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The BAPCOA's Restriction on Attorney-Client Speech in the Fifth and Eighth Circuits: Worth Saving or Destroying Comment.

Sara Berkeley

COMMENTS

THE BAPCPA'S RESTRICTION ON ATTORNEY-CLIENT SPEECH IN THE FIFTH AND EIGHTH CIRCUITS: WORTH SAVING OR DESTROYING?

SARA BERKELEY

I. INTRODUCTION

At the April 20, 2005 signing ceremony of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA),[1] President George W. Bush extolled the reform act as bringing "greater stability and fairness to our financial system."[2] The controversial Act was Congress's answer to the persistent urging of unsecured creditors and legislators who felt that increasing rates of bankruptcy filings reflected consumer debtors' changing perceptions of the bankruptcy system as a first resort, rather than a last. Despite widespread criticism from academics and law practitioners alike,[3] Congress passed the BAPCPA to restore "personal responsibility and integrity" to the bankruptcy system by attempting to regulate fraud committed by debtors and bankruptcy service providers.[4] The 2005 Act was the most

1. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

2. Remarks on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 1 PUB. PAPERS 639 (Apr. 20, 2005).

3. *See* St.Clair Newbern III, *Legislative Enactments*, *in* 3 ADVISING SMALL BUSINESSES § 47:8 (Steven C. Alberty ed., 2009) ("BAPCPA was enacted despite the opposition of a significant number of bankruptcy judges and law school professors who felt that the abuses that infrequently occurred could be addressed ... [through] the existing Bankruptcy Code."). Some scholars characterize the act as "a behemoth of bad policy, an illiteracy of ill-conceived provisions, an underbelly of unintended consequences." Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 284 (2005). Examining the scope of the provision, Vance and Cooper suggest a more accurate name for the BAPCPA is the "Bankruptcy Act Reform Fiasco," or simply, "BARF." *Id.* at 332 n.1.

4. Megan A. Taylor, Comment, *Gag Me with a Rule of Ethics: BAPCPA's Gag Rule and the Debtor Attorney's Right to Free Speech*, 24 EMORY BANKR. DEV. J. 227, 227 (2008). Some suggest that the BAPCPA went so far as to repeal the "fresh start" ideology of bankruptcy law in America. Harvey R. Miller, *Chapter 11 in Transition—From Boom to Bust and into the Future*, 81 AM. BANKR. L.J. 375, 388 (2007). Miller characterizes the BAPCPA as "the ill-conceived" victory of special interests. *Id.* The BAPCPA achieved

comprehensive overhaul of bankruptcy reform in twenty-five years;[5] indeed, its legislative history spans nearly a decade.[6] At its core, a major component of change came in the form of newly imposed restrictions on individuals and entities engaged in bankruptcy services.[7] Many of those whom the Act directly addresses are categorized broadly in the BAPCPA as "debt relief agencies."[8]

In relevant part, the BAPCPA defines a "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person[9] in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110."[10] Section 101(12A) then excludes five entities from the category, including some nonprofit organizations and creditors.[11] Confusion has spread among the bankruptcy courts

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long-held goals of creditor groups who wished to curtail the discretion of the bankruptcy courts. *Id.* He argues that the delicate balance between debtors' rights and creditors' rights was upset by the legislation. *Id.*

5. H.R. REP. No. 109-31, pt. 1, at 3 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 90.

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

7. 11 U.S.C. §§ 101(12A), 526–528 (2006).

8. *Id.* § 101(12A); *see* Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221, 222 (2004) (discussing the Code as it was before the BAPCPA amendments). Even prior to the BAPCPA, Congress included bankruptcy professionals as "part of the problem," and not the solution for abuses within the system. *Id.* Some consider this source of blame to be a diversion: instead of closing loopholes in the system, Congress cracked the whip on bankruptcy attorneys in an unprecedented fashion. *See* Megan A. Taylor, Comment, *Gag Me with a Rule of Ethics: BAPCPA's Gag Rule and the Debtor Attorney's Right to Free Speech*, 24 EMORY BANKR. DEV. J. 227, 227 (2008) (criticizing the BAPCPA's content-based restrictions).

9. The term "assisted person" is defined in § 101(3) as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $164,250." 11 U.S.C.A. § 101(3) (2004 & Supp. 2009) (adjusting dollar amount from $150,000 to $164,250 by the Judicial Conference of the United States).

10. 11 U.S.C. § 101(12A).

11. *Id.* The "debt relief agency" category does not include:

> (A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;
>
> (B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;
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> (C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;
>
> (D) a depository institution . . . or any Federal credit union or State credit union . . .

and federal courts as to whether the heavily regulated debt relief agency category includes attorneys.[12] The plain language of the statute, as well as the legislative history, often leads to the conclusion that attorneys are "debt relief agencies" both as written and intended.[13] However, the divisions among the courts that have broached the subject reflect the serious nature of such a clearly affirmative answer.[14] That is, if an attorney is a "debt relief agency," the BAPCPA imposes several additional mandates beyond those which directly regulate attorney conduct.[15] Moreover, the sweeping language of the category as written could implicate unsuspecting attorneys who practice in areas outside

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or any affiliate or subsidiary of such depository institution or credit union; or

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

11 U.S.C. § 101(12A).

12. *See* Robert Wann, Jr., *Revisiting "Debt Relief Agencies" Three Years After Bankruptcy Reform*, BANKING & FIN. SERVS. POL'Y REP., Aug. 2008, at 6 (examining the ways in which courts have "muddle[d] through the 'debt relief agency' provisions of . . . the BAPCPA").

13. *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 791 (8th Cir. 2008) (deciding that the plain language of § 101(12A) includes attorneys as "debt relief agencies"), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119); Olsen v. Gonzalez, 350 B.R. 906, 912 (D. Or. 2006) (asserting that the plain language of the provision includes attorneys), *aff'd*, 368 B.R. 886 (D. Or. 2007).

14. *See In re* Att'ys at Law & Debt Relief Agencies, 332 B.R. 66, 67 (Bankr. S.D. Ga. 2005) (determining whether attorneys are "debt relief agencies"). The court explained that an affirmative answer would trigger "a new layer of regulation . . . on the bar of this Court, and evaluation of new risks and liabilities will preoccupy [attorneys] as they strive to represent their clients." *Id.* at 68. After conducting a statutory construction analysis, the court concluded that attorneys are not debt relief agencies. *Id.* The United States Bankruptcy Court for the Southern District of Georgia was the first court to rule that lawyers did not fit the definition of "debt relief agencies." George H. Singer & Whitney R. Cohen, *The Attorney As "Debt Relief Agency": A Bridge Too Far?*, BENCH & B. MINN., Apr. 2008, at 20, 21. In fact, the court acted on its own motion to answer the question on the same day that the BAPCPA went into effect. *Id.* at 20, 21 (discussing *In re Att'ys at Law*, 332 B.R. at 67).

15. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.) (promulgating new restrictions for attorneys engaged in bankruptcy law); *In re Att'ys at Law*, 332 B.R. at 67 (outlining the application of 11 U.S.C. §§ 526–528 to attorneys if they indeed fall within the debt relief agency provisions); *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, 289 (2005) ("[T]hese definitions bring into play a hideous array of new restrictions . . . .").

bankruptcy law.[16] Hence, the courts that have interpreted § 101(12A) have not unanimously included attorneys in the category of "debt relief agencies."[17]

Section 526(a)(4) of the BAPCPA provides, in relevant part, 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

16. *See* Conn. Bar Ass'n v. United States, 394 B.R. 274, 280–81 (D. Conn. 2008) (delineating the broad application of the debt relief agency definition). Judge Droney explained that because the definitions accompanying the debt relief agency mandates are written broadly, they could apply to lawyers advising "customers of a failed business, non-debtor spouses, or anyone else who may need representation related to a bankruptcy proceeding, so long as they are an 'assisted person'" under 11 U.S.C. § 101(4A). *See id.* at 281 (applying the debt relief agency provisions); Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 295 (2005) (commenting that the language does not clearly identify who is included in the definition, and thus "it could trap lots of unintended victims"). Chief Judge Davis also observed that the provisions, "due to slipshod drafting, will apply to many attorneys who rarely, or never, represent consumer bankruptcy debtors[.]" *In re Att'ys at Law*, 332 B.R. at 68 (quoting Henry J. Sommer, *Trying to Make Sense out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191, 206 (2005)); *see also* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 576–77 (2005) (exemplifying situations wherein an attorney could fall prey to the BAPCPA requirements even though she does not practice bankruptcy law). Chemerinsky explains, for example, that a landlord could qualify as an "assisted person" under the debt relief agency definition. Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 576–77 (2005). Should that landlord, in contemplation of filing bankruptcy, seek his attorney's advice regarding his tenants' rights in bankruptcy, the debt relief agency requirements would trigger and apply to that attorney, perhaps unknowingly. *Id.* *But see* Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743, 751 (5th Cir. 2008) (rejecting Hersh's argument that attorneys are bound by the BAPCPA even when they are not counseling debtors). The Fifth Circuit disagreed with Hersh regarding her claim that, as written, the debt relief agency provision would apply to attorneys who are not advising debtors. *Id.* Judge Garwood explained that, "if Hersh is counseling a client who is a creditor or any other client who qualifies as an 'assisted person' but who is not seeking legal advice related to the client's own bankruptcy," then Hersh would not be in a position to violate § 526. *Id.* In short, the court explained, she simply would not be advising a client "in contemplation of bankruptcy," and thus the debt relief agency provisions would not apply. *Id.*

17. *See Milavetz*, 541 F.3d at 790 (citing *In re* Irons, 379 B.R. 680, 685 (Bankr. S.D. Tex. 2007)) (pointing out the division among the lower courts when interpreting § 101(12A)).

> part of preparing for or representing a debtor in a case under this title.[18]

Since the enactment of the BAPCPA, attorneys have challenged 11 U.S.C. § 526(a)(4) as violative of the Constitution,[19] in part because of the statute's regulation of attorney-client speech.[20] These attorneys maintain that lawyers can "advise" a client to "incur more debt" in contemplation of filing a bankruptcy petition in a fashion not only beneficial and necessary to the client's case, but lawful. In this view, § 526(a)(4) operates as a "gag rule" on an attorney's ability to inform a client (or prospective client) of such options. Consequently, in its broad scope, the rule prevents an attorney from exercising her duty under codes of professional conduct to provide competent services to her client. The restriction therefore presents the bankruptcy attorney with a Hobson's choice: she can either underrepresent her client by withholding the otherwise lawful advice, or violate the so-called gag order of § 526(a)(4).[21]

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18. 11 U.S.C. § 526(a)(4) (2006).

19. *See* U.S. CONST. amend. I, cl. 3 ("Congress shall make no law . . . abridging the freedom of speech . . . ."). In *Hersh*, an attorney also challenged the BAPCPA on Fifth Amendment grounds, contending that her client had "the right to retain counsel in civil matters." Hersh v. United States, 347 B.R. 19, 28 (N.D. Tex. 2006), *rev'd in part sub nom.* Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743 (5th Cir. 2008). The court dismissed the challenge for lack of standing. *Id.*

20. *See, e.g.*, *Milavetz*, 541 F.3d at 793 (discussing how § 526(a)(4) "prevents attorneys from fulfilling their duty to clients to give them appropriate and beneficial advice"); *Conn. Bar Ass'n*, 394 B.R. at 281 (referring to the restrictions of § 526(a)(4) as being "content-based and affect[ing] protected speech"); *In re* Irons, 379 B.R. 680, 686–87 (Bankr. S.D. Tex. 2007) (addressing complainant's concern that the regulation oppresses attorney-client speech); Olsen v. Gonzales, 368 B.R. 886, 916 (D. Or. 2007) (stating § 526(a)(4) "prevents lawyers from advising clients to take lawful ... [and] prudent actions"); Zelotes v. Martini, 352 B.R. 17, 24 (D. Conn. 2006) (referring to the impact § 526(a)(4) has on attorney-client speech), *aff'd sub nom.* Zelotes v. Adams, 363 B.R. 660 (D. Conn. 2007); Geisenberger v. Gonzales, 346 B.R. 678, 680 (E.D. Pa. 2006) (examining the effects of § 526(a)(4) on attorney-client speech); *Hersh*, 347 B.R. at 24 (stating that § 526(a)(4) prevents an attorney from advising a client to take certain actions that are lawful under the BAPCPA). *But see Milavetz*, 541 F.3d at 797–98 (Colloton, J., concurring in part and dissenting in part) (arguing for a narrow interpretation consistent with the intent of Congress). Judge Colloton urged that the statute should not be given its "broadest reading"; he maintained that such an interpretation raised unnecessary constitutional problems. *Id.* at 799. Rather, Judge Colloton advocated the reading provided by the Government, which he found as "an acceptable narrowing construction that would avoid most constitutional difficulties." *Id.*

21. Megan A. Taylor, Comment, *Gag Me with a Rule of Ethics: BAPCPA's Gag Rule*

In 2008, the "debt relief agency" controversy made its way into the federal courts of appeals and created an even split.[22] The Eighth Circuit joined the majority view of the lower courts in September 2008 and held § 526(a)(4) unconstitutional as applied to attorneys in *Milavetz, Gallop & Milavetz, P.A. v. United States*.[23] However, in December 2008, in *Hersh v. United States ex rel. Mukasey*,[24] the Fifth Circuit ruled in favor of a narrow construction of § 526(a)(4) that renders the statute unproblematic under the First Amendment.[25] The Fifth Circuit opinion in *Hersh* and Judge Colloton's dissenting opinion in *Milavetz* reflect a competing analysis of statutory interpretation.[26] This perspective, in a departure from the Eighth Circuit majority opinion, maintains that under the doctrine of constitutional avoidance, § 526(a)(4) is more properly construed as a legitimate ethical regulation of attorney speech.[27] This Comment will examine the contours of

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and the Debtor Attorney's Right to Free Speech, 24 EMORY BANKR. DEV. J. 227, 227 (2008).

22. *Compare Milavetz*, 541 F.3d at 797 (holding § 526(a)(4) unconstitutional as applied to attorneys), *with Hersh*, 553 F.3d at 761 (holding § 526(a)(4) constitutional under a narrowing construction).

23. Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119).

24. Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743 (5th Cir. 2008).

25. *Hersh*, 553 F.3d at 761 (holding that § 526(a)(4) does not violate the Constitution under a narrowing interpretation); *cf.* Zadvydas v. Davis, 533 U.S. 678, 688 (2001) (construing an immigration statute to suit constitutional standards). In *Zadvydas*, the Court decided whether a post-removal statute authorized the Attorney General to hold an alien for an indefinite period of time. *Zadvydas*, 533 U.S. at 682. The Court found nothing in the statute's legislative history that supported a reading of the statute as authorizing the detention indefinitely. *Id.* at 682, 699. The Court conceded that such a reading would violate the Constitution. *Id.* at 690. However, the Court recognized its history of "read[ing] significant limitations into other immigration statutes" to force their compliance with the Constitution. *Id.* at 689. Thus, the Court included an "implicit [time] limitation" into the statute, determining that the provision only authorized the Attorney General to detain aliens for "a period reasonably necessary to bring about [their] removal." *Id.*

26. *Compare Hersh*, 553 F.3d at 753 (construing § 526(a)(4) narrowly to include an implied purposive abuse requirement), *with Milavetz*, 541 F.3d at 798 (Colloton, J., concurring in part and dissenting in part) (disagreeing with the broad interpretation of the statute under the majority's opinion).

