IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JACQUES H. GEISENBERGER, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2:05-CV-5460-JS
ALBERTO GONZALES, et al.,	)	
	)	
Defendant.	)	

Introduction

Jacques Geisenberger, a Pennsylvania attorney who represents debtors in bankruptcy proceedings, challenges sections 227 through 229 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which have been codified at 11 U.S.C. §§ 526-528.[1] Among other things, these sections limit the advice that an attorney can give to a client and require certain disclosures. Mr. Geisenberger argues that they are unconstitutional in violation of the First Amendment, Fifth Amendment, Tenth Amendment, and the separation-of-powers doctrine, in all circumstances involving attorneys. None of his arguments has merit, and the Court should dismiss the complaint for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6).

Mr. Geisenberger complains that several aspects of these provisions impinge on his First Amendment rights. Compl. at p. 4-5, 7. He makes two primary arguments. The first relates to § 528(a)(4)'s disclosure requirement. This section obligates lawyers, in certain circumstances, to

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[1] This brief is filed on behalf of the federal defendants, United States Attorney General Alberto Gonzales and United States Trustee Kelly Beaudin Stapleton. Pennsylvania Attorney General Tom Corbett is the third defendant.

include the following statement, or a substantially similar one, in their advertisements: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."[2] 11 U.S.C. § 528(a)(4). Mr. Geisenberger claims that this requirement "interfere[s] with" and "impact[s]" his law practice. Compl. at p. 6. Mr. Geisenberger's second argument relates to § 526(a)(4), which obligates lawyers not to "advise a [debtor-client] or prospective [debtor-client] to incur more debt in contemplation of such person filing a case under this title . . ." Id. He argues that this clause prevents him from giving "lawful advice and counsel to clients." Compl. at p. 7.

Mr. Geisenberger's arguments are without merit. Courts review disclosure requirements pursuant to a relaxed standard under which disclosure requirements, to pass constitutional muster, need only be "reasonably related" to the "State's interest in preventing deception of consumers" and not unjustified or unduly burdensome. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985). Congress enacted § 528(a)(4)'s disclosure requirement after hearing evidence about consumer deception, and this requirement ameliorates that problem by ensuring that potential clients know that bankruptcy is an option that attorneys may recommend to them. It easily passes muster under Zauderer.

Section 526(a)(4) also comports with the Constitution. It prohibits an attorney from advising a debtor to take on debt because he or she intends to file for bankruptcy; it does not forbid an attorney from counseling a debtor to take on debt when the agency would give the same advice even if the person were not contemplating filing for bankruptcy. Given the limited scope of § 526(a)(4), Mr. Geisenberger's claim of unconstitutionality fails. Section 526(a)(4) is essentially a rule of

[2] The statute defines debt relief agency at 11 U.S.C. § 101(12A).

professional conduct, and it satisfies the balancing test that courts apply to such rules: It protects the integrity of the judicial system without too strictly limiting attorney speech.

As to the Fifth Amendment, Mr. Geisenberger argues that the advice-limitation provisions deny him equal protection because "any attorney practicing [in] any area of law other than bankruptcy may give their clients lawful advice." Compl. at p. 8. This argument fails. The advice that Mr. Geisenberger wants to give is not "lawful" as he uses the term because the First Amendment does not guarantee him the right to give it. Thus, Mr. Geisenberger, like all other attorneys, is allowed to give advice that the First Amendment protects.

Finally, Mr. Geisenberger suggests, but does not explicitly argue, that the BAPCPA's challenged provisions run afoul of the Tenth Amendment and the separation-of-powers doctrine. To the extent that he forwards this claim, he does so by repeatedly asserting that only the states and the federal courts, and not Congress, may regulate the "practice of law." Compl. at p. 7. This claim is baseless. The Commerce and the Bankruptcy Clauses of the Constitution empowered Congress to enact the challenged provisions, and nothing in Article III limits these powers of Congress with respect to the regulation of attorneys.

Statutory Background

After conducting a series of hearings, Congress found that over the past decade "the number of bankruptcy filings had *nearly doubled to more than 1.6 million cases filed in fiscal year 2004*." 2005 U.S.C.C.A.N. at 91 (emphasis in original).[3] It concluded that this "increase in consumer bankruptcy filings has adverse financial consequences for our nation's economy." Id. For example,

[3] BAPCPA is the product of nearly eight years of proposals and hearings on reform of bankruptcy law and practices. See 2005 U.S.C.C.A.N. at 92-96.

in 1997 alone, "it was estimated that *more than $44 billion* of debt was discharged by debtors who filed for bankruptcy relief, a figure when amortized on a yearly basis amounts to a loss of at least $110 million every day." Id. (footnotes omitted). According to one estimate, these losses "translate into a $400 annual 'tax' on every household in our nation." Id.

