

## Casenote

### ***Milavetz, Gallop & Milavetz, P.A. v. United States: “In Contemplation Of” the Meaning, Applicability, and Validity of Attorney Restrictions in the BAPCPA***

#### I. INTRODUCTION

In *Milavetz, Gallop & Milavetz, P.A. v. United States*,<sup>1</sup> the Supreme Court of the United States held that, under section 227 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),<sup>2</sup> attorneys who provide bankruptcy counsel are “debt relief agencies.”<sup>3</sup> The Court also held two BAPCPA provisions constitutional: one provision that prevented debt relief agencies from advising a debtor to incur more debt in contemplation of bankruptcy<sup>4</sup> and another that imposed disclosure requirements on debt relief agencies.<sup>5</sup> In light of the inconsistent and unclear interpretations of BAPCPA provisions

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1. 130 S. Ct. 1324 (2010).

2. Pub. L. No. 109-8, § 227, 119 Stat. 23, 67 (codified as amended in scattered sections of 11 U.S.C.).

3. *Milavetz*, 130 S. Ct. at 1331.

4. *Id.* at 1334.

5. *Id.* at 1341.

considered in this case, the Court's ruling acts to ease concerns that stem from incipient First Amendment<sup>6</sup> challenges to BAPCPA.

## II. FACTUAL BACKGROUND

Two clients came to the law firm of Milavetz, Gallop & Milavetz, P.A., seeking counsel on the possibility of incurring debt before filing for bankruptcy.<sup>7</sup> The Milavetz law firm, along with the firm's president, a bankruptcy attorney within the firm, and the two clients (Milavetz), brought a pre-enforcement action in the United States District Court for the District of Minnesota, asking for a declaratory judgment that several provisions of BAPCPA § 227<sup>8</sup> did not apply to attorneys or were unconstitutional as applied to attorneys.<sup>9</sup> As a preliminary consideration, Milavetz asked whether attorneys are within the definition of debt relief agencies set forth in BAPCPA.<sup>10</sup> Provided that attorneys are debt relief agencies, Milavetz further questioned the constitutionality of § 526(a)(4) of the Bankruptcy Code,<sup>11</sup> which prohibits a debt relief agency from advising a client to incur more debt when contemplating bankruptcy.<sup>12</sup> Milavetz also questioned the constitutionality of 11 U.S.C. § 528(a)(4)<sup>13</sup> and (b)(2),<sup>14</sup> which mandate certain disclosure requirements for debt relief agencies in their advertising.<sup>15</sup> The suit asked the district court to find these provisions inapplicable or unconstitutional as to attorneys, such that they may advise their clients to incur additional debt and avoid the burden of disclosure requirements in advertisements.<sup>16</sup>

The district court granted Milavetz's motion for summary judgment, finding that attorneys were excluded from BAPCPA's definition of debt relief agency, and that the questioned provisions of BAPCPA were unconstitutional as to attorneys.<sup>17</sup> The United States Court of Appeals for the Eighth Circuit affirmed in part and reversed in part.<sup>18</sup> The

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6. U.S. CONST. amend. I.

7. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d 785, 788 n.1 (8th Cir. 2008).

8. Pub. L. No. 109-8, § 227, 119 Stat. 23, 67 (2005).

9. *Milavetz*, 541 F.3d at 788.

10. *Id.* at 789.

11. 11 U.S.C. § 526(a)(4) (2006).

12. *Id.*; *Milavetz*, 541 F.3d at 788.

13. 11 U.S.C. § 528(a)(4) (2006).

14. 11 U.S.C. § 528(b)(2) (2006).

15. *Milavetz*, 541 F.3d at 788-89; *see also* 11 U.S.C. § 528(a)(4), (b)(2).

16. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1330-31 (2010).

17. *Milavetz*, 541 F.3d at 788.

18. *Id.*

court determined that attorneys were included in BAPCPA's definition of debt relief agency<sup>19</sup> and noted that the issue was one of first impression among federal courts of appeals.<sup>20</sup> In so determining, the court relied on a plain-language interpretation of BAPCPA and eschewed the district court's use of the canon of constitutional avoidance to read attorneys out of the definition of debt relief agency.<sup>21</sup> The court of appeals also disagreed with the district court's finding on the § 528 disclosure requirements; the court of appeals held the disclosure requirements were a restriction on commercial speech and applied a rational basis standard of review, concluding that the requirements passed constitutional scrutiny.<sup>22</sup> Having reversed on two issues, the court affirmed the district court's ruling that § 526(a)(4) was unconstitutional as applied to attorneys.<sup>23</sup> The court of appeals determined that the prohibition on advice to incur more debt was overbroad and would include nonabusive advice; therefore, the prohibition was not narrowly tailored to stand up to constitutional scrutiny.<sup>24</sup>

The Supreme Court granted certiorari due to conflict among the federal courts of appeals on the breadth and constitutionality of § 526(a)(4).<sup>25</sup> Unanimously, the Court affirmed the Eighth Circuit's inclusion of attorneys in the definition of debt relief agency as well as the constitutionality of the disclosure requirements of § 528, while reversing the court of appeals finding on the unconstitutionality of § 526(a)(4).<sup>26</sup>

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19. *Id.* at 792.

20. *Id.* at 790.

21. *Id.* at 791-92. The canon of constitutional avoidance requires "that where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 791 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)) (internal quotation marks omitted). The court of appeals determined that interpreting the definition of debt relief agency to exclude attorneys would run contrary to the intent of Congress; thus, the canon of constitutional avoidance did not apply. *Id.*

22. *Id.* at 795-97.