27. *See Hersh*, 553 F.3d at 753 (explaining that § 526(a)(4) should be interpreted under the doctrine of constitutional avoidance); *Milavetz*, 541 F.3d at 798 (Colloton, J., concurring in part and dissenting in part) (advocating a narrow construction of § 526(a)(4) under the avoidance doctrine but agreeing with the majority that §§ 526(a)(4) and (b)(2) are constitutional); *cf.* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr.

the § 526(a)(4) challenge and the ways in which it has (and has not) proved successful in the bankruptcy courts, district courts, and on its first impressions in the federal courts of appeals. Section II discusses the background of bankruptcy law, explaining the perceived abuses of the system in stages of its development in America. Section III discusses § 101(12A) of the Bankruptcy Code (the Code) and examines the threshold question of whether attorneys are properly included within the "debt relief agency" category. Section IV sets forth the constitutional analysis under which the Eighth Circuit struck down § 526(a)(4), and Section V discusses the Fifth Circuit's more cautioned approach to the § 526(a)(4) controversy under the doctrine of constitutional avoidance. Finally, Section VI concludes with a look at the deepening debate on the § 526(a)(4) issue[28] and the questions it raises about the proper role the judiciary plays in both upholding the Constitution and saving legislation from the "tyranny of literalness."[29]

Trades Council, 485 U.S. 568, 575 (1988) (delineating the importance of the doctrine of constitutional avoidance). The Supreme Court has explained 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." *Milavetz*, 541 F.3d at 791 (quoting *Edward J. DeBartolo Corp.*, 485 U.S. at 575).

28. As this Comment goes to print, the United States Supreme Court prepares to render an opinion in *Milavetz, Gallop & Milavetz, P.A. v. United States.* Although the Court's decision in the case will shed light on the proper interpretation of § 526(a)(4), the controversy is expected to be the first of many challenges to the constitutionality of certain BAPCPA provisions. *See generally* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571 (2005) (providing an in-depth discussion of the problematic portions of the BAPCPA).

29. *See* United States v. Witkovich, 353 U.S. 194, 199 (1957). In *Witkovich*, the Supreme Court dealt with an immigration provision that gave dramatically broad powers to the Attorney General in acquiring information from an immigrant scheduled for impending deportation. *Id.* Recognizing the constitutional problems posed if the statute were interpreted in its literal form, the Government argued, and the Court agreed, that "a restrictive meaning for what appear to be plain words may be indicated by the Act as a whole." *Id.* "All relevant considerations[,]" the Court continued, "for giving a rational content to the words become operative." *Id. See generally* United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) (incorporating a scienter requirement into a statute to save it from constitutional doubt); Boos v. Barry, 485 U.S. 312 (1988) (construing a statute narrowly to avoid constitutional problems). The practice of applying a narrowing construction to constitutionally problematic statutes has its limits. *See, e.g.*, Aptheker v. Sec'y of State, 378 U.S. 500, 515 (1964) (declining to judicially rewrite a statute to force its compliance with constitutional demands).

II. THE HISTORICAL UNDERPINNINGS OF MODERN BANKRUPTCY LAW

A. *Shifting Attitudes and Economic Crises: Congress's Attempts at a Federal Bankruptcy System*

Although the principle that America is a nation of "second chances" predicates modern bankruptcy law,[30] humanitarian concerns were not a central focus of bankruptcy law's early English or American antecedents.[31] England's first bankruptcy law came about in 1542, titled, "'An act *against* such persons as do make bankrupts,'"[32] and under this early English scheme, bankruptcy concerned acts committed by the debtor to avoid repayment of debts.[33] The law at the time viewed such debtors as "quasi-criminals"; these so-called "offenders" faced the possibility of imprisonment or death for their attempts to evade persistent creditors.[34] Discharge was not introduced into the English system

30. Remarks on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 1 PUB. PAPERS 639 (Apr. 20, 2005). President George W. Bush explained at the signing of the bill that "America is a nation of personal responsibility[,]" but that "[w]e're also a nation of fairness and compassion where those who need it most are afforded a fresh start." *Id.* The theory of discharge has been called a "scholarly conundrum." John M. Czarnetzky, *The Individual and Failure: A Theory of the Bankruptcy Discharge*, 32 ARIZ. ST. L.J. 393, 393 (2000). Czarnetzky poses several competing theories to justify the practice of discharge, such as a moral concern that demands humane treatment of all members of society and the use of discharge as a "carrot" to encourage debtors to participate in the process of liquidation and repayment. *Id.* Another prevailing view maintains that discharge "increases social utility" by placing the debtor back in a productive position once he is out from under his debts. *Id.*

31. *See generally* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 6–32 (1995) (examining the history of bankruptcy law in America leading up to the Bankruptcy Reform Act of 1978).

32. *Id.* at 7 (emphasis added) (quoting 34 & 35 Hen. 8, c. 4 (1542–43) (Eng. & Wales).

33. *Id.*; *see also* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 329 (1991) (explaining that the initial English bankruptcy laws were distinctly geared toward creditors). Debtors used several strategies to avoid creditors, including fleeing the kingdom, hiding assets, seeking sanctuary, and "keeping house." Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 328 (1991).

34. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7–8 (1995) (stating that the death penalty was available for property crimes; bankruptcy was commonly viewed no differently). Under early English common law, writs of *capias* allowed for "body execution." *Id.* at 7. After obtaining a writ of *capias*, the creditor was free to "[seize] the body" of the debtor until his debts were paid. *Id.* Tabb also argues that, while death was a possibility under the

until 1705 and was available only to "cooperative debtors."[35] Those who were deemed uncooperative (i.e. fraudulent), however, faced a penalty of death for their transgressions.[36] Moreover, early English bankruptcy laws were applicable only to merchants,[37] as unpaid debts were generally viewed as a restraint on national commerce.[38]

In colonial America, the Framers of the Constitution were primarily concerned with the potential encumbrance state bankruptcy laws could pose on national commerce.[39] Most states

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English system, the actual numbers do not suggest authorities inflicted such punishment as a matter of common practice. *Id.* at 12. To the contrary, records show that in the 115 years such penalties were imposed, only five debtors were executed under bankruptcy law. *Id.*; *see also* 2 WILLIAM BLACKSTONE, COMMENTARIES *473–74 (asserting that "the delay of payment is a species of dishonesty" and it is "an unjustifiable practice, for any person but a tradesman to encumber himself with debts of any considerable value").

35. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 11 (1995). Prior to the introduction of discharge into the English system, the process operated in some ways like a modern Chapter 7 liquidation. *Cf.* LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 92–95 (5th ed. 2006) ("Following liquidation of the nonexempt property of a Chapter 7 estate, the trustee distributes the money pro rata to the general creditors."). An appointed bankruptcy chancellor would seize all assets from offenders, sell them, and distribute the proceeds pro rata to the creditors. *See* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 328 (1991) (describing the creditor's rights under the Statute of 4 Anne). "Upon notice the various assets of the debtor were seized, appraised, and sold, and the proceeds were distributed pro rata to all creditors proving just claims." *Id.* However, because there was no "discharge" of debt, the creditors continually haunted the debtor with lawsuits to collect debts even after asset liquidation. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 10 (1995).

36. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 8 (1995).

37. *See id.* at 9 ("The bankruptcy law only applied to 'traders', *i.e.*, to *merchant* debtors.").

38. *See* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 327 (1991) ("Only the creditor's interests were of concern."). Tabb notes that protection of creditors was generally likened to protection of commerce. *Id.* Moreover, protection of commerce was largely seen as protection of the king. *Id.*

39. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13 (1995); *see also* Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 54 (1983) (outlining the roots of the bankruptcy clause in early American thought). Justice Joseph Story maintained that federal bankruptcy law would solve the "mischief" of varied state law. Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 54 (1983). He also feared that local politicians acting on "narrow interests" were harmful to debtors and advised that the federal government was better

in the colonial era had their own system of regulating relationships between debtors and creditors, and James Madison, for one, feared that the lack of national uniformity provided fertile ground for fraud.[40] The Framers wrote the Bankruptcy Clause into the United States Constitution and thereby granted Congress the ability to regulate the varying bankruptcy systems spread across state lines.[41] But Congress did not significantly act on its constitutional power to create "uniform laws on the subject of bankruptcies" until 1800.[42]

By the turn of the nineteenth century, national pressure for Congress to develop a federal system of bankruptcy had significantly increased.[43] The Panic of 1797, however, was the critical catalyst for its formation.[44] Although the 1797 crash was the second of its kind in a decade, its fallout resulted in the imprisonment of thousands of debtors unable to resolve their debts.[45] Despite some political controversy to the contrary,[46]

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suited to create a uniform system. *Id.* The power of Congress to regulate bankruptcy laws was accepted under the same understanding of the power to regulate commerce. *Id.* Uniform bankruptcy laws, as understood by scholars, would engender more trade between the United States and foreign countries. *Id.* at 54–55.

40. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13 (1995) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds . . . ." (quoting THE FEDERALIST NO. 42 (James Madison))); *see also* David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 499 (1998) (describing the "colorful" nature of nineteenth century bankruptcy debates). Thomas Jefferson was opposed to bankruptcy in the early years of the century, and Daniel Webster is still remembered for his "impassioned speeches" supporting legislation of bankruptcy on a national level. David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 499 (1998).

41. *See* U.S. CONST. art. I, § 8, cls. 1, 4 ("Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.").

42. Bankruptcy Act of 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248; *see also* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13 (1995) (outlining American bankruptcy law prior to 1898). The federal law of 1800 was briefly in effect until its repeal in 1803. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13 (1995). The same fate followed for the Act of 1841 (repealed in 1843) and the Act of 1867 (repealed in 1878). *Id.*

43. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14 (1995) (characterizing the crash of 1792 as a primary source of the public pressure in favor of federal bankruptcy laws).

44. *Id.*

45. *Id.* at 14 (describing the "widespread ruin . . . of thousands of debtors").

Congress recognized that the nation needed something more than a varied, state-regulated system of bankruptcy law to address the changing trade and credit markets.[47] Yet, the Act of 1800 simply reflected the same system as set forth in England's contemporaneous bankruptcy scheme.[48] It was repealed shortly thereafter in 1803.[49]

The "fresh start" ideology of contemporary American bankruptcy law has its roots in the shift from involuntary bankruptcy proceedings against the debtor to voluntary relief for debtors as spawned in the Act of 1841.[50] Like its predecessors, the 1841 Act was repealed, and its validity only lasted approximately one year.[51] Creditors were enraged by the number of debtors obtaining discharge under the new system, and the administrative burdens proved costly.[52] Nonetheless, the Act's impact on American bankruptcy law has proved indefinite.[53]

Though an exhaustive delineation of the history of bankruptcy

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46. *See id.* at 15 ("By 1803, the sentiment for repeal of the 1800 Act was overwhelming.").

47. *See* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 345 (1991) (alleging that the colonies' efforts to legislate on bankruptcy were no match for the national financial distress caused by the "Panic").

48. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 12 (1995) (suggesting that the 1732 Statute of George II was, in many aspects, a model for the American system of bankruptcy adopted in 1800). Two major similarities between the two systems were (1) the involuntary nature of the proceedings, and (2) their applicability to only traders. *Id.* "Insolvency laws," a separate debt relief scheme, addressed the consumer debtor more directly than did the mirrored American and English models. *Id.*

49. *See* David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 500 (1998) (concluding that the nineteenth century pattern of establishing and then repealing bankruptcy laws is attributable to cycles of "good times" followed by severe economic slumps).

50. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 17 (1995) (noting that the act was revolutionary in its creation of voluntary bankruptcy and discharge for the "financially troubled debtor"). Tabb also asserts that, with the marriage of trader-merchant bankruptcy law and consumer-debtor insolvency law, the Act of 1841 "could be called the first modern bankruptcy law." *Id.* at 18.

51. *Id.*

52. *See id.* at 17–18 (describing new procedures for debtors under the Bankruptcy Act of 1841). "Many thousands of debtors were discharged, minimal dividends were paid to creditors, and administrative fees were high." *Id.* at 18.

53. *See* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 353 (1991) ("Despite its short life ... the [Act of 1841] represented a significant milestone in the evolution of the bankruptcy discharge.").

law in America is beyond the scope of this Comment, several other defining moments in the development of modern bankruptcy law are worth mention. After the Act of 1841 was repealed, Congress deferred again to state regulation for nearly twenty-five years.[54] In 1867, Congress tried again, but the 1867 Act was repealed in 1878 due to loudly voiced concerns from creditors regarding fees, delays, and minimal collection of debts.[55] Finally, in 1898, Congress passed an act that stuck.[56] The Bankruptcy Act of 1898 stayed intact for nearly eighty years, and though Congress has amended the original many times, the Act is the basis of prevailing bankruptcy laws.[57] The 1898 Act turned its aim dramatically toward debtor relief, allowing liquidation, voluntary and involuntary proceedings, and exemptions proving necessary for an

54. *Id.*

55. Bankruptcy Act of 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99; Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 362 (1991).

56. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 27 (1995) (explaining that despite Congress's attempts to repeal the law in the 1960s, 1980s, and 1990s, the Act remained the law); *see also* David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 505 (1998) (outlining the primary aspects of the 1898 Act that contributed to its staying power). Skeel explains that the Act's minimalist structure lent to the creation of a bankruptcy bar, which helped to maintain the survival of the Act. David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 505 (1998). In other words, attorneys began to play an "increasingly prominent role in the debates"; their presence became influential and widespread, essentially "preclud[ing] the possibility of eliminating federal bankruptcy law altogether." *Id.* at 506.

57. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 24 (1995) ("[T]he 1898 Act ushered in the modern era of liberal debtor treatment in United States bankruptcy laws."). The Chandler Act, passed in 1938, was the most momentous of changes made to the Act of 1898. *Id.* at 23, 29 (citing the Chandler Act, ch. 575, 52 Stat. 840 (1938) (repealed in 1978)). Scholars offer several explanations as to why the Act of 1898 was sustained substantially longer than its predecessors. *See* David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 505 (1998) (examining the persistence of the Act of 1898). For one, the Act of 1898 created a bankruptcy bar that shared a major financial stake in federal legislation and thus contributed to the survival of the national bankruptcy legislation. *Id.* The Act also emerged at a time of great development toward the West and widespread commerce facilitated by industrialization. *See* David S. Kennedy & R. Spencer Clift, III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy Court and Its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 174–76 (2000) (outlining the social and economic climate surrounding the 1898 Act).

individual's chance to "start over."[58]

B. *Attempts at Bankruptcy Reform Leading Up to BAPCPA*

In the post-Depression era, Congress amended the Code through the promulgation of the Chandler Act of 1938.[59] The Chandler Act made comprehensive alterations to the 1898 Act and included updated procedural and administrative changes for liquidation proceedings.[60] The most significant of changes brought by the Chandler Act included a new Chapter "X," which governed corporate reorganizations, and Chapter XIII, which addressed "wage earners' plans."[61] While Congress continued to amend specific provisions within prevailing bankruptcy law, sweeping change did not arrive for some time following the Chandler Act. Its newly revised reorganization and procedural provisions reigned for some forty years.[62]

By the 1960s, the bankruptcy system, as promulgated in the Bankruptcy Act of 1898 and amended by the Chandler Act, began to feel archaic and inefficient to both observers and practitioners.[63] The political and economic climate that

58. *See* David S. Kennedy & R. Spencer Clift, III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy Court and Its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 175–76 (2000) (considering important features of the Act of 1898 and their impact on attorneys). The Act also created "bankruptcy referees" who possessed powers far exceeding those given to judges in prior Acts, but who were subject to judicial review by an Article III court. *See id.* (detailing the duties of the then newly-established bankruptcy referees). This early delegation of power to referees set into motion the administrative and judicial role that is the backbone of modern bankruptcy litigation. *See id.* at 177 (pointing out that under the Act of 1898, judges were expected "to perform dual administrative and judicial functions"). The writers explain that this dual role led to eventual deficiencies in the bankruptcy system; such matters were impacted significantly by the promulgation of the Rules of Bankruptcy Procedure during the 1970s. *Id.*

59. Chandler Act, Pub. L. No. 75-696, 52 Stat. 840 (1938) (repealed 1978).

60. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 29 (1995).

61. *Id.*

62. *Id.* at 29–30.