Looking for the source of this meteoric increase in bankruptcy filings, Congress determined that the bankruptcy system "ha[d] loopholes and incentives that allow and – sometimes – even encourage[d] opportunistic personal filings and abuse," 2005 U.S.C.C.A.N. at 91, and that attorneys sometimes played a role in exploiting these "opportunities." A civil enforcement initiative undertaken by the United States Trustee Program, and considered by Congress, found that "[a]buse of the system is more widespread than many would have estimated." Id. (quoting J. Christopher Marshall, *Civil Enforcement: An Early Report*, Journal of the Nat'l Ass'n of Bankr. Trustees 39 (Fall 2002). The study "'consistently identified"' such problems as "'misconduct by attorneys and other professionals'" along with "'debtor misconduct and abuse . . . , problems associated with bankruptcy petition preparers, and instances where a debtor's discharge should be challenged.'" 2005 U.S.C.C.A.N. at 92 (quoting Antonia G. Darling and Mark A. Redmiles, *Protecting the Integrity of the System: the Civil Enforcement Initiative,* Am. Bankr. Institute J. 12 (Sept. 2002)).

Congress heard evidence regarding several specific problems with the bankruptcy bar. One was the use of deceptive advertisements by some bankruptcy practitioners. Dean Sheaffer, Chairman of the Pennsylvania Retailers' Association, testified that some lawyers run advertisements "promising to make individuals' debts disappear" without even mentioning bankruptcy. *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003,* Hearing on H.R. 975 before House Judiciary Comm., 108th Cong., 1st Sess. 55 (2003). And the House Judiciary Committee took note of a

consumer alert issued by the Federal Trade Commission which warned that some advertisements promising debt relief may actually involve filing bankruptcy. See, e.g., *Bankruptcy Reform Act of 1998 (Part III)*, Hearing on H.R. 3150 before House Judiciary Comm., 105 Cong., 2d Session 90-92 (1998).

The evidence also suggested that some bankruptcy attorneys were failing to provide clients with sufficient information regarding their options and the consequences of bankruptcy. The Honorable Edith Hollon Jones, United States Court of Appeals Judge for the Fifth Circuit and member of the National Bankruptcy Review Commission, testified as follows:

> Most debtors never see a judge. Many bankruptcy lawyers never talk to their clients. The first time they see their clients often is when they are in a herd of people in bankruptcy courts and the lawyer raises a hand and says "Anyone's who's my client needs to step forward right now."

Bankruptcy Reform Act of 1998: Part I, Hearing on H.R. 3150 before House Judiciary Comm., 105 Cong., 2d Sess. 15 (1998). Congressman James Moran testified that "there are some within the bankruptcy profession operating like a mill, steering many consumers into bankruptcy without adequately informing them of their choices . . . ." Id. at 13. In this same vein, a study conducted by Tahira K. Hira, a Professor at Iowa State University, revealed that the two most common complaints of people who had their debts discharged in a bankruptcy proceeding were a lack of information, and concern, about the practices of their lawyers. *The Consumer Bankruptcy Reform Act: Seeking Fair and Practical Solutions to Consumer Bankruptcy Crisis*, Hearing on S. 1301 before Senate Judiciary Comm., 105th Cong., 2d Sess. 29 (1998).

BAPCPA is "a comprehensive package of reform measures" designed "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure

that the system is fair for both debtors and creditors." H.R. Rep. No. 109-31, 109th Cong., 1st Sess. at 1, reprinted in 2005 U.S.C.C.A.N. 88, 89. As part of this package, Congress amended the Bankruptcy Code ("Code") to establish certain standards of professional conduct for "debt relief agencies," see 11 U.S.C. §§ 526-528, a category of individuals that includes attorneys, 11 U.S.C. §§ 101(12A), 101(4A).

Section 526 lays down a number of rules of professional conduct for lawyers when dealing with consumer debtors; § 526(a)(4)'s mandate matters most for this case. It reads as follows:

> A debt relief agency shall not [] advise a [debtor-client] or prospective [debtor-client] 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 representing a debtor in a case under this title.

11 U.S.C. § 526(a)(4). This portion of the statute thus prohibits an attorney from "advis[ing]" a consumer debtor (1) "to incur more debt in contemplation of" filing for bankruptcy; or (2) "to incur more debt . . . to pay" an attorney or bankruptcy petition preparer. 11 U.S.C. § 526(a)(4).[4] If an attorney violates this provision, he or she may be obligated to return "any fees or charges" paid to him or her by the debtor-client along "actual damages" and "reasonable attorneys' fees." § 526(c)(2)(A). Also, state attorneys general may bring actions to enjoin violations of § 526 and recover damages for debtors, and the court, the United States Trustee, or the debtor may bring actions seeking injunctive relief or civil penalties. 11 U.S.C. § 526(c)(3), (5).

