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Judge Karen Overstreet
Chapter 13
Hearing Location: Seattle
Hearing Date: January 18, 2006
Hearing Time: 9:30 a.m.
Response Date: January 6, 2006

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

In re	)	No. 04-24651
	)	
MICHELE MOORE,	)	U.S. TRUSTEE'S OPPOSITION TO MOTION FOR DECLARATION THAT THE DEBT RELIEF AGENCY PROVISIONS OF THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 ARE INVALID AS APPLIED TO DULY ADMITTED MEMBERS OF THE BAR PRACTICING BEFORE THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
Debtor.	)	

INTRODUCTION

Debtor Michele Moore has filed a motion seeking a declaration that the "debt relief agency" provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") -- 11 U.S.C. §§ 101(12A), 101(4A), 342, 526, 527 and 528 – are invalid and not enforceable as to members of the Bar of this Court.[1] These provisions establish certain standards for professional conduct when dealing with consumer debtors with limited assets and require debt relief agencies to provide such debtors with certain written disclosures regarding

[1] Motion for Declaration That The Debt Relief Agency Provisions of the Bankruptcy Abuse and Prevention and Consumer Protection Act of 2005 Are Invalid as Applied to Duly Admitted Members of the Bar Practicing before the United States District Court for the Western District of Washington ("Motion") (filed on Oct. 24, 2005), at 1.

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bankruptcy proceedings. In her motion, the debtor asserts (1) that the term "debt relief agency," 11 U.S.C. § 101(12A), should not be interpreted to include attorneys, and (2) that if such provisions are deemed to apply to attorneys, they violate the First and Tenth Amendments of the United States Constitution.[2]

Ms. Moore's motion should be denied.[3] First, Ms. Moore lacks standing to challenge the interpretation and constitutionality of the debt relief agency provisions. Ms. Moore cannot show that she has suffered any injury as a result of the challenged disclosure provisions because they do not impose any obligations or restrictions on her. Nor does she have standing to raise the rights of her attorney. Ms. Moore also cannot show any injury as result of the restriction against providing advice to incur more debt in contemplation of bankruptcy because that provision was not in effect when she filed her petition for bankruptcy in 2004.

Second, if Ms. Moore has standing, her statutory claim has no merit. BAPCPA defines "debt relief agency" as "any person" that, for a fee, "provides any bankruptcy assistance to an

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[2] On November 9, 2005, this Court issued a notice to the Attorney General that the constitutionality of the debt relief provisions in BAPCPA had been challenged. Pursuant to 11 U.S.C. § 307, the United States Trustee "may raise and may appear and be heard on any issue in any case or proceeding" under the Bankruptcy Code. Therefore, because the United States Trustee is an officer of the United States, it is not necessary for the United States to intervene pursuant to 28 U.S.C. § 2403.

[3] This motion should also be denied because it seeks equitable relief, which Fed. R. Bankr. P. 7001 requires be sought by complaint in an adversary proceeding. This point was specifically recognized in In Re Jackson, Case No. 05-44941-B (Bankr. D.S.C. Nov. 21, 2005), where the court dismissed a similar motion for a declaration that the debt relief provisions are invalid as applied to licensed attorneys. A copy of the order is attached as Exhibit A to the Appendix in Support of U.S. Trustee's Opposition to Debtor's Motion. See also In re Application for General Order Determining That Certain Provisions of the Bankruptcy Abuse Prevention and Consumer Act of 2005 Are Inapplicable to Attorneys, Misc. No. 9, (W.D. Okla. Dec. 1, 2005) (Exhibit B).

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assisted person." 11 U.S.C § 101(12A). "Bankruptcy assistance" includes "providing information, advice, counsel . . . or providing legal representation[.]" 11 U.S.C. § 101(4A) Therefore, attorneys who provide advice and legal representation to assisted persons, such as Ms. Moore, fall squarely with the plain language of BAPCPA. Ms. Moore cites nothing in the language of the Act or its legislative history to contradict this plain reading of the definition of a debt relief agency.

Finally, Ms. Moore's challenge to the constitutionality of the BAPCPA also has no merit. Contrary to Ms. Moore's claim, the requirements placed on debt relief agencies do not violate the First Amendment. The Supreme Court has consistently found that disclosure requirements, like those imposed on debt relief agencies by 11 U.S.C. § 527, are not subject to a strict scrutiny test. See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985). Instead, such requirements should be upheld as long as they are reasonably related to preventing deception. The disclosure requirements at issue here meet this test. As the legislative history demonstrates, the disclosure provisions are imposed on debt relief agencies to protect consumer debtors from abuses by attorneys and to insure that debtors have a basic understanding of the bankruptcy proceedings, and they are reasonably related to that objective.

The restriction in 11 U.S.C. § 526(a)(4) also does not violate the First Amendment. This restriction does not prohibit an attorney from advising an assisted person on what the bankruptcy law states. Nor is it a general prohibition against advising an assisted person to incur debt. Instead, it only prohibits an attorney from advising an assisted person "to incur more debt in contemplation" of filing for bankruptcy. 11 U.S.C. § 526(c)(4)(emphasis added). In other words, it prohibits advice to incur more debt because the debtor intends to file for bankruptcy.

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This restriction, therefore, is an ethical standard that protects debtors from receiving advice that could result in denial of relief and prevents abuse of the bankruptcy system, and thus should be upheld under the balancing test set forth in Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991).

Finally, contrary to Ms. Moore's contention, the restrictions and requirements imposed on debt relief agencies under BAPCPA are permissible exercises of Congress' power under the Bankruptcy and Commerce Clauses of the United States Constitution (U.S. Const., Art. 1, Section 8, clauses 3 and 4), and thus do not violate the Tenth Amendment.

