenge statute absent enforcement because the harm of chilled speech occurs even without actual prosecution); *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972) (holding that constitutional violations can occur based on the chilling effect a regulation may have on speech, even absent actual enforcement).

38. *Zelotes*, 352 B.R. at 21.

the statute, they are not required to comply with these sections, and thus their First Amendment rights are not violated.

Relying on the plain language of the Bankruptcy Code does not provide a clear answer to this inquiry. One bankruptcy court left to sort out congressional intent opined, “while the experts who drafted BAPCPA are entitled to a failing grade in Legislative Drafting, 101, the Court is left to determine what Congress intended.”³⁹ Section 101(12A) of the Bankruptcy Code, which defines the term “debt relief agency,” does not include any reference to attorneys.⁴⁰ The definition states, “The term ‘debt relief agency’ means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110”⁴¹

Additionally, section 526 of the Bankruptcy Code is entitled “Restrictions on Debt Relief Agencies,” and makes no specific mention of attorneys.⁴² Section 527 is entitled “Disclosures” and specifically applies to “Debt Relief Agencies,” but also make no specific reference to whether this term includes attorneys.⁴³ The somewhat ambiguous and confusing statutory language has led to a split among bankruptcy courts in deciding whether or not attorneys are subject to these BAPCPA provisions.

The first bankruptcy court to address this issue, in an opinion released October 17, 2005, the day the BAPCPA amendments became effective, chose to avoid the First Amendment inquiry altogether by holding that attorneys are not included within the meaning of the term “debt relief agency,” and are thus not required to comply with these provisions.⁴⁴ On its own motion, the United States Bankruptcy Court for the Southern District of Georgia in the case *In Re Attorneys at Law* raised the issue of whether the BAPCPA amendments “regulating Debt Relief Agencies apply to attorneys licensed to practice law.”⁴⁵ Relying mainly on the plain language of the statute, the court held that attorneys are not included in the term “debt relief agencies,” and are thus not subject to these provisions.⁴⁶

39. *In re Reyes*, 361 B.R. 276, 279 (Bankr. S.D. Fla. 2007).

40. 11 U.S.C. § 101(12A) (2006).

41. *Id.*

42. 11 U.S.C. § 526 (2006).

43. 11 U.S.C. § 527 (2006).

44. *In re Attorneys at Law*, 332 B.R. 66, 71 (Bankr. S.D. Ga. 2005).

45. *Id.* at 67.

46. *Id.* at 67-69.

The court noted that the term “attorney” or “lawyer” does not appear in the sections that refer to debt relief agencies.⁴⁷ Rather, these sections refer to “bankruptcy petition preparer” which is specifically defined in section 110 of the act as “a person other than an attorney for the debtor . . . who prepares for compensation a document for filing.”⁴⁸ The court then reasoned that, “because the definition of ‘debt relief agency’ omits express reference to attorneys and includes a term which excludes attorneys, it is difficult to imagine that Congress meant otherwise.”⁴⁹ However, the court failed to mention that while the definition of debt relief agency includes reference to “bankruptcy petition preparer,” which by definition excludes attorneys, it also includes, “any person who provides any bankruptcy assistance to an assisted person . . . ,” a statement that could certainly apply to attorneys.⁵⁰

The court also noted that BAPCPA requires debt relief agencies to inform assisted persons of their right to an attorney, and argued that it is “hard to imagine” that Congress intended to require attorneys to inform assisted persons of their right to an attorney.⁵¹ The court concluded, based on the plain language, that Congress intended to regulate those individuals and businesses who aim to assist persons in filing bankruptcy, but are not licensed attorneys.⁵²

In January 2007, the United States Bankruptcy Court for the Southern District of Florida issued an opinion also stating that attorneys in general are not subject to the provisions, and, in particular, attorneys who provide pro bono bankruptcy assistance are not included with the term “debt relief agency.”⁵³ The attorney in this case provided pro bono representation to the debtor, and the debtor sought a determination by the court as to whether counsel fell within the meaning of “debt relief agency.”⁵⁴

Relying on principles of constitutional avoidance, the court held that further constitutional inquiry is unnecessary because the challenged sections do not apply to attorneys.⁵⁵ The opinion briefly notes that “the Court does not believe Congress intended the scope of the statute to include attorneys. If Congress wanted ‘attorney’ included in the definition, it could

47. *Id.* at 69.