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[4] See H.R. Rep. No. 109-31(I), at 66 (2005) (explaining that the second clause of § 526(a)(4) "prohibits [a debt relief] agency from . . . advising an assisted person or prospective assisted person to incur additional debt in contemplation of filing for bankruptcy relief or for the purpose of paying fees for services rendered by an attorney or petition preparer in connection with the bankruptcy case"); H.R. Rep. No. 108-40(I), at 174 (2003); H.R. Conf. Rep. No. 107-617, at 204 (2002); H.R. Rep. No. 107-3(I), at 42 (2001).

It is important to note in relation to § 526(a)(4) that, in addition to the more general evidence about attorney misbehavior, Congress heard testimony to the effect that its addition of a means test (for determining whether the presumption that a Chapter 7 filing is abusive should apply) that depends on debt levels, see 11 U.S.C. § 707(b)(2)(A), would increase the likelihood that bankruptcy attorneys would counsel their clients to take on debt before filing for bankruptcy. The Honorable Randall Newsome, United States Bankruptcy Judge for Northern District of California, issued the following warning:

> The more debt that is incurred prior to filing, the more likely the debtor will qualify for Chapter 7. Perverse as it may seem, I can envision debtor's counsel advising their clients to buy the most expensive car that someone will sell them, and sign on to the biggest payment they can afford (at least until the bankruptcy is filed) as a way of increasing their deductions under § 109(h).

Bankruptcy Reform Act of 1998: Part I, Hearing on H.R. 3150 before House Judiciary Comm., 105 Cong., 2d Sess. 25 (1998).

Section 527 requires attorneys to provide certain notices to a debtor, including (1) a description of the various types of bankruptcy proceedings and the costs and benefits of proceeding under each chapter, (2) an explanation of information that the debtor is to provide during the bankruptcy proceeding (e.g., accurate valuations of assets and liabilities), and (3) a warning that the debtor's failure to provide such information may result in the dismissal of the case or other sanction. 11 U.S.C. § 527(a). As part of getting the debtor acquainted with the information that he or she must provide during the bankruptcy proceeding, the attorney must inform the debtor about how to value certain assets at "replacement value." § 527(c)(1), (3).

Section 528 sets out various disclosure requirements. See 11 U.S.C. § 528. The disclosure requirement relevant for purposes of this case obligates attorneys to "clearly and conspicuously" place the following statement, or a substantially similar one, "in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public," § 528(a)(3): "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." § 528(a)(4). ("Bankruptcy assistance" includes "providing information, advice [,] counsel . . . or [ ] legal representation[.]" 11 U.S.C. § 101(4A).)

Motion to Dismiss Standard

Rule 12(b)(6) authorizes courts to dismiss complaints in whole or in part if the plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal is proper if, accepting all of the factual allegations in the complaint as true and "drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations in the complaint." Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc., 140 F.3d 478, 483 (3d Cir. 1998).

Argument

I. Section 528(a)(4)'s Disclosure Requirement Is Constitutional Under Zauderer.

In Count I of his complaint, Mr. Geisenberger contends that § 528(a)(4)'s disclosure requirement will "unlawfully restrict" his "ability to advertise his law practice in violation of the First Amendment" by "regulating his advertising." Compl. at p. 6. This claim is misguided. The First Amendment does not prohibit all regulation of advertisements, and the disclosure requirement imposed by § 528(a)(4) satisfies the standard announced in Zauderer, 471 U.S. at 651.

In Zauderer, the Supreme Court upheld the Ohio Supreme Court's decision to punish a lawyer for failing to make a disclosure in an advertisement. Zauderer, 471 U.S. at 650. The lawyer placed an advertisement in a paper which read, "if there is no recovery, no legal fees are owed by our clients." Id. at 652. The Ohio Supreme Court punished the lawyer, pursuant to the Ohio disciplinary rules for lawyers, for failing to disclose in the advertisement that clients might owe costs if there were no recovery, even if they would not owe legal fees. Id. at 632, 635-636. The lawyer challenged the punishment, arguing that the disclosure requirement violated the First Amendment. Id. at 636. The Supreme Court sided with the state. It preliminarily noted that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." Id. at 651 (emphasis in the original) (internal citation omitted). The Court then set out the governing standard, deciding that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing the deception of consumers" and are not "unjustified or unduly burdensome." Id. Finally, the Court concluded that the state's disclosure requirement "easily passe[d] muster" under this reasonableness standard given the "self-evident" possibility of deception. Id. at 652.