63. *See* Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 61 (1997) (summarizing the inefficiencies of an outdated and aggressively amended Act of 1898). Scholar Harvey R. Miller examines the rapid economic changes at work in the 1960s and their effects on bankruptcy practice in America. Harvey R. Miller, *Chapter 11 in Transition—from Boom to Bust and into the Future*, 81 AM. BANKR. L.J. 375, 377 (2007). Public ownership, he explains, became a very

influenced the creation of the Act at the turn of the twentieth century no longer shaped the goals of modern bankruptcy law.[64] The movement toward reform lasted ten years[65] and was supplemented by a report issued by the Commission on Bankruptcy Laws of the United States.[66] Among others, major complaints of the Commission were: "[t]he rapid increase of bankruptcies,"[67] "[i]nsufficiently generous fresh start for debtors,

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popular concept, and many growing businesses desired to "go [] public" in American markets. *Id.* at 376. In the 1970s, however, the economic cycle ended in a "bankruptcy boom." *Id.* Thereafter, he notes, bankruptcy began to allure more attorneys into its burgeoning area of law. *Id.* The stigma of bankruptcy slowly changed as the cases got bigger and more common. *Id.* This boom continued to grow through the middle of the 1990s, and it reached its height in the early 2000s when it was popularized with cases like that of Enron and WorldCom. Harvey R. Miller, *Chapter 11 in Transition—from Boom to Bust and into the Future*, 81 AM. BANKR. L.J. 375, 376 (2007).

64. *See* Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 61 (1997) (discussing the relative change in national needs since the Act of 1898); *see also* David S. Kennedy & R. Spencer Clift, III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy Court and Its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 177 (2000) (indicating that the aftermath of World War II was a major strain on the bankruptcy system considered during the early formation of the Act of 1978). The economic underpinnings in America were not as globalized in the 1970s as they are today. *See* Harvey R. Miller, *Chapter 11 in Transition—from Boom to Bust and into the Future*, 81 AM. BANKR. L.J. 375, 388 (2007) (examining the events leading up to the Reform Act of 1978). The Uniform Commercial Code had not yet been adopted by many states at this time, and as a consequence, unsecured lenders had little protection. *See id.* (commenting on the economic climate of the 1960s and 1970s in America). Many lenders relied instead upon relationships with their customers to secure loans, and access to credit was mostly limited. *Id.* Thus, in the late 1960s and 1970s, creditors began to demand representation, and their impact on new bankruptcy legislation began to materialize. *Id.* at 389.

65. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 32 (1995).

66. H.R. REP. No. 91-927 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3559; *see* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 32 (1995) (setting forth the mission of the Bankruptcy Commission as directed by Congress). The stated goals were to "study, analyze, evaluate, and recommend changes to the [1898] Act . . . in order for such Act to reflect and adequately meet the demands of present technical, financial, and commercial activities." H.R. REP. No. 91-927(1970), *reprinted in* 1970 U.S.C.C.A.N. 3559.

67. Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 68 (1997) (discussing the Commission's findings in its Report). The Commission found that bankruptcies had increased from 10,196 filings in 1946, to 208,329 filings in 1967. *Id.* The dramatic increases of consumer bankruptcy filings were specifically noted by the Commission in its Report. *Id.* at 68; *see also* H.R. REP. No. 91-927 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3559 (reporting the goals and findings of the Commission).

and inadequate incentives for creditors to collect in bankruptc[ies]," and "[a]busive or negligent practices by bankruptcy judges, trustees, and bankruptcy lawyers."[68] In response to perceived abuses of the bankruptcy system, the 1978 Act also sought to increase Chapter 13 reorganization filings—an aim that was also a goal of the 2005 Act.[69] Although Congress continued to amend the Code after the 1978 Act, it was not until 2005 that comprehensive reform came to the consumer bankruptcy laws in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[70]

C. *A Brief History of the BAPCPA*

The BAPCPA is a derivative of the National Bankruptcy Review Commission (NBRC), an investigational entity Congress created in 1994 to study a host of issues relating to the bankruptcy system.[71] Setting a two-year timeline, Congress directed the nine-member committee to base its work "upon reviewing, improving, and updating the Code in ways which do not disturb the fundamental tenets and balance of current law."[72] The NBRC's examination of the bankruptcy system included meetings with, or

68. Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 68 (1997). Other complaints included administrative waste and "[l]ack of uniformity in the treatment of debtors." *Id.* The chief undertaking of the 1978 Act was the congressional grant of a broader scope of jurisdiction for bankruptcy courts. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 34 (1995). Additionally, Congress sought to address the administrative problems that existed under the Act of 1898. *Id.* at 35.

69. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 34–36 (1995).

70. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

71. *See* H.R. REP. No. 109-31, at 3 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 90 (reviewing the findings of the NBRC and the need for new legislation to address them); St.Clair Newbern III, *Legislative Enactments*, *in* 3 ADVISING SMALL BUSINESSES § 47:8 (Steven C. Alberty ed., 2009) (summarizing the NBRC's activity in the years leading up to congressional action).

72. *See* H.R. REP. No. 103-835, at 59 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3399 (addressing the need to review abuses in the system); *see also* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 486 (2005) (reviewing Congress's directives for the NBRC); Gary Neustadter, *2005: A Consumer Bankruptcy Odyssey*, 39 CREIGHTON L. REV. 225, 226 (2006) (discussing the creation of the NBRC).

recommendations from, more than 2,600 people,[73] and culminated three years later in a 1,028-page report that contained 172 recommendations for the Bankruptcy Code.[74]

The most controversial aspects of the Report were related to consumer bankruptcy.[75] In addition to the official recommendations, 272 pages of sharply dissenting views were filed with the Report.[76] Citing, among other trends, the decline of the moral stigma once attached to consumer filings, a minority of the NBRC felt that the recommendations did not "go far enough to penalize or deter abuse."[77] Congress apparently agreed.[78]

Both the Senate and House Judiciary Committees discussed the findings in the NBRC's report in the fall of 1997.[79] The theoretical undercurrents of the hearings echoed the views of the NBRC dissenters, particularly in the area of consumer bankruptcy.[80] Representative George W. Gekas, for example,

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73. Nat'l Bankr. Review Comm'n, Rep. of the Nat'l Bankr. Review Comm'n ix (Oct. 20, 1997), *available at* http://govinfo.library.unt.edu/nbrc/report/02pref.pdf. The preface to the NBRC Report points out that over 600 people involved in the bankruptcy system attended NBRC meetings and over 2,300 written submissions were sent from every state on "every conceivable subject related to bankruptcy." *Id.*; *see also* St.Clair Newbern III, *Legislative Enactments*, *in* 3 ADVISING SMALL BUSINESSES § 47:8 (Steven C. Alberty ed., 2009) (discussing the NBRC's Report).

74. Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 487 (2005).

75. *Id.* at 477–88.

76. *Id.* at 487.

77. *Id.* at 488. For more on claims that bankruptcy filing has increased with the decline of related social stigmas, see Bruce M. Price & Terry Dalton, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (and Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135, 155–59 (2007) (explaining that, traditionally, "[s]ociety viewed bankrupt debtors as financially irresponsible and overindulging").

78. *See* Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J., 283, 285 (2005) ("Beginning in the 105th Congress, when BAPCPA was first introduced, nearly every version of the bill reflected the views of the NBRC's minority."); *see also* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 493 (2005) (noting that one month before the Commission filed its Report, the House began to consider legislation that "largely reflect[ed] the views of the dissenting Commissioners with respect to the direction of consumer bankruptcy reforms").

79. Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 494 (2005).

80. *See id.* at 495 (observing the similarities in viewpoints regarding the state of consumer bankruptcy as shown between the dissenters and state representatives).

condemned the state of bankruptcy as an "epidemic"; he argued that bankruptcy had become "a way for reckless spenders to escape their debts."[81] In February 1998, he introduced the Bankruptcy Reform Act of 1998 into the House[82] with the stated goal of "restor[ing] bankruptcy to its original purpose—as a final last resort after all the options have been explored."[83] Although the "seeds" of the BAPCPA were rooted in the 103rd and 104th Congresses,[84] the core elements of the Act remained the same throughout.[85] By the time the BAPCPA passed Congress and was signed into law in 2005, Congress had introduced hundreds of changes to existing bankruptcy law.[86] Many of these changes were aimed at the newly-formed "debt relief agenc[ies],"[87] which the BAPCPA amended into the Bankruptcy Code.[88]

III. THE THRESHOLD QUESTION: ARE ATTORNEYS "DEBT RELIEF AGENCIES"?

A. *Majority—Attorneys Are Debt Relief Agencies*

Bankruptcy Courts in the Western[89] and Southern Districts of Texas,[90] the Northern District of California,[91] and the Eastern

81. *Nat'l Bankr. Review Comm'n: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 105th Cong. 2–3 (1997).

82. Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 496 (2005).

83. *Id.* at 495 (quoting *Nat'l Bankr. Review Comm'n: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 105th Cong. 2–3 (1997)) (discussing Representative Gekas's plan to introduce legislation that would address the area of consumer bankruptcy).

84. *Id.* at 486.

85. Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 571 (2005) (contending that, despite its lengthy legislative history, "each iteration of [the Act] continued the same core features[]").

86. George H. Singer & Whitney R. Cohen, *The Attorney As "Debt Relief Agency:" A Bridge Too Far?*, 65 BENCH & B. MINN. 20, 20 (2005).

87. Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 789 n.2 (8th Cir. 2008) ("Prior to the BAPCPA, the term 'debt relief agency' did not exist in the Code."), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119).

88. 11 U.S.C. § 101 (2006).

89. *In re* Mendoza, 347 B.R. 34, 38 n.6 (Bankr. W.D. Tex. 2006).

90. *In re* Irons, 379 B.R. 680, 684 (Bankr. S.D. Tex. 2007).

91. *In re* Gutierrez, 356 B.R. 496, 500 (Bankr. N.D. Cal. 2006).

District of Virginia[92] have all included attorneys within the category of "debt relief agencies." The United States District Courts for the Northern District of Texas,[93] the District of Connecticut,[94]and the District of Oregon[95] have agreed. And, finally, the dispute made its way to the federal appellate courts for the Fifth and Eighth Circuits, which concluded that attorneys are, indeed, debt relief agencies.[96]

The courts that included attorneys in the debt relief agency category did so under a plain reading of the statute, which is often regarded as the preferred method of statutory analysis.[97] With the

92. *In re* Robinson, 368 B.R. 492, 500 n.7 (Bankr. E.D. Va. 2007).

93. Hersh v. United States, 347 B.R. 19, 22 (N.D. Tex. 2006), *rev'd in part sub nom.* Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743 (5th Cir. 2008).

94. Zelotes v. Adams, 363 B.R. 660, 665 (D. Conn. 2007).

95. Olsen v. Gonzales, 350 B.R. 906, 912 (D. Or. 2006), *aff'd*, 368 B.R. 886 (D. Or. 2007).

96. Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743, 750 (5th Cir. 2008); Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 797 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119).

97. *Hersh*, 347 B.R. at 22–23 (discussing the term "debt relief agencies" in light of its plain meaning). The Fifth Circuit agreed with the district court's mode of analysis in *Hersh* and affirmed its conclusion that attorneys are debt relief agencies. *Hersh*, 553 F.3d at 750. Although it addressed the legislative history of the BAPCPA in its analysis, the District of Oregon halted its analysis under the "plain meaning" of § 101(12A) and included attorneys in the debt relief agency category with "no further rules of construction." *Olsen*, 350 B.R. at 912. The argument that attorneys are debt relief agencies under a plain reading of the statute is in small part supported, perhaps, by the cases that have assumed that fact without deciding it. *See, e.g.*, In re Mendoza, 347 B.R. 34, 38 n.6 (Bankr. W.D. Tex. 2006) (assuming attorneys fall within the debt relief agency category); *see also In re* Gutierrez, 356 B.R. 496, 502–04 (Bankr. N.D. Cal. 2006) (treating attorneys as part of the debt relief agencies regulated by § 526). The Bankruptcy Court for the Western District of Texas, for example, merely commented in a footnote that § 526(a)(2) of the BAPCPA "prohibits the debtor's attorney (who is, in virtually all of these cases, a 'debt relief agency') from making" certain statements to his client. *In re Mendoza*, 347 B.R. at 38 n.6. Similarly, the Northern District of California presumed without question that "debt relief agencies" includes bankruptcy attorneys in *In re Gutierrez*, 356 B.R. at 502–04, as did the Eastern District of Virginia in *In re* Norman, No. 06-70859-A, 2006 WL 3053309, at *4 n.5 (Bankr. E.D. Va. Oct. 24, 2006). The Western District of Texas used these examples as support for its holding that attorneys are "debt relief agencies" and noted that it "see[s] no ambiguity in the Bankruptcy Code" on the issue. *In re* Irons, 379 B.R. 680, 685–86 (Bankr. S.D. Tex. 2007). Accordingly, it decided to "follow the plain meaning of the statute" and hold that attorneys are subject to the mandates of §§ 526(a)(4) and 527(b). *Id.* at 685. The court also disclaimed the persuasive value of *In re Attorneys at Law*, which held that attorneys are not "debt relief agencies." *Id.* at 686 (citing *In re* Att'ys at Law & Debt Relief Agencies, 332 B.R. 66 (Bankr. S.D. Ga. 2005)). The court stated that it "respectfully declines to subscribe to the Georgia opinion

guidance of defined terms appearing in § 101(4A), both the Fifth and the Eighth Circuits concluded that "attorneys who provide 'bankruptcy assistance' to 'assisted persons' are unambiguously included in the definition of 'debt relief agencies.'"[98] For example, because "debt relief agency" is defined as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration," the courts look to the definition of "bankruptcy assistance" contained in § 101(4A). The definition of "bankruptcy assistance" includes "providing legal representation with respect to a case or proceeding under" the Bankruptcy Code.[99] The Fifth Circuit explained, "As only attorneys can provide legal representation, they are necessarily included in the definition of 'debt relief agency.'"[100]

The courts also looked to the express exceptions of the § 526(a)(4) debt relief agency category, which include:

> (A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;
> (B) a nonprofit organization . . .
> (C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt . . .
> (D) a depository institution . . . or any Federal credit union or State credit union . . . or any affiliate or subsidiary . . . ; or
> (E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17 . . . .[101]

The district court in *Hersh* concluded that Congress surely would have included "attorney" in the list of excepted entities if it desired to exclude attorneys from a group they fell "so plainly within."[102] The Fifth Circuit approved this analysis, noting that an

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. . . . An opinion issued without a pending case or controversy is the equivalent of a law review article issued without peer review." *Id.*

98. *Milavetz*, 541 F.3d at 791; *see also Hersh*, 553 F.3d at 749–50 (agreeing with the holding of the Eighth Circuit on a plain reading of § 101(12A)).

99. 11 U.S.C. § 101(4A) (2006).

100. *Hersh*, 553 F.3d at 750–51.

101. 11 U.S.C. § 101(12A) (2006).

102. Hersh v. United States, 347 B.R. 19, 23 (N.D. Tex. 2006), *rev'd in part sub nom.* Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743 (5th Cir. 2008). Furthermore, the court noted that inferences made on the basis of "imprecise drafting are surely

exclusion for attorneys should not be implied, especially because § 101(12A) "is simply a general definition without *any* specific inclusions," and none of the five explicit exclusions make any reference to attorneys.[103] The Eighth Circuit also pointed out that Congress could have explicitly included "attorney" in the list of exclusions if it meant to exclude them from the "debt relief agency" provision.[104]

To support their interpretations, some courts also analyzed the statutory construction of other provisions affecting § 101(12A).[105] For instance, the Eighth Circuit reasoned that if Congress did not intend to include attorneys within its "debt relief agency" category, it would not have included § 526(d)(2), which provides that: "No provision of this section, section 527, or section 528 shall . . . be deemed to limit or curtail the authority or ability . . . of a State . . . to determine and enforce qualifications for the practice of law[.]"[106] Though not entirely clear, the court seemed to suggest that Congress, when it enacted §§ 526, 527, and 528, recognized it was treading on grounds traditionally reserved for state regulation.[107] Accordingly, these courts reasoned, Congress

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overwhelmed by the plain language" of § 526(a)(4). *Id.* The *Hersh* court asserted that a "plain language" reading is of primary importance when interpreting a statute and analogized its mode of interpretation by reference to the Supreme Court's reading in *Lamie v. United States Trustee*. *Id.* at 22 (citing Lamie v. U.S. Trustee, 540 U.S. 526 (2004)). "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie*, 540 U.S. at 534 (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)).