23. *Id.* at 794.

24. *Id.* For examples of nonabusive advice to incur debt in contemplation of filing, see *infra* notes 59, 66.

25. *Milavetz*, 130 S. Ct. at 1331.

26. *Id.* at 1329.

## III. LEGAL BACKGROUND

A. *Enactment of the BAPCPA*

On April 20, 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).<sup>27</sup> The aim of BAPCPA was to reconstruct a national bankruptcy system such that the process would be “fair for both debtors and creditors,” with the specific goal of restoring personal financial accountability in bankruptcy filings.<sup>28</sup> To increase systemic accountability, BAPCPA “substantially augment[ed] the responsibilities of those . . . who counsel debtors with respect to obtaining [consumer bankruptcy] relief.”<sup>29</sup>

BAPCPA includes several provisions that mandate certain behavior from debt relief agencies.<sup>30</sup> Debt relief agencies are defined in BAPCPA as “any person who provides any bankruptcy assistance to an assisted person,”<sup>31</sup> with such assistance further defined as service provided to a person with the “purpose of providing information, advice, counsel, . . . or . . . legal representation with respect to a [bankruptcy] proceeding.”<sup>32</sup> Under BAPCPA, debt relief agencies cannot encourage an “assisted person”<sup>33</sup> to engage in specified financial behavior, including a prohibition against advice “to incur more debt in contemplation of” filing for bankruptcy.<sup>34</sup> Furthermore, BAPCPA regulates debt relief agencies by requiring certain disclosures in advertisements.<sup>35</sup>

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27. Pub. L. No. 109-8, 119 Stat. 23.

28. H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89. Despite the explicit purpose contained within the legislative history of BAPCPA, many critics believe that BAPCPA’s purpose did not relate to curbing bankruptcy abuse but was an effort of consumer credit industry lobbies to reduce the total number of bankruptcies, abusive or otherwise. *See, e.g.*, Sean C. Currie, *The Multiple Purposes of Bankruptcy: Restoring Bankruptcy’s Social Insurance Function After BAPCPA*, 7 DEPAUL BUS. & COM. L.J. 241, 248-52 (2009); *see also* Michelle J. White, *Bankruptcy Reform Gave Creditors Too Much*, WASH. POST, Aug. 21, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/19/AR2006081900413.html>.

29. H.R. REP. NO. 109-31, pt. 1, at 2.

30. *See, e.g.*, 11 U.S.C. §§ 526-528 (2006).

31. 11 U.S.C. § 101(12A) (2006).

32. 11 U.S.C. § 101(4A) (2006).

33. An “assisted person” is defined under the code as “any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000.” 11 U.S.C. § 101(3) (2006).

34. 11 U.S.C. § 526(a)(4) (2006).

35. 11 U.S.C. § 528(a)(4), (b)(2) (2006).

*B. Are Attorneys “Debt Relief Agencies”?*

Aside from the Eighth Circuit’s ruling in *Milavetz*, only one other appellate court had considered the scope of debt relief agencies under BAPCPA. In *Hersh v. United States*,<sup>36</sup> the United States Court of Appeals for the Fifth Circuit heard a suit filed by a Texas bankruptcy attorney, which alleged that attorneys were not debt relief agencies under BAPCPA.<sup>37</sup> The court held that bankruptcy attorneys were debt relief agencies for three key reasons.<sup>38</sup> First, the court noted that 11 U.S.C. § 101(12A) provides several exclusions to the definition of debt relief agency, yet attorneys are not one of those exclusions.<sup>39</sup> Second, the court recognized that the definition of “bankruptcy assistance” under 11 U.S.C. § 101(4A) includes services related to “legal representation.”<sup>40</sup> Finally, the court cited the legislative history of BAPCPA as indicative of Congress’s intent to include attorneys within the meaning of debt relief agency.<sup>41</sup>

Several federal district courts have ruled on the extent to which attorneys are included in the meaning of debt relief agency, yet these rulings did not yield a definitive statement on the inclusion of attorneys.<sup>42</sup> In *In re Attorneys at Law & Debt Relief Agencies*,<sup>43</sup> the United States Bankruptcy Court for the Southern District of Georgia was the first to opine on the scope of the term.<sup>44</sup> Issuing an opinion on the effective date of BAPCPA, the court found attorneys outside the meaning of debt relief agencies, reasoning that an inclusive reading would require “a breathtakingly expansive interpretation of federal law to usurp state regulation.”<sup>45</sup> In *In re Reyes*,<sup>46</sup> the United States Bankruptcy Court for the Southern District of Florida echoed this reasoning, declaring that

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36. 553 F.3d 743 (2008).

37. *Id.* at 747.

38. *Id.* at 750-51.

39. *Id.* at 750.

40. *Id.* at 750-51 (emphasis omitted) (internal quotation marks omitted).

41. *Id.* at 751.

42. *See id.* at 750 n.5.

43. 332 B.R. 66 (Bankr. S.D. Ga. 2005).

44. *Id.* at 67; *see also In re Irons*, 379 B.R. 680, 685-86 (Bankr. S.D. Tex. 2007) (discussing the ruling of *In re Attorneys*).

45. 332 B.R. at 71; *see In re Irons*, 379 B.R. at 685-86 (noting that *In re Attorneys* was decided “on the effective date of the statute”). Chief among the textual concerns of the court in *In re Attorneys* was the absence of “attorney” in the § 101(12A) definition of debt relief agency, the express exclusion of attorneys in the 11 U.S.C. § 110(a)(1) (2006) definition of bankruptcy petition preparer, and the absence of debt relief agency within the 11 U.S.C. § 101(4) (2006) definition of attorney. 332 B.R. at 69.