Accordingly, Ms. Moore's motion seeking a declaration that the debt relief agency provisions of BAPCPA do not apply to attorneys should be denied.[4]

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.*" H.R. Rep. No. 109-31, 109th Cong., 1st Sess. at 4, reprinted in 2005 U.S.C.C.A.N. at 91 (emphasis in original).[5] It concluded that this "increase in consumer bankruptcy filings has adverse financial consequences for our nation's economy." Id. For example, in 1997 alone, "it

[4] Without seeking permission from this Court, Larry B. Feinstein, a bankruptcy attorney in Seattle, filed what is styled as an "Amicus Curiae Brief in Support of Attorney Jump's Motions" ("Amicus Br."). In a footnote, Mr. Feinstein states that the brief was actually drafted by Howard Marc Spector, an attorney in Dallas, Texas, who is representing an attorney in another action challenging the constitutionality of the Act. Hersh v. United States, Case No. 3-05CV-2330N (N.D. Tex.). Although it is not clear that this brief is properly before this Court, the U.S. Trustee will address the arguments made in the brief to the extent they relate to claims raised by the debtor.

[5] 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.

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

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1 H.R. 975 before House Judiciary Comm., 108th Cong., 1st Sess. 55 (2003)(Exhibit C). And the
2 House Judiciary Committee took note of a consumer alert issued by the Federal Trade
3 Commission which warned that some advertisements promising debt relief may actually involve
4 filing bankruptcy. See, e.g., *Bankruptcy Reform Act of 1998 (Part III)*, Hearing on H.R. 3150
5 before House Judiciary Comm., 105 Cong., 2d Session 90-92 (1998)(Exhibit D). As Senator
6 Sessions explained, "[i]n many instances, the deceptive and fraudulent advertising practices of
7 bankruptcy mills lure consumers into bankruptcy unnecessarily." 151 Cong. Rec. S2472 (March
8 10, 2005)(Exhibit E).
9
10 The evidence also suggested that some bankruptcy attorneys were failing to provide
11 clients with sufficient information regarding their options and the consequences of bankruptcy.
12 The Honorable Edith Hollan Jones, United States Court of Appeals Judge for the Fifth Circuit
13 and member of the National Bankruptcy Review Commission, testified as follows:
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15 > 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."
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19 *Bankruptcy Reform Act of 1998: Part I*, Hearing on H.R. 3150 before House Judiciary Comm.,
20 105 Cong., 2d Sess. 15 (1998)(Exhibit F). Congressman James Moran testified that "there are
21 some within the bankruptcy profession operating like a mill, steering many consumers into
22 bankruptcy without adequately informing them of their choices . . . ." Id. at 13. In this same
23 vein, a study conducted by Tahira K. Hira, a Professor at Iowa State University, revealed that the
24 two most common complaints of people who had their debts discharged in a bankruptcy
25 proceeding were a lack of information, and concern, about the practices of their lawyers. *The*
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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)(Exhibit G).

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." 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. See 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. Section 526(a)(4), for example, provides that:

> A debt relief agency shall not [] 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 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).[6] If an attorney violates this provision, he or she may be obligated to return "any fees or charges"

[6] 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).

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paid to him or her by the debtor-client along with "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).

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)(Exhibit F).

Section 527 requires that debt relief agencies provide certain disclosures and notices to an assisted person, 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 the information that person is to provide during the bankruptcy proceeding (e.g., assets and liabilities must be accurately disclosed), and (3) a warning that the assisted person's failure to

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provide such information may result in the dismissal of the case or other sanction, including a criminal sanction. 11 U.S.C. § 527(a). A debt relief agency must also provide an assisted person with a separate specified notice explaining, *inter alia,* that the assisted person may proceed pro se or may hire an attorney, or a bankruptcy petition preparer, and that the attorney or preparer must furnish the person a "a written contract specifying what the attorney or bankruptcy petition preparer will do for you and how much it will cost." 11 U.S.C. § 527(b). In addition, except to the extent it provides the information itself, a debt relief agency must provide an assisted person with reasonably sufficient information regarding valuation of assets and determining liabilities, income, and other information required to be provided in the proceeding, 11 U.S.C. § 527©.

Section 528 provides that a debt relief agency shall execute a written contract with the assisted person explaining "clearly and conspicuously" the agency's services and fees. 11 U.S.C. § 528(a)(1). It also requires a debt relief agency to disclose "clearly and conspicuously" in advertisements that the services are with respect to bankruptcy relief under the Act, and use the following statement in advertisements: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code," or a substantially similar statement. 11 U.S.C. §§ 528(a)(3)-(4), (b).

ARGUMENT

I. MS. MOORE LACKS STANDING TO CHALLENGE THE DEBT RELIEF AGENCY PROVISIONS

Ms. Moore lacks standing to challenge the validity of the application of the debt relief agency provisions to her attorney and other licensed attorneys admitted to practice before this Court. The "irreducible constitutional minimum of standing" contains three requirements.

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Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). First, a party must have suffered

> an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed merely 'speculative,' that the injury will be redressed by a favorable decision.

Id. at 560-61 (internal citation and quotation mark omitted).