Section 528(a)(4)'s disclosure requirement satisfies Zauderer's standard. The section obligates lawyers to place the following statement in advertisements that are actually, if not explicitly, touting bankruptcy assistance services: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." § 528(a)(4); see § 528(a)(3). This required disclosure is reasonably related to the government's interest in preventing deception and is not unduly

burdensome. Evidence before Congress indicated that some bankruptcy lawyers did not mention in their advertisements that their ability to make "debts disappear" derived from the use of the bankruptcy process. See, e.g., *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003,* Hearing on H.R. 975 before House Judiciary Comm., 108th Cong., 1st Sess. 55 (2003); *Bankruptcy Reform Act of 1998 (Part III)*, Hearing on H.R. 3150 before House Judiciary Comm., 105 Cong., 2d Session 90-92 (1998); 151 Cong Rec. S. 2306 (daily ed. March 9, 2005) (Sen. Feingold). Such advertisements easily could have misled laypeople into thinking that debts could be erased without payment or bankruptcy. The potential for deception is apparent, then, and the sort of advertisements targeted by this amendment resemble the advertisement at issue in Zauderer, where an omission from a lawyer's advertisement created the "self-evident" possibility of deception. 471 U.S. 652. The disclosure requirement reasonably relates to the government's interest in forestalling deception by alerting people that a lawyer may use bankruptcy as a means to help them, even though his or her advertisement does not say so. Also, it is not unduly burdensome: it consists simply in inserting a two-line admonition into certain advertisements. The requirement passes constitutional muster under Zauderer, and the Court should dismiss this claim pursuant to Rule 12(b)(6).

II. Section 526(a)(4) Does Not Violate the First Amendment Because It Is Essentially An Ethical Rule Which Satisfies the Standards Applied to Such Rules.

Mr. Geisenberger claims, in Count II of his complaint, that § 526(a)(4) violates the First Amendment because it prohibits attorneys from giving "certain lawful advice and counsel to clients." Compl. at pp. 4, 7. The law does not support this claim. Section 526(a)(4) bars attorneys only from counseling clients to incur debt because they will be filing for bankruptcy. The First Amendment does not forbid the government from implementing this sort of commonsense limitation: Section

526(a)(4)'s limitation on counseling is essentially a rule of professional conduct which satisfies the balancing test that courts apply to such rules.

A. The Meaning of "in Contemplation" of Bankruptcy

Section 526(a)(4) prohibits an attorney from advising a debtor to take on debt because he or she intends to file for bankruptcy; it does not forbid an attorney from counseling a debtor to take on debt when the agency would give the same advice even if the person were not contemplating filing for bankruptcy. In relevant part, § 526(a)(4) provides that a lawyer may not "advise [a debtor-client or potential debtor-client] to incur more debt in contemplation of such person filing a case under this title." 11 U.S.C. § 526(a)(4). The phrase "in contemplation of . . . filing a case under this title" is the key to understanding this provision, and as always, Congress's intention is the touchstone for interpretation, Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 842-43 (1984). Congress enacted the BAPCPA "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors;" it wanted to limit abuses of the bankruptcy system to mitigate the financial toll that bankruptcy filings were taking on creditors and the economy as a whole. See H.R. Rep. No. 109-31, 109th Cong., 1st Sess. at 1, reprinted in 2005 U.S.C.C.A.N. 88, 89, 91. In light of Congress's intention, the best interpretation of the "in contemplation" language is that it prevents an attorney from advising a debtor to take on debt because he or she intends to file for bankruptcy, as such advice is aimed at allowing the debtor to unfairly take advantage of discharge (by running up debt primarily because it will not need to be repaid) or "game" the means test (by piling on enough

debt to avoid a presumption of abuse, § 707(b)(2)).[5] These opportunistic uses of bankruptcy are antithetical to the notions of "personal responsibility" and "integrity" that motivated Congress to pass the BAPCPA.[6]

B. Section 526(a)(4) Satisfies the Standard Applied to Ethical Rules.

The Supreme Court has established that ethical rules for attorneys that limit speech are subject to a standard of review less stringent than the strict-scrutiny standard. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991) (Rehnquist, C.J., concurring).[7] Gentile addressed an ethical rule that, unlike § 526(a)(4), regulated extrajudicial attorney speech in a pending case. Id. at 1033, 1062. (Section 526(a)(4) applies to lawyer's speech prior to the filing of a bankruptcy petition.) But the Gentile Court did not limit the more lenient standard to the facts of the case before it. To the

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[5] Under the means test, an abuse of the bankruptcy system is presumed where the amount of the debtor's income, after deduction of certain expenses and other specified amounts, exceeds specified thresholds. See 11 U.S.C. § 707(b)(2)(A). Because the amount of secured and priority debt is one of the amounts deducted from income, increasing the amount of debt could reduce the amount of income under the means test, and thus allow an individual who would otherwise fall within the presumption of abuse to evade the presumption. Similarly, since the trigger for the presumption is based on the ratio of "available income" to the amount of "unsecured debt," increasing the amount of unsecured debt could also help an assisted person evade the presumption of abuse. See *Bankruptcy Reform Act of 1998: Part I*, Hearing on H.R. 3150 before House Judiciary Comm., 105 Cong., 2d Sess. 25 (1998) (testimony of The Honorable Randall Newsome, United States Bankruptcy Judge for Northern District of California.)

