UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

In re:

ATTORNEYS AT LAW AND DEBT RELIEF AGENCIES

District Court Case No. 4:05-cv-00206-WTM

Docketed in Bankruptcy Court as Miscellaneous Proceeding No. 05-00400

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FELICIA S. TURNER,
UNITED STATES TRUSTEE,

Appellant.

______________________________/

BRIEF OF UNITED STATES TRUSTEE AS APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES....................ii

INTRODUCTION AND STATEMENT OF BASIS FOR APPELLATE JURISDICTION 1

STATEMENT OF THE ISSUES....................3

STANDARDS OF REVIEW....................3

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY 3

II. THE STATUTORY AND LEGISLATIVE BACKGROUND 4

SUMMARY OF THE ARGUMENT 5

ARGUMENT

I. THE BANKRUPTCY COURT LACKED JURISDICTION UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION BECAUSE THERE WAS NO "CASE OR CONTROVERSY." THE BANKRUPTCY COURT HAD NO CASE OR PROCEEDING BEFORE IT, AND NO PARTIES WITH STANDING SOUGHT JUDICIAL RELIEF FROM THE BANKRUPTCY COURT 6

II. ALTERNATIVELY, THE BANKRUPTCY COURT LACKED BOTH JURISDICTION AND POWER TO ENTER THE ORDER UNDER SECTIONS 151 AND 157 OF TITLE 28 8

1. The Bankruptcy Court Lacked Jurisdiction Under Section 157 of Title 28 8
2. The Bankruptcy Court Lacked Power to Enter the Order Under Section 151 of Title 28....................9

III. THE BANKRUPTCY COURT'S RULING THAT THE PROVISIONS OF THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 REGULATING DEBT RELIEF AGENCIES DO NOT APPLY TO LICENSED ATTORNEYS WAS INCORRECT AS A MATTER OF LAW 10

1. Statutory Framework – The Debt Relief Agency Provisions 11

2. The Bankruptcy Court's Interpretation of the Provisions Regarding Debt Relief Agencies Was Erroneous 13

CONCLUSION...20

ADDENDUM..21

TABLE OF AUTHORITIES

FEDERAL CASES

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937) 6, 7

Arizonans for Official English and Robert D. Park v. Arizona, 520 U.S. 43, 73 (1997) 2, 8

In re BellSouth Corp., 334 F.3d 941 (11th Cir. 2003) 2

Crossley v. Lieberman, 868 F.2d 566 (3rd Cir. 1989) 19

Dixie Electric Co-op. v. Citizens of the State of Alabama, 789 F.2d 852 (11th Cir. 1986) 7

In re Evans, 524 F.2d 1004 (5th Cir.1975) 2

In re Goerg, 930 F.2d 1563, 1565 (11th Cir. 1991) 6

K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) 15

In re Lemco Gypsum, Inc., 910 F.2d 784, 787 (11th Cir. 1990) 6

New York v. United States, 505 U.S. 144 (1992) 19

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60-61 (1982) . . 6

Printz v. United States, 521 U.S. 898 (1997) 19

Reserve Mining Co. v. Lord, 529 F.2d 181, 185 (8th Cir. 1976) 10

Steel Co. v. Citizens For A Better Environment, 523 U.S. 83 (1998) 2, 8

In re Sublett, 895 F.2d 1381 (11th Cir. 1990) 3

United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.), 33 F.3d 294 (3d Cir. 1994) 1