In this case, Ms. Moore cannot show that she has suffered any injury in fact as a result of the disclosure requirements placed on debt relief agencies. The challenged provisions do not impose any restrictions on debtors. Nor do they prevent her from being represented by an attorney or from receiving advice from an attorney on what the Bankruptcy Code permits. Instead, the challenged provisions simply require her attorney and others who assist consumer debtors, like herself, in bankruptcy proceedings to provide certain written disclosures to their clients.[7] The required written disclosures are designed to protect debtors by providing certain basic information about the bankruptcy procedures, the obligations of debt relief agencies, and the responsibility of debtors to provide truthful information. 11 U.S.C. § 527. In her declaration, Ms. Moore asserts that she did not "appreciate the disclosures or [her attorney's] inability to discuss her case with [her] until after [she] signed the disclosures." Declaration of

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[7] Ms. Moore cannot rest her claim on the legal rights of her attorney. As courts have stressed, "a plaintiff must 'assert his own legal rights and interests, and cannot rest his claim on the legal rights or interests of third parties,'" absent evidence that there is some hindrance to the third party's ability to protect his own interest. Coyne v. American Tobacco Co., 183 F.3d 488, 494 (6th Cir. 1999) (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975). For example, in Lee v. Oregon, 91 F.3d 1240, 1245 (9th Cir. 1996), the Ninth Circuit held that doctors cannot bring claims on behalf of their patients absent evidence that there is some hindrance to the patients' ability to protect their own interests. In this case, Ms. Moore makes no effort to demonstrate that her attorney is unable to protect his own interests. Indeed, she cannot. If her attorney wishes to challenge the provisions, he can bring his own action in district court.

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Michelle Moore in Support of Motion, ¶ 9.[8] The fact that Ms. Moore may personally believe that the disclosures are unnecessary does not make receipt of the disclosure cognizable injury.

Moreover, any injury to Ms. Moore as a result of the limitation in 11 U.S.C. § 526(a)(4) on advice which an attorney may give an assisted person would be at this point purely speculative. That provision only prohibits a debt relief agency from advising a debtor to incur more debts in contemplation of filing a petition for bankruptcy. Id. That provision has no application here because Ms. Moore filed her petition for bankruptcy in 2004, before the effective date of the Act. While she alleges that the new law would apply if she were to dismiss her current bankruptcy petition in order to attempt to refinance her loans and subsequently refile for bankruptcy because her refinancing plans "fell through" (Moore Decl., ¶ ¶ 3, 9), this possibility is purely speculative at this time.

Ms. Moore seeks to avoid this basic jurisdictional flaw in her motion by citing to 11 U.S.C. § 526(c)(2). Motion at 5. Contrary to Ms. Moore's contention, this provision does not provide "the debtor with an opportunity to seek determination of the enforceability of Sections 526, 527 and 528 of BAPCPA." Id. Instead, this provision provides that an assisted person may seek damages from a debt relief agency for "intentionally or negligently fail[ing] to comply with" the requirements set forth in 11 U.S.C. §§ 526-528. 11 U.S.C. § 526(c)(2). Nothing in that provision gives a debtor standing to challenge the provisions themselves.

Accordingly, Ms. Moore's motion should be denied for lack of standing.

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[8] Indeed, the provisions themselves do not require that an assisted person sign the notices. Instead, the requirement that she sign the notice was a requirement imposed by her attorney to establish a record that he provided her the required notices.

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II. BAPCPA'S REQUIREMENTS AND RESTRICTIONS ON "DEBT RELIEF AGENCIES" APPLY TO MS. MOORE'S COUNSEL.

Even if Ms. Moore had standing, her contention that Congress did not intend to include attorneys within the definition of "debt relief agencies" cannot be squared with the plain language of the BAPCPA. As explained above, BAPCPA defines the term "debt relief agency" (with certain exceptions not applicable here) as "any person" that, for a fee, "provides any bankruptcy assistance to an assisted person." 11 U.S.C. § 101(12A).[9] "Bankruptcy assistance" includes "providing information, advice, counsel . . . [and] legal representation." 11 U.S.C. § 101(4A). Thus, while the definition of "debt relief agency" does not specifically mention attorneys, its plain language, when coupled with the definition of the term "bankruptcy assistance," clearly covers attorneys who provide "advice," "counsel" or "legal representation" with respect to a bankruptcy proceeding.[10]

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[9] A "person" is defined as an "individual, partnership or corporation." 11 U.S.C. § 101(41).

[10] In her motion, Ms. Moore cites to an order issued by Judge Lamar W. Davis, the Chief Judge for the Bankruptcy Court in the Southern District of Georgia, which adopts the interpretation of the provision that she favors. Motion at 6. That order concedes that "the definition of debt relief agency is facially broad enough to cover bankruptcy preparers and attorneys" and "the inclusion of 'legal representation' in the scope of what a debt relief agency does certainly suggests [sic] a contrary result" to that which the court reached. Order at 5. The order, however, tries to avoid this clear reading of the statute by suggesting that "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 the authority to protect consumers" from "non-attorneys" who "often attempt to provide 'legal representation,' often to poorer, less educated, and more vulnerable citizens." Order at 5-6. This holding is misguided in at least two ways. First, since, as the order itself acknowledges, the interpretation is not consistent with the plain language of this provision, there is no need to resort to legislative history. Exxon Mobil Corp. v. Allapattah Serv., Inc., 125 S.Ct. 2611, 2626 (2005). Second, as explained infra at 16, the legislative history demonstrates that Congress intended to include attorneys. In any event, the validity of the order is in serious question, inasmuch as it was issued by the bankruptcy judge sua sponte, in the absence of any pending case or controversy. The order has been appealed to