[6] Section 526(a)(4) has a narrower meaning than is suggested by Mr. Geisenberger's complaint. See Compl. at 4. Given this fact, it is not clear that Mr. Geisenberger has standing because the complaint does not state with particularity what advice Mr. Geisenberger wants to give to his clients. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). We assume for the purposes of this memorandum, however, that Mr. Geisenberger intends to give specific advice restricted by § 526(a)(4).

[7] Though a concurrence, Chief Justice Rehnquist's opinion garnered five votes for this proposition. Gentile, 501 U.S. at 1081-1082 (O'Connor, J., concurring).

contrary, the Court noted that leniency traditionally has permeated its review of ethical restrictions on lawyers:

> Even in an area far from the courtroom and the pendency of a case, our decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses.

Id. at 1073. And what is more, in United States v. Scarfo, 263 F.3d 80, 92-93 (3rd Cir. 2001), the Third Circuit decided that Gentile provides the standard for reviewing restrictions on attorneys' speech "in general" and so applied the lenient standard to a set of facts distinct from Gentile's. See also Canatella v. Stovitz, 365 F. Supp. 2d 1064, 1071-1072, 1076 (N.D. Cal. 2005) (upholding, under Gentile, an ethical rule that limits the advice that lawyers can give to their clients).

The Court has applied a lenient standard of review to ethical restrictions on lawyer's speech in different circumstances because the factual differences do not undermine the principle underlying the Court's leniency: The government's interest "in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the court." Ohralik v. State Bar Ass'n, 436 U.S. 447, 460 (1978); see also, Gentile, 501 U.S. at 1072-1075. "[L]awyers are trusted agents of their clients" and "assistants to the court in searching for a just solution to a dispute," Ohralik, 436 U.S. at 460 (quotation and citation omitted), and therefore "obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech," In re Sawyer, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring). The short of the matter is that the Court has decided that lawyers may need to abstain from speech that would otherwise be protected because of their special role in society.

Under Gentile, a content-based restriction of speech in the form of an ethical rule comports with the First Amendment if it regulates speech that would create a substantial likelihood of material prejudice to a judicial proceeding and is narrowly tailored to accomplish its purpose. Gentile, 501 U.S. at 1075-1076. The Court indicated that speech creates a substantial likelihood of "material prejudice to a judicial proceeding" if it is substantially likely to affect the outcome of the proceeding (or would affect the outcome absent the expenditure of substantial resources) and do so in a way inconsistent with accepted norms. Id. at 1075. So for example, extrajudicial statements by lawyers involved in a pending case are substantially likely to affect the outcome in a case by affecting the views of potential jurors (absent particularly searching voir dire or a change of venue), and permitting such statements would contravene the norm that cases are to be decided by jurors based on the evidence presented at trial. Id.

Section 526(a)(4) is essentially an ethical rule. First, it serves the purpose that ethical rules serve. According to Gentile, an ethical rule limits attorney speech to protect the government's interest in protecting "the integrity and fairness" of the "judicial system." 501 U.S. at 1075. Section 526(a)(4) protects the "integrity and fairness" of the bankruptcy system in two ways. For one, it deters debtors from accumulating debt simply to take advantage of discharge or to "game" the new debt-triggered means test (by deterring lawyers from giving the advice to do so), and therefore reduces the likelihood that a court will unwittingly discharge debts that Congress has determined, through the Code, see § 707(a),(b), ought not be discharged.[8]

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[8] Ensuring that attorneys take their responsibilities to clients seriously and advocate only sensible courses of action is of particular importance in the bankruptcy context for an additional reason: Unlike most other areas of law, courts have permitted debtors to assert reasonable reliance on the advice of counsel as an excuse to avoid punishments for improper behavior under the Bankruptcy Code. See, e.g., Norwest Bank Neb., N.A. v. Tveten, 848 F.2d 871, 876 (8th Cir.

Section 526(a)(4) also guards the "integrity and fairness" of the system by protecting debtors from attorneys who would lead them to undertake abusive practices which would redound to their detriment. Even prior to the amendments, incurring additional debts prior to filing a bankruptcy petition could constitute impermissible abuse of the bankruptcy system, i.e., "substantial abuse," and result in the dismissal of a petition. See, e.g., In re Price, 353 F.3d 1135, 1139-1140 (9th Cir. 2004) (determination of "substantial abuse" would include a consideration of, among other things, whether the debtor has obtained "cash advancements and consumer goods on credit exceeding his or her ability to repay them" or "has engaged in eve-of-bankruptcy purchases"). As amended, the Code lowers the threshold that must be met for a bankruptcy court to dismiss a debtor's petition from "substantial abuse" to "abuse" of Chapter 7. See 11 U.S.C. § 707(b)(1). Under the revised Code, then, accruing greater debt in contemplation of bankruptcy, either to take advantage of discharge or "game" the means test, is more likely to lead to a dismissal of the petition. See § 707 (b)(3)(B). Thus, it is more important than ever to deter unscrupulous attorneys from advising their clients to