103. *Hersh*, 553 F.3d at 751. The Fifth Circuit rejected the argument that the doctrine of constitutional avoidance should compel the court to exclude attorneys from the debt relief agency category. *Id.* The court asserted these arguments "do not overcome the referenced evident congressional intent and the plain language of the statute." *Id.*

104. Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 791 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119).

105. *See id.* (acknowledging that "tools of statutory construction [are] not necessary" when a statute is unambiguous). Despite its failure to find ambiguity in § 101(12A), the Eighth Circuit continued to support its "plain reading" argument with other modes of analysis, such as statutory construction and legislative history. *Id.* at 789–92.

106. 11 U.S.C. § 526(d)(2) (2006).

107. *See* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 580 (2005) (explaining that regulation of attorney conduct may violate the Tenth Amendment). Chemerinsky argues that "[t]he regulation of attorneys is an important governmental function in the administration of justice . . . [that] has historically been reserved to and performed by the states." *Id.*; *see also* Hoover v. Ronwin, 466 U.S. 558, 570 n.18 (1984)

included § 526(d)(2) as a disclaimer of its power to regulate attorney practice.[108] Thus, since Congress identified that § 526(a)(4) would overlap such regulations *because* it applied to attorneys, it felt the need to include a provision allowing BAPCPA, state, and federal regulations regarding attorney-client conduct to coexist.[109] Whether such coexistence is practicable under a literal reading of the statute, however, is questionable.[110]

Lastly, the courts turned to legislative history to buttress their respective holdings that attorneys are debt relief agencies.[111] The district court in *Hersh*, for instance, pointed out that the House Report on the BAPCPA refers to "attorney" 164 times, "clearly indicat[ing]" that Congress intended the inclusion of attorneys within the newly added debt relief agency category.[112] The Fifth Circuit added that the House Report for the BAPCPA "'consistently identified' such problems as 'debtor misconduct and abuse'" and "'misconduct by attorneys and other professionals.'"[113] Further, the Eighth Circuit took note that one of the BAPCPA primary aims was to strengthen "professionalism standards *for attorneys* and others who assist consumer

(noting that the regulation of attorneys' activities is well within and at the core of a state's "power to protect the public"). The Court also explained that the state's interest in the regulation of its lawyers "is especially great since lawyers are essential to the primary governmental function of administering justice . . . ." *Hoover*, 466 U.S. at 570 n.18.

108. *See* Samuel Bufford & Erwin Chemerinsky, *Constitutional Problems in the 2005 Bankruptcy Amendments*, 82 AM. BANKR. L.J. 1, 23 (2008) (reiterating that the BAPCPA represents a "substantial step into the field of regulation of law practice"). Chemerinsky also notes that, despite language in § 526 that avoids preemption of state and federal agencies from regulating the practice of law, "these provisions do impose substantially on the practice of law by attorneys" unless they "fall outside of the scope of the 'debt relief agency' definition." *Id.* at 24.

109. *See* 11 U.S.C. § 526(d)(2) (2006) (stating explicitly that the Bankruptcy Code shall not limit the states from regulating the practice of law).

110. *Compare* 11 U.S.C. § 526(a)(4) (2006) (prohibiting an attorney from advising a client to incur more debt in contemplation of filing for bankruptcy), *with* TEX. DISCIPLINARY R. PROF'L. CONDUCT 2.01, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 2005) (declaring that a lawyer should "render candid advice" in accordance with professional judgment).

111. *See* Hersh v. United States, 347 B.R. 19, 23 (N.D. Tex. 2006) (examining the legislative history of the BAPCPA), *rev'd in part sub nom.* Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743 (5th Cir. 2008).

112. *Id.*

113. Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743, 751 (5th Cir. 2008) (citing H.R. REP. No. 109, at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 109–31).

debtors[.]"[114] Ultimately, such evidence of legislative intent provided these courts with yet another layer of support to the plain meaning and statutory construction analysis of § 101(12A). Together, these modes of interpretation led the majority of the courts to conclude that attorneys are "debt relief agencies" under the BAPCPA.[115]

B. *Minority—Attorneys Are Not "Debt Relief Agencies"*

The Southern District of Georgia acted *sua sponte* on the morning the BAPCPA became effective[116] to determine whether the debt relief agency provision would apply to attorneys.[117]

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114. Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 791–92 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119). The Eighth Circuit also pointed out that Senator Feingold proposed an amendment that would have explicitly excluded attorneys from the definition of debt relief agencies, but the Senate never addressed the proposal. *Id.* at 792 n.6.

115. *See generally Hersh*, 553 F.3d at 748 (illustrating the support of legislative history for the conclusion that attorneys are "debt relief agencies"); *Milavetz*, 541 F.3d at 791–92 (demonstrating how the legislative history of § 526 indicates the inclusion of attorneys in the definition of "debt relief agencies").

116. *See* Robert Landry & Nancy Hisey Mardis, Comment, *Consumer Bankruptcy Reform: Debtors' Prison without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U. L. REV. 91, 92 (2006) (stating that most of the BAPCPA became effective on October 17, 2005, with limited exceptions). There were several provisions of the Act that were effective immediately, such as the amendments to the homestead exemption. *See also In re* Att'ys at Law & Debt Relief Agencies, 332 B.R. 66, 67 (Bankr. S.D. Ga. 2005) (acting on its own motion to determine whether attorneys are debt relief agencies under the new BAPCPA provisions).

117. *In re Att'ys at Law*, 332 B.R. at 67 (acting on its own motion to determine which entities the BAPCPA purports to regulate). The court in *In re Attorneys* took notice of the confusion and controversy behind the promulgation of the BAPCPA. *Id.* at 68. Chief Judge Davis summarized the scathing criticism leveled against the BAPCPA by both the legal community and academics. *See id.* (pointing out that both judges and scholars anticipated problems with the new "debt relief provision" of the BAPCPA). The court took notice of the contention that the new "debt relief agency" would "de-professional bankruptcy attorneys[.]" *See id.* (citing Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, 24 AM. BANKR. INST. J. 1, 69 (2005)). Accordingly, Judge Davis declared that attorneys are not included within the "debt relief agenc[y]" category. *Id.* at 68. The court acknowledged that academics and legal communities had analyzed the provisions of the BAPCPA and expressed concern that the new debt relief agency category would apply to attorneys. *In re Att'ys at Law*, 332 B.R. at 67–68. One scholar noted, "These provisions, due to slipshod drafting, will apply to many attorneys who rarely, or never, represent consumer bankruptcy debtors . . . ." *Id.* at 68 (quoting Henry J. Sommer, *Trying to Make Sense out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191, 206–07 (2005)). The court also addressed its power to act on its own motion. *Id.* at 68 n.1. The

Although eventually overturned in part by the Eighth Circuit, the District Court of Minnesota also held that attorneys are not "debt relief agencies" in *Milavetz, Gallop & Milavetz, P.A. v. United States*.[118] Finally, in *In re Reyes*,[119] the Southern District of Florida held that attorneys did not fall within the definition of debt relief agencies.[120] These courts, collectively, argued for a plain meaning approach (sometimes coupled with the doctrine of avoidance), rules of statutory construction, and the absurd-result analysis to reach their respective conclusions.[121]

First, under Chief Judge Davis' "plain reading" in *In re Attorneys at Law*,[122] attorneys and debt relief agencies are neither synonymous, nor are they, as a matter of common knowledge, inclusive of one another.[123] On the other hand, the *Milavetz* court—while noting that § 101(12A) seemed to include attorneys "[a]t first glance"—held that the doctrine of constitutional avoidance compelled the conclusion that attorneys are not "debt

court explained that 11 U.S.C. § 526(c)(5) authorizes the court to do so "to enjoin violations of the debt relief agency provisions or impose civil penalties on the violator." *In re* Att'ys at Law & Debt Relief Agencies, 332 B.R. 66, 68 n.1 (Bankr. S.D. Ga. 2005). The court reasoned that, under such broad jurisdiction as granted in the statute, it must also have the power to act *sua sponte* to determine "that certain types of persons . . . are not covered at all[.]" *Id.*

118. Milavetz, Gallop & Milavetz, P.A. v. United States, 355 B.R. 758, 769 (Bankr. D. Minn. 2006), *rev'd in part by* 541 F.3d 785 (8th Cir. 2008).

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

120. *See id.* at 280 (maintaining that "[i]t seems far more logical" to conclude that Congress did not intentionally include attorneys to qualify as debt relief agencies).

121. *See generally In re Att'ys at Law*, 332 B.R. at 71 (employing several modes of statutory interpretations to arrive at its conclusion that attorneys are not "debt relief agencies").

122. *In re* Att'ys at Law & Debt Relief Agencies, 332 B.R. 66 (Bankr. S.D. Ga. 2005).

123. *Id.* at 69. Initially, the court conceded that the provision defining "debt relief agenc[y]" is "broad enough on its face to include attorneys"; they also found the "providing legal representation" language of § 101(4A) suggestive of an inclusion of attorneys. *Id.* at 67. However, Chief Judge Davis supported his statutory interpretation with special attention to "ordinary meaning." *Id.* at 69. He contends that statutory construction begins with the language Congress used, and the controlling assumption is that the ordinary meaning of such language is the best expression of congressional intent. *Id.* (citing Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982)). In Judge Davis' examination, the term "debt relief agency" might suggest an inclusion of attorneys at first glance, but in their ordinary usage the two are not synonymous with each other, thus revealing Congress's intent to *not* include attorneys in the category. *In re Att'ys at Law*, 332 B.R. at 67–69.

relief agencies."[124] Also citing the doctrine of constitutional avoidance as its guide, the *In re Reyes* court advocated the same technique of construing the statute as advanced in the *Milavetz* opinion.[125] That is, the *In re Reyes* court noted that § 526 does not apply to attorneys because an interpretation otherwise would create a chilling effect on speech.[126] Under this avoidance method, an intentional construing of § 101(12A) to exclude attorneys from the debt relief agency category avoided the serious constitutional problems the alternative presented, and was therefore the worthier approach.[127]

Second, and as a matter of construction, both the *Milavetz* and *In re Attorneys* courts argued that Congress's express incorporation of "'bankruptcy petition preparer[s],'" coupled with its failure to include "attorney," implies that Congress did not intend that the provision apply to attorneys.[128] Additionally, the *In re Attorneys* and *Milavetz* courts disregarded the "'providing

124. *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 355 B.R. 758, 768 (Bankr. D. Minn. 2006) ("This doctrine counsels that, in construing a statute for ambiguity, the Court must opt for a construction which avoids grave constitutional questions."), *rev'd in part by* 541 F.3d 785 (8th Cir. 2008).

125. *Compare Milavetz*, 355 B.R. at 768 (supporting their interpretation with the doctrine of constitutional avoidance), *with In re* Reyes, 361 B.R. 276, 279 (Bankr. S.D. Fla. 2007) (following the *Milavetz* court's approach under the dictates of constitutional avoidance).

126. *In re Reyes*, 361 B.R. at 281 (concluding that attorneys are not debt relief agencies to avoid constitutional difficulties).

127. *See id.* (avoiding the absurdity that would result from an inclusion of attorneys in the debt relief agency category). *But see* Robert Wann, Jr., *Revisiting "Debt Relief Agencies" Three Years After Bankruptcy Reform*, BANKING & FIN. SERVS. POL'Y REP., Aug. 2008, at 6 (examining the *Reyes* decision critically). Wann characterizes the *Reyes* court's absurd-result mode of interpretation as "questionable." *Id.* He argues that such an approach is "highly subjective." *Id.* at 8. Because the level of ambiguity that courts accept as a precondition is uncertain, employment of the doctrine varies wildly, and use of it on the § 526(a)(4) controversy is insufficient—at least on its own—to exclude attorneys from the debt relief agency provision. *Id.*

128. *See Milavetz*, 355 B.R. at 768; *In re* Att'ys at Law & Debt Relief Agencies, 332 B.R. 66, 69 (Bankr. S.D. Ga. 2005) (quoting 11 U.S.C. § 110(a)(1) (2006)). The *Milavetz* court noted that the section makes no direct reference to attorneys; however, § 101(12A) does include "'bankruptcy petition preparer,' which, by definition, [] expressly excludes attorneys and their staff." *Milavetz*, 355 B.R. at 768. The *Reyes* court also addressed Congress's use of "bankruptcy petition preparer." *In re Reyes*, 361 B.R. at 280. It maintained that the inclusion of bankruptcy petition preparers into the category reflects Congress's desire to regulate harmful debt agencies which "provide no benefit at all to the debtor." *Id.*

legal representation'" language of § 101(4A) as a dispositive reference to attorneys.[129] The *In re Attorneys* court rationalized that the language "'providing legal representation'" is nothing more than Congress's attempt to grant bankruptcy courts jurisdiction over situations where a consumer was harmed by entities engaged in the "unauthorized practice of law."[130] Contrastingly, the *Milavetz* and *In re Reyes* courts used the "rule of construction" contained in § 101(4A) to reach their conclusions.[131]

Section 101(4A) provides that nothing in §§ 526, 527, and 528 shall "be deemed to limit or curtail the authority or ability . . . of a State . . . to determine and enforce qualifications for the practice of law[.]"[132] The *Milavetz* court explained that, should it interpret the "debt relief agency" provision to apply to attorneys, the conflict suggested in § 101(4A) would materialize.[133] In other words, an inclusion of attorneys in the debt relief category would mean "Congress has taken upon itself the authority to determine the advice attorneys can give their clients . . . thereby infringing on the state's traditional role of regulating attorneys."[134] The *In re Reyes* court also agreed with this rule of construction and concluded that excluding attorneys from the debt relief agency category is the "far more logical" approach.[135]

Third, the courts used an "absurd" result approach in their analyses to remove attorneys from the debt relief agency category.[136] For example, § 527(b) obligates a debt relief agent to

129. *In re Att'ys at Law*, 332 B.R. at 69 (quoting 11 U.S.C. § 101(4A)).

130. *Id.*

131. *See Milavetz*, 355 B.R. at 768 (using the "rule of construction" contained in § 101(4A)); *see also In re* Reyes 361 B.R. 276, 280 (Bankr. S.D. Fla. 2007) (examining and using the language of § 526(c)(3)(C)—which was eventually codified as § 101(4A)—to reach its conclusion).

132. *See Milavetz*, 355 B.R. at 768 (citing 11 U.S.C. § 526(d)(2)(A) (2006)).

133. *Id.*

134. *Id.*

135. *In re Reyes*, 361 B.R. at 280.