Where, as here, the plain language of an Act is broad enough to encompass attorneys, the courts have refused to imply an exception. For example, in Heintz v. Jenkins, 514 U.S. 291, 298 (1995), the Supreme Court held that lawyers who regularly engaged in litigation to collect consumer debts fell within the definition of "debt-collector" under the Fair Debt Collection Practices Act even though the definition did not mention "lawyers" or the "practice of law." Similarly, in Goldfarb v. Virginia State Bar, 421 U.S. 773, 786 (1975), the Supreme Court refused to imply an exemption for attorneys in the Sherman Act, which prohibits those engaged in a "trade or commerce" from price fixing.[11] As the Supreme Court emphasized, "our cases have repeatedly established that there is a heavy presumption against implicit exemptions." Id. at 787. That presumption applies with particular force here because BAPCPA expressly excepted from the definition of "debt relief agencies" certain other types of persons or organizations (i.e. nonprofit organizations). See 11 U.S.C. § 101(12A). That Congress provided for such exceptions and did not exempt attorneys further shows that attorneys who provide bankruptcy assistance to assisted persons are not exempt from the notice requirements and restrictions on "debt relief agencies." Detweiler v. Pena, 38 F.3d 591, 594 (D.C. Cir. 1994)

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the U.S. District Court of the Southern District of Georgia (Misc. Case No. 2005-2).

[11] Contrary to Ms. Moore's suggestion, there is nothing unusual about Congress imposing restrictions on attorneys even though States already regulate their practices. For example, as noted above, debt collection attorneys are subject to the requirements of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1601 et seq. See Heinz v. Jones, 514 U.S. at 298; Crossley v. Lieberman, 868 F.2d 566, 569 (3d Cir. 1989). 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."

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("Where a statute contains explicit exceptions, the courts are reluctant to find other implicit exceptions.").

In her motion, Ms. Moore tries to find support for her assertion that attorneys do not fall within the definition of "debt relief agency" in 11 U.S.C. § 101(12A) by citing to the requirement in 11 U.S. C. §§ 527(b) that a debt relief agency must provide an assisted person with written notice that he has the right to hire attorney or to represent himself. Ms. Moore argues that interpreting this provision to apply to an attorney "is confusing, absurd, and devoid of logic and plain old common sense" because she "cannot imagine" that when she first met with her attorney in this case that he would have been required to tell her that she had the right to retain an attorney. Motion at 6.

This argument, however, distorts the notice requirement with regard to representation. The Act requires a debt relief agency to provide written notice informing an assisted person, *inter alia*, that (1) "[i]f 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," and (2) "you are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice." 11 U.S.C. § 527(b). Contrary to Ms. Moore's suggestion, requiring an attorney to provide such notice is not "devoid of logic and plain old common sense." Motion at 6. The notice provision ensures that an assisted person knows all of his or her options with regard to representation in a bankruptcy proceeding, including the option of not being represented by an attorney.

Moreover, the suggestion that Congress did not intend the term "debt relief agency" to

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include attorneys is belied by other specific references to attorneys in this provision. Section 527(b) specifically requires the written notice to also contain the following two statements: (1) "IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PREPARER," and (2) "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." 11 U.S.C. § 527(b) (emphasis added). While this language does not explicitly state that an attorney is a debt relief agency, the reference to an attorney in connection with one of the specific obligations imposed on a debt relief agency (i.e. the provision of a written contract) strongly implies that an attorney falls within the definition of a debt relief agency. Indeed, the reference to the law requiring an attorney to provide a written contract would make little sense unless an attorney were a debt relief agency.

Ms. Moore's reliance on 11 U.S.C. § 526(d) is similarly misguided. That provision simply states that no provision of 11 U.S.C. §§ 526, 527, and 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 the State; or (B) of the Federal court to determine and enforce the qualifications for the practice of law before the court." 11 U.S.C. § 526(d)(2). If anything, this provision demonstrates that the debt relief agency provisions were intended to cover attorneys. If the restrictions did not apply to attorneys, this provision would be rendered meaningless. As the Supreme Court has recognized, courts are reluctant to treat statutory provisions as "surplusage." Babbitt v. Sweet Home Chapter,

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Communities for Great Ore., 515 U.S. 687, 698 (1995). Accord United States v. Menacsche, 348 U.S. 528, 538-39 (1955).

Thus, contrary to Ms. Moore's claim, application of the "debt relief agency" provisions to her attorney is consistent with the plain language of the Act. When, as here, the statute is "unambiguous," then the "judicial inquiry is complete." Barnhart v. Sigmon Coal Company, 534 U.S. 458, 462 (2002). The court "must give effect to the unambiguous expressed intent of Congress." Chevron USA Inc. v. Natural Resource Defense Council, 467 U.S. 837, 842-43 (1984).

Even if the plain language of the statute left any room for doubt, the legislative history of the provision likewise demonstrates that Congress intended the term "debt relief agency" to encompass attorneys. In the Conference Report, Congress specifically found that there was "misconduct by attorneys and other professionals" in the bankruptcy system. 2005 U.S.C.C.A.N. at 92. See also supra at 5-6 (testimony in hearings regarding problems with practices by attorneys in bankruptcy proceedings). Moreover, in March 2005, while the BAPCPA was under consideration in the Senate, Senator Feingold offered an amendment to exclude attorneys from the definition of debt relief agency. 151 Cong. Rec. S2316 (March 9, 2005). That amendment was withdrawn by Senator Feingold in return for adoption of other unrelated amendments. 151 Cong. Rec. S2453 (March 10, 2005).

Accordingly, Ms. Moore's claim that the debt relief provisions do not apply to attorneys must be rejected.

III. THE DEBT RELIEF PROVISIONS DO NOT VIOLATE THE FIRST AMENDMENT.

Ms. Moore's allegations that the debt relief provisions violate the First Amendment also lack merit. The requirements placed on debt relief agencies which relate to speech fall into two categories: (1) written disclosure requirements, and (2) prohibitions on advising assisted persons to take certain actions. None of these restrictions violate the First Amendment.