United States v. Corrick, 298 U.S. 435 (1936) 2, 8

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) 7

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. I, sec. 8 19

U.S. Const., Art. III, sec. 2 6

FEDERAL STATUTES

11 U.S.C. § 101(3) 4, 11,

11 U.S.C. §§ 101(4A) 1, 11, 13, 15

11 U.S.C. §§ 101(12A) 1, 11, 15, 16, 19

11 U.S.C. §§ 110(a) 11

11 U.S.C. § 105 10

11 U.S.C. § 307 1

11 U.S.C. § 526 . . . . . . 1, 4, 5, 10, 11, 12, 15

11 U.S.C. § 527 . . . . . . 1, 4, 5, 11, 12, 13, 15, 16, 527

11 U.S.C. § 528 . . . . . . 1, 4, 5, 11, 12, 13, 15

15 U.S.C. §§ 1651 2

15 U.S.C. § 7245 19

28 U.S.C. 151 . . . . . . 3, 5, 6, 8, 9

28 U.S.C. § 157 . . . . . . 5, 8, 9

28 U.S.C. § 158 2

28 U.S.C. § 586 1

28 U.S.C. § 1334 8

28 U.S.C. §§ 1601 *et seq* 19

28 U.S.C. § 11692a(6) 19

FEDERAL RULES

Fed. R. Bankr. P. 1001 10

Fed. R. Bankr. P. 17001 10

Fed. R. Bankr. P. 8013 3

Fed. R. Bankr. P. 9014 10

MISCELLANEOUS

151 Cong Rec. S2306 (daily ed. Mar. 09, 2005) 18

INTRODUCTION AND STATEMENT OF BASIS FOR APPELLATE JURISDICTION

The United States Trustee appeals an order of the United States Bankruptcy Court for the Southern District of Georgia (the "Bankruptcy Court") issued on October 17, 2005 (the "Order"). The United States Trustee is an official of the United States Department of Justice that must administer and enforce the Bankruptcy Code. *See* 11 U.S.C. § 307 (United States Trustee has standing to "raise . . . any issue in any case or proceeding" under Bankruptcy Code); 28 U.S.C. § 586 (setting forth many duties of United States Trustee); *United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.)*, 33 F.3d 294, 295-299 (3d Cir. 1994).

The Order interprets certain provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 that define and regulate "debt relief agencies." *See* 11 U.S.C. §§ 526-528.[1] The Bankruptcy Court ruled that these provisions, which became effective on the date the Bankruptcy Court issued the Order, do not apply to attorneys and that attorneys admitted to practice before the Bankruptcy Court are "excused from compliance" with them. Order at 9. The Bankruptcy Court so ruled even though the statutory definition of "debt relief agencies" includes persons that provide "legal representation" in bankruptcy proceedings. *See* 11 U.S.C. §§ 101(12A),[2] 101(4A). The Order plainly undermines the enforcement of the Bankruptcy Code (and undermines the United States Trustee's ability to assist with such enforcement) because it

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[1] The full text of these sections is set forth in the attached Addendum.

[2] The full text of § 101(12A) is likewise set forth in the Addendum.

purports to render these new statutory provisions inoperative in the Southern District of Georgia as applicable to attorneys.

The Order is final in the sense that it disposes of all issues raised by the Bankruptcy Court. *See* Order at 4, n.1. This Court therefore has appellate jurisdiction to review the Order under section 158(a) of title 28.[3] As explained more extensively in the body of the brief, however, the Bankruptcy Court lacked both Article III and statutory jurisdiction to issue the order *sua sponte* due to the absence of a live case or controversy between actual parties. The United States Trustee therefore believes that this Court should vacate the Order for lack of jurisdiction and need not address the merits of the Order in this appeal. *See United States v. Corrick*, 298 U.S. 435, 440 (1936) (court had "jurisdiction on appeal, not of the merits, but merely for the purpose of correcting the error of the lower court in entertaining the suit" (footnotes omitted) (*quoted in Arizonans for Official English and Robert D. Park v. Arizona*, 520 U.S. 43, 73 (1997) (vacating with remand for dismissal for lack of case or controversy)). *See also Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 110 (1998) (vacating with remand for dismissal for lack of case or controversy).

In the event, however, that this Court deems it appropriate to reach the merits, the United States Trustee requests that this Court reverse the Bankruptcy Court and hold that the

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[3] If it did not have jurisdiction under section 158, this Court would have jurisdiction to review the Order under the authority of mandamus set forth in section 1651 of title 28, because the Bankruptcy Court plainly exceeded its jurisdiction in issuing the Order. See *In re BellSouth Corp.*, 334 F.3d 941 (11th Cir. 2003) (mandamus is extraordinary remedy that may be used to correct a "judicial usurpation of power" and "'confine a lower court to its jurisdiction'"), quoting *In re Evans*, 524 F.2d 1004, 1007 (5th Cir.1975).

Bankruptcy Court premised the Order on an erroneous construction of the statutory provisions regarding debt relief agencies.

STATEMENT OF THE ISSUES

The United States Trustee raises three issues on appeal:

1. Did the Bankruptcy Court lack jurisdiction to enter the Order based on the absence of a "case or controversy" under Article III of the United States Constitution?

2. Did the Bankruptcy Court lack authority under section 151 of title 28 to enter the Order because there was no properly commenced "action, suit or proceeding" pending before the Bankruptcy Court?

3. Assuming *arguendo* that the Bankruptcy Court properly exercised its jurisdiction, was it correct in ruling that the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 regulating debt relief agencies do not apply to licensed attorneys?

STANDARDS OF REVIEW

The standards of review on appeal are clearly erroneous as to findings of fact and *de novo* as to conclusions of law. *In re Sublett*, 895 F.2d 1381 (11th Cir. 1990); Fed. R. Bankr. P. 8013. This appeal raises only issues of law.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

As indicated above, the Bankruptcy Court issued the Order *sua sponte* on October 17, 2005, the date that the relevant provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCPA") took effect. There was no case or proceeding pending

in the Bankruptcy Court to which the Order related, and it consequently contained no case or docket number at the time the Bankruptcy Court issued it. The Bankruptcy Court posted the Order on its Internet web site and later docketed it as Miscellaneous Proceeding No. 05-00400. The United States Trustee filed a timely notice of appeal from the Order on October 27, 2005.