48. 11 U.S.C. § 110(a)(1) (2006).

49. *Attorneys at Law*, 332 B.R. at 69.

50. 11 U.S.C. § 101(12A) (2006).

51. *Attorneys at Law*, 332 B.R. at 70.

52. *Id.* at 69-71.

53. *Reyes*, 361 B.R. at 280.

54. *Id.* at 278-79.

55. *Id.* at 280.

have accomplished [the] same by adding the word to 11 U.S.C. § 101 (12A).”⁵⁶ The court applied greater analysis to whether attorneys providing pro bono bankruptcy assistance in particular are subject to the BAPCPA provisions that apply to debt relief agencies, and determined they are not.⁵⁷

The court relied on the portion of the definition of debt relief agency that states, “in return for the payment of money or other valuable consideration.”⁵⁸ Because an attorney providing pro bono assistance receives no money in return for her services, the court held that pro bono bankruptcy attorneys are not required to comply with sections 526, 527, and 538 of the Bankruptcy Code.⁵⁹ The court further held that even in cases where the attorney reports the pro bono hours to the bar association, the attorney is still not a “debt relief agency” because this act does not constitute “valuable consideration” within the meaning of the statute.⁶⁰

Other bankruptcy courts addressing the issue have reached the opposite conclusion, holding that attorneys are indeed included within the meaning of debt relief agency under BAPCPA and are subject to the challenged provisions.⁶¹ In *Hersh v. United States*, decided in July 2006, the plaintiff sought declaratory judgment that she, as an attorney, is not a debt relief agency.⁶² The court in *Hersh*, however, held that attorneys are included within the meaning of debt relief agency under BAPCPA.⁶³

The *Hersh* court held that the plain meaning of the statute leads to a reading of the term “debt relief agency” as including attorneys because debt relief agencies are defined as “providing legal advice” and “only attorneys are authorized to provide legal advice.”⁶⁴ Additionally, the court noted that section 101(12A) includes five specific exceptions that do not fall within the meaning of “debt relief agency,” and “attorney” is not among them.⁶⁵ The *Hersh* court reasoned that if Congress intended to explicitly exclude attorneys, they would have included attorneys among the enumerated exceptions.⁶⁶

56. *Id.*

57. *Id.*

58. *Id.* at 280.

59. *In re Reyes*, 361 B.R. 276, 281 (Bankr. S.D. Fla. 2007).

60. *Id.*

61. *See Hersh v. United States*, 347 B.R. 19, 19 (N.D. Tex. 2006); *Olsen v. Gonzales*, 350 B.R. 906, 906 (Bankr. D. Or. 2006).

62. *Hersh*, 347 B.R. at 21.

63. *Id.* at 22.

64. *Id.* at 22-23.

65. *Id.* at 22.

66. *Id.* at 23.

Also, the disclosure requirements in section 527 include statements that specifically apply to attorneys. For example, debt relief agencies must issue a disclosure statement informing debtors that the law requires bankruptcy petition preparers and attorneys to give the debtor a written contract.⁶⁷ It seems clear from this statement that these provisions were intended to encompass both bankruptcy petition preparers and attorneys.