A. Disclosure Requirements Are Constitutional Under Zauderer.

The disclosure requirements do not violate the First Amendment rights of attorneys. In Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 650 (1985), the Supreme Court recognized that there were "material differences between disclosure requirements and outright prohibitions on speech." In that case, an attorney challenged a disciplinary action taken by a state court against him for failure to include in an advertisement a disclaimer stating that "clients might be liable for significant litigation costs even if their lawsuits were unsuccessful . . . ." Id.[12] It observed that "appellant's constitutionally protected interest in not providing any particular factual information is minimal." Id. at 651. The Court found that, as long as the disclosure requirements "are reasonably related to the [government's] interest in preventing deception of consumers," and are not "unjustified or unduly burdensome," there is no First Amendment violation. Id. at 651. Applying those standards, the Court concluded that "the State's position that it [was] deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs [was] reasonable" and that the State's action was a permissible regulation of commercial speech. Id.[13] Accord Planned Parenthood of Southeastern

[12] The advertisement stated that clients would not be responsible for legal fees if their suits failed.

[13] See also In re R.M.J., 455 U.S. 191, 201 (1982) ("[A] warning or disclaimer might be appropriately required, even in the context of advertising as to price, in order to dissipate the

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Pennsylvania v. Casey, 505 U.S. 833, 884 (1992)(upholding requirement that physicians provide information on risk of abortion and childbirth); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115-116 (2nd Cir. 2001) (upholding mercury-labeling requirement on lamps as reasonably related to the state's goal of reducing pollution).

The disclosure provisions in BAPCPA meet the test set forth in Zauderer. In the various hearings on bankruptcy reform, several witnesses testified regarding the failure of some bankruptcy attorneys to provide their clients with sufficient information regarding bankruptcy proceedings and their options and the consequences of bankruptcy. See supra at 5-6. The disclosure requirements are "reasonably related" to resolving these problems by insuring that certain basic information will be made available to consumer debtors. They do not impose an outright ban on any particular advice or advertising by debt relief agencies. Instead, the provisions merely require debt relief agencies to provide certain factual information to avoid deception at the time that the assisted person is retaining their services. As Senator Grassley explained, the disclosure provisions "prevent bankruptcy mills from preying upon the those who are uninformed of their rights." 151 Cong. Rec. S2469 (March 10, 2005)(Exhibit E). The Act requires debt relief agencies to "disclose the nature of the services they offer, explain the alternatives to filing bankruptcy, disclose the rights and obligations of debtors who file for bankruptcy, and explain the consequences of filing for bankruptcy." Id. Accord 151 Cong. Rec. S2459 (March 10, 2005) (Senator Hatch states that the act "prevents bad actors from preying on

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possibility of consumer confusion or deception."); Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977) (noting that an attorney's advertisement may require "a warning or disclaimer . . . so as to assure that the consumer is not misled"); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 433 U.S. 350, 384 (1977) (noting that "information, warnings, and disclaimers" on advertisements may be necessary to prevent deception).

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the uninformed.")(Exhibit E). Because the disclosure provisions are reasonably related to the government's interest in preventing deception and providing consumer debtors with basic information regarding bankruptcy proceedings, the disclosure provisions should be upheld under Zauderer.[14]

In his amicus brief, Mr. Feinstein seeks to avoid this conclusion by alleging that some of the statements in the required disclosures are themselves false and misleading because they may not be applicable in certain cases or may not provide a "complete" picture in specific cases. Amicus Br. at 10-11. [15] This claim has no merit. Nothing in the BAPCPA prohibits an attorney from providing additional information related to the specific issues presented by an individual

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[14] Mr. Feinstein cites Riley v. National Federation of the Blind of N.C., 487 U.S. 781 (1988), for the contention that strict scrutiny should be applied. Amicus Br. at 8. That case is not on point. The disclosure requirement at issue in that case required a fundraiser to disclose to potential donors the average percentage of gross receipts actually received by the charity from the fundraiser. The Supreme Court applied the strict scrutiny test because the solicitations were inextricably interwinded with advocacy and the disclosure requirement "necessarily discriminates against small and unpopular causes." Id. at 2679. The disclosures at issue here, on the other hand, are more analogous to the disclosures required in attorney advertisement in Zauderer. They are made in a commercial context at the time in which the debtor in considering whether to retain an attorney to file for bankruptcy. 11 U.S.C. § 527(a) (notice must be given "not later than 3 business days after the first date on which a debt relief agency first offers to provide bankruptcy assistance to an assisted person.")

[15] In his brief, Mr. Feinstein also asserts that the advertising disclosures required by 11 U.S.C. § 528 are irrational because they would require a divorce attorney who does not normally represent clients in bankruptcy to insert the phrase – "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code" – in his/her advertisements. Amicus Br. at 14. This challenge is not properly before the Court because it was not raised by Ms. Moore. Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445 (2d Cir. 2001)(court refuse to consider constitutional challenge briefly addressed by defendant in a footnote, although fully examined by amicus); A.D. Bedell Wholesale Co. v. Phillips Morris Inc., 263 F3d 239, 266 (3d Cir. 2001) ("Unless raised by the parties, a court normally should not entertain statutory or constitutional challenges asserted solely by amici."). In any case, the argument has no merit because the provision only requires an attorney to make this statement "in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public."