II. THE STATUTORY AND LEGISLATIVE BACKGROUND

The President signed the BAPCPA into law on April 20, 2005, and the bulk of its provisions became effective on October 17, 2005. This legislation constitutes the most extensive overhaul of the Bankruptcy Code since its enactment in 1978. As indicated by its title, the BAPCPA has two primary goals: the prevention of bankruptcy abuse and the protection of consumers involved in the bankruptcy process. The consumer protection provisions consist, *inter alia*, of enhanced disclosure requirements and other safeguards pertaining to reaffirmations of dischargeable debt by bankruptcy debtors, penalties for abusive practices by creditors, requirements for credit counseling and debtor education, and the provisions at issue in this appeal pertaining to debt relief agencies.

The requirements imposed on debt relief agencies are for the benefit of persons "whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000," 11 U.S.C. § 101(3), *i.e.*, persons of moderate and less than moderate means. These requirements are set forth in three new sections of the Bankruptcy Code: 526, 527 and 528. Section 526 prohibits debt relief agencies from: (i) misrepresenting to assisted persons the services to be provided to them or the risks attendant upon becoming a debtor; (ii) advising an assisted person to make untrue or misleading statements in bankruptcy filings; and (iii) advising

an assisted person to incur more debt in contemplation of filing bankruptcy or for the purpose of paying an attorney or bankruptcy petition preparer for bankruptcy services. It also provides that any waiver of rights under sections 526, 527 and 528 is unenforceable.

Section 527 requires debt relief agencies to provide assisted persons with certain information, notices and disclosures, including: (i) notice of the right to proceed *pro se*, hire an attorney or hire a bankruptcy petition preparer; (ii) information on how to complete the bankruptcy schedules, value assets and determine what property is exempt; and (iii) notice of the obligation of debtors to provide truthful and accurate information and the potential consequences of failing to do so.

Section 528 requires debt relief agencies to provide assisted persons a written contract explaining clearly and conspicuously the nature of services they will render, the amount of the fees or charges for such services, and the terms of payment. In addition, section 528 requires debt relief agencies to disclose in their advertising that they are debt relief agencies, that the assistance they provide may involve bankruptcy relief, and that they are in the business of helping people file for relief under the Bankruptcy Code.

SUMMARY OF THE ARGUMENT

This Court should vacate the Order because the Bankruptcy Court entered it in the absence of a case or controversy under Article III of the United States Constitution. Alternatively, the Bankruptcy Court lacked the power and jurisdiction to enter the Order under under sections 151 and 157 of title 28. Assuming *arguendo* that the Bankruptcy Court had

authority to enter the Order, the United States Trustee submits that this Court should reverse the Order as an erroneous interpretation of the statutes regarding debt relief agencies.

ARGUMENT

I. THE BANKRUPTCY COURT LACKED JURISDICTION UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION BECAUSE THERE WAS NO "CASE OR CONTROVERSY." THE BANKRUPTCY COURT HAD NO CASE OR PROCEEDING BEFORE IT, AND NO PARTIES WITH STANDING SOUGHT JUDICIAL RELIEF FROM THE BANKRUPTCY COURT.

"[I]t is well settled that the jurisdiction of the bankruptcy courts to hear cases related to bankruptcy is limited initially by statute and eventually by Article III." *In re Lemco Gypsum, Inc*., 910 F.2d 784, 787 (11th Cir. 1990). Although a bankruptcy court is not itself an Article III court, *see Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60-61 (1982), a bankruptcy court may exercise a judicial function as a "unit of the district court." *See* 11 U.S.C. § 151 ("In each judicial district, the bankruptcy judges . . . shall constitute a unit of the district court to be known as the bankruptcy court for that district."); *In re Goerg*, 930 F.2d 1563, 1565 (11th Cir. 1991) ("original jurisdiction over bankruptcy cases is vested in Article III courts and [] bankruptcy courts obtain jurisdiction only at the discretion of the district court"). Accordingly, bankruptcy courts are bound by the jurisdictional limitations of Article III.

The Bankruptcy Court's entry of the Order violates an essential premise of judicial power under the Constitution – judicial action is limited to cases and controversies. United States Constitution, Article III, section 2, cl. 1. As the United States Supreme Court stated in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937) (citations omitted):

> The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

See also Dixie Electric Co-op. v. Citizens of the State of Alabama, 789 F.2d 852, 857-58 (11th Cir. 1986) (federal court may not adjudicate potential issues that may arise). In summary, the dispute must call "for an adjudication of present right upon established facts." *Aetna*, *supra*, 300 U.S. at 242. By limiting the judicial role to such cases or controversies, brought by parties with standing, Article III thereby limits the judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

It is clear beyond peradventure that the Bankruptcy Court had no concrete case or controversy before it when it issued the Order. The Bankruptcy Court issued the Order on the very morning that the new federal statutes became effective, before a concrete dispute could even be brought to the Bankruptcy Court by parties having a stake in the interpretation of the statutes.