46. 361 B.R. 276 (Bankr. S.D. Fla. 2007).

attorneys are not within the scope of debt relief agencies and lamenting the breadth of BAPCPA's language: "[W]hile the experts who drafted BAPC[P]A are entitled to a failing grade in Legislative Drafting 101, the [c]ourt is left to determine what Congress intended."<sup>47</sup> The court noted concerns that BAPCPA might step on the traditional state role in overseeing attorney conduct.<sup>48</sup> The court also reasoned that if Congress had intended to regulate attorney conduct, it would have expressly included the word "attorney" in the definition of debt relief agency.<sup>49</sup>

Despite some courts' adamant defense of the exclusionary point of view, the majority of district courts have included attorneys within the meaning of debt relief agency.<sup>50</sup> In *In re Irons*,<sup>51</sup> the United States Bankruptcy Court for the Southern District of Texas included attorneys within the scope of the term, determining that it was within the plain meaning of BAPCPA.<sup>52</sup> Similarly, the United States Bankruptcy Court for the Eastern District of Virginia held in *In re Robinson*<sup>53</sup> that attorneys must adhere to the written contract requirement of debt relief agencies within BAPCPA, declaring that "there can be little doubt that the requirement . . . applies to attorneys."<sup>54</sup> Generally, courts have included attorneys within the definition of debt relief agencies under BAPCPA.<sup>55</sup>

### C. *Is "in Contemplation of" Unconstitutionally Overbroad?*

In *Olsen v. Gonzales*,<sup>56</sup> decided in August 2006, the United States District Court for the District of Oregon held 11 U.S.C. § 526(a)(4) to be unconstitutionally overbroad.<sup>57</sup> The court reasoned that the Government has a compelling interest in preventing speech that is unlawful or unethical, as in advice that is abusive of the bankruptcy system.<sup>58</sup> There are some situations, however, when advice to incur "debt 'in

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47. *Id.* at 279.

48. *Id.*

49. *Id.* at 280.

50. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d 785, 790 (8th Cir. 2008).

51. 379 B.R. 680 (Bankr. S.D. Tex. 2007).

52. *Id.* at 685-86.

53. 368 B.R. 492 (Bankr. E.D. Va. 2007).

54. *Id.* at 500 n.7.

55. *See, e.g., Olsen v. Gonzales*, 350 B.R. 906, 912 (D. Or. 2006); *Conn. Bar Ass'n v. United States*, 394 B.R. 274, 280 (D. Conn. 2008); *In re Mendoza*, 347 B.R. 34, 38 n.6 (Bankr. W.D. Tex. 2006).

56. 350 B.R. 906 (D. Or. 2006).

57. *Id.* at 916.

58. *See id.* at 915 n.5, 916.

contemplation' of bankruptcy" is lawful and financially prudent.<sup>59</sup> "Thus, [§] 526(a)(4) prevents lawyers from giving clients their best advice"; therefore, § 526(a)(4) is unconstitutionally overbroad.<sup>60</sup>

In November 2006, an attorney brought a facial challenge to the constitutional validity of § 526(a)(4) in *Zelotes v. Martini*,<sup>61</sup> and the United States District Court for the District of Connecticut held that the provision unconstitutionally chilled permissible speech of the attorney.<sup>62</sup> Calling § 526(a)(4) "a prophylactic rule," the court recognized that the prohibition extends to "any additional debt in contemplation of bankruptcy" and articulated concerns that such a broad proscription would rule out certain prudent and lawful advice by an attorney.<sup>63</sup> Three months later, in February of 2007, the same Connecticut district court reaffirmed that finding of unconstitutionality in *Zelotes v. Adams*.<sup>64</sup> On motion for reconsideration, the Government offered a narrower interpretation of "in contemplation of," asking the court to limit the prohibition of § 526(a)(4) to refer only to instances when the attorney advises the debtor to incur more debt "because" of an intention to file for bankruptcy.<sup>65</sup> The court rejected such a broad reading and articulated three more instances, beyond those provided by the court in *Olsen*, in which an attorney would be acting responsibly and with financial prudence in advising a client to incur more debt before filing for bankruptcy.<sup>66</sup> In *Connecticut Bar Ass'n v. United States*,<sup>67</sup> a third

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59. *Id.* at 916 ("That situation could be the case when: (1) refinancing at a lower rate to reduce payments and forestall . . . bankruptcy; or (2) taking on secured debt . . . that would survive bankruptcy and also enable the debtor to continue to get to work and make payments.").

60. *Id.*

61. 352 B.R. 17 (D. Conn. 2006).

62. *Id.* at 24-25.

63. *Id.* at 24.

64. 363 B.R. 660, 666 (D. Conn. 2007).

65. *Id.* at 664. The Government supported its argument with the Supreme Court's interpretation in *United States v. Wells*, 283 U.S. 102 (1931), of "in contemplation of death." *Adams*, 363 B.R. at 664 (internal quotation marks omitted). The Court in *Wells* determined that "in contemplation of death" mean[t] that the thought of death is the impelling cause of the transfer," not that the thought of death was imminent at the time of transfer. 283 U.S. at 118-19. In *Adams* the Government argued that a similar interpretation of "in contemplation of" should be adhered to in reading § 526(a)(4), such that advice to incur debt is only prohibited when impending bankruptcy is the impelling cause of the advice. 363 B.R. at 664 (internal quotation marks omitted).