136. *In re Att'ys at Law*, 332 B.R. at 70 (citing United States v. Katz, 271 U.S. 354, 357 (1926)). *See generally* Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001 (2006) (defending the absurdity doctrine). The traditional justification for the absurdity doctrine is the idea that the judiciary has an obligation to adhere to legislative intent and serve as its "faithful agents" while interpreting statutes. *Id.* at 1007. If statutes, upon a plain meaning, appear to obstruct values of the legal system, courts infer that Congress did not intend the result when enacting the legislation and will thus interpret the statute in a

disclose to an "assisted person" that he has a right to hire an attorney, that only an attorney can render legal advice, and that the client may proceed *pro se*.[137] The *In re Attorneys* court bemoaned such an "absurd" scenario, explaining,

> [i]t is hard to imagine that the language which . . . conspicuously omits the word "attorney" really *requires* an attorney to tell an assisted person that he/she has the right to hire an attorney or how to prepare the documents *pro se* that the attorney is poised to prepare on that person's behalf.[138]

Rather, the court noted, the provision is likely intended to cover the "shadowy, gray areas" not already covered by existing regulations.[139] The *In re Reyes* court acknowledged that "it makes no sense" that Congress would restrict an attorney from advising a client to pay for legal services.[140] Finally, the *Milavetz* court stressed the absurd result of a regulation that forces attorneys to "provide a statement telling their clients they have a right to an attorney, and that only an attorney can provide legal advice as required for debt relief agencies."[141] According to these courts, a logical or sensible interpretation is preferable over one that is illogical or absurd.[142] The logical approach, then, is to declare attorneys beyond the reach of the debt relief agency category.[143]

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manner it concludes is consistent with legislative intent. *Id.* Some scholars disagree with this approach. *Id.* at 1008. New Textualists, for example, maintain that the better way for courts to adhere to Congress's will is to enforce the clear terms of the statute. *Id.* Since the legislative process is complex, and its final result contains the product of Congress's deliberate choices between competing interests and goals, New Textualists urge that the precise wording of the statute is a more stable guide than "legislative intent." Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1008 (2006).

137. *See* 11 U.S.C. § 527(b) (2006) (listing requirements for mandatory disclosures between debtor and "debt relief agency").

138. *In re Att'ys at Law*, 332 B.R. at 70.

139. *Id.*

140. *In re* Reyes 361 B.R. 276, 280 (Bankr. S.D. Fla. 2007).

141. Milavetz, Gallop & Milavetz, P.A. v. United States, 355 B.R. 758, 768 (Bankr. D. Minn. 2006), *rev'd in part by* 541 F.3d 785 (8th Cir. 2008).

142. *In re Att'ys at Law*, 332 B.R. at 70 (citing United States v. Katz, 271 U.S. 354, 357 (1926)).

143. *See In re Reyes*, 361 B.R. at 280 (concluding that the logical answer is that attorneys are not debt relief agencies); *Milavetz*, 355 B.R. at 768 (addressing the plaintiffs' claims of § 526(b)(4)'s absurd requirements); *In re Att'ys at Law*, 332 B.R. at 70 (declaring that its interpretation, which excludes attorneys from the debt relief agency category, is

IV. THE EIGHTH CIRCUIT ANALYSIS: § 526(A)(4) VIOLATES ATTORNEYS' RIGHTS TO FREE SPEECH

A. *Determining the Applicable Level of Scrutiny: Content-Based Speech Versus Content-Neutral Speech*

In the context of free-speech claims, the level of judicial scrutiny applicable to a challenged statute depends on whether such statute is content-based or content-neutral.[144] The Supreme Court explained the distinction in *Turner Broadcasting Systems v. Federal Communications Commission*,[145] maintaining that content-based laws are "laws that by their terms distinguish speech from disfavored speech on the basis of the ideas or views" they express.[146] In contrast, laws that proscribe speech without regard to the message that the speech conveys are usually deemed content- or viewpoint-neutral.[147] If the regulation is content-based, the court applies the highest level of scrutiny, known as

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preferable over one that is "illogical or absurd" (citing United States v. Katz, 271 U.S. 354, 357 (1926))).

144. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (proclaiming the "general rule" that content-based regulations and content-neutral regulations differ in application). The Court has explained that the determination of whether a particular regulation is content-based or content-neutral can prove difficult. *Id.* The First Amendment acts as a device to prevent the government from restricting speech based on the message that the speech conveys. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). Therefore, the Court regards content-based regulations as "presumptively invalid." *Id.*

145. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

146. *Id.* at 643. The importance of striking down laws that regulate speech on the basis of its content is recognized as a mechanism against tyranny. *See* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (examining varying theories in defense of the First Amendment), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969). The risk that speech suppression poses in a majoritarian democracy is a recognized guiding principle of the First Amendment. *See id.* (discussing the power of the majority to silence dissent). "Recognizing the occasional tyrannies of governing majorities," Justice Brandeis wrote, the framers "amended the Constitution so that free speech and assembly should be guaranteed." *Id.* Judge Learned Hand, discussing the purpose of free speech, has explained, "The First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." United States v. Associated Press, 52 F. Supp. 362, 372 (D.N.Y. 1943), *quoted in* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

147. *Turner Broad. Sys., Inc.*, 512 U.S. at 643; *see also* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 122 n.1 (1991) ("[W]e determined that statutes were content neutral where they were intended to serve purposes unrelated to the content of the regulated speech, despite their incidental effects on some speakers but not others.").

strict scrutiny, whereas content-neutral laws receive an intermediate level of scrutiny.[148] Section 526(a)(4) is a content-based regulation because "[i]t 'focuses only on the content of the speech and the direct impact that speech has on its listeners . . . [which is] the essence of content-based regulation.'"[149] Because the law specifically forbids an attorney from giving certain advice[150] to prevent the attorney's clients from abusing the system, it is a content-based regulation requiring an application of strict scrutiny.[151] Strict scrutiny requires the government to prove that the regulation uses the least restrictive means to reach a compelling governmental interest.[152] However, several of the

148. *Turner Broad. Sys., Inc.*, 512 U.S. at 643 (distinguishing content-neutral from content-based legislation and the applicable scrutiny for each type of regulation). Intermediate scrutiny will uphold a content-neutral regulation so long as the law "furthers an important or substantial governmental interest;" the interest the government seeks to promote is not "the suppression of free expression; and if the incidental restriction" does not burden First Amendment freedoms "greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 377 (1968).

149. Robert Wann, Jr., *"Debt Relief Agencies:" Does the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Violate Attorneys' First Amendment Rights?*, 14 AM. BANKR. INST. L. REV. 273, 288 (2006) (emphasis omitted) (quoting United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 811–12 (2000)); *see also* Zelotes v. Adams, 363 B.R. 660, 666 n.7 (Bankr. D. Conn. 2007) (maintaining that, "when viewed in its entirety, § 526(a)(4) appears to be a content-based regulation on speech"); Megan A. Taylor, Comment, *Gag Me with a Rule of Ethics: BAPCPA's Gag Rule and the Debtor-Attorney's Right to Free Speech*, 24 EMORY BANKR. DEV. J. 227, 227–28 (2008) (agreeing that the BAPCPA is a content-based restriction on an attorney's free speech rights).

150. 11 U.S.C. § 526(a)(4) (2006).

151. *See* Robert Wann, Jr., *Revisiting "Debt Relief Agencies" Three Years After Bankruptcy Reform*, BANKING & FIN. SERVICES POL'Y REP., Aug. 2008, at 6, 10 ("As content-based law, § 526(a)(4) is subject to strict scrutiny.").

152. *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 792 (8th Cir. 2008) (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994)) (discussing the correct standard of analysis applicable to the statute), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119); Megan A. Taylor, Comment, *Gag Me with a Rule of Ethics: BAPCPA's Gag Rule and the Debtor-Attorney's Right to Free Speech*, 24 EMORY BANKR. DEV. J. 227, 262 (2008) (bemoaning the over-inclusive nature of § 526(a)(4)). Taylor contends that even if the Court were to find that the aim of § 526(a)(4) is a compelling interest, the statute would fail strict scrutiny on its second—"narrowly tailored"—prong. Megan A. Taylor, Comment, *Gag Me with a Rule of Ethics: BAPCPA's Gag Rule and the Debtor-Attorney's Right to Free Speech*, 24 EMORY BANKR. DEV. J. 227, 262 (2008). In other words, to survive heightened scrutiny § 526(a)(4) must also be "narrowly tailored" to meet its compelling interest; yet, the statute burdens too much protected speech to satisfy such a requirement of First Amendment jurisprudence. Megan A. Taylor, Comment, *Gag Me with a Rule of Ethics: BAPCPA's Gag Rule and the Debtor-Attorney's*

courts that have addressed challenges to § 526(a)(4) avoided deciding the appropriate level of scrutiny applicable to the statute; they have concluded instead that despite which scrutiny applies—strict or otherwise—§ 526(a)(4) violates the First Amendment due to its severe overbreadth in application.[153]

In *Milavetz*, the Eighth Circuit addressed two opposing arguments regarding the correct level of scrutiny applicable to an analysis of § 526(a)(4).[154] The law firm, unsurprisingly, asserted that the correct standard applicable is "strict scrutiny."[155] In contrast, the United States argued that § 526(a)(4) is an ethical rule, and consequently, it asserted that the suitable level of scrutiny is the so-called *Gentile* standard.[156] Under the *Gentile*

Right to Free Speech, 24 EMORY BANKR. DEV. J. 227, 262 (2008); *see also* Cohen v. California, 403 U.S. 15, 24 (1971) (explaining the importance of the First Amendment in America). In *Cohen*, the Court explained, "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours." *Cohen*, 403 U.S. at 24. The First Amendment puts the decision in the hands of the people as to which views the majority will voice loudly. *Id.* That choice directly supports the ideals of individual liberty "upon which our political system rests." *Id.* *But see* Gitlow v. New York, 268 U.S. 652, 667 (1925) (reminding the parties that, though freedom of speech is of paramount importance, it "has long been recognized" that the right is not absolute).

153. *See Milavetz*, 541 F.3d at 793 (finding the statute unconstitutional under either strict scrutiny or the *Gentile* standard); *Hersh*, 347 B.R. at 25 (finding that the statute violates the First Amendment under both strict scrutiny and the rational basis test); Olsen v. Gonzales, 350 B.R. 906, 916 (D. Or. 2006) (agreeing with the reasoning in *Hersh* and finding that the statute is both over-inclusive and under-inclusive because it fails to regulate conduct by non-profit organizations), *aff'd*, 368 B.R. 886 (D. Or. 2007); Zelotes v. Martini, 352 B.R. 17, 22 (D. Conn. 2006) (choosing not to decide on the precise scrutiny applicable because the statute fails under even a lenient approach), *aff'd sub nom.* Zelotes v. Adams, 363 B.R. 660 (D. Conn. 2007). *But see* Milavetz, Gallop & Milavetz, P.A. v. United States, 335 B.R. 758, 764 (D. Minn. 2006) (deciding that, because the regulation is content-based, strict scrutiny applies), *rev'd in part by* 541 F.3d 785 (8th Cir. 2008).

154. *Milavetz*, 541 F.3d at 792 ("The parties disagree as to the level of scrutiny we apply to the constitutional analysis of this limitation on speech.").

155. Memorandum of Law at 3, Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785 (8th Cir. 2008) (No. 05-CV-2626).

156. *Milavetz*, 541 F.3d at 792 (8th Cir. 2008); *see also* Gentile v. State Bar of Nev., 501 U.S. 1030, 1075 (1991) (applying a balancing test wherein First Amendment rights are balanced "against the State's legitimate interest in regulating the activity in question"). In *Gentile v. State Bar of Nevada*, the Supreme Court examined the question of whether, if viewed as officers of the court, attorneys rightly face ethical restrictions on speech to a degree that an ordinary citizen would not. *Gentile*, 501 U.S. at 1071. The Court concluded that because attorneys have special access to information essential to a fair trial, both their speech and conduct is subject to state regulation. *Id.* at 1074–75. *But see* Megan A. Taylor, Comment, *Gag Me with a Rule of Ethics: BAPCPA's Gag Rule and the Debtor-Attorney's Right to Free Speech*, 24 EMORY BANKR. DEV. J. 227, 255 (2008) (pointing out

standard, the Supreme Court balances First Amendment interests in the light of the Government's "legitimate interest in regulating the activity in question."[157] After balancing the *Gentile* interests, the Court will then conclude whether the regulation imposes "only narrow and necessary limitations on lawyers' speech."[158] Thus, the only difference between the two is the interest the government seeks: "compelling," under strict scrutiny, and "legitimate" under the *Gentile* approach.[159] The dispute over the correct standard posed few complications for the Eighth Circuit, however, as the majority of the court held that § 526(a)(4) fails under either approach because the statute "is not narrowly tailored nor narrowly and necessarily limited" in its sweep.[160]

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that neither *Gentile*, nor any other case, has directly "considered the transactional side of legal practice").

157. *Gentile*, 501 U.S. at 1075. *But see* Megan A. Taylor, Comment, *Gag Me with a Rule of Ethics: BAPCPA's Gag Rule and the Debtor-Attorney Right to Free Speech*, 24 EMORY BANKR. DEV. J. 227, 245–47 (2008) (discussing the argument that § 526(a)(4) is an ethical rule). Taylor points out that the language of the restriction is couched in terms that do not resemble ethical rules. *Id.* at 245. For example, she notes that Congress uses "commanding" language such as "shall not advise" and "shall not make any statement" in § 526(a)(4). *Id.* Such bright-line rules, Taylor points out, are atypical in ethical regulations. *Id.* at 246–47.

158. *Gentile*, 501 U.S. at 1075. The *Gentile* opinion concerned a Nevada statute regulating an attorney's speech in reference to pending criminal cases. *Id.* at 1033. The Court viewed the speech in question as uniquely dangerous because an "[a]n attorney's position may result in some added ability to obstruct the proceedings through well-timed statements to the press[.]" *Id.* at 1057. Because of the dangers such attorney-speech poses, the Court recognized "a substantial governmental interest" that would "support additional regulation of speech." *Id.* Usually, the court added, the disapproval of society coupled with professional responsibility act as constraints on conduct that would prove harmful to clients and abusive of the courts. *Id.*

159. *Milavetz*, 541 F.3d at 793. *Compare Gentile*, 501 U.S. at 1075 (setting forth a standard that requires (1) a balance of First Amendment rights against the State's legitimate interest "in regulating the activity in question," and (2) limitations that are narrow and necessary in meeting that goal), *with* Bernal v. Fainter, 467 U.S. 216, 219 (1984) ("In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available."). Commercial speech, although afforded First Amendment protection, is also not subject to "strict scrutiny." Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989). Rather, the Court will uphold such legislation if it is "'narrowly tailored' to serve a significant governmental interest." *Id.* at 478.

160. *Milavetz*, 541 F.3d at 793; *see also* Olsen v. Gonzales, 350 B.R. 906, 916 (D. Or. 2006) (determining that the statute is "overly restrictive in violation of the First Amendment" even under a lesser, *Gentile* standard), *aff'd*, 368 B.R. 886 (D. Or. 2007).

B. *Section 526(a)(4) Is Not Narrowly Tailored*

Section 526(a)(4) is substantially over-inclusive because, in its context, it applies to any advice to incur debt, and not just debt that amounts to abuse of the system.[161] Laws that are overbroad, to wit, laws which in their sweep implicate protected freedoms, are particularly problematic under the First Amendment because they have the potential to create a "chilling effect" on that constitutionally-protected speech.[162] Hence, the Supreme Court requires that a law regulating speech maintain a close fit between its ends (the evils Congress seeks to regulate) and the means (the speech restricted to meet the ends).[163] The assumed aim under the BAPCPA—by inference from its title—is the prevention of abuse.[164] But, there are many instances in which an attorney may advise a client "in contemplation of" bankruptcy to incur more debt that do not fall within the "ends" Congress seeks to eliminate.[165]

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161. Hersh v. United States, 347 B.R. 19, 25 (N.D. Tex. 2006), *rev'd in part sub nom.* Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743 (5th Cir. 2008). The *Hersh* court explained that § 526(a)(4) "is overinclusive in at least two respects: (1) it prevents lawyers from advising clients to take lawful actions; and (2) it extends beyond abuse to prevent advice to take prudent actions." *Id.* Section 526(a)(4) restricts an attorney from giving advice that is not only beneficial and pragmatic to the client, but lawful as well. *See id.* at 24 (explaining the impermissibly broad reach of § 526(a)(4) into constitutionally protected areas).