The Order also presents a pristine illustration of why standing is a crucial element of the “case or controversy” requirement of Article III. In the absence of any party possessing standing to request or contest the relief granted by the Bankruptcy Court, the Bankruptcy Court could neither address any alleged violations of the relevant statutes, nor consider the arguments for or against any particular interpretation of the relevant statutes as made by parties affected by the

outcome. The absence of any briefing meant the Bankruptcy Court below acted in a vacuum without the benefit of the views of the United States Trustee, who helps administer these statutes, affected debtors, whom Congress enacted the statutes to protect, or attorneys, whom Congress regulated by passing the statutes. Practically speaking, it was precipitous for the Bankruptcy Court to interpret these federal statutes this way. Constitutionally speaking, it lacked jurisdiction to enter an opinion with no case and no parties.

Due to the lack of a cognizable case or controversy below, the United States Trustee respectfully submits that this Court should exercise "jurisdiction on appeal, not of the merits, but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Corrick*, 298 U.S. 435, 440 (1936) (footnotes omitted) (*quoted in Arizonans for Official English and Robert D. Park v. Arizona*, 520 U.S. 43, 73 (1997) (vacating with remand for dismissal for lack of case or controversy). *See also Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 110 (1998) (vacating with remand for dismissal for lack of case or controversy). The United States Trustee, therefore, asks the Court to vacate the Order for lack of a case or controversy.

II. ALTERNATIVELY, THE BANKRUPTCY COURT LACKED BOTH JURISDICTION AND POWER TO ENTER THE ORDER UNDER SECTIONS 151 AND 157 OF TITLE 28.

Due to the absence of a case or controversy, this Court should vacate the Order and need not evaluate any other arguments raised in this brief. Nonetheless, the Order was also improper because the Bankruptcy Court lacked jurisdiction to enter the Order under section 157 of title 28 and lacked power to enter the Order under section 151 of title 28.

1. The Bankruptcy Court Lacked Jurisdiction Under Section 157 of Title 28.

The Bankruptcy Court derives its jurisdiction from the bankruptcy jurisdiction of the District Court. Section 1334(a) of title 28 provides that the district courts, except as set forth in subsection (b), "shall have original and exclusive jurisdiction *of all cases* under title 11." (Emphasis added). Subsection (b), in turn, provides that the district courts have "original but not exclusive jurisdiction *of all civil proceedings* arising under title 11, or arising in or related to cases under title 11." (Emphasis added). A bankruptcy court's jurisdiction is then based on the referral of such cases and proceedings from the district court to the bankruptcy court pursuant to section 157 of title 28: "Each district court may provide that any or all *cases* under title 11 and any and all *proceedings* arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." (Emphasis added.) [4]

The Order did not adjudicate an issue in a pending bankruptcy "case" or "proceeding." Consequently, the Bankruptcy Court lacked jurisdiction to enter the Order.

2. The Bankruptcy Court Lacked Power to Enter the Order Under Section 151 of Title 28.

Alternatively, the Bankruptcy Court lacked statutory power under section 151 of title 28 to enter an order without a pending bankruptcy case. A bankruptcy court is a "unit of the district court" and derives its authority from the district court. 28 U.S.C. § 151.[5] A bankruptcy court has authority "with respect to any action, suit, or proceeding . . . except as otherwise provided by law or by rule or order of the district court." *Id.*

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[4]The full text of this section is set forth in the attached Addendum.

[5]The full text of this section is set forth in the attached Addendum.

The Bankruptcy Court exceeded its statutory authority under section 151 of title 28 by interpreting five new statutory provisions outside of any "action, suit or proceeding." The United States Trustee is aware of no authority for the proposition that a bankruptcy court may interpret federal statutes, and thereby excuse compliance with those statutes, outside of an action, suit or proceeding being brought by a party with standing to seek relief from the court. The Bankruptcy Court based its authority on sections 105 and 526(c) of title 11, but those provisions presume the existence of a bankruptcy case within which a bankruptcy court may consider a matter. "Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply *in a case under chapter 7, 11, 12, or 13 of this title*." 11 U.S.C. § 103(a) (emphasis added). The Bankruptcy Court's issuance of the Order outside of its grant of judicial authority also rendered ineffective the procedural protections normally afforded to litigants under the Federal Rules of Bankruptcy Procedure and, to the extent that they are incorporated therein, the Federal Rules of Civil Procedure. *See* Fed. R. Bankr. P. 1001 ("The Bankruptcy Rules and Forms govern procedure *in cases under title 11 of the United States Code*.") (emphasis added). S*ee also* Fed. R. Bankr. P. 7001 and 9014 (addressing applicability of various rules to adversary proceedings and contested matters within bankruptcy cases). *Cf. Reserve Mining Co. v. Lord*, 529 F.2d 181, 185 (8th Cir. 1976) (lower court exceeded its authority by unilaterally ordering deposit of $100,000 as bond without affording due process to affected party).