The *Olsen* court in also held that attorneys qualify as debt relief agencies under BAPCPA.⁶⁸ The court in *Olsen* discussed the *In re Attorneys at Law* decision at length, and concluded that although the reasoning in that case is sound, analysis of legislative history points to a finding that attorneys are included within the meaning of debt relief agency.⁶⁹ The court pointed to two specific portions of the legislative history that lead to the conclusion that Congress specifically intended attorneys to be subject to these provisions.⁷⁰

First, the congressional notes state: “The bill’s consumer protections include provisions strengthening professional standards for attorneys and others who assist consumer debtors with their bankruptcy cases.”⁷¹ In addition, the *Olsen* court noted that prior to the congressional vote on BAPCPA, Senator Feingold (D-Wisconsin) proposed an amendment that would have specifically excluded attorneys from the term “debt relief agency,” and Congress chose not to incorporate this amendment into the final act.⁷²

The text of the statute itself is not conclusive, and may even be confusing. Additionally, the conflicting district court findings on the issue leave bankruptcy attorneys uncertain as to whether they are truly required to comply with these BAPCPA provisions. However, when an analysis of the text of the statute is combined with relevant sources of the legislative history, as noted by the *Olsen* court, it becomes clear that Congress intended to regulate attorneys under the provisions of BAPCPA that apply to debt relief agencies. After determining that attorneys are subject to the provisions of these sections of the code, an inquiry must be made into the substance of these provisions and whether they constitute a violation of an attorney’s First Amendment rights.

67. 11 U.S.C. § 527(b) (2006).

68. *Olsen*, 350 B.R. at 912.

69. *Id.*

70. *Id.*

71. *Id.* (quoting H.R. REP. NO. 109-31, pt 1, at 1 (2005)).

72. *Id.* at 912.

IV. Do the Provisions Violate Attorneys' Rights to Free Speech?

The provisions of the code regulating debt relief agencies, including attorneys, have been challenged as both unconstitutionally restricting, as well as unconstitutionally compelling speech. With regard to speech, the First Amendment reads, "Congress shall make no law . . . abridging the freedom of speech . . ." ⁷³ The Supreme Court has interpreted the freedom of speech to encompass both "the right to speak freely and the right to refrain from speaking at all." ⁷⁴ Attorneys challenging these BAPCPA sections argue that they compel them to make statements that may be contrary to their interests, and restrict their speech such that they are unable to properly advise clients.

A. Section 527 Does Not Violate the First Amendment

Attorneys have challenged section 527 as unconstitutionally compelling attorney speech because it requires debt relief agencies to make certain written disclosures to clients seeking debt relief assistance. Attorneys, as debt relief agencies under BAPCPA, are required to supply debtors with a copy of the following written notice:

If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the Contract before you hire anyone. ⁷⁵

The required disclosure statement goes on to detail the debtors' rights and responsibilities should they decide to file for either Chapter 7 or Chapter 13 relief, including how to complete bankruptcy schedules, and how to value assets, among others. ⁷⁶ These disclosure requirements are being challenged as unconstitutionally compelling speech by attorneys who feel the disclosures require them to make statements that are contrary to

73. U.S. CONST. amend. I.

74. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

75. 11 U.S.C. § 527(b) (2006).

76. *Id.*

their interests and may prevent potential debtors from receiving beneficial attorney assistance.

It seems unlikely, however, that the Supreme Court would or should find these BAPCPA provisions to be a violation of attorneys' free speech rights. The Court has previously considered the constitutionality of statutes regulating other professions in a similar manner. In *Riley v. National Federation of the Blind of North Carolina*, the Supreme Court considered the constitutionality of portions of a North Carolina statute regulating charitable fundraisers.⁷⁷ The Court struck down the portion of that statute outlining what constitutes a reasonable fundraising fee as violating free speech because it was not narrowly tailored to achieve a compelling government purpose.⁷⁸

Applying an undue burden analysis, the *Riley* Court also struck down portions of the same statute requiring professional fundraisers to "disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity."⁷⁹ The *Riley* Court noted that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" invoking constitutional scrutiny.⁸⁰ The Court went on to note that compelled statements of fact are no less subject to scrutiny than compelled statements of opinion.⁸¹ The Court held that these provisions were not narrowly tailored, that they constituted a substantial burden to fundraisers, and that other, less burdensome, more efficient means for combating fraud were available.⁸² The court noted, however, that preventing fraud is a compelling government interest, and that requiring professionals to make certain disclosures is not necessarily unconstitutional, but that "the First Amendment does not permit the state to sacrifice speech for efficiency."⁸³

The *Hersh* court also noted, "as members of a licensed profession, attorneys and other professionals are subject to regulation of their professional activities by the state, which may extend to speech."⁸⁴ *Hersh* analyzed section 527 using the "undue burden" standard applied in both *Riley* and in *Planned Parenthood v. Casey*, a 1992 case upholding a

77. *Riley v. Nat'l. Fed'n of the Blind*, 487 U.S. 781 (1988).