162. Broadrick v. Oklahoma, 413 U.S. 601, 612, 630 (1973) (explaining that in certain free speech claims, "[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression").

163. *See* 2 MICHAEL ARIENS, AMERICAN CONSTITUTIONAL LAW AND HISTORY 689–90 (2008) (discussing the Court's First Amendment analyses of content-based regulations). The Supreme Court has explained that even a content-neutral regulation is overinclusive "if a substantial portion of the burden on speech does not serve to advance [the state's content neutral] goals." Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 122 n.1 (1991) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

164. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.); *see In re* Reyes, 361 B.R. 276, 280 (Bankr. S.D. Fla. 2007) (excluding attorneys from the debt relief agency category under the assumption that Congress was attempting to provide "consumer protection" through the BAPCPA, as evidenced in its title).

165. *See* 11 U.S.C. § 526(a)(4) (2006) (restricting an attorney from advising a client to incur more debt "in contemplation of" filing a bankruptcy petition); *accord* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and*

For instance, a debtor is commonly in such financial straits when he consults a bankruptcy attorney that he cannot afford to pay for an attorney's assistance or court filing costs.[166] Under these circumstances, the debtor may seek a loan from family members or friends to obtain the funds necessary to file a petition.[167] Although this situation is not an abuse of the bankruptcy system, § 526(a)(4) prevents the attorney from advising the client to seek these resources.[168] The restriction not only impinges on the attorney's ability to facilitate her client's needs, it also hinders the client's legitimate access to the bankruptcy system altogether.[169]

Also, many debtors have assets with values that exceed applicable exemptions under state laws, and the Bankruptcy Code allows the possibility of conversion of non-exempt assets to exempt assets.[170] Although an attorney has knowledge of this information about the debtor's legal avenues, under § 526(a)(4) she is not legally permitted to relay it to her client.[171] As a final example, if the assisted person is filing under Chapter 13 reorganization, it may be in his best interest to refinance his home

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Consumer Protection Act of 2005, 79 AM. BANKR. L.J. 571, 579 (2005) ("The clause directly regulates the content of speech of lawyers to their clients, even when it is accurate, legal, and desirable."). The courts that have entertained challenges to § 526(a)(4) are mindful of these concerns. *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 793–95 (8th Cir. 2008) (citing instances where advice prohibited by § 526(a)(4) would otherwise be lawful), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119); Olsen v. Gonzales, 350 B.R. 906, 916 (D. Or. 2006) (noting an attorney's duty to disclose advice to a client that is otherwise lawful), *aff'd*, 368 B.R. 886 (D. Or. 2007); *Hersh*, 347 B.R. at 24 (pointing to situations where advice proscribed by § 526(a)(4) would be beneficial to the client); *In re* Att'ys at Law & Debt Relief Agencies, 332 B.R. 66, 68 (Bankr. S.D. Ga. 2005) (explaining that § 526(a)(4) puts an attorney in direct conflict with existing ethical obligations to represent his client).

166. *See* Plaintiff's Response to Defendants' Motion to Dismiss at 6, Olsen v. Gonzales, 350 B.R. 906 (D. Or. 2006) (No. 05-6365) (discussing the overbreadth of § 526(a)(4)), *aff'd*, 368 B.R. 886 (D. Or. 2007).

167. *See id.* (providing that debtors may often seek loans to gain access to the bankruptcy courts).

168. *See also id.* at 6–7 (prohibiting attorneys from advising clients to seek legitimate financial resources).

169. *See id.* at 7 (illustrating the manner in which § 526(a)(4) inhibits an attorney's ability to "facilitate the clients' needs").

170. *Id.* (explaining the availability of transfers of assets under the Bankruptcy Code, 11 U.S.C. § 727 (2006)).

171. Plaintiff's Response to Defendants' Motion to Dismiss at 6, *Olsen*, 350 B.R. 906 (explaining § 526(a)(4)'s impact on an attorney's ability to inform her client about his available options).

in order to more readily meet his payment schedule, or purchase a car that will secure reliable transportation to work.[172] In many of these instances, the secured debt will survive the bankruptcy and the debt may be reaffirmed once the bankruptcy petition is filed.[173] These actions are not only lawful, but beneficial to the client and his creditors alike.[174]

These are but a few examples illustrating that, in its literal meaning, § 526(a)(4) fails to scale the "narrowly tailored" hurdle of First Amendment analysis.[175] In the language of the Supreme Court, these acts do not fall within the "ends" Congress seeks to regulate, yet they are prohibited under § 526(a)(4) (the "means") entirely.[176] Thus, the law "is not narrowly tailored" under strict

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172. Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, n.9 (8th Cir. 2008) (citing Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 579 (2005)), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119); *see also* Nathaniel C. Nichols, *When Harry Met Sally: Client Counseling Under BAPCPA*, 15 WIDENER L.J. 641, 661 (2006) (pointing out that "nothing in the BAPCPA prevents a debtor from incurring the debt for a motor vehicle prior to filing bankruptcy").

173. *See Milavetz*, 541 F.3d at 794 ("Incurring these types of additional secured debt, which would often survive or could be reaffirmed by the debtor, may be in the debtor's best interest without harming the creditors."); *see also* Erwin Chermerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 579 (2005) (examining the many ways in which debt incurred before the filing of bankruptcy does not amount to fraud; for example, the debtor may "intend to keep all payments fully current and to reaffirm such debt once the case is filed").

174. *See Milavetz*, 541 F.3d at 793 (explaining "situations where it would likely be in the assisted person's, and even the creditors', best interest for the assisted person to incur additional debt in contemplation of bankruptcy").

175. *See id.* at 794 (recognizing the existence of other factual scenarios that also exemplify "why incurring additional debt in contemplation of bankruptcy may not be abusive or harmful to creditors"). Jean Braucher explains that "the debtor may have urgent needs that require borrowing, including to hire an attorney, for a reliable car, for emergency medical treatment, or to pay back child support or taxes." Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL L. REV. 93, 138–39 (2007). Braucher also points out that a debtor might need to borrow against exempt home equity and pension plans and also include attorneys' fees in the repayment plan—all of which would fall under the prohibition of incurring more debt. *Id.*

176. *See generally* 2 MICHAEL ARIENS, AMERICAN CONSTITUTIONAL LAW AND HISTORY 689 (2008) (explaining that in free speech cases, "the state must prove that it has a compelling interest (end) and has used the least restrictive means to achieve that interest"); Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 579 (2005) (bemoaning the overbreadth of § 526(a)(4)).

scrutiny, nor is it "narrowly and necessarily limited" under the lesser *Gentile* standard; therefore, as the Eighth Circuit explains, § 526(a)(4) fails a First Amendment overbreadth challenge under either approach.[177]

V. THE FIFTH CIRCUIT ANALYSIS: § 526(A)(4) AS AN ETHICAL REGULATION

As its title suggests, the BAPCPA represents Congress's concern with addressing perceived methods employed by many to cheat the bankruptcy system.[178] With this framework in mind, the Fifth Circuit held in *Hersh* that the statute should be given a narrow construction "to avoid any of the potential constitutional

177. *Milavetz*, 541 F.3d at 793. The Eighth Circuit explained that, because § 526(a)(4) is not narrowly tailored, it reaches beyond speech that "the government has an interest in restricting." *Id.*; *see* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 580 (2005) (exclaiming that a law which prevents lawyers "from giving important, lawful information to their clients cannot be reconciled with the First Amendment"); *see also* Zelotes v. Adams, 363 B.R. 660, 667 (D. Conn. 2007) (maintaining that what § 526(a)(4) lacks in order to meet constitutional muster is a fit "between the legislature's ends and the means chosen to accomplish those ends"). The Supreme Court has explained that the methods utilized by the government to meet the ends need not be the best available. Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989). Rather, the method must be one whose scope is proportional to the ends that are served by the regulation. *Id.*

178. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.). One of BAPCPA's primary goals is to restore "personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." H.R. REP. No. 109-31, at 3 (2005) *reprinted in* 2005 U.S.C.C.A.N. 88, 89. Despite criticism launched at its practical effects, the BAPCPA also seeks to protect consumers subject to abusive practices by creditors and debt relief agencies alike. *See id.* (noting that the reform also "includes various consumer protection reforms"). The placing of blame on attorneys for problems in the system is not unique to the BAPCPA. *See Bankruptcy Reform Act of 1998-Part I: Hearing on H.R. 3150 Before the Subcomm. on Commerical and Admin. Law of the H. Comm. on the Judiciary*, 105th Cong. 137 (1998) (statement of John J. Gleason, Vice President of Credit, Bonton Department Stores) (discussing the role of attorneys in boosting the number of filed petitions). In a hearing before the House Judiciary Committee in 1998, Congressman James Moran explained that many bankruptcy attorneys "operate like a mill" and lead consumer debtors into bankruptcy without adequate disclosure of their choices. *Bankruptcy Reform Act of 1998-Part I: Hearing on H.R. 3150 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 105th Cong. 26 (1998) (statement of Rep. James P. Moran, Member, H. Comm. on Appropriations).

problems" inherent in § 526(a)(4).[179] Judge Colloton of the Eighth Circuit dissented in *Milavetz* on this point also; he maintained that "we have not only the power, but the duty, to adopt a narrowing construction that will avoid constitutional difficulties whenever possible."[180] Citing *Boos v. Barry*,[181] both the Fifth Circuit and Judge Colloton pointed to the Supreme Court's observations in its opinion concerning a challenged statute from the District of Columbia.[182] The D.C. law to which they referred regulated public congregation "within 500 feet of any [embassy, legation or consulate]."[183] In *Boos* the Court noted that, because the prohibition applied to *any* congregation for *any* reason, the statute in question was constitutionally problematic standing alone.[184] But in accordance with the "duty to avoid constitutional difficulties," the Court upheld the regulation by adopting a narrowing construction.[185] Justice O'Connor noted,

179. *Compare* Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743, 753 (5th Cir. 2008) (proclaiming that the doctrine of constitutional avoidance guides its analysis), *with Milavetz*, 541 F.3d at 797 (Colloton, J., concurring in part and dissenting in part) (pointing out that it is the court's duty to adopt a narrow construction that avoids constitutional difficulties).

180. *Milavetz*, 541 F.3d at 798. *Compare Hersh*, 553 F.3d at 753 (exploring the dissenting opinion of Judge Colloton in *Milavetz*), *with Milavetz*, 541 F.3d at 799 (arguing that the "text, structure, and legislative history of § 526(a)(4) provide adequate support for a narrowing construction").

181. Boos v. Barry, 485 U.S. 312 (1988).

182. *See Hersh*, 553 F.3d at 757–58 (citing *Boos*, 485 U.S. at 329); *Milavetz*, 541 F.3d at 798 (Colloton, J., concurring in part and dissenting in part) (advocating an approach similar to that taken by the Supreme Court in *Boos*); *see also* Fox v. Washington, 236 U.S. 273, 277 (1915) ("So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be construed . . . ."); United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 407–08 (1909) (discussing the avoidance theory).

183. *Milavetz*, 541 F.3d at 798 (Colloton, J., concurring in part and dissenting in part) (citing *Boos*, 485 U.S. at 329); *see also Hersh*, 553 F.3d at 757–58 (citing *Boos*, 485 U.S. at 329).

184. *Hersh*, 553 F.3d at 758 (citing *Boos*, 485 U.S. at 330); *Milavetz*, 541 F.3d at 798 (Colloton, J., concurring in part and dissenting in part) (citing *Boos*, 485 U.S. at 330) (second emphasis added).

185. *Boos*, 485 U.S. at 330. Specifically, the Court read the prohibition as affecting only public congregation aimed at nearby embassies and authorizing police to disperse public protest only when the police reasonably believed that a threat to the security or peace of the assembly was made. *See id.* (choosing to adhere to the court of appeals' narrowing construction which "alleviate[d]" constitutional difficulties). The Court asserted that when reading the statute narrowly, the regulation was only one of time, place, and manner and was therefore constitutional in its scope. *See id.* at 331 ("So

"It is well settled that federal courts have the power to adopt narrowing constructions of federal legislation ... [i]ndeed, the federal courts have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible."[186] Employing this so-called duty of avoidance, the Fifth Circuit chose an alternative to a literal approach that renders § 526(a)(4) constitutional as applied to attorneys.[187] The court maintained that once construed in a permissibly narrow fashion, § 526(a)(4) does not raise significant free speech concerns.[188] For one, as it pointed out, the Supreme Court has held that "speech in which a person proposes an illegal transaction" is not protected speech.[189] Furthermore, the Fifth Circuit claimed, the prevalence of unchallenged rules such as those found in the Model Rules of Professional Conduct show that state ethical regulations on attorney speech are not only unproblematic, but "proper in certain situations."[190]

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narrowed, the congregation clause ... does not reach a substantial amount of constitutionally protected conduct; it merely regulates the place and manner of certain demonstrations.").

186. *Id.* at 330–31.

187. *Hersh*, 553 F.3d at 754 ("If interpreted ... broadly, section 526(a)(4) would raise serious constitutional problems ...."); *see also Milavetz*, 541 F.3d at 799–801 (Colloton, J., concurring in part and dissenting in part) (criticizing the majority's broad interpretation of § 526(a)(4)).

188. *See Hersh*, 553 F.3d at 756 (advocating an interpretation that implies a purposive abuse element into § 526(a)(4)).

189. *Id.* at 755 (citing Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)).

190. *See id.* (illustrating model ethical rules that are consistent with § 526(a)(4) in its narrow form). A narrow reading of § 526(a)(4) as an ethical rule would not produce a conflict under the Texas Disciplinary Rules of Professional Conduct. *Compare* Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 800 (8th Cir. 2008) (Colloton, J., concurring in part and dissenting in part) (advocating for a narrowing construction which treats the statute as an ethical regulation), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119), *with* TEX. DISCIPLINARY R. PROF'L CONDUCT 2.01 cmt. n.7, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 2005) (discussing an attorney's duty to her client). As the Texas Disciplinary Rules of Professional Conduct provides in section 1.02(c), "A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(c); *cf.* Gentile v. State Bar of Nev., 501 U.S. 1030, 1066 (1991) ("Membership in the bar is a privilege burdened with conditions ...." (quoting *In re Rouss*, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917) (Cardozo, J.))). The Supreme Court, in *Gentile*, also noted that official codes of legal ethics have existed for over a century. *Gentile*, 501 U.S. at 1066 (citing the Alabama Code of 1887 as the first official code of legal ethics).

A. *The Last Resort/Avoidance Doctrine*

The duty of "narrow construction" relied on by Judge Colloton in *Milavetz*, and explained by Justice O'Conner in *Boos v. Barry*, also appeared in a well known concurring opinion penned by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*.[191] As a "cardinal princip[le]" of statutory interpretation, the Supreme Court uses the "narrow construction" approach to restrict the language of broad statutes which, in their literal form, generate constitutional doubts.[192] Though Justice Brandeis raised several strategies for an avoidance of constitutional questions in *Ashwander*, the most relevant here is his decree that "when the validity of an act of the Congress is drawn into question, and even if a serious doubt of constitutionality is raised," the Court should determine initially "whether a construction of the statute is fairly possible by which the question may be avoided."[193] While the

191. *Milavetz*, 541 F.3d at 800; Boos v. Barry, 485 U.S. 312, 330–31 (1988); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). The doctrine of "avoidance" is a mainstay in constitutional jurisprudence; its roots appear in opinions dating back to the early 19th century. *Ashwander*, 297 U.S. at 346–48 (delineating seven principles to avoid "passing upon a large part of all the constitutional questions pressed upon [the Court] for decision[]"); *see* Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 9 (1996) (discussing the avoidance canon as "one of a large group of techniques used to avoid 'unnecessary' constitutional questions, as explicitly set out in Justice Brandeis's famous concurrence in *Ashwander v. Tennessee Valley Authority*"); *see also* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948 (1997) ("Avoidance is perhaps the preeminent canon of federal statutory construction; its pedigree is so venerable that the Supreme Court invoked a version of it even before *Marbury v. Madison* . . . ." (citing Mossman v. Higginson, 4 U.S. (4 Dall.) 12 (1800))).