66. *Adams*, 363 B.R. at 665 (footnote omitted) ("[I]t might be finally [sic] prudent . . . to . . . (3) take out a loan to pay the filing fee in a bankruptcy case or to obtain the services of a bankruptcy attorney, (4) take out a loan to convert a non-exempt asset to an exempt asset, or (5) co-sign undischargable student loans.").

67. 394 B.R. 274 (D. Conn. 2008).

examination by the same court of § 526(a)(4) yielded the same conclusion of unconstitutionality on the basis of overbreadth.<sup>68</sup>

After resolving the scope of “debt relief agency” under BAPCPA, the Fifth Circuit, in *Hersh*, ruled on the constitutionality of § 526(a)(4).<sup>69</sup> Aside from the Eighth Circuit’s ruling in *Milavetz*,<sup>70</sup> no other federal appellate court had ruled on the constitutionality of § 526(a)(4).<sup>71</sup> The Fifth Circuit held that the challenged provision of BAPCPA was constitutional by reading “in contemplation of” narrowly to include only advice made with the intent of abusing the bankruptcy system.<sup>72</sup> The keystone of this rationale is the doctrine of constitutional avoidance, which, according to the court in *Hersh*, provided a reading of § 526(a)(4) that avoids a “blanket restriction” that would otherwise be overbroad and unconstitutional.<sup>73</sup> Noting that Congress has a compelling interest in preventing abuse of the bankruptcy system, the court recognized that the constitutional hang-up in this BAPCPA restriction was the phrase “in contemplation of” bankruptcy, which was not narrowly-tailored to meet the Government’s compelling interest.<sup>74</sup> By narrowly construing the term to apply only to abusive advice, the court created “a limiting construction of the statute [by] adding a requirement [] nowhere expressed in the statute.”<sup>75</sup> The court cited the Supreme Court ruling in *Boos v. Barry*<sup>76</sup> as an authority for adopting a modifying construction on an unrestricted statutory regulation.<sup>77</sup> Because restricting “in

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68. *Id.* at 282, 284. Addressing the concerns of the Government that the court was misreading “in contemplation of,” the court maintained that the provision still overreached to instances in which the attorney has a fiduciary duty, in the name of zealous representation, to give the legal advice that BAPCPA prohibits. *Id.* at 283. In seeking a resolution in line with the purpose of BAPCPA, the court suggested that “[i]f the government seeks to prevent manipulation of the bankruptcy system, a more narrowly tailored approach would be to penalize those who take on certain types of debts, rather than prohibiting legal advice about permissible courses of action.” *Id.*

69. *See* 553 F.3d at 764.

70. *See* 541 F.3d at 794.

71. *Hersh*, 553 F.3d at 752. The ruling in *Hersh*, which reads “in contemplation of” narrowly to avoid constitutional problems, conflicts with the Eighth Circuit’s broad reading in *Milavetz*. *Compare id.* at 756, with *Milavetz*, 541 F.3d at 794. This conflict was the basis for the Supreme Court’s issuance of certiorari in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1331 (2010).

72. *Hersh*, 553 F.3d at 756.

73. *Id.* at 753-54.

74. *Id.* at 755-56.

75. *Id.* at 758 (emphasis omitted) (citing *Boos v. Barry*, 485 U.S. 312, 330-31 (1988)).

76. 485 U.S. 312 (1988).

77. *Hersh*, 553 F.3d at 757-58. As further justification for adding such a limitation, the Fifth Circuit extensively reviewed the legislative history and proffered the legislative purpose imbued in that history: that Congress adopted BAPCPA to combat abuse of the

contemplation of” to abusive prefling advice excludes advice made in good faith and in legal prudence, the Fifth Circuit held that § 526(a)(4) was not unconstitutionally overbroad.<sup>78</sup>

*D. Are BAPCPA Disclosure Requirements Unconstitutional?*

Two seminal Supreme Court cases lay out the appropriate standard of scrutiny for compelled commercial speech. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>79</sup> the Court articulated a middle scrutiny standard for speech that “is neither misleading nor related to unlawful activity.”<sup>80</sup> This scrutiny test uses four prongs: (1) whether the speech is unlawful or misleading; (2) whether the government has a substantial interest in compelling the speech; (3) whether the substantial interest is directly advanced by the regulation; and (4) whether it is narrowly tailored in such advancement.<sup>81</sup> The Court clarified the operation of the first prong in *In re R.M.J.*,<sup>82</sup> noting that while “[t]ruthful advertising related to lawful activities is entitled to . . . protection[,],” when advertisements are “inherently misleading or . . . prove[n] . . . in fact [to be] subject to abuse,” the Government may impose reasonable restrictions.<sup>83</sup>

In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,<sup>84</sup> the Court addressed the scrutiny level applicable when the first prong of *Central Hudson* is not met.<sup>85</sup> *Zauderer* involved a disciplinary proceeding for an Ohio attorney who challenged the constitutionality of disciplinary rules prohibiting misleading advertising.<sup>86</sup> In considering First Amendment rights in commercial speech, the Court held that disclosure requirements may have the effect of chilling protected speech; however, “as long as disclosure requirements are reasonably related to the [Government’s] interest in preventing deception of consumers,” those requirements do not infringe on the First Amendment rights of the advertiser.<sup>87</sup>

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bankruptcy system, and such a construction is the natural extension of that legislative purpose. *Id.* at 760-61.

78. *Id.* at 763.

79. 447 U.S. 557 (1980).

80. *Id.* at 564.

81. *Id.* at 566.

82. 455 U.S. 191 (1982).

83. *Id.* at 203.

84. 471 U.S. 626 (1985).

85. *See id.* at 638.

86. *Id.* at 631, 634.

87. *Id.* at 651.