78. *Id.* at 791.

79. *Riley*, 487 U.S. at 795.

80. *Id.*

81. *Id.* at 796.

82. *Riley*, 487 U.S. at 795.

83. *Id.*

84. *Hersh v. United States*, 347 B.R. 19, 26 (Bankr. N.D. Tex. 2006).

Pennsylvania law requiring doctors to provide women seeking abortions with information about the procedure, including its risks.⁸⁵ In *Casey*, the Court held that the requirements did not violate the free speech of doctors because it did not represent an “undue burden” on the doctors providing the information, and also did not create a “substantial obstacle” to patients seeking abortions.⁸⁶

The *Hersh* court went on to hold that “section 527 advances a sufficiently compelling government interest and does not unduly burden either the attorney-client relationship or the ability of a client to seek bankruptcy.”⁸⁷ The expressed congressional intent in passing BAPCPA was to combat consumer abuses of the bankruptcy system, and the requirements of section 527 are intended to ensure that consumers are able to make fully informed decisions about entering into bankruptcy.⁸⁸ *Hersh* argued that the government interest was compelling because among “attorneys[] and their debtor clients, the consumer debtor is often at an informational disadvantage,” and that the compelled disclosures did not present a significant burden on attorneys.⁸⁹ *Hersh* distinguished *Riley* by noting that in *Riley* “the compelled disclosure will almost certainly hamper the legitimate efforts of professional fundraisers” and the provision “discriminates against small or unpopular charities.”⁹⁰ In comparison, *Hersh* states, of section 527, “the factual, viewpoint-neutral statement provides a sufficiently benign and narrow means of ensuring that clients are aware of certain general information regarding bankruptcy.”⁹¹

The court in *Olsen* largely followed the reasoning in *Hersh* in finding that section 527 does not unconstitutionally compel speech.⁹² The plaintiffs in *Olsen* argued that the required disclosures regarding the availability of non-attorney assistance amount to “disclosure of an opponent’s viewpoint.”⁹³ The court noted, however, that while attorneys are required to make the disclosures, nothing prevents them from also advising their clients as to “why a licensed attorney is beneficial.”⁹⁴

85. *Id.* at 27; *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

86. *Casey*, 505 U.S. at 883.

87. *Hersh*, 347 B.R. at 27.

88. *Id.*

89. *Id.*

90. *Id.* at 26 (quoting *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 799-800 (1988)).

91. *Id.* at 27.

92. *Olsen v. Gonzales*, 350 B.R. 906, 918 (Bankr. D. Or. 2006).

93. *Id.*

94. *Id.* at 919.

The requirements of section 527, while possibly cumbersome for some attorneys, pass constitutional scrutiny under an undue burden test. The required disclosures further a compelling government interest in providing important information to debtors; they do so in a manner that is not unduly burdensome to attorneys and do not prevent debtors from receiving needed assistance. This section of BAPCPA is constitutional, and should be upheld.

B. Section 528(b)(2) Unconstitutionally Compels Attorney Speech

The requirements of section 528, which regulates the advertising of debt relief agencies and provides for certain disclosure statements to be made in conjunction with all advertisements, are also subject to constitutional scrutiny.⁹⁵ Debt relief agencies are required to state in all advertisements, “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code,” or “a substantially similar statement.”⁹⁶ Additionally, any advertising “directed to the general public,” must “disclose clearly and conspicuously in such advertisement that the assistance may involve bankruptcy relief.”⁹⁷ Bankruptcy courts are split as to whether these required statements constitute a First Amendment violation.