III. THE BANKRUPTCY COURT'S RULING THAT THE PROVISIONS OF THE BAPCPA REGULATING DEBT RELIEF AGENCIES DO NOT APPLY TO LICENSED ATTORNEYS WAS INCORRECT AS A MATTER OF LAW.

If this Court determines that the Order satisfies the Article III "case or controversy" requirement and that the Bankruptcy Court had the jurisdiction and power to issue the Order, then the United States Trustee submits that this Court should reverse the Order as an erroneous construction of the statutory provisions regarding debt relief agencies.

1. Statutory Framework – The Debt Relief Agency Provisions.

The BAPCPA creates a new term, "debt relief agency." Section 101(12A) of title 11[6] defines it to mean, with certain listed exceptions not applicable here, "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.[7] Section 101(4A) defines the term "bankruptcy assistance" to mean:

> [A]ny goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or *providing legal representation with respect to a case or proceeding under this title.*

(Emphasis supplied). Section 101(3) of title 11 defines the term "assisted person" to mean "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000."

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[6] The full text of this section is set forth in the attached Addendum.

[7] Section 110(a)(1&2) defines the term "bankruptcy petition preparer" to mean "a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation ... a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a [bankruptcy] case ..." Regulation of bankruptcy petition preparers under section 110 of title 11 existed prior to the BAPCPA.

Sections 526, 527 and 528 of title 11 impose obligations and prohibitions on debt relief agencies designed to, *inter alia*: i) protect consumer debtors of modest means from becoming debtors under the Bankruptcy Code without full awareness that they are doing so or without knowledge of the obligations and consequences attendant on doing so; and ii) prevent those in the business of providing document preparation, planning, or other bankruptcy-related services from engaging in misleading or exploitative conduct in their dealings with debtors or prospective debtors.

Section 526 prohibits a debt relief agency from:

– failing to perform any service that it promised an assisted person or prospective assisted person it would perform in connection with a bankruptcy case;

– making any statement or counseling or advising any assisted person or prospective assisted person to make a statement in a document filed in a bankruptcy case that is untrue or misleading or that, upon the exercise of reasonable care, it should have known was untrue or misleading;

– misrepresenting to an assisted person or prospective assisted person the services that it will provide or the benefits and risks that may result if the person becomes a debtor in a bankruptcy case; or

– advising an assisted person or prospective assisted person to incur more debt in contemplation of filing a bankruptcy case or for the purpose of paying an attorney or bankruptcy petition preparer for services performed in preparing for or representing the assisted person.

Section 526 further specifies that any waiver by a assisted person of any protection or right provided thereunder is unenforceable and provides civil remedies and penalties for violations of that section, section 527 or section 528.

Section 527 requires debt relief agencies to provide assisted persons with certain information, notices and disclosures pertaining to the rights and obligations of bankruptcy debtors, including: (i) notice of the right to proceed *pro se* or to hire an attorney or bankruptcy petition preparer; (ii) information on how to complete the bankruptcy schedules, value assets and determine what property is exempt; and (iii) notice of the obligation of debtors under the Bankruptcy Code to provide truthful and accurate information and of the potential consequences of failing to do so.

Section 528 requires debt relief agencies to provide assisted persons to whom they provide bankruptcy assistance a copy of a written contract explaining clearly and conspicuously the services the agency will provide, the fees or charges for such services, and the terms of payment. In addition, section 528 requires debt relief agencies to disclose in their advertising that they are debt relief agencies, that the assistance they provide may involve bankruptcy relief, and that they are in the business of helping people file for relief under the Bankruptcy Code.

2. The Bankruptcy Court's Interpretation of the Provisions Regarding Debt Relief Agencies Was Erroneous.

The Bankruptcy Court acknowledged both that "the language defining debt relief agencies is broad enough on its face to include attorneys" and that "the reference to 'providing legal representation' in § 101(4A) suggests that attorneys are covered." Order at 2. The

Bankruptcy Court further acknowledged that published legal commentary on the BAPCPA has assumed that the term "debt relief agency" includes attorneys. Order at 3. The Bankruptcy Court concluded, however, that "[b]ecause the definition of 'debt relief agency' omits express reference to attorneys and includes a term [i.e., 'bankruptcy petition preparer'] which excludes attorneys," Congress did not intend to include attorneys within the its purview. Order at 5. Instead, reasoned the Court:

> the inclusion of the term "legal representation" in the definition of "bankruptcy assistance" was Congress's effort to empower the Bankruptcy Courts presiding over a case with authority to protect consumers who are before the Court, who may have been harmed by a debt relief agency that may have engaged in the unauthorized practice of law, and whose existing remedies for any damage is more theoretical than real.