In *Olsen* the District of Oregon considered the constitutionality of the disclosure requirements of 11 U.S.C. § 528<sup>88</sup> in light of *Zauderer* and *Central Hudson*, finding that, in a facial challenge, BAPCPA disclosure requirements in advertisements did not violate the First Amendment as compelled commercial speech.<sup>89</sup> The court applied the *Central Hudson* four-prong test to determine the constitutionality of BAPCPA's disclosure requirements because, prior to the legislated imposition of the requirements, attorneys did not advertise in ways that were deceptive or misleading.<sup>90</sup> Under the intermediate scrutiny standard, the court further found that the provisions met the other three prongs of the *Central Hudson* test for the following three reasons: (1) the purpose of preventing fraud was a substantial interest, (2) there was direct advancement of that interest because attorneys can provide supplemental information in their advertisements, and (3) the requirements were narrowly drawn to the court's satisfaction.<sup>91</sup>

In *Connecticut Bar Ass'n*, the District of Connecticut reached a different conclusion regarding the disclosure requirements of § 528, finding unconstitutionality because the requirements were not reasonably related to the Government's interest in preventing deception of consumers under the *Zauderer* test.<sup>92</sup> The court applied the more lenient *Zauderer* test, reasoning that the *Zauderer* test was more appropriate than the *Central Hudson* test when regulation involves disclosure requirements.<sup>93</sup> Even using the more lenient test, the court found there was no reasonable relation between the Government's interest of preventing fraudulent speech and the regulation imposed by BAPCPA.<sup>94</sup> The court reasoned that the disclosure statement—"We help people file for bankruptcy relief under the Bankruptcy Code"—applied to attorneys providing a broad range of services, not all of which necessitated bankruptcy relief.<sup>95</sup> Consequently, the court found the required disclosure statement to be misleading; therefore, the statement was not reasonably related to the Government's interest in preventing consumer deception.<sup>96</sup>

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88. 11 U.S.C. §§ 528 (2006).

89. 350 B.R. at 919-20.

90. *Id.* at 920 (finding that the first prong of *Central Hudson* was satisfied).

91. *Id.* at 920-21.

92. *See* 394 B.R. at 289-90.

93. *Id.* at 289 n.16.

94. *Id.* at 290.

95. *Id.* (internal quotation marks omitted).

96. *Id.*

## IV. COURT'S RATIONALE

A. *Majority Opinion*

In *Milavetz*<sup>97</sup> the Supreme Court granted certiorari to settle a conflict among the courts of appeals as to the constitutionality of the BAPCPA § 227<sup>98</sup> speech restrictions.<sup>99</sup> Justice Sotomayor delivered the opinion of the Court, which was unanimous except for separate concurrences by Justice Scalia and Justice Thomas.<sup>100</sup>

The Court first discussed the threshold issue of whether BAPCPA includes attorneys within the meaning of debt relief agencies.<sup>101</sup> The Court adopted the Government's interpretation of BAPCPA as including attorneys within the plain meaning of debt relief agencies.<sup>102</sup> Debt relief agencies are defined in BAPCPA as entities that provide "bankruptcy assistance,"<sup>103</sup> and bankruptcy assistance sometimes takes the form of "legal representation with respect to a case or proceeding."<sup>104</sup> The Court reasoned that some forms of bankruptcy assistance can only be provided by attorneys; therefore, including attorneys within the definition of debt relief agencies comports with a plain reading of the text.<sup>105</sup> Buttressing this conclusion, the Court pointed out that 11 U.S.C. § 101(12A) details several exceptions to the meaning of debt relief agency, and in drafting this section, Congress did not exclude attorneys.<sup>106</sup> In a footnote, the majority opinion noted that the legislative history also hints at no such exclusion.<sup>107</sup>

Milavetz suggested that the absence of attorneys from the exceptions of § 101(12A) should be considered in light of BAPCPA's explicit exclusion of attorneys within the 11 U.S.C. § 110(a)(1)<sup>108</sup> definition of "bankruptcy petitioner preparer."<sup>109</sup> As Justice Sotomayor pointed out, however, that reading is implausible unless bankruptcy petition

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97. 130 S. Ct. 1324 (2010).

98. Pub. L. No. 109-8, § 227, 119 Stat. 23, 67 (2005).

99. 130 S. Ct. at 1331.

100. *Id.* at 1329.

101. *Id.* at 1331.

102. *Id.*

103. 11 U.S.C. § 101(12A) (2006).

104. 11 U.S.C. § 101(4A) (2006).

105. *Milavetz*, 130 S. Ct. at 1332; *see also* 11 U.S.C. § 110(e)(2) (2006).

106. *Milavetz*, 130 S. Ct. at 1332.

107. *Id.* at 1332 n.3. Justice Scalia's concurrence focuses on his disagreement with the Court's inclusion of this footnote. *Id.* at 1341-42 (Scalia, J., concurring).

108. 11 U.S.C. § 110(a)(1) (2006).