The plaintiffs in *Olsen* argued that while they advise clients in bankruptcy matters, they do not help clients to file for bankruptcy, and therefore following the provisions of section 528 would require them to make an untrue statement.⁹⁸ The *Olsen* court conceded that this statement would be untrue in regard to plaintiffs, but stated that, “section 528 does not appear to violate the constitution in a facial challenge.”⁹⁹ The court argued that there is no apparent standard for judging compelled commercial speech, but using standards in several previous holdings found that there is no violation here.¹⁰⁰

Olsen looked to the “four-prong intermediate scrutiny test” for commercial speech first announced in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*.¹⁰¹ The first prong requires that the speech in question is protected commercial speech under

95. 11 U.S.C. § 528 (2006).

96. 11 U.S.C. § 528(b)(2)(B) (2006).

97. *Id.*

98. *Olsen*, 350 B.R. at 919.

99. *Id.*

100. *Id.* at 919-920.

101. *Id.* at 919 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)).

the Constitution; the second prong requires the government to have a substantial interest.¹⁰² If both of these prongs are satisfied, the third and fourth prongs look to whether the statute is narrowly drawn and advances that substantial government interest.¹⁰³

The *Olsen* court found that the first prong of *Central Hudson* is easily satisfied because the regulations involve commercial advertising statements that are neither illegal nor misleading.¹⁰⁴ In analyzing the second prong, the court looked to the legislative history of section 528, and noted that Congress's intent in enacting this section was to "[p]revent deceptive advertising practices."¹⁰⁵ The court thus concluded that the second prong is satisfied because "[p]reventing fraud is a substantial interest."¹⁰⁶ Under the third and fourth prongs of *Central Hudson*, section 528 must advance the stated government interest of preventing fraud in advertising for bankruptcy assistance services and must be narrowly drawn in achieving this goal. The court concluded that the interest is furthered by the required advertising statements because it "gives consumers more accurate information to better determine what type of debt relief agency they may require."¹⁰⁷ The fourth prong requiring that the statute be narrowly drawn was satisfied, according to *Olsen*, because "[t]he challenged provisions only require debt relief agencies to insert a two-line admonition into certain advertisements," and "generally applies to most consumer bankruptcy attorneys while generally not applying to non-consumer bankruptcy attorneys."¹⁰⁸

The *Olsen* court then noted that the Supreme Court has, in other cases, applied a rational basis test¹⁰⁹ or a strict scrutiny test in cases concerning commercial speech.¹¹⁰ The *Olsen* court concluded, however, that under strict scrutiny, rational basis, or an intermediate scrutiny test, "the regulation passes constitutional muster."¹¹¹ The court notes that the required advertisement statements are short and not cumbersome, and that although they are untrue in the case of the plaintiff, the plaintiff could

102. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

103. *Id.*

104. *Olsen*, 350 B.R. at 919.

105. *Id.* at 920 (quoting 151 CONG. REC. H2063-01, 2066 (2005)).

106. *Olsen*, 350 B.R. at 920.

107. *Id.*

108. *Id.* at 921.

109. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

110. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 801 (1988).

111. *Olsen*, 350 B.R. at 920.

easily “add details to his advertisements such as he does not actually file petitions.”¹¹²

In a December 2006 decision, the Bankruptcy Court for the District of Minnesota denied the government’s motion to dismiss the plaintiffs challenge to section 528.¹¹³ The court in *Milavetz v. United States* also looked to the four-prong test in *Central Hudson* as the standard for regulations on “non-deceptive advertising.”¹¹⁴ In *Milavetz*, the government argued that a less stringent rational basis review is called for because the BAPCPA regulations actually apply to deceptive advertising.¹¹⁵ The government argued that prior to BAPCPA, “some bankruptcy lawyers did not mention in their advertisements that their ability to make ‘debts disappear’ derived from the use of the bankruptcy process.”¹¹⁶ The court concluded, however, that there was no evidence that bankruptcy assistance advertisements had been deceptive in any regard, and that the intermediate scrutiny standard of *Central Hudson* should apply.¹¹⁷