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1988); In re Adeeb, 787 F.2d 1339, 1343 (9th Cir. 1986). (This defense has typically been invoked for denials of discharge due to fraudulent filings or transfers of assets.) Section 526(a)(4) helps to account for the fact that debtors may have less incentive to be careful about their bankruptcy-related actions (because they can avoid punishment by asserting reliance on their attorneys' advice) by enhancing attorneys' incentives not to give improper advice. A similar scenario is found in the tax context, where taxpayers are immune to penalty under 26 U.S.C. § 6662 if their action was prompted by reasonable good faith reliance on professional advice. See 26 C.F.R. § 1.6664-4. Accompanying this taxpayer exemption from penalty is a well-developed set of ethical rules for advice given by tax professionals, and corresponding penalties for violation of the rules in question. See 31 C.F.R. § 10.33-.37; id. § 10.50-.52. A similar system of ethical restrictions also exists in patent practice, where good-faith reliance on patent counsel's opinion may constitute a defense to willful patent infringement or be germane to equitable intervening rights under 35 U.S.C. § 252. See, e.g., Ortho Pharmaceutical Corp. v. Smith, 959 F.2d 936, 943-45 (Fed. Cir. 1992); see also 37 C.F.R. §§ 10.23, 10.85, 10.89, 10.130.

"incur debt in contemplation" of bankruptcy.[9]

Section 526(a)(4) should be judged under the standard for ethical rules also because it resembles other regulations that have been upheld as ethical rules under Gentile. For example, in Canatella, 365 F. Supp. 2d at 1071-1072, 1076, the court upheld, under Gentile's standard, § 6068(c) of the California Business and Professions Code which provides that "it is the duty of an attorney . . . to counsel . . . those actions, proceedings, or defenses only as appear to him or her legal or just." Cal. Bus. & Prof. Code § 6068(c). Section 526(a)(4) resembles § 6068(c), of course, in that both restrict the advice that a lawyer can give to a client prior to the initiation of a legal proceeding. Because § 526(a)(4) is an ethical rule, Gentile's standard applies.

Section 526(a)(4) satisfies Gentile's standard. A lawyer's advice to incur debt in contemplation of bankruptcy would be substantially likely to prejudice the outcome of the bankruptcy proceeding: Creditors would be unable to recover more debt than would have been the case in the absence of this advice, or they and the court would have to expend substantial resources to avoid this possibility, and this situation would contravene principles of bankruptcy law because the Code provides that such debts need not be unrecoverable, see § 707(a),(b). Section 526(a)(4) is narrowly tailored to prevent this harm because it does not limit more speech than is necessary to accomplish this purpose. It does not prohibit an attorney from advising a client on what the law is or discussing the standards for determining when debt is abusive. Nor does it prevent an attorney from advising a debtor to incur further debt in all cases. Instead, it simply prohibits an attorney from advising a

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[9] Other provisions of § 526(a) likewise plainly serve the purpose of protecting debtors from various forms of unprofessional or unethical conduct by bankruptcy practitioners including: failing to perform agreed-upon services, 11 U.S.C. § 526(a)(1); making untrue or misleading statements, § 526(a)(2), or misrepresenting the lawyer's services or the risks and benefits of becoming a debtor, § 526(a)(3).

client to incur debt where the motivation for incurring such debt is that the debtor will be filing for bankruptcy.[10]

III. Section 527 Does Not Require A Lawyer to Advise His Client to Value All Assets at Their Replacement Value.

Mr. Geisenberger claims, in Count II, that 11 U.S.C. § 527 will "force[ ] [him] to inform his client[s] that they must value all property as it was secured property [i.e., at replacement value], even if the property could legally be valued differently." This claim misses its mark. Section 527 does not require attorneys to advise their clients to value all property at replacement value, rather, it requires attorneys to tell their clients to value secured assets at replacement value, in accord with 11 U.S.C. § 506 (requiring secured assets to be valued at replacement value). Moreover, if even Mr. Geisenberger's interpretation were plausible, it should be eschewed in favor of the proposed alternative interpretation which does not raise doubts about the section's constitutionality.