Order at 5-6. Stated differently,

> Congress intended to establish regulation of entities who interface with debtors in shadowy, gray areas not already covered by bankruptcy petition preparer regulations and to bolster the existing regulation of bankruptcy petition preparers, but it did not intend to regulate attorneys.

Order at 6.

The Bankruptcy Court expressed concern that if the definition of "debt relief agency" encompasses attorneys, "a new layer of regulation will be superimposed on the bar of this Court, and evaluation of new risks and liabilities will preoccupy them as they strive to represent their clients, comply with existing state regulation of their practice, learn the new substantive and procedural mandates of this new law, and adhere to the separate professional standards applicable to members of the Bar of this Court," a result that the Bankruptcy Court stated "should not be borne by the Bar needlessly or merely out of an abundance of caution" but only

"if that is the result Congress mandated." Order at 4. In the Bankruptcy Court's view, the effect of such an interpretation would be to "usurp state regulation of the practice of law" and thereby "possibly violate the Tenth Amendment to the Constitution ..." Order at 8.

"In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). As the Bankruptcy Court noted, the language of sections 101(12A) and (4A) is broad enough on its face to include attorneys. Section 101(12A) defines a "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person ... *or* who is a bankruptcy petition preparer under section 110 ..." (Emphasis added). Section 101(4A) defines "bankruptcy assistance" to include "providing legal representation with respect to a case or proceeding under the [Bankruptcy Code]." There is no doubt that bankruptcy attorneys provide legal representation with respect to bankruptcy cases. While section 101(12A) lists several exclusions from the definition of debt relief agency (*e.g.*, nonprofit organizations, depository institutions, and distributors of copyrighted works), attorneys are not among them. Thus, the plain and ordinary meaning of the statutory language used to define "debt relief agency" encompasses attorneys, and the reference to "legal representation" should not be narrowly read as "unauthorized legal representation."

Aside from the statutory language used to define "debt relief agency" and "bankruptcy assistance," other provisions of the legislation also indicate that Congress intended to include attorneys and lawful legal representation within its purview. Section 526(d)(2), for example, provides that no language in sections 526, 527, or 528 shall be deemed to

> limit or curtail the authority or ability –
>
> (A) of a State or subdivision or instrumentality thereof to determine and enforce qualifications for the practice of law under the laws of that State; or
>
> (B) of a Federal Court to determine and enforce the qualifications for the practice of law before that court.

This provision would be meaningless if the provisions regarding debt relief agencies did not apply to attorneys. Also, section 527(b) requires debt relief agencies to provide assisted persons with a written notice containing the following disclosures:

> 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.

It makes little sense to require someone other than an assisted person's attorney to disclose to the assisted person that the law requires the attorney to provide the assisted person with a written contract specifying what the attorney is going to do and how much it will cost. While the Bankruptcy Court found it "hard to imagine" that this provision "really requires an attorney to tell an assisted person that he/she has the right to hire an attorney or how to prepare documents *pro se* that the attorney is poised to prepare on that person's behalf," Order at 6, this is no more odd than requiring a non-attorney petition preparer who is poised to prepare documents for an assisted person to disclose to the assisted person that "you can get help in some localities from a bankruptcy petition preparer who is not an attorney."

The legislative history of the BAPCPA reinforces the conclusion that Congress intended the term "debt relief agency" to encompass attorneys and lawful legal representation. In March

2005, while the BAPCPA was under consideration by the Senate, Senator Feingold offered an amendment to exclude attorneys from the definition of debt relief agency. The amendment would have changed section 101(12A) of title 11 to read, in relevant part, as follows:

> The term “debt relief agency” means any person, other than an attorney or an employee of an attorney, 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 ...

Id. It would also have removed the words “an attorney or” from the title of the notice required by section 527(b) so as to make it read, “IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM A BANKRUPTCY PETITION PREPARER,” rather than “IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.”

Senator Feingold discussed his amendment on the floor of the Senate as follows:

> Another of my amendments deals with a provision that bankruptcy lawyers are very concerned about. This is amendment No. 93 on debt relief agencies. The amendment is strongly supported by the American Bar Association. This amendment would exclude lawyers from the provisions dealing with “debt relief agencies” in sections 226 to 228 of the bill. As currently written, the bill would impose a number of unnecessary burdens on the attorney/client relationship in bankruptcy proceedings. Subjecting attorneys to the "debt relief agency" provisions will add little substantive protection for consumers, but require substantial amounts of extra paperwork and cost.
>
> Requiring lawyers to call themselves “debt relief agencies” will do more to confuse the public than to protect it. I think members of the public generally understand what the word “lawyer” means, but the phrase “debt relief agency” is vague and unhelpful. It is also misleading, because there are significant differences between lawyers and nonlawyers, but both would be identifying themselves as debt relief agencies under this bill.