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case. Moreover, while Section 527 identifies the basic information that Congress concluded should be provided to a debtor, it clearly states that the disclosures need only be provided "to the extent applicable." 11 U.S.C. § 527(b). Section 527 also allows modification of the required statement so long as it is "substantially similar" to that offered by the statute. Id. In any case, none of the examples cited by Mr. Feinstein demonstrate that the information contained in the disclosures are false or misleading. For example, Mr. Feinstein contends that the statement that debtors "will have to pay a filing fee to the bankruptcy court" because under F. R. Bankr. P. 1006(b), the payment may be made in installments. It is not clear why Mr. Feinstein finds that this statement is misleading because whether payment is made in full or in installments, the fee must still be paid. Mr. Feinstein also questions the statements that a debtor may want to seek additional help in deciding whether to reaffirm his debts, preparing a Chapter 13 plan or filing under a chapter of the Code other than Chapter 7 and 13. He claims that these statements are misleading because they do not say that only an attorney can provide legal advice. This argument, however, ignores that last sentence of this disclosure which specifically states that "only attorneys, not bankruptcy preparers, can give you legal advice." 11 U.S.C. § 527(b). Similarly while the information provided regarding chapter 13 repayment plans is a brief description and does not fully set forth all permutations that may occur under the Code in any given chapter 13 case, the summary is not misleading. If additional information is needed regarding the debtor's specific case, the attorney is free to provide it. In short, the disclosures are simply intended to insure that the debtor has certain basic information regarding bankruptcy. They are not intended to be an exhaustive list of advice that a competent attorney should provide to a debtor-client about his/her particular case.

Accordingly, because the disclosure provisions meet the test set forth in Zauderer, they should be upheld.

B. Section 526(a)(4) Should Be Upheld Under The Gentile Test Because It Establishes An Ethical Standard Designed To Protect Consumer Debtors And The Integrity And Fairness Of The Bankruptcy System.

Section 526(a)(4) also does not violate the First Amendment. The challenge to this provision is based on misconceptions regarding both the scope of the restriction and the proper standard of review for such restrictions. As explained below, this restriction on advice is narrow and prohibits an attorney from advising a debtor to take on additional debt because he or she intends to file for bankruptcy. Moreover, because this restriction is an ethical rule, there is no basis for subjecting this provision to "strict scrutiny review." See Sable Communications of Cal, Inc. v. Sable, 492 U.S. 115, 126 (1988). Instead, it is subject to a balancing test. Gentile v. State Bar of Nevada, 510 U.S. at 1073.

1. The Scope of the Advice Prohibited by Section 526(a)(4) Is Limited.

This provision does not establish a general prohibition against advising an assisted person to incur more debt. Nor does it prohibit an attorney from advising an assisted person on what the law states. Instead, it only prohibits a debt relief agency from advising an assisted person "to incur more debt in contemplation" of filing a petition for bankruptcy. 11 U.S.C. § 526(a)(4)(emphasis added). 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

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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)).[16] These opportunistic uses of bankruptcy are antithetical to the notions of "personal responsibility" and "integrity" that motivated Congress to pass the BAPCPA.

Section 526(a)(4) thus only 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.

2. The Supreme Court Has Held That Ethical Restrictions on Attorney Speech Are Subject to a Balancing Test.

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[16] 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.).

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The Supreme Court has recognized that the government may properly regulate some attorney speech, particularly when that speech breaches professional duties of competency or loyalty to a client, or otherwise abuses the special trust that attorneys hold as agents of the justice system. See Gentile v. State Bar of Nevada, 510 U.S. at 1073; Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460-62 (1978). See also In re Sawyer, 360 U.S. 622, 646-47 (1959)(concurring opinion of Justice Stewart)("obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.").

In Ohralik, a state bar association had brought a disciplinary action against an attorney for soliciting accident victims for the purposes of representing them on a contingent basis. Applying a balancing test, the Supreme Court found that the disciplinary action did not violate the attorney's First Amendment rights because the government has a "special responsibility for maintaining standards among the members of the licensed professions." 436 U.S. at 460. The Court held that this 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.'" Id. (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975)). As the Court stressed, lawyers are not only "self-employed businessmen," but also are "trusted agents of their clients" and "assistants to the court in searching for a just solution to dispute." Id. (quoting Cohen v. Hurley, 366 U.S. 117, 124 (1961)).

The Supreme Court applied this same more lenient balancing test in evaluating the constitutionality of a gag order issued by a state court in a criminal case. Gentile v. State Bar of Nevada, 501 U.S. at 1073. In the plurality opinion, Chief Justice Rehnquist found that lawyers are "subject to ethical restrictions on speech to which an ordinary citizen would not be." Id. at

1071.[17] Thus, while the Court found that the order was void for vagueness, the plurality did not apply strict scrutiny. Instead, Chief Justice Rehnquist held that the speech of attorneys "may be regulated under a less demanding standard than established for regulation of the press." Id. Under this more lenient test, courts balance the First Amendment rights of attorneys "against the government's 'legitimate interest in regulating the activity in question.'" Id. at 1075. Such ethical restrictions can be upheld if they regulate speech that would create a substantial likelihood of material prejudice to judicial proceedings and impose "only narrow and necessary limitations on lawyers' speech." Id. Accord United States v. Scarfo, 263 F.3d 80, 92-93 (3d Cir. 2001); Cantella v. Stovitz, 263 F. Supp.2d 1064, 1076 (N.D. Cal. 2005).[18]

3. Restrictions on Advice to Incur Further Debt in Contemplation of Bankruptcy Is An Ethical Rule Which Satisfies Gentile Standard.