109. *Milavetz*, 130 S. Ct. at 1332 (internal quotation marks omitted).

preparers are the only debt relief agencies.<sup>110</sup> Milavetz also proffered a federalism argument, contending that the inclusion of attorneys within the scope of debt relief agencies creates a reading that clashes with the role of state governments in regulating the legal profession.<sup>111</sup> The Court dismissed that logic by noting that “Congress would have had no reason to enact that provision if the debt-relief-agency provisions did not apply to attorneys.”<sup>112</sup> Lastly, the Court rejected Milavetz’s argument for a narrow reading based on the canon of constitutional avoidance, finding that the canon is only applicable in the presence of statutory ambiguity, of which there is none here.<sup>113</sup>

The majority opinion then moved to Milavetz’s assertion that 11 U.S.C. § 526(a)(4)<sup>114</sup> is unconstitutional “as a broad, content-based restriction on attorney-client communications that is not adequately tailored to constrain only speech the Government has a substantial interest in restricting.”<sup>115</sup> According to the Court, the Eighth Circuit, which found the restriction unconstitutionally overbroad, read § 526(a)(4) as a ban on advice to incur any debt in contemplation of filing.<sup>116</sup> Justice Sotomayor spurned this approach, instead adopting a narrower reading of the restriction that included only conduct that is “designed to manipulate the protections of the bankruptcy system,” basing that reading on the meaning of the phrase “in contemplation of.”<sup>117</sup>

Justice Sotomayor based her explanation of the phrase “in contemplation of” on the Court’s ruling in *Conrad, Rubin & Lesser v. Pender*,<sup>118</sup> in conjunction with context provided by other sections of BAPCPA.<sup>119</sup> The Court noted that the critical issue in *Pender* was “whether the

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110. *Id.*

111. *Id.*

112. *Id.* The Court also reasoned that the federalism argument is weak because “Congress and the bankruptcy courts have long overseen aspects of attorney conduct in this area of substantial federal concern.” *Id.* at 1332-33. Milavetz further argued that, because one of the exceptions found in 11 U.S.C. § 101(12A) includes “employee[s] or agent[s]” of a person who provides bankruptcy assistance, the absence of “partners” creates the problem that entire law firms must comply with BAPCPA’s behavioral restrictions on the basis of one partner’s conduct. 130 S. Ct. at 1333 (internal quotation marks omitted). The Court rejected this argument because a partnership, by its nature, requires that its partners assume certain responsibilities jointly, and oftentimes one partner’s conduct dictates the entire behavior of the partnership. *Id.*

113. *Id.* at 1333.

114. 11 U.S.C. § 526(a)(4) (2006).

115. *Milavetz*, 130 S. Ct. at 1334.

116. *Id.*

117. *Id.* at 1335-36 (internal quotation marks omitted).

118. 289 U.S. 472 (1933).

119. *Milavetz*, 130 S. Ct. at 1336.

thought of bankruptcy was the impelling cause of the transaction.”<sup>120</sup> Adopting a similar construction, the Court held that advice to incur more debt, made in expectation of discharge, is per se abusive.<sup>121</sup> The Court pointed to contextual support, noting that BAPCPA augments protections already in place under the old bankruptcy code that guarded against accumulating more debt in anticipation of discharge.<sup>122</sup> Under BAPCPA, means-testing provisions provide that a bankruptcy filer’s petition is presumptively abusive in certain instances, a change which reflects increased protections against abusive accumulation of debt made prior to filing.<sup>123</sup> Aside from the textual arguments, Justice Sotomayor also pointed out the practicality of a narrow construction: “It would make scant sense to prevent attorneys and other debt relief agencies from advising individuals thinking of filing for bankruptcy about options that would be beneficial to both those individuals and their creditors.”<sup>124</sup> The Court held that § 526(a)(4) is narrowly tailored to apply only to advice that encourages an assisted person to incur “debt when the impelling reason” for such counsel is imminent bankruptcy.<sup>125</sup>

Turning to Milavetz’s remaining argument, the majority determined that § 526(a)(4) is not impermissibly vague.<sup>126</sup> Milavetz contended that the difficulty in determining what is abusive advice will inevitably chill protected speech.<sup>127</sup> The Court discarded this contention by noting that determination of what is abusive is irrelevant, and the question of applicability relates to whether the impelling cause of this advice is impending bankruptcy.<sup>128</sup> Any advice given with the expectation of obtaining discharge is abusive per se, so the relevant question is whether the advice was given in anticipation of such discharge.<sup>129</sup>

Finally, the Court addressed the disclosure requirements of 11 U.S.C. § 528(a)(4)<sup>130</sup> and (b)(2)<sup>131</sup> and agreed with the Eighth Circuit’s finding of constitutionality.<sup>132</sup> The issue of constitutionality turned on the applicable standard of scrutiny for provisions regulating commercial

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120. *Id.* (quoting *Pender*, 289 U.S. at 477) (internal quotation marks omitted).

121. *Id.*

122. *Id.*

123. *Id.* at 1336-37.

124. *Id.* at 1337.

125. *Id.*

126. *Id.* at 1338.

127. *Id.*

128. *Id.*

129. *See id.*

130. 11 U.S.C. § 528(a)(4) (2006).

131. 11 U.S.C. § 528(b)(2) (2006).

132. *Milavetz*, 130 S. Ct. at 1341.

speech.<sup>133</sup> Milavetz sought application of the intermediate scrutiny standard articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*;<sup>134</sup> the Government sought application of the more lenient *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*<sup>135</sup> standard.<sup>136</sup> The Court decided to apply the *Zauderer* standard, reasoning that the less exacting scrutiny is appropriate given the purpose of the disclosure requirements in “combat[ting] the problem of inherently misleading commercial advertisements.”<sup>137</sup> Specifically, the Court pointed to its previous holding in *In re R.M.J.*<sup>138</sup> as evidence that a low scrutiny should apply in regulation of advertisements for professional services due to the augmented risk of deception posed by such advertisements.<sup>139</sup> Applying a reasonable-relation standard, as articulated in *Zauderer*,<sup>140</sup> the Court addressed Milavetz’s contentions that there was a lack of a reasonable relation between the disclosure requirements and the Government’s interest in preventing consumer deception.<sup>141</sup> The Court alleviated Milavetz’s concern that “‘debt relief agency’ is confusing and misleading” by noting that bankruptcy advertisers can clarify the meaning of the term by providing other information in the advertisement that is neither prescribed nor proscribed by BAPCPA.<sup>142</sup> Finding a reasonable relation, the Court upheld the constitutionality of the § 528 disclosure requirements, affirming the ruling of the Eighth Circuit.<sup>143</sup>

### B. *Concurring Opinions: Scalia and Thomas*

Justice Scalia concurred in part and in the judgment, only disagreeing with the contents of footnote three of the majority opinion.<sup>144</sup> The disagreement stemmed from Justice Scalia’s opposition to the use of legislative history in interpreting the meaning of a statute.<sup>145</sup> He

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133. *Id.* at 1339.