> Only lawyers are permitted to give legal advice, to file pleadings, or to represent debtors in bankruptcy hearings. Perhaps most importantly, only lawyers are bound to confidentiality by the attorney-client privilege. These distinctions are important to consumers, but they would be obscured by the bill as written.
>
> Furthermore, these provisions would apparently apply to any law firm that provides bankruptcy services, even if that law firm were primarily providing landlord-tenant advice even to landlords criminal defense services, or other unrelated services. Large firms with only one bankruptcy practitioner may be required to advertise themselves as "debt relief agencies."
>
> I think this will be immensely confusing to consumers without any apparent benefit.
>
> The substantive provisions on "debt relief agencies" would add little to the already existing laws and regulations governing attorney conduct. Attorneys currently have extensive duties relating to disclosures, fees, and ethical obligations. These provisions would micromanage that relationship without adding any meaningful substantive protection. I think the intention of the bill's drafters was to prevent attorneys from tricking consumers into bankruptcy by not telling consumers from the beginning that they work on bankruptcy issues, and then sort of springing the idea of bankruptcy on the consumer. But rather than simply prohibiting this sort of unethical behavior, the bill tries to micromanage the attorney-client relationship by requiring large amounts of additional paperwork and disclosure. Extra paperwork substantially burdens the consumer and adds to the cost of bankruptcy. Given that attorney conduct is already regulated, I believe these provisions are unnecessary as applied to attorneys and provide no clear benefit.

151 Cong Rec. S2306 (daily ed. Mar. 09, 2005) (statement of Sen. Feingold).

Because Congress did not adopt Senator Feingold's amendment, it is clear from the legislative history of the BAPCPA, as well as its plain language and the design of the statute as a whole, that Congress intended for the provisions governing debt relief agencies to be applicable to attorneys.

The Bankruptcy Court was, of course, correct in its observation that this will impose a new layer of regulation on bankruptcy attorneys already subject both to state regulation of their practice and to the separate professional standards applicable under the rules of this Court and

the Bankruptcy Court. However, this is not the first time Congress has extended the reach of consumer protection legislation to attorneys. There is no question, for example, that debt collection attorneys are subject to the requirements of The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1601 *et seq.* *See Crossley v. Lieberman*, 868 F2d 566, 569 (3rd Cir. 1989). If a debt collection attorney qualifies as a "person ... who regularly collects or attempts to collect ... debts owed or due or asserted to be owed or due another" within the contemplation of section 1692a(6) of title 15, there is no reason why a bankruptcy attorney would not qualify as a "person who provides any bankruptcy assistance" within the contemplation of section 101(12A) of title 11.

Congress has likewise subjected attorneys to federal regulation for the purpose of protecting investors. Section 307 of the Sarbanes-Oxley Act of 2002 (codified as 15 U.S.C. § 7245) requires the U.S. Securities and Exchange Commission to "issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission ... in the representation of issuers," including certain specified requirements regarding the reporting of evidence of violations of the securities laws. Accordingly, the provisions of the BAPCPA governing debt relief agencies are by no means unique in their application to conduct by attorneys. They are simply another effort by Congress to protect a segment of the public, in this case a vulnerable class of consumer debtors, from the detrimental acts of third parties, including attorneys.[8]

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[8] Contrary to the Bankruptcy Court's suggestion (Order at 8 & n.4), this construction of these statutes presents no Tenth Amendment problems. Congress has express constitutional authority to establish federal bankruptcy laws (U.S. Const., Art. I, sec. 8), and nothing in the relevant provisions involves any federal commandeering of state resources. *See Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

CONCLUSION

Based on the foregoing legal authorities and analysis, the United States Trustee respectfully requests that this Court vacate the Order due to the absence of a "case or controversy" in the Bankruptcy Court as required under Article III of the United States Constitution. Alternatively, the Bankruptcy Court lacked statutory jurisdiction and power to enter the Order. If, however, this Court concludes that the Bankruptcy Court properly exercised its jurisdiction and authority, the United States Trustee submits that the Bankruptcy Court nonetheless erred in its interpretation of the statutes regarding debt relief agencies, and respectfully requests that this Court reverse the Order.

Respectfully submitted,

____

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ADDENDUM

The full text of **11 U.S.C. § 101(12A)** is as follows:

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, but does not include –

(A) any person that is an officer, director, employee or agent of a person who provides such assistance or of such preparer;

(B) a nonprofit organization which is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such a depository institution or credit union; or

(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

11 U.S.C. § 526 provides as follows:

Restrictions on debt relief agencies.

(a) A debt relief agency shall not--

(1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;

(2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue and misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;

(3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to--

(A) the services that such agency will provide to such person; or

(B) the benefits and risks that may result if such person becomes a debtor in a case under this title; or

(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 fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

(b) Any waiver by any assisted person of any protection or right provided under this section shall not be enforceable against the debtor by any Federal or State court or any other person, but may be enforced against a debt relief agency.