Mr. Geisenberger's claim focuses on § 527(a)(2)(B). This clause requires attorneys to provide the following notice, in certain circumstances:

> [a] clear and conspicuous written notice advising [debtors] that . . . (B) all assets and all liabilities are required to be completely and accurately

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[10] It appears that Mr. Geisenberger does not challenge the lawyer-pay provision of § 526(a)(4) because he does not interpret it as a speech restriction. Compl. at p. 4. Nor could he legitimately do so. The data submitted by the United States Trustee in Lamie v. United States Trustee, 540 U.S. 526 (2004), which held that the Code does not allow the attorney for Chapter 7 debtor to be compensated from the estate, reveal that 96% of chapter 7 cases closed during 2002 had no assets in the estate to pay anything to counsel or creditors. Brief of the Solicitor General, 2003 WL 21839367, at 38-39. This helps explain why Congress instructed debtors' attorneys not to advise their clients to incur more debt to pay them. In 96% of chapter 7 cases, debtors' attorney will have counseled their clients and will know (or should know) that their clients' bankruptcy cases will be "no assets" cases, which means that unsecured creditors will recover nothing. Prohibiting attorneys from advising clients to incur debts to pay them reduces the likelihood that debtors will shift the cost of attorneys' fees to creditors.

> 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 a reasonable inquiry to establish such value.

11 U.S.C. § 527 (a)(2)(B).

The plain language of § 527(a)(2)(B) does not support Mr. Geisenberger's interpretation. The challenged clause does not provide that the debtor must be told to value all assets at replacement value, instead, it states that the debtor must be told that, "where requested," he or she must calculate the replacement value of assets pursuant to 11 U.S.C. § 506 (after a reasonable inquiry). The phrase "where requested" presumably refers to the places on the "documents filed to commence the case" where the debtor lists secured assets. Thus, Mr. Geisenberger's interpretation is wrong.

But even if Mr. Geisenberger's interpretation were plausible, the Court should eschew it in favor of the one detailed above. Under Zauderer, the courts review disclosure requirements pursuant to a relaxed standard because a person's "constitutionally protected interest in not providing any particular factual information is minimal." 471 U.S. at 651. Presumably, however, an individual would have a much stronger interest in "not providing" inaccurate information, and the government's interest in requiring that such information be disclosed would be diminished. Cf. id. Serious constitutional doubt would exist about any statute that required the dissemination of false information. Mr. Geisenberger's interpretation raises such constitutional doubts about the statute, while the other plausible interpretation does not. The canon of constitutional avoidance thus tips the scales: The Court should not presume that Congress intended the constitutionally questionable interpretation. Clark v. Martinez, 125 S.Ct. 716, 724-25 (2005).

IV. Section 524(c)(3) Is Constitutional.

Mr. Geisenberger also complains about the provisions of the Code which state that a debtor who is represented by an attorney "during the course of negotiating a[ ] [reaffirmation] agreement" cannot reaffirm debt unless the attorney files a declaration or affidavit stating, among other things, that the reaffirmation agreement represents a fully informed choice by the debtor and will not impose an undue hardship on the debtor or a dependent of the debtor. Compl. at p. 5. See also 11 U.S.C. § 524(c)(3). He explains in his complaint that, as a matter of principle, he does not agree with reaffirmations, and he intimates that, therefore, he will not file the declarations or affidavits required by § 524(c)(3). See Compl. at p. 5. Mr. Geisenberger implies that his refusal to act disadvantages his clients vis-à-vis those represented by attorneys who will file the necessary forms and that somehow this disadvantage to his clients springs from § 524(c)(3), which "discriminates [against], burdens, and interferes" with his practice of law. Id.

The complaint does not suggest what about § 524(c)(3) is unconstitutional, and no constitutional infirmity is apparent. No compelled speech problem exists because Mr. Geisenberger need submit a declaration or affidavit only if he agrees with what it says. And to the extent the law "discriminates" among lawyers by favoring those who file affidavits or declarations, it is unobjectionable. Rational basis review applies (because no protected class or fundamental right is involved), see FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993), and the law, to protect debtors and ensure the orderly functioning of the bankruptcy system, reasonably distinguishes between lawyers who assure the court that an affirmation is proper and those who do not.

V. The Equal Protection Claim Fails Because the First Amendment Claims Fail.

In Count III, Mr. Geisenberger claims that the advice-limitation provisions of the BAPCPA, §§ 526(a)(4), 527(a)(2)(B), deny him equal protection because "any attorney practicing [in] any area

of law other than bankruptcy may give their clients lawful advice." Compl. at p. 8. This claim fails. The advice that Mr. Geisenberger wants to give is not "lawful" as the term is used by Mr. Geisenberger because the First Amendment does not guarantee him the right to give it. Thus, Mr. Geisenberger, like all other attorneys, is allowed to give advice that the First Amendment entitles him a right to give. That attorneys in other practices may not be prohibited from giving advice that the First Amendment does not protect is unobjectionable because Congress can act incrementally to eradicate the problem of improper advice. See generally, Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). The Court should dismiss this claim pursuant to Rule 12(b)(6).