In applying *Central Hudson*, the court concluded that the government does not have a legitimate compelling interest in combating fraud in advertising for bankruptcy assistance, remarking, “[s]etting aside the implausibility of anyone actually believing in a magic wand capable of making debt go away, it is most unlikely that the insertion of the [required] statement . . . prevents consumer deception; it may well increase it.”¹¹⁸ The court also noted that the requirement that both bankruptcy attorneys and non-attorneys providing bankruptcy assistance use identical language may further increase consumer confusion.¹¹⁹ Additionally, *Milavetz* concluded that section 528 fails the fourth prong of *Central Hudson*, which requires the statute to be narrowly drawn because it applies to anyone offering bankruptcy services, not just those with misleading advertisements.¹²⁰ The court opines that this section “broadly regulates absolutely truthful advertisements throughout an entire field of legal practice,” and that “[t]he government . . . failed to show that this restriction on attorneys’ commercial speech is justified.”¹²¹

112. *Id.* at 919.

113. *Milavetz v. United States*, 355 B.R. 758, 769 (Bankr. D. Minn. 2006).

114. *Id.* at 766.

115. *Id.*

116. *Milavetz*, 355 B.R. at 766.

117. *Id.* at 767.

118. *Milavetz*, 355 B.R. at 767.

119. *Id.*

120. *Id.*

121. *Id.*

Section 528 is intended to combat fraud, which may constitute a compelling government interest where the threat of fraud is real and imminent. However, as the *Milavetz* court noted, the threat of fraud here is not imminent, and the statute is not narrowly tailored to achieve this purpose.¹²² Therefore, section 528 does not pass constitutional scrutiny and should be struck down.

C. Section 526(a)(4) Violates the First Amendment

Section 526(a)(4) includes the most blatant and problematic constitutional violations in BAPCPA. The pertinent section reads:

(a) A debt relief agency shall not . . . (4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.¹²³

In its July 2006 decision, the *Hersh* court was the first to rule this BAPCPA section unconstitutional.¹²⁴ The court considered two alternative tests to determine the constitutionality of the speech restrictions, and found section 526(a)(4) failed to pass constitutional muster under either test.¹²⁵ As *Hersh* noted, most restrictions on speech are subjected to strict constitutional scrutiny.¹²⁶ In order to withstand strict scrutiny, the regulation must be “(1) narrowly tailored to promote (2) a compelling government interest.”¹²⁷

The Supreme Court, in *United States v. Playboy Entertainment Group*, considered the constitutionality of restrictions on broadcasting of certain programming via cable television.¹²⁸ The Court held unequivocally, “as we consider a content-based regulation the answer should be clear: The standard is strict scrutiny.”¹²⁹ Here, section 526(a)(4), in restricting attorney speech based on content, clearly falls into this category.

122. *Id.*

123. 11 U.S.C. § 526 (a)(4) (2006).

124. *Hersh v. United States*, 347 B.R. 19, 27 (Bankr. N.D. Tex. 2006).

125. *Id.* at 25.

126. *Id.* at 24.

127. *Id.* (citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000)).

128. *Playboy*, 529 U.S. at 811.

129. *Id.* at 814.

Nevertheless, the government argued in *Hersh* that section 526(a)(4) constitutes an ethical regulation and is subject to a lesser level of scrutiny.¹³⁰ The government based its argument on a balancing test used in *Gentile v. State Bar of Nevada*, which considered a statute regulating statements to the press by attorneys representing criminal defendants.¹³¹ In *Gentile*, the Court employed a balancing test and determined that the statute achieved a “constitutionally permissible balance” because it “served the State’s legitimate interest” and “impose[d] only narrow and necessary limitations.”¹³²

Hersh noted, however, that both strict scrutiny and the balancing test employed in *Gentile* require that the statute be narrowly drawn in advancing the government’s interest.¹³³ In analyzing whether or not section 526(a)(4) is sufficiently narrow under either strict scrutiny or a balancing test, the *Hersh* court held that it is not.¹³⁴ The compelling interest the government sought to advance with section 526(a)(4), as articulated in *Hersh*, was “to end the manipulation of the system by certain filers who took on additional debt prior to bankruptcy.”¹³⁵ Section 526(a)(4), however, hardly seems narrowly tailored to effectuate this stated purpose.