Section 526(a)(4) can be upheld as such an ethical restriction. Just as the restrictions in standards in Gentile, Ohralik and Cantella sought to protect the integrity of the legal system, Section 526(a)(4) can be seen as a method for protecting the integrity and fairness of the bankruptcy system. Two driving principals of the bankruptcy system are a ratable distribution to creditors according to the priorities set forth in the Code, and a discharge to provide a fresh start for honest debtors. United States v. Fox, 95 U.S. 670, 672 (1877). Section 526(a)(4) seeks to

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[17] Although a concurrence, Chief Justice Rehnquist's opinion on this point garnered five votes. Id. at 1081-82 (O'Connor, J., concurring).

[18] Contrary to Mr. Feinstein's assertion (Amicus Br. at 9), nothing in Bd. of Trustees of the State University of New York v. Fox, 494 U.S. 469 (1989), suggests that ethical restrictions on advice by an attorney should be reviewed under the strict scrutiny test. Indeed, that case did not even involve attorneys; instead, the issue was the constitutionality of the university's refusal to permit corporations to conduct product demonstrations in dormitories. To the extent the Court cited Zauderer and Ohralik, it did so as examples in which the Court declined to impose a least-restrictive-means requirement. 492 U.S. at 480-81.

protect both principals.

First, it protects creditors. Improperly enlarging the pool of pre-existing debt subverts the principal of ratable distribution, because it dilutes the dividend that would otherwise be payable to prior creditors. Section 526(a)(4) protects creditors from such dilution by deterring advice which would encourage debtors to accumulate debt simply to take advantage of the discharge or to "game" the new debt-triggered means test.[19] Section 526(a)(4) also protects creditors by reducing the likelihood that a court will unwittingly discharge debts that Congress has determined, through the Code, see § 707(a),(b), ought not be discharged.[20]

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[19] In his amicus brief, Mr. Feinstein appears to suggest that Ms. Moore's attorney intends to provide "legal strategy . . . enabling clients to conform their income and expenses to established statutory guidelines" set forth by the means test, 11 U.S.C. § 707(b). Amicus Br. at 3. Such attempts to meet the eligibility requirement for Chapter 7 by incurring additional debts are exactly the sort of "gaming" of the system that this provision is designed to prevent.

[20] 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. 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.

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Second, Section 526(a)(4) protects debtors from attorneys who would lead them to undertake abusive practices which would result in nondischargeability of a particular debt or denial of the dischargeabiltiy entirely. Certain consumer debts incurred on the eve of bankruptcy are presumed fraudulent and, therefore, nondischargeable under Section 523(a)(2)©. Additionally, 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).[21] Thus, it is more important than ever to deter unscrupulous attorneys from advising their clients to "incur debt in contemplation" of bankruptcy.[22]

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[21] Mr. Feinstein's assumption that "incurring new debt in anticipation of filing remains perfectly permissible" (Amicus Br. at 14) is, therefore, simply incorrect. Debts incurred to "game" the system are subject to dismissal under 11 U.S.C. § 707.

[22] 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

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Section 525(a)(4) should also be judged under the standard for ethical rules because it resembles other regulations that have been upheld as ethical restrictions under Gentile. For example, the court in Canatella v. Stovitz, 263 F. Supp.2d at 1071-1072, 1076, recently upheld Section 6068© 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©. The court found that the state "had a strong interest in ensuring that its attorneys adhere to the highest standard of conduct" and that "[c]ounseling illegal or unjust actions or pleadings has a direct, adverse effect on the administration of the courts." Id. at 1076.

Section 526(a)(4) is not only an ethical standard but it also satisfies the Gentile standard by prohibiting speech which would likely to cause a substantial prejudice to the bankruptcy proceeding. A lawyer's advice to incur debt in such cases would be substantially likely to prejudice the outcome of the bankruptcy proceeding. Incurring such abusive debts would dilute the ratable distribution to creditors or, in some cases, result in no recovery at all. To prevent such abuse, creditors, the United States Trustee and the court would have to expend substantial resources to dismiss such abusive filings. 11 U.S.C. § 707(a),(b). Such a dismissal may in turn prejudice an honest debtor who had relied on the advice of his attorney. 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

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statements, § 526(a)(2), or misrepresenting the lawyer's services or the risks and benefits of becoming a debtor, § 526(a)(3).

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attorney from advising a debtor to incur further debt in all cases. Instead, it simply prohibits an attorney from advising a client to incur debt where the motivation for incurring such debt is that the debtor will be filing for bankruptcy.[23] A prohibition against counseling debtors to incur debt in contemplation of seeking a bankruptcy discharge is thus a legitimate ethical restriction on attorneys, designed to safeguard the integrity of the system.

Accordingly, Section 526(a)(4) should be upheld under the Gentile test.[24]

IV. BAPCPA DOES NOT VIOLATE THE TENTH AMENDMENT.

Ms. Moore also asserts that the debt relief agency provisions violate the Tenth

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[23] Neither the debtor nor the amicus challenge the lawyer-pay provision of § 526(a)(4). Nor could they 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 debtors 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 adopted the restriction on debtors' attorneys not to advise their clients to incur more debt to pay them. In 96% of chapter 7 cases, debtors' attorneys 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.

[24] Even if this Court were to find that the strict scrutiny test should be applied, 11 U.S.C. § 526(a)(4) should be upheld. Under the strict scrutiny test, the government "may regulate the content of speech in order to promote a compelling interest if it chooses the least restrictive means to further that interest." Sable, 492 U.S. at 126. There can be no dispute that prevention of abuse of the bankruptcy proceeding is a compelling government interest. Congress found that the increase in bankruptcy had "an adverse financial consequence on our nation's economy" and that abuse of the bankruptcy system was more widespread than many would have estimated. 2005 U.S.C.C.A.N. at 91. It further found that bankruptcy system had "loopholes and incentives that allowed and – sometimes – even encouraged opportunistic personal filings and abuse" and that misconduct by attorneys was part of the problem. Id. at 92. In placing a restriction on advice to incur further debt, Congress chose the least restrictive means. It only prohibited advice to incur debt in contemplation of bankruptcy. See supra at 20-22.