VI. Congress Had the Power to Enact §§ 526-528.

Mr. Geisenberger implies in his complaint that he believes that Congress contravened the Tenth Amendment and the separation-of-powers doctrine when it enacted §§ 526-528 because only the states and the federal judiciary may regulate the practice of law. Compl. at 7. The Court should decline to address the merits of this suggestion because Mr. Geisenberger did not formally raise it as a claim in his complaint. Mr. Geisenberger's argument is also unavailing. The Bankruptcy and Commerce Clauses empowered Congress to enact the challenged provisions, and there is no separation-of-powers difficulty.

The Tenth Amendment does not independently limit Congress's power to legislate vis-à-vis the states; it simply emphasizes that congressional action must be supported by an Article I fount of authority. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Supreme Court has explained that, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that

power to the States." New York v. United States, 505 U.S. 144, 156 (1992); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). Thus, the Tenth Amendment, whose reservation of power "is essentially a tautology," New York, 505 U.S. at 157, is not itself a limitation on congressional power separate from the doctrine of enumerated powers; rather, the Tenth Amendment "directs [courts] to determine whether an incident of state sovereignty is protected by a limitation on Article I power." Id.

The Bankruptcy Clause empowered Congress to enact §§ 526-528. See U.S. Const. art. I, § 8, cl. 4. This clause authorizes Congress "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." The Supreme Court has held that this power allows Congress to "embrace within its legislation whatever may be deemed important to a complete and effective bankruptcy system." United States v. Fox, 95 U.S. 670, 672 (1877). Accord In re Reiman, 20 F. Cas. 500, 501 (D. N.Y. 1875) ("whatever relates to the subject of bankruptcy is within the jurisdiction of Congress"). Congress found there were problems with the bankruptcy system, including "misconduct by attorneys and other professionals." 2005 U.S.C.C.A.N. at 92. It passed BAPCPA "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both the debtors and creditors." Id. at 89. Sections 526-528 advance these purposes. Broadly speaking, they ensure that lawyers provide debtors with the information necessary to make informed decisions about bankruptcy and that lawyers otherwise act ethically, as by not encouraging the incurrence of abusive debt. Thus, the challenged provisions fall within the parameters of Congress' authority under the Bankruptcy Clause.

The Commerce Clause also authorized Congress to enact §§ 526-528. See U.S. Const. art. I, § 8, cl. 3. This clause grants Congress the authority "to regulate commerce . . . among the several states," id., and pursuant to it, Congress may regulate the following categories of activities: (1) the

use of the channels of interstate commerce; (2) the instrumentalities of or persons or things in interstate commerce; and (3) those activities that substantially affect interstate commerce. Gonzales v. Raich, 125 S.Ct. 2195, 2205 (2005). Sections 526-528 can be justified under the latter two categories. First, they can be viewed as regulations of commerce itself. As the Supreme Court held in Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 (1975), advice, legal representation and other services provided by an attorney for money are "'commerce' in the most common usage of the word," and as such may be regulated by Congress. And of course, the regulation of advertisements is the regulation of commerce. Zauderer, 471 U.S. at 651.

Second, even if the services provided to debtors in bankruptcy proceedings are not considered "interstate commerce," the activities of lawyers in bankruptcy proceedings can be regulated because they have a substantial effect on interstate commerce. Congress found that abuses in bankruptcy proceedings, including misconduct by attorneys, had a serious impact on the economy. 2005 U.S.C.C.A.N. at 90-92. As §§ 526-528 address this abuse, their enactment was a permissible exercise of Congress' power under the Commerce Clause to regulate activities which "exert[ ] a substantial economic effect on interstate commerce.'" Raich, 125 S.Ct. at 2205-06 (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)).

Nor did Congress usurp the judiciary's authority by enacting §§ 526-528. To decide whether a branch's action violates the separation-of-powers doctrine, courts determine whether the Constitution commits the action to another branch. See, e.g., Christopher v. Harbury, 536 U.S. 403, 417 (2002). The Constitution does not entrust the regulation of the practice of law exclusively to the judiciary. Article III contains no textual impediment to Congress regulating attorney conduct. What is more, Congress has enacted legislation governing the practice of law on numerous other occasions.

See 15 U.S.C. §§ 1601 et seq. (Fair Debt Collection Practices Act); 15 U.S.C. § 7201 et seq. (Sarbanes-Oxley Act of 2002). This history supports the argument that Congress has the power to regulate attorney conduct. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring) (explaining that, in certain circumstances, history provides a gloss on the language of the Constitution). Finally, the Third Circuit has recognized that Congress can regulate attorney conduct. Eash v. Riggins Trucking, Inc., 757 F.2d 557, 564 (3rd Cir. 1985) (en banc) ("[I]n the absence of contrary legislation, courts under their inherent powers have developed a wide range of tools to promote efficiency in their courtrooms and to achieve justice in their results.").

Conclusion

For the foregoing reasons, the Court should dismiss Mr. Geisenberger's complaint.

Respectfully submitted,

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