(c) (1) Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of this section, section 527, or section 528 shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person.

(2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have–

(A) intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 with respect to a case or proceeding under this title for such assisted person;

(B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521; or

(C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency.

(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State--

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.

(4) The district courts of the United States for districts located in the State shall have concurrent jurisdiction of any action under subparagraph (A) or (B) of paragraph (3).

(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may –

(A) enjoin the violation of such section; or

(B) impose an appropriate civil penalty against such person.

(d) No provision of this section, section 527, or section 528 shall –

(1) annul, alter, affect, or exempt any person subject to such sections from complying with any law of any State except to the extent that such law is inconsistent with those sections, and then only to the extent of the inconsistency; or

(2) be deemed to limit or curtail the authority or ability –

(A) of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State; or

(B) of a Federal court to determine and enforce the qualifications for the practice of law before that court.

The full text of **11 U.S.C. § 527** is as follows:

Disclosures.

(a) A debt relief agency providing bankruptcy assistance to an assisted person shall provide–

(1) the written notice required under section 342(b)(1); and

(2) to the extent not covered in the written notice described in paragraph (1), and not later than 3 business days after the first date on which a debt relief agency first offers to provide any bankruptcy assistance services to an assisted person, a clear and conspicuous written notice advising assisted persons that--

(A) all information that the assisted person is required to provide with a petition and thereafter during a case under this title is required to be complete, accurate, and truthful;

(B) all assets and all liabilities are required to be completely and accurately disclosed in the documents filed to commence the case, and the replacement value of each asset as defined in section 506 must be stated in those documents where requested after reasonable inquiry to establish such value;

(C) current monthly income, the amounts specified in section 707(b)(2), and, in a case under chapter 13 of this title, disposable income (determined in accordance with section 707(b)(2)), are required to be stated after reasonable inquiry; and

(D) information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including a criminal sanction.

(b) A debt relief agency providing bankruptcy assistance to an assisted person shall provide each assisted person at the same time as the notices required under subsection (a)(1) the following statement, to the extent applicable, or one substantially similar. The statement shall be clear and conspicuous and shall be in a single document separate from other documents or notices provided to the assisted person:

IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.

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.

The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, as well as in some cases a Statement of Intention need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice.

(c) Except to the extent the debt relief agency provides the required information itself after reasonably diligent inquiry of the assisted person or others so as to obtain such information reasonably accurately for inclusion on the petition, schedules or statement of financial affairs, a debt relief agency providing bankruptcy assistance to an assisted person, to the extent permitted by nonbankruptcy law, shall provide each assisted person at the time required for the notice required under subsection (a)(1) reasonably sufficient information (which shall be provided in a clear and conspicuous writing) to the assisted person on how to provide all the information the assisted person is required to provide under this title pursuant to section 521, including –

(1) how to value assets at replacement value, determine current monthly income, the amounts specified in section 707(b)(2) and, in a chapter 13 case, how to determine disposable income in accordance with section 707(b)(2) and related calculations;

(2) how to complete the list of creditors, including how to determine what amount is owed and what address for the creditor should be shown; and

(3) how to determine what property is exempt and how to value exempt property at replacement value as defined in section 506.

(d) A debt relief agency shall maintain a copy of the notices required under subsection (a) of this section for 2 years after the date on which the notice is given the assisted person.

4. The full text of **11 U.S.C. § 528** is as follows:

Requirements for debt relief agencies.

(a) A debt relief agency shall –

(1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such

assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously--

(A) the services such agency will provide to such assisted person; and

(B) the fees or charges for such services, and the terms of payment;

(2) provide the assisted person with a copy of the fully executed and completed contract;

(3) clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public (whether in general media, seminars or specific mailings, telephonic or electronic messages, or otherwise) that the services or benefits are with respect to bankruptcy relief under this title; and

(4) clearly and conspicuously use the following statement in such advertisement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

(b) (1) An advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public includes--

(A) descriptions of bankruptcy assistance in connection with a chapter 13 plan whether or not chapter 13 is specifically mentioned in such advertisement; and

(B) statements such as "federally supervised repayment plan" or "Federal debt restructuring help" or other similar statements that could lead a reasonable consumer to believe that debt counseling was being offered when in fact the services were directed to providing bankruptcy assistance with a chapter 13 plan or other form of bankruptcy relief under this title.

(2) An advertisement, directed to the general public, indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt shall –

(A) disclose clearly and conspicuously in such advertisement that the assistance may involve bankruptcy relief under this title; and

(B) include the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the within and foregoing Brief of United States Trustee as Appellant has this day been served upon the following by mailing a copy of the same through the United States Mail bearing sufficient postage thereon:

Mr. Terry P. Leiden
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This 18th day of November, 2005.

By:______________________________
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