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1 Amendment. She appears to base this claim on the contention that the provisions usurp the
2 authority of a state to determine the qualifications for the practice of law. This claim is
3 misguided.

First, BAPCPA explicitly provides that no provision in Sections 526, 527 and 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 the qualifications for practice of law under the laws of that State." 11 U.S.C. § 526(d)(2). The restrictions at issue here, however, do not relate to bar admission or other "qualifications for practice of law" imposed by States or federal courts. Instead, the challenged provisions relate to the notices and other requirements that attorneys must follow in representing clients in bankruptcy proceedings.[25]

Second, the Tenth Amendment does not prohibit Congress from regulating the conduct of attorneys. 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 merely "directs us to determine whether an incident of state sovereignty is protected

[25] Washington state law specifically recognizes the difference between fixing "the qualifications, requirements and procedures for admission to practice," and "rules of professional conduct." RCWA 2.48.060.

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by a limitation on Article I power." Id.

The fact that a state bar rule may already prescribe ethical requirements on attorneys does not alter this analysis. The Supreme Court has rejected an analogous claim that Congress did not intend antitrust laws to apply to attorneys in light of the pre-existing state regulation. Goldfarb v. Virginia State Bar, 421 U.S. at 786-88.

In enacting the BAPCPA, Congress cited its authority under Article I, Section 8, Clauses 3 (Commerce Clause) and 4 (Bankruptcy Clause) of the United States Constitution. H.R. Rep. No. 109-31, at 47. The challenged provisions can be upheld under either of the clauses.

A. The Challenged Provisions Are a Legitimate Exercise of Congressional Authority Under the Bankruptcy Clause of the United States Constitution.

The Bankruptcy Clause authorizes Congress "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., art. I, § 8, cl. 4. The Supreme Court has held that this power "may embrace within its legislation whatever may be deemed important to a complete and effective bankruptcy system." United States v. Fox, 95 U.S. at, 672). Accord In re Reiman, 20 F. Cas. 500 (D. N.Y. 1875) ("whatever relates to the subject of bankruptcy is within the jurisdiction of Congress").

The provisions at issue were enacted to correct abuses in the bankruptcy system. The studies cited by Congress specifically found that those abuses included "misconduct by attorneys and other professionals." 2005 U.S.C.C.A.N. at 92. The Act was 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 the debtors and creditors." Id. at 89. The provisions at issue advance these purposes. First, the restrictions on debt relief agencies are

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designed to protect "assisted persons" (consumer debtors with limited assets) by insuring that an assisted person understands the bankruptcy process and his or her rights and responsibilities in the proceedings. Second, the provisions are designed to protect the creditors from abusive filings. For example, the provisions prohibit a debt relief agency from counseling or advising an assisted person or prospective assisted person to make a statement in a document filed in the case "that is untrue and misleading, or upon the exercise of reasonable care, should have been known to by the agency to be untrue or misleading." 11 U.S.C. § 526(a)(2). Likewise, the prohibition on advising assisted persons to incur debt in contemplation of bankruptcy is designed to protect creditors by insuring that a debtor is not encouraged to take advantage of the system by incurring debts knowing that they will be discharged. 11 U.S.C. § 526(a)(4). In view of these concerns, the provisions clearly fall within the parameters of Congress' authority under the Bankruptcy Clause.

B. The Challenged Provisions Are a Legitimate Exercise of Congressional Authority under the Commerce Clause of the United States Constitution.

The provisions also fall within the parameters of Congress' power under the Commerce Clause, which provide Congress with the authority "to regulate commerce . . . among the several states." U.S. Const., art. I, §. 8, cl. 3. The Supreme Court has identified three broad categories of activity that Congress may regulate: (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).

Here the provisions regulating actions by attorneys can be justified under the latter two categories. First, they can be reviewed as a regulation of commerce itself. As the Supreme Court held in Goldfarb, 421 U.S. at 788, advice, legal representation and other services provided by an

attorney for money is "'commerce' in the most common usage of the word," and as such may be regulated by Congress. Of course, the regulation of advertisements is the regulation of commerce. Zauderer, 472 U.S. at 651.

Second, even if the services provided to assisted persons in bankruptcy proceedings were not considered "interstate commerce," the activities of lawyers in bankruptcy proceedings have a substantial effect on interstate commerce. In explaining the "substantially affect" standard, the Supreme Court confirmed that "'even if [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.'" Id. at Gonzales v.Raich, 125 S.Ct. At 2005-06 (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)) (emphasis added). The Supreme Court also confirmed that "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." Id. (quoting United States v. Lopez, 514 U.S. 549, 558 (1995)). In this case, Congress found that abuses in bankruptcy proceedings had a serious impact on the economy. 2005 U.S.C.C.A.N. at 90-91. Further, Congress found that "misconduct by attorneys" was one of the abuses. Id. at 92. The restrictions placed on debt relief agencies are designed to protect both debtors and creditors from such practices.

Accordingly, the challenged provisions should be upheld as permissible exercises of Congress' power under the Commerce Clause.

CONCLUSION

For the above stated reasons, Ms. Moore's motion to declare the "debt relief agency" provisions invalid and inapplicable to attorneys should be denied.

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Respectfully submitted,

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