The *Hersh* court noted that the speech banned in section 526(a)(4) prevents attorneys from “advising clients to take actions that are lawful, even under BAPCPA.”¹³⁶ The court went on to list several situations where taking on additional debt may be not only lawful, but beneficial, including “refinancing at a lower rate to reduce payments and forestall or even prevent entering bankruptcy,” and “taking on secured debt such as [a] loan on an automobile that would survive bankruptcy and also enable the debtor to continue to get to work and make payments.”¹³⁷ Section 526(a)(4), in prohibiting attorneys from advising clients to take on debt, is overly inclusive because it “prevents lawyers from advising clients to take lawful actions” and “it extends beyond abuse to prevent advice to take prudent actions.”¹³⁸ The court held that this is far more than what is “narrow and necessary” even under the *Gentile* balancing test.¹³⁹

130. *Hersh*, 347 B.R. at 24.

131. *Id.* (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991)).

132. *Gentile*, 501 U.S. at 1075.

133. *Hersh*, 347 B.R. at 24.

134. *Id.* at 25.

135. *Id.* at 24.

136. *Hersh*, 347 B.R. at 24.

137. *Id.*

138. *Id.* at 25.

139. *Id.*

In its August 2006 decision, the court in *Olsen* largely followed *Hersh* in finding section 526(a)(4) unconstitutional.¹⁴⁰ *Olsen* reiterated that the restrictions of section 526 prevent attorneys from providing clients with the best advice because they cannot advise debtors to take on additional debt even though “sometimes taking on more debt could be the most financially prudent option.”¹⁴¹ The *Olsen* court found that the restrictions of this section are not narrowly tailored to prevent abuse of the system, as required under either strict scrutiny or a balancing test, because “it also ensnares advice regarding lawful actions.”¹⁴²

In *Zelotes*, the court also found section 526(a)(4) facially unconstitutional under either strict scrutiny or the *Gentile* balancing test.¹⁴³ The *Zelotes* court also noted that other less restrictive means may be available to address the government’s concerns about debtor fraud, including “eliminating the incentives for opportunistic action or enacting penalties for those who take on such debt prior to filing for bankruptcy”¹⁴⁴

In the most recent case to come to a conclusion on the constitutionality of section 526(a)(4), the *Milavetz* court in December 2006, also found this section facially unconstitutional.¹⁴⁵ The *Milavetz* court found that 526(a)(4) is a content based restriction and therefore applied a strict scrutiny standard of review.¹⁴⁶ In *Milavetz*, the government argued that it had a compelling interest in “deterring debtors from ‘gaming’ the means test by improperly enlarging pre-existing debt . . . protect[ing] debtors from attorneys who might lead them to abusive practices . . . [and] protect[ing] the integrity of the bankruptcy system.”¹⁴⁷ The *Milavetz* court found, however, much like the courts in *Hersh*, *Olsen*, and *Zelotes*, that even if the government has a compelling interest at stake, 526(a)(4) is not narrowly tailored to effectuate this interest.¹⁴⁸

The government in *Milavetz* attempted to argue that section 526(a)(4) is in fact narrowly tailored because “it does not limit more speech than is necessary to accomplish this purpose.”¹⁴⁹ The court categorically rejected

140. *Olsen v. Gonzales*, 350 B.R. 906, 916 (Bankr. D. Or. 2006).

141. *Id.*

142. *Id.*

143. *Zelotes v. Martini*, 352 B.R. 17, 22 (Bankr. D. Conn. 2006).

144. *Id.* at 24.