134. 447 U.S. 557, 564 (1980).

135. 471 U.S. 626, 651 (1985).

136. *Milavetz*, 130 S. Ct. at 1339.

137. *Id.* at 1339-40.

138. 455 U.S. 191 (1982).

139. *Milavetz*, 130 S. Ct. at 1340.

140. *See* 471 U.S. at 651 (holding “that an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers”).

141. *Milavetz*, 130 S. Ct. at 1340-41.

142. *Id.*

143. *Id.* at 1341.

144. *Id.* (Scalia, J., concurring in part and concurring in the judgment).

145. *Id.* at 1341-42. Justice Scalia gives three reasons why legislative history does not provide evidence of statutory meaning: “(1) [W]e do not know that the members of the

believed the logic of footnote three—connecting committee reports to congressional intent—to be “a bridge too far.”<sup>146</sup>

The concurrence of Justice Thomas, in judgment and in part, related to the majority’s finding of constitutionality on the disclosure requirements of § 528.<sup>147</sup> Justice Thomas expressed his dissatisfaction with the *Zauderer* standard of scrutiny that applies to restrictions on misleading commercial speech.<sup>148</sup> Although he agreed that the *Zauderer* standard applied to the constitutional challenge in *Milavetz*, he noted his eagerness to reexamine the standard to determine the extent to which it protects against government-mandated disclosure requirements.<sup>149</sup> Justice Thomas lamented that *Milavetz* involved an as-applied challenge to the constitutionality of the disclosure requirements because the dearth of evidence on the nature of *Milavetz*’s advertisements precluded a ruling on the facial constitutionality of the disclosures.<sup>150</sup> As such, Justice Thomas could not reexamine the *Zauderer* standard and confirmed that *Milavetz*’s constitutional challenge of § 528’s disclosure requirements failed.<sup>151</sup>

## V. IMPLICATIONS

It is no surprise, nor is it a secret, that bankruptcy attorneys were not eager to embrace the litany of regulations instituted by the new Bankruptcy Code in 2005.<sup>152</sup> The reluctance of bankruptcy attorneys was augmented by the general perception that BAPCPA<sup>153</sup> was poorly drafted and that the statutory overhaul left a maze of ambiguity and uncertainty for attorneys to navigate.<sup>154</sup> Chief among attorneys’

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Committee read the Report [of the House Committee on the Judiciary], (2) it is almost certain that they did not vote on the Report (that is not the practice), and (3) even if they did read and vote on it, they were not, after all, those who made this law.” *Id.*

146. *Id.* at 1342. Justice Scalia points out the Court’s acknowledgement of the footnote’s extraneity and the peril of using legislative history in statutory interpretation: “The footnote advises conscientious attorneys that . . . they must spend time and their clients’ treasure combing the annals of legislative history in *all* cases . . .” *Id.*

147. *Id.* (Thomas, J., concurring in part and concurring in the judgment).

148. *Id.* at 1343.

149. *Id.*

150. *Id.* at 1344.

151. *Id.* at 1344-45.

152. See Keith M. Lundin, *Ten Principles of BAPCPA: Not What was Advertised*, 24 AM. BANKR. INST. J. 1 (2005); see also Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283 (2005).

153. Pub. L. No. 109-8, 119 Stat. 23 (2005).

154. See Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,”*

concerns was the specter of increased liability corresponding with measures of BAPCPA designed to increase accountability.<sup>155</sup> In *Milavetz*,<sup>156</sup> the Supreme Court resolved some ambiguities created by the deficient drafting of BAPCPA; however, ambiguities and practical problems for bankruptcy attorneys still endure.

The Court's holding that 11 U.S.C. § 526(a)(4)<sup>157</sup> is constitutional as to prohibitions on advice given in contemplation of bankruptcy when filing is the impelling reason for the advice resolved a conflict between adherence to BAPCPA and attorneys' fiduciary duties to their clients.<sup>158</sup> A major difficulty posed by the § 526(a)(4) prohibition was that attorneys had to deal with scenarios in which it was financially prudent to advise clients to incur more debt as part of pre-filing counseling.<sup>159</sup> For example, suppose a potential bankruptcy client came into an attorney's office and, in the course of considering whether to file for bankruptcy, asked the attorney if she should sell her home and rent an apartment instead to reduce her overall debt by eliminating mortgage payments.<sup>160</sup> If renting the apartment would cause the client to incur lease debt, the bankruptcy attorney could not have supported such a decision prior to the *Milavetz* ruling. After *Milavetz*, the Court protects attorneys in these instances when a "valid purpose" is served by such advice, and thus, the advice is financially prudent.<sup>161</sup>

Unfortunately, the scenario is not always so clearly "valid"; although the Court resolved part of the conflict by narrowing the § 526(a)(4) prohibition, the decision in *Milavetz* left much to the discretion of bankruptcy attorneys. The Court held that BAPCPA's prohibition applies when an attorney "advis[es] a debtor to incur more debt because

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79 AM. BANKR. L.J. 191, 191-92 (2005); see also *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66, 68 (Bankr. S.D. Ga. 2005) ("[I]ntolerable is needless uncertainty in the minds of the Bar as to their duty under this new statute.").

155. See Vance & Cooper, *supra* note 152, at 283-84 (comparing enactment of BAPCPA to a scene from PLATOON (Hemdale Film Corp. 1986) with the attorneys finding out that BAPCPA is really a booby trap).

156. 130 S. Ct. 1324 (2010).

157. 11 U.S.C. § 526(a)(4) (2006).

158. *Milavetz*, 130 S. Ct. at 1336.

159. See, e.g., *Zelotes v. Adams*, 363 B.R. 660, 665 (D. Conn. 2007) (recognizing five instances in which it would be financially prudent to encourage incurring more debt before filing for bankruptcy).

160. This is a problematic scenario that was suggested by bankruptcy scholar Eric Brunstad prior to the Supreme Court's ruling in *Milavetz*, suggesting the overbreadth of 11 U.S.C. § 526(a)(4). See Thomas B. Scheffey, *Bankruptcy Attorneys Prepare for Supreme Court Argument Over Legal Advice Rules*, CONN. L. TRIB., Oct. 9, 2009, <http://www.law.com/jsp/article.jsp?id=1202434405292&hbxlogin=1>.

161. *Milavetz*, 130 S. Ct. at 1336.

the debtor is filing for bankruptcy, rather than for a valid purpose.”<sup>162</sup> This begs the question, what is a valid purpose? The residual problem left by *Milavetz* is that bankruptcy attorneys have to determine the range of the term “valid.” Imagine the scenario in which a debtor, preparing to file for bankruptcy, calls her bankruptcy attorney and says the following: “I don’t have insurance or money to pay for the doctor or for my son’s medicine. Can I put it on my Visa?”<sup>163</sup> Does the bankruptcy attorney consider paying for a child’s medicine a valid purpose under the protection of *Milavetz*? Although *Milavetz* resolves situations that are more clear-cut, attorneys facing shades of gray when deciding the applicability of § 526(a)(4) cannot look to the language of Justice Sotomayor’s opinion for definitive help in deciding whether they may be liable for advice under BAPCPA. Essentially, this has the effect of chilling attorney speech in such a situation, even though it is unclear whether failing to advise would yield less exposure to liability.

In upholding the constitutionality of the disclosure requirements of 11 U.S.C. § 528,<sup>164</sup> the Court imposed a minor burden in requiring attorneys to add a statement to their bankruptcy advertisement material.<sup>165</sup> The disclosure, however, might not be so minor when considered from the perspective of the advertisee because the disclosure itself is misleading and deceptive.<sup>166</sup> Left unaddressed by the Court in *Milavetz*, an issue remains regarding the disconnect within 11 U.S.C. § 528(b)(2),<sup>167</sup> which requires all “debt relief agenc[ies] provid[ing] assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt” to include the disclosure statement.<sup>168</sup> The disconnect surfaces because the disclosure contains the text, “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.”<sup>169</sup> That language requires disclosure by attorneys who provide nonfiling services mentioned in § 528(b)(2).<sup>170</sup> Constitutional scholar Erwin Chemerinsky points out that this disconnect may

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162. *Id.*

163. Vance & Cooper, *supra* note 152, at 312 (internal quotation marks omitted).

164. 11 U.S.C. § 528 (2006).

165. *See Milavetz*, 130 S. Ct. at 1341.

166. *See Connecticut Bar Ass’n v. United States*, 394 B.R. 274, 290 (D. Conn. 2008) (internal quotation marks omitted) (holding § 528 unconstitutional, based on the fact that the prescribed statement—“We help people file for bankruptcy”—is misleading and confusing to the consumer).

167. 11 U.S.C. § 528(b)(2) (2006).

168. *Id.*

169. *Id.* (internal quotation marks omitted).

170. *See Connecticut Bar Ass’n*, 394 B.R. at 290.

“actually create more confusion among debtors seeking assistance.”<sup>171</sup> Because the Court did not address this omission, attorneys remain to clean up when clients are left confused and misled.<sup>172</sup> Two real options are available to attorneys in light of this confusion: they may avail themselves of “‘substantially similar’ language,”<sup>173</sup> or they may provide more information in their advertisement that clarifies the confusion created by the required language.<sup>174</sup>

The opinion in *Milavetz* left some questions unanswered but otherwise brought order to a state of constitutional flux created by BAPCPA’s inartful drafting. In the face of BAPCPA’s ambiguous provisions, *Milavetz* occasions some clarity for bankruptcy attorneys, informing them that, yes, they must conform to BAPCPA because they are debt relief agencies. Some opacity remains in what advice is “for a valid purpose” under *Milavetz*,<sup>175</sup> and attorneys will still have to guess what kind of advice falls within the § 526(a)(4) prohibition. Because the courts have failed to address the misleading nature of BAPCPA’s advertisement disclosure requirement, attorneys will have to deal with clients’ confusion, but there are opportunities to do so elsewhere in advertisements. Overall, *Milavetz* provides some direction to bankruptcy attorneys on how to proceed under BAPCPA, and some direction is better than none at all.

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171. See Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 578 (2005).

172. See Sommer, *supra* note 154, at 211.

173. *Id.*

174. See *Milavetz*, 130 S. Ct. at 1341.

175. *Id.* at 1336.