145. *Milavetz v. United States*, 355 B.R. 758, 766 (Bankr. D. Minn. 2006).

146. *Id.* at 764.

147. *Id.* at 765.

148. *Id.*

149. *Id.*

the government's argument, stating, "[a]ttorneys have a First Amendment right—let alone an established professional ethical duty—to advise and zealously represent their clients."¹⁵⁰ The court opined that this section prevents attorneys from properly advising clients as to the best course of action.¹⁵¹

By prohibiting attorneys from advising their clients to take these legal actions, section 526(a)(4) prevents attorneys from providing debtors with the best possible assistance. Forcing attorneys to comply with this provision not only fails to further the government's interests, it may even thwart them. In enacting BAPCPA, the government sought to combat a "generally consistent upward trend" in the number of bankruptcy filings which resulted in "adverse financial consequences for our nation's economy."¹⁵² However, this section, by prohibiting attorneys from advising debtors to take actions that may in fact prevent them from requiring bankruptcy protection, is inconsistent with this stated goal.

V. Conclusion

When Congress passed BAPCPA, it did so with the intent of reducing abuses of a bankruptcy system that had largely been unchanged for more than twenty years. There can be little doubt that the aging Bankruptcy Code was ripe for revision, and that many of Congress' concerns were well founded. However, the resulting final BAPCPA legislation, the product of years of congressional compromises, includes several ambiguous and constitutionally questionable sections that have left the courts fraught with BAPCPA litigation.

In particular, the BAPCPA provisions applying to debt relief agencies have led to confusion. The many cases challenging these provisions that have already made their way through the courts have resulted in circuit splits that only serve to further confuse the issue. The First Amendment implications of these provisions require courts to consider the potential chilling effects on attorney speech, even absent actual enforcement. Attorneys have standing to bring cases challenging these provisions because of these potential chilling effects and courts should allow these cases to be heard in order to reach a decision on the merits.

Additionally, although the provisions are ambiguous on their face, when statutory language is considered in combination with the legislative history, it is clear that Congress intended the term debt relief agency to

150. *Id.* (citing *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 548-549 (2001))

151. *Id.* at 765.

152. H.R. REP. NO. 109-31, pt. 1, at 3-4 (2005).

include attorneys providing bankruptcy assistance. Since Congress intended for attorneys to comply with these provisions, and attorneys have standing to challenge them, it is imperative that courts reach some cohesive conclusion as to their constitutionality.

The disclosure requirements of section 527 do not violate attorneys' free speech rights because they further a compelling government interest in a manner that is not overly burdensome for attorneys. The required statements are short, factual, and attorneys are permitted to add information to clarify what services they offer. Therefore, section 527 is constitutional and should be upheld.

Conversely, the advertising disclosure requirements of section 528(b)(2) unconstitutionally compel speech because the purported government interest they serve is not compelling or imminent, and the requirements are not narrowly tailored to achieve that supposed purpose. Section 528(b)(2) should be struck down as unconstitutional.

Finally, and most alarmingly, section 526(a)(4) unconstitutionally limits speech to the detriment of attorneys and debtors alike. Prohibiting attorneys from advising clients to take on additional debt fails either strict or intermediate scrutiny because it is not narrowly tailored to achieve the government's goals. Section 526(a)(4) may in fact thwart the government's purported goals by prohibiting attorneys from advising clients to take lawful actions that may in fact prevent them from needing to seek bankruptcy protection. Section 526(a)(4) thus constitutes a flagrant violation of the First Amendment and courts should strike it down.

Until these issues are resolved and the unconstitutional provisions stricken, attorneys are left unable to provide their debtor clients with the best possible assistance without fear of prosecution. Furthermore, debtors may not receive complete information regarding their options in reducing the impacts of bankruptcy or avoiding the need to file altogether. As appeals on these decisions continue to make their way through the court system, it is imperative that the Supreme Court consider these issues at the first opportunity in order to clear up confusion and strike down the unconstitutional BAPCPA provisions.