192. *See Hersh*, 553 F.3d at 754 (citing Crowell v. Benson, 285 U.S. 22, 52 (1932)); *see also* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (utilizing the doctrine of avoidance); United States v. Witkovich, 353 U.S. 194, 201 (1957) (restricting the broad meaning of a statute to comport with constitutional demands); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948 (1997) (explaining the seven different facets of the avoidance doctrine). Vermeule explains the difference between "procedural avoidance," which disposes of a controversy on an antecedent statute before reaching the merits of a constitutional claim; "classical avoidance," which looks to "two possible interpretations," and accepts the valid of the two; and "modern avoidance," which involves construing a statute to avoid constitutional problems, so long as such a construction does not violate the intent of Congress. Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948–49 (1997).

193. *Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring). Justice Brandeis listed seven principles of prudentially developed rules. *Id.* at 346–49. The seven as listed are: (1)

Fifth Circuit conceded that the doctrine of avoidance does not grant judges license to rewrite legislation, it rejected the "tyranny of literalness" in its review of § 526(a)(4) and relied instead on several factors to support its position that the statute should be read in a narrow fashion.[194]

First, the Fifth Circuit asserted that the text of § 526(a)(4) supports a narrow construction when interpreted according to its common usage.[195] The court maintained that the phrase "in contemplation of [filing] bankruptcy" is a term of art in its proper context.[196] As the court pointed out, *Black's Law Dictionary* defines the phrase "in contemplation of bankruptcy" as "[t]he

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"The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding" so as to take to the courts that which was lost in the legislature. *Id.* at 346. (2) "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Id.* (citations omitted). (3) "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* at 347. (4) "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring). (5) "The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." *Id.* (6) "The Court will not pass upon the constitutionality of a statute at the instance of one who availed himself of its benefits." *Id.* at 348. (7) "[E]ven if a serious doubt of constitutionality is raised . . . [the] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.*

194. Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743, 757 (5th Cir. 2008) (citing *Witkovich*, 353 U.S. at 198); *see Milavetz*, 541 F.3d at 798 (Colloton, J., concurring in part and dissenting in part) (advocating a narrow construction that would save § 526(a)(4) from invalidation). The avoidance principle has its limits, as the Court has pointed out, and cannot support a reading that is "plainly contrary to the intent of Congress." *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) ("It is therefore incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress.").

195. *Hersh*, 553 F.3d at 758 (focusing on the language "in contemplation of" as a term of art); *see also Milavetz*, 541 F.3d at 799 (Colloton, J., concurring in part and dissenting in part) (examining the common usage of the term "in contemplation of" as employed in bankruptcy courts).

196. *Hersh*, 553 F.3d at 758; *see also Milavetz*, 541 F.3d at 799 (Colloton, J., concurring in part and dissenting part) (recognizing that "the phrase 'in contemplation of' has been construed in bankruptcy context to mean actions taken with the intent to abuse the protections of the bankruptcy system"); *accord* Buckingham v. McLean, 54 U.S. (1 How.) 151, 167 (1851) (deciding that to give the words "contemplation of" a broad scope would be contrary to the "furtherance of the general purpose with which they were introduced"); *cf. In re* Pearce, 21 Vt. 611, 617 (D. Vt. 1843) (determining that the phrase included an intention to "defeat the general distribution of effects, which takes place under a proceeding in bankruptcy").

thought of declaring bankruptcy because of the inability to continue current financial operations, often coupled with action designed to thwart the distribution of assets in a bankruptcy proceeding."[197] The court agreed with Judge Colloton that because the common definition includes "an intent to abuse the system," Congress's likely focus was only aimed at advice given to induce the debtor to abuse the bankruptcy scheme.[198] Additionally, the Fifth Circuit pointed to a case in which the court described a debtor's fraudulent practice of "loading up" on debt as a method of "incurring card debt in contemplation of bankruptcy."[199] By interpreting the language in accordance with its common usage in bankruptcy proceedings, the court argued it could fairly construe § 526(a)(4) in a narrow manner consistent with its text.[200] Judge Colloton of the Eighth Circuit also highlighted several bankruptcy opinions that employed the "contemplation of bankruptcy" language.[201] He, too, urged that

197. *Hersh*, 553 F.3d at 758 (citing BLACK'S LAW DICTIONARY 336 (8th ed. 2004)); *accord Milavetz*, 541 F.3d at 797 (Colloton, J., concurring in part and dissenting in part) (citing BLACK'S LAW DICTIONARY 336 (8th ed. 2004)).

198. *Compare Hersh*, 553 F.3d at 758 (citing *In re* Mercer, 246 F.3d 391, 421 n.43 (5th Cir. 2001)) (explaining that Congress intended to proscribe advice that aims to abuse the system), *with Milavetz*, 541 F.3d at 799 (Colloton, J., concurring in part and dissenting in part) (advocating a purposive abuse requirement as allegedly intended by Congress).

199. *Hersh*, 553 F.3d at 758 (citing *In re* Mercer, 246 F.3d 391, 421 n.43 (5th Cir. 2001)).

200. *See id.* at 758–59 (pointing out that the utilization of the language "in contemplation of" supports the conclusion that the prohibition is only aimed at situations wherein a debtor intends to abuse the system); *see also Milavetz*, 541 F.3d at 799–800 (Colloton, J., concurring in part and dissenting in part) (examining the "in contemplation of" language in § 526(a)(4)). Judge Colloton lists several American and English courts that use the "in contemplation of" language as a term of art containing an inference of the intent to abuse the system. *Milavetz*, 541 F.3d at 799–800 (Colloton, J., concurring in part and dissenting in part); *see* Olsen v. Gonzalez, 368 B.R. 886, 888 (D. Or. 2006) (addressing the § 526(a)(4) debate). Although unsuccessful, in *Olsen*, the Government contended that the phrase "'in contemplation of' is key to understanding th[e] provision." Memorandum in Support of Motion to Dismiss at 10, Olsen v. Gonzalez, 368 B.R. 886, 886–88 (D. Or. 2006) (No. 05-6365). The Government also argued that § 526(a)(4), when read in accordance with its common meaning in the bankruptcy courts, "does not establish a general prohibition against advising an assisted person to incur more debt." *Id.* Rather, the Government argued, the phrase "makes attorneys liable for 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 take unfair advantage of discharge." *Id.* at 11.

201. *Milavetz*, 541 F.3d at 799–800 (Colloton, J., concurring in part and dissenting in part) (citing *In re* Pearce, 21 Vt. 611 (D. Vt. 1843)); *see also* Buckingham v. McLean, 54 U.S. (1 How.) 151, 167 (1851) ("To give to these words, contemplation of bankruptcy, a

such authorities should guide the court to a permissibly narrow and unproblematic construction of § 526(a)(4).[202]

The structure of the enforcement provisions also guided the Fifth Circuit to its conclusion that § 526(a)(4) should be construed narrowly.[203] The court suggested that the statutes governing enforcement of § 526(a)(4) further reflect Congress's intent to proscribe only abusive conduct by bankruptcy attorneys.[204] Section 526(c)(2) sets forth the civil penalties facing attorneys who violate § 526 of the BAPCPA.[205] According to § 526(c)(2), "Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs."[206] Moreover, § 526(c)(3) authorizes the chief law enforcement officer or agency of a state to bring an enjoinment action against the attorney to recoup the assisted person's actual damages.[207] Importantly, as the Fifth Circuit pointed out, actual damages and sanctions are unlikely to arise in situations where an attorney has provided lawful, rather than abusive advice.[208]

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broad scope, and somewhat loose meaning, would not be in furtherance of the general purpose with which they were introduced.").

202. *Milavetz*, 541 F.3d at 799–800 (Colloton, J., concurring in part and dissenting in part). *But see* Zelotes v. Adams, 363 B.R. 660, 665 (Bankr. D. Conn. 2007) (noting that the "in contemplation of" language is not limiting enough to save the statute). The Government likened the "in contemplation of" bankruptcy language to the "in contemplation of death" language as used in IRS regulations. *Id.* When evaluating the "in contemplation of death" language, the Supreme Court found that the "test" is the decedent's motive. *Id.* However, the Court also noted that the language "was not capable of precise delineation." *Id.* Judge Dorsey concluded that similar reasoning applies when interpreting § 526(a)(4). *Id.* Judge Dorsey explained: "Congress did not qualify or narrow the phrase"; rather, it chose "the broad language" regardless of whether the debt is incurred for fraudulent purposes. *Zelotes*, 363 B.R. at 665.

203. *Hersh*, 553 F.3d at 758–59 (citing 11 U.S.C. § 526(c)(2)–(3) (2006)).

204. *Id.* at 760 (citing 11 U.S.C. § 526(c)(2)(3) (2006)); *see also* Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 800 (8th Cir. 2008) (Colloton, J., concurring in part and dissenting in part) (discussing the enforcement provisions applicable to § 526 violations), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119).

205. 11 U.S.C. § 526(c) (2006).

206. *Id.* § 526(c)(2).

207. *Id.* § 526(c)(3).

208. Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743, 761 (5th Cir. 2008); *see Milavetz*, 541 F.3d at 800 (Colloton, J., concurring in part and dissenting in part) ("The remedies for a violation . . . emphasize actual damages.").

Rather than reaching all advice to incur debt, according to the Fifth Circuit, the statute proscribes only action that poses a significant risk of "potential negative repercussions" for the debtor.[209] Further, as Judge Colloton opined, "[t]here is no reason to believe that a client could recover the remittal of attorney's fees or that a court would find a civil penalty 'appropriate' as a remedy for legal advice that *benefits* both the debtor *and* his creditors."[210] Under this narrow view of the statute, granting advice to incur debt does not alone violate § 526(a)(4). Instead, the statute applies only in situations where unethical advice is given by an attorney, relied on by the debtor, and could result in actual injury to the debtor's claim through a court's determination of abuse of the bankruptcy system.[211] In sum, the enforcement provision's emphasis on actual damages, according to the Fifth Circuit and Judge Colloton, further bolsters a narrowing approach that incorporates an implicit element of abuse into § 526(a)(4)'s "gag rule."[212]

The Fifth Circuit explained that important changes and additions to the bankruptcy scheme, as designed by the BAPCPA, necessitate Congress's aggressive move to proscribe abusive conduct by attorneys who might face temptation to assist clients in cheating the new system.[213] In addition to lowering the standard for dismissal from "substantial abuse," as it was prior to the

209. *Hersh*, 553 F.3d at 760.

210. *Milavetz*, 541 F.3d at 800 (Colloton, J., concurring in part and dissenting in part).

211. *Hersh*, 553 F.3d at 760–61; *see also* Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 800 (8th Cir. 2008) (Colloton, J., concurring in part and dissenting in part) (pointing out that "a debtor is likely to have a remedy against [his] attorney only in" a situation where the advice to abuse the system results in damage to the debtor through dismissal of the petition), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119).

212. *See Hersh*, 553 F.3d at 759 (citing 11 U.S.C. §§ 526(c)(2)–(3) (2006) and their impact on interpretation of § 526(a)(4)); *Milavetz*, 541 F.3d at 800 (Colloton, J., concurring in part and dissenting in part) ("The remedies for a violation thus emphasize actual damages."), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119). *But see* Zelotes v. Adams, 363 B.R. 660, 666 n.7 (D. Conn. 2007) (disagreeing with the argument that § 526(a)(4) is an ethical rule). Judge Dorsey of the District of Connecticut pointed out that "[n]othing in the § 526(a)(4) nor any other part of the section alludes to ethics or purports to be an ethical principle." *Id.* Rather, Judge Dorsey points out, "[t]he section is titled 'Restrictions on debt relief agencies[.]'" *Id.*

213. *See Hersh*, 553 F.3d at 761 (explaining how the new changes to abuse determination standards create new incentives for debtors to pile on debt before filing a bankruptcy claim).

BAPCPA, to simply "abuse," Congress also created a new "means test" to curb Chapter 7 filings.[214] Touted as the "most dramatic statutory change" to the Code,[215] the BAPCPA created a new rebuttable presumption of abuse when a debtor is unable to pass a new "means test."[216] As a preliminary matter, the court determines whether the debtor's income, multiplied by twelve, exceeds "the median family income in the state in which the debtor resides."[217] If it does, the court will not allow the debtor to file for Chapter 7 relief and he must instead face dismissal or convert his petition to a Chapter 13 case.[218] Then, using the new "means test," a court again determines whether a debtor qualifies for Chapter 7 relief through a calculation of the debtor's monthly income minus the available deductions and allowed expenses.[219]

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214. *See id.* at 760 (discussing the new standards promulgated by the BAPCPA and codified at 11 U.S.C. § 707(b)(1)); *see also* Wieland v. Thomas, 382 B.R. 793, 796 (D. Kan. 2008) (explaining that, "[i]f a presumption of abuse arises under the means test, it 'may only be rebutted by demonstrating special circumstances . . .'"). The *Wieland* court also explained that it can—based on the totality of the circumstances of the debtor's financial position—render a finding of a bad-faith filing. *Wieland*, 382 B.R. at 796. The court also noted that Congress created the "means test" in order to force debtors to pay back their creditors to the fullest extent they can afford. *Id.*

215. Robert J. Landry, III & Nancy Hisey Mardis, Comment, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U. L. REV. 91, 108 (2006).

216. *See Hersh*, 553 F.3d at 761 (asserting that the core of new changes added by the BAPCPA surrounds the new "means test" in 11 U.S.C. § 707(b)(2)(A)); Robert J. Landry, III & Nancy Hisey Mardis, Comment, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U. L. REV. 91, 108 (2006) (discussing the new "means test" that replaces the former requirement for dismissal of a petition).

217. *See* Robert J. Landry, III & Nancy Hisey Mardis, Comment, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U. L. REV. 91, 108 (2006) (setting forth the various ways abuse may be found by the bankruptcy court).

218. *Id.*

219. *See* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 590–91 (2005) (addressing the new "means test" as created by the BAPCPA); Robert J. Landry, III & Nancy Hisey Mardis, Comment, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U. L. REV. 91, 108 (2006) (explaining the "means test" as it applies in Chapter 7 petitions). The "means test" is found in 11 U.S.C. § 707 (2006), which sets forth, in relevant part, that in determining whether

> the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the

If the debtor's income, thus calculated, exceeds certain specified guidelines, abuse is the prevailing presumption and the case must be converted to a Chapter 13 petition.[220] The Fifth Circuit maintained that the means test incentivizes debtors to "load up on debt" to fabricate a higher debt ratio.[221] The Fifth Circuit viewed § 526(a)(4) as an attempt by Congress to prevent attorneys from advising their clients to rack up debt just before filing a bankruptcy petition in order to "game" the new requirements.[222] Thus, as a matter of construction, Congress placed § 526(a)(4) among these new provisions to further emphasize an intent to deter abuse.[223] The Fifth Circuit proposed that this overall picture "suggests that Congress did not enact § 526(a)(4) as a sweeping prohibition on good faith, lawful, and ethical advice."[224]

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amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,575, whichever is greater; or (II) $10,950.

11 U.S.C. § 707(b)(2)(A)(i) (2006). For a detailed analysis of how the "means test" functions, see Robert J. Landry, III & Nancy Hisey Mardis, Comment, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U. L. REV. 91, 108 (2006).

220. *See, e.g.*, Bruce M. Price & Terry Dalton, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (and Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135, 166 (2007) (explaining that "[t]he means test is designed to force those debtors who have the ability to repay at least some of their debts into a Chapter 13 repayment plan"); *see* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 590–91 (2005) (exploring the changes to the Code through means testing); Robert J. Landry, III & Nancy Hisey Mardis, Comment, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U. L. REV. 91, 108 (2006) (discussing the new "means test" in the Code). One of the many criticisms launched at the BAPCPA stems from the inability of the "means test" to distinguish debt created by "irresponsible" debtors from those debts created by unfortunate circumstances, such as serious medical problems. *See* Bruce M. Price & Terry Dalton, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (and Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135, 167–68 (2007) (discussing the impact of the means test on less fortunate Americans).

221. Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743, 761 (5th Cir. 2008); *see also* Memorandum in Support of Motion to Dismiss Pursuant to Fed. R. Civ. P[.] 12(B)(6) at 11, Olsen v. Gonzalez, 368 B.R. 886 (D. Or. 2007) (No. 05-6365-HO) (describing the opportunity for debtors to "game" the means test).

222. *Hersh*, 553 F.3d at 761 (examining other relevant provisions to the Code that emphasize a crack down on debtor abuse of Chapter 7 filings).

223. *See id.* (noting the placement of § 526(a)(4) among new provisions that aim to deter abuse).

224. *Id.*

Judge Colloton in dissent urged that a narrow interpretation is in accord with the "evident purpose of the statute" manifest in the BAPCPA's legislative history.[225] The Fifth Circuit also expressed its understanding that the narrowed reading of § 526(a)(4) supports the legislative intent expressed by Congress in its House Report.[226] Congress expressed its desire to confront "misconduct by attorneys and other professionals," along with "abusive practices by consumer debtors," who purposely charge large amounts on their credit cards or obtain cash advances before filing a bankruptcy petition.[227] With this frame of reference in mind, Judge Colloton contended that the problematically broad reading of § 526(a)(4) forces the statute beyond the purposes it was meant to address.[228] "[T]here is no need," he claimed, to adopt a reasoning that one party says is absurd, the other says was unintended, and is inconsonant with Congress's purpose as evidenced in the very title of the BAPCPA.[229] As a matter of text, structure, and legislative history, both the Fifth Circuit and the Eighth Circuit's lone dissenter urged that § 526(a)(4) is best read as an ethical regulation, and not as a problematically literal First Amendment violation.[230]

B. *Lingering Issues Concerning § 526(a)(4)*

The Fifth Circuit rejected Hersh's argument that, even if construed narrowly, § 526(a)(4) nevertheless violates the First Amendment because it eliminates the ability of attorneys to advise their clients to incur debt in order to pay for attorney fees.[231] The

225. Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 800 (8th Cir. 2008) (Colloton, J., concurring in part and dissenting in part), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119).

226. *Hersh*, 553 F.3d at 761 (citing H.R. REP. No. 109-31, pt. 1, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89).

227. *Milavetz*, 541 F.3d at 800 (Colloton, J., concurring in part and dissenting in part) (quoting H.R. REP. No. 109-31, pt. 1, at 5, 15 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 92, 101).

228. *Id.*

229. *Id.* at 800–01.

230. *See generally Hersh*, 553 F.3d at 743 (reversing the district court's opinion, in part, and holding § 526(a)(4) constitutional); *Milavetz*, 541 F.3d at 785, 797–801 (Colloton, J., concurring in part and dissenting in part) (disagreeing with the majority's determination that § 526(a)(4) is unconstitutional).

231. *Hersh*, 553 F.3d at 763.

language to which Hersh refers is the final portion of § 526(a)(4), which provides that "[a] debt relief agency shall not . . . advise an assisted person . . . to pay an attorney . . . for services performed as part of preparing for or representing a debtor" in a bankruptcy proceeding.[232] Relying on the Supreme Court's language in the *Gentile* opinion, the Fifth Circuit explained that attorney speech is "subject to diminished First Amendment protection when it is regulated in furtherance of a substantial governmental interest."[233] Although the court did not directly address Hersh's argument because she raised it for the first time on appeal, it noted, *arguendo*, that even if the fee provision "would unconstitutionally restrict some speech, there is no indication and [Hersh] does not argue, that this restriction would be substantial in comparison to the legitimate reach of the statute."[234] Reversing the district court's holding that § 526(a)(4) facially violates the First Amendment due to its overbreadth, the court failed to identify any "significant imbalance between any protected speech" restricted by the statute and the speech that § 526(a)(4) legitimately proscribes.[235] In the end, even under the restricted

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232. *See* 11 U.S.C. § 526(a)(4) (2006) (prohibiting an attorney from advising a client to incur debt to pay attorneys fees); *Hersh*, 553 F.3d at 763 (declining to address Hersh's argument that the final provision of § 526(a)(4) violates her right to free speech); *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, 312 (2005) (illustrating the absurdity of the § 526(a)(4) prohibition on attorney speech). Vance and Cooper propose four things that an attorney cannot do as a result of § 526(a)(4)'s restrictions. Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 311 (2005). They explain that:

> 1. [An attorney] can no longer take credit cards . . . .
> 2. [An attorney] can't suggest that the debtor borrow the money from a family member or friend.
> 3. [An attorney] cannot *answer* if the debtor asks whether borrowing money to pay the attorney's fee is an option.
> 4. [An attorney] can't accept money that the debtor insists was a gift from family or friends, unless the intent to make a gift is clearly documented.

Id.

233. *Hersh*, 553 F.3d at 756 (examining the Court's analysis in *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991)). The Supreme Court in *Gentile* discussed the exceptional role an attorney plays in the administration of justice. *Gentile*, 501 U.S. at 1072. Because of that crucial role, the Court noted, ensuring obedience to ethical precepts requires an attorney's abstinence from what would otherwise be protected speech. *Id.*

234. *Hersh*, 553 F.3d at 763.

235. *Id.* at 763–64.

reading of the statute as advocated by the Fifth Circuit, First Amendment issues for attorneys under § 526(a)(4) remain.[236]

VI. CONCLUSION

The debate over the constitutionality of § 526(a)(4) is but one of many constitutional quandaries that critics of the BAPCPA anticipate will arise before the federal courts.[237] Although the Southern District of Georgia acted immediately upon the BAPCPA's conception to address the debt relief agency question, nearly four years passed before the federal appellate courts were poised to answer.[238] Additionally, while the opinions from the Eighth and Fifth Circuits expose the complexity of the debate, they further deepen the lingering confusion on the question for both bankruptcy courts and practitioners. Just as the Eighth Circuit bolstered the emerging consensus that § 526(a)(4) is unconstitutional,[239] the Fifth Circuit opinion added momentum to the opposing side of the debate.[240]

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236. *See id.* at 764 n.26 (noting that it did not address the final portion of § 526(a)(4) and that such a challenge would be better brought as an as-applied rather than a facial challenge); *see also* Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 798 n.13 (8th Cir. 2008) (Colloton, J., concurring in part and dissenting in part) (pointing out that an "as-applied" challenge was the correct way to address § 526(a)(4)), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119).

237. *See generally* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571 (2005) (outlining the many constitutional issues in the BAPCPA).

238. *In re* Att'ys at Law & Debt Relief Agencies, 332 B.R. 66, 66 (Bankr. S.D. Ga. 2005) (bringing forth its own motion to answer the question concerning whether attorneys are debt relief agencies).

239. *See, e.g.*, *Milavetz*, 541 F.3d at 794 (holding § 526(a)(4) unconstitutional as applied to attorneys); Conn. Bar Ass'n v. United States, 394 B.R. 274, 283 (D. Conn. 2008) (concluding that § 526(a)(4) is not sufficiently tailored to pass First Amendment scrutiny); Zelotes v. Adams, 363 B.R. 660, 667–68 (D. Conn. 2007) (granting an injunction against enforcement of § 526(a)(4) because of its failure to pass constitutional muster); *In re* Reyes, 361 B.R. 276, 281 (S.D. Fla. 2007) (deciding that § 526(a)(4) unconstitutionally restricts attorney-client speech); Zelotes v. Martini, 352 B.R. 17, 25 (D. Conn. 2006) (concluding that § 526(a)(4) is unconstitutional), *aff'd sub nom.* Zelotes v. Adams, 363 B.R. 660 (D. Conn. 2007); Olsen v. Gonzales, 350 B.R. 906, 916 (D. Or. 2006) (holding § 526(a)(4) unconstitutional because it is both over and under inclusive), *aff'd*, 368 B.R. 886 (D. Or. 2007); Hersh v. United States, 347 B.R. 19, 25 (N.D. Tex. 2006) (holding that § 526(a)(4) is unconstitutional), *rev'd in part sub nom.* Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743, 764 (5th Cir. 2008) (holding § 526(a)(4) constitutional).

240. *Compare Hersh*, 553 F.3d at 752 (addressing and agreeing with Judge Colloton's opinion from *Milavetz*), *with Milavetz*, 541 F.3d at 797 (Colloton, J., concurring in part and

For now, at least, the question of whether attorneys are properly included in the debt relief agency category of § 101(12A) of the BAPCPA is most likely answerable in the affirmative.[241]

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dissenting in part) (disagreeing with the majority's holding that § 526(a)(4) is unconstitutional). In one respect, the Fifth Circuit's approach is unsurprising insofar as it proceeds cautiously on the constitutionality of the § 526(a)(4) provision. *See generally Hersh*, 553 F.3d at 761 (relying on the doctrine of constitutional avoidance to uphold § 526(a)(4)). Several attorneys who brought early challenges to the § 526(a)(4) provision faced dismissal for lack of standing. *See* Geisenberger v. Gonzales, 346 B.R. 678, 682 (E.D. Pa. 2006) (dismissing for lack of standing because there was no indication of a "feared future event"); *In re* McCartney, 336 B.R. 588, 592 (Bankr. M.D. Ga. 2006) (dismissing the challenge for lack of standing); Robert Wann, Jr., *Revisiting "Debt Relief Agencies" Three Years After Bankruptcy Reform*, BANKING & FIN. SERVICES POL'Y REP., Aug. 2008, at 6, 11 (indicating that the courts have "treaded lightly" in dealing with the § 526(a)(4) challenge). These attorneys had difficulties proving an imminent injury because they could not indicate that courts or state attorneys general sought enforcement of § 526(a)(4) violations. *See Geisenberger*, 346 B.R. at 682 (finding a declaratory order inappropriate because the Commonwealth of Pennsylvania had not threatened enforcement of the provision); *In re McCartney*, 336 B.R. at 592 (claiming that since no entity has threatened enforcement of § 526(a)(4), the Movant could not show actual injury). The Fifth Circuit addressed this issue in *Hersh* as well, but allowed the challenge to stand based on the Supreme Court's contention that the danger of chilling free speech may outweigh the duty to avoid constitutional adjudication whenever possible. *Hersh*, 553 F.3d at 748 (citing Sec'y of State v. Joseph H. Munson Co. Inc., 467 U.S. 947 (1984)). Hersh argued that the threat of civil enforcement was enough to chill her speech when advising her client to take legitimate actions in contemplation of filing for bankruptcy. *Id.* Additionally, the courts who defied the plain meaning of § 101(12A) in order to exclude attorneys from the debt relief category also show deference to the doctrine of avoidance by foreclosing constitutional problems before ever reaching the question of § 526(a)(4)'s constitutionality. Milavetz, Gallop & Milavetz, P.A. v. United States, 355 B.R. 758, 769 (Bankr. D. Minn 2006), *rev'd in part by* 541 F.3d 785 (8th Cir. 2008); *In re Reyes*, 361 B.R. at 279; *In re Att'ys at Law*, 332 B.R. at 67–68.

241. *See Hersh*, 553 F.3d at 749 (agreeing with the Eighth Circuit's unanimous opinion that the debt relief agency provisions apply to attorneys); *Milavetz*, 541 F.3d at 792 (concluding that attorneys are included in the debt relief agency category). *But see Milavetz*, 355 B.R. at 769 (finding that attorneys are not debt relief agencies); *In re Att'ys at Law*, 332 B.R. at 68–69 (concluding that attorneys are not included in the debt relief agency category). The bankruptcy courts and the federal courts that have excluded attorneys from the debt relief agency category have done so on varying theories of statutory interpretation. *See In re Reyes*, 361 B.R. at 279–80 (asserting that Congress did not intend the "mean-spirited" chilling effects of § 526(a)(4); the court instead inferred Congress's intentions from the title of the Act to exclude attorneys); *In re Att'ys at Law*, 332 B.R. at 69 (concluding that the inclusion of "bankruptcy petition preparer" as a debt relief agency logically excludes attorneys from the category). These approaches, however, prove to be the minority in those cases addressing the debt relief agency challenge. *Compare In re Reyes*, 361 B.R. at 280 (excluding attorneys from the debt relief agency provision), *and In re Att'ys at Law*, 332 B.R. 68–69 (declining to include attorneys in the debt relief agency category), *with Hersh*, 553 F.3d at 750–51 (including attorneys in the

Additionally, though not discussed here, other First Amendment issues related to disclosure requirements triggered by § 101(12A) and mandated by §§ 527(b) and 528(b) of the BAPCPA were held constitutional by the Fifth and Eighth Circuits respectively.[242] Litigation over these provisions, including § 526(a)(4), is making its way into the federal appellate courts. As the split deepens, the Supreme Court will issue the final word on several of the BAPCPA's regulations on attorney conduct.[243]

The Eighth Circuit's opinion is in accord with what some scholars suspected. Indeed, many critics of the BAPCPA predicted at the outset that § 526(a)(4)'s prohibition on attorney speech would fail constitutional scrutiny.[244] The Eighth Circuit

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debt relief agency category), *and Conn. Bar Ass'n*, 394 B.R. at 290 (placing attorneys within the debt relief agency provision), *and Milavetz*, 541 F.3d at 797 (saying that the debt relief agency provisions apply to attorneys), *and In re* Irons, 379 B.R. 680, 680 (Bankr. S.D. Tex. 2007) (applying the debt relief agency provisions to attorneys), *and In re* Robinson, 368 B.R. 492, 500 (Bankr. E.D. Va. 2007) (applying the debt relief agency mandates to attorneys), *and In re* Gutierrez, 356 B.R. 496, 496 (Bankr. N.D. Cal. 2006) (holding attorneys to the requirements of the debt relief agency provisions), *and* Olsen v. Gonzales, 350 B.R. 906 (D. Or. 2006) (holding that attorneys are debt relief agencies), *and In re* Mendoza, 347 B.R. 34, 38 n.6 (Bankr. W.D. Tex. 2006) (including attorneys in the debt relief agency category).

242. *See Hersh*, 553 F.3d at 746 (holding § 527(b) constitutional); Milavetz, Gallop & Milavetz, P.A. v. United States 541 F.3d 785, 797 (8th Cir. 2008) (holding § 528(b)(2) constitutional), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119). 11 U.S.C. § 528 requires bankruptcy attorneys to declare, "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. § 528(a)(4), (b)(2) (2006). In a symposium held on the BAPCPA provision's impact on attorney conduct, Judge Steven Rhodes explored the possible reasons that Congress decided to include such disclosure requirements. Symposium, *Ethics: New Challenges for Attorneys Under the New Code*, 4 DEPAUL BUS. & COM. L.J. 567, 579–80 (2006). He explained that, in his own twenty years of bench experience, he encountered "more than one person" who would explain to him, "I didn't know I filed bankruptcy. Nobody ever used that word to me." *Id.* Thus, Judge Rhodes posits, Congress attempts—through such legislation—to increase advertising standards for attorneys in order to clarify the bankruptcy process for debtors who are often under-informed or unfairly led into filing. *Id.* The Court addressed attorney advertising in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). It asserted that lawyer advertising is within the category of constitutionally protected commercial speech. *Bates*, 433 U.S. at 369 n.19. Further, the Court criticized the idea that compelled advertising would diminish attorneys' reputations in the community. *Id.* at 369–70.

243. *Milavetz*, 541 F.3d at 797; *see* David L. Hudson, Jr., *A Debt-Defying Act*, 95 A.B.A. J., Jan. 2009, at 19 (quoting Erwin Chemerinsky's discussion of the BAPCPA provisions and the likelihood that the Supreme Court will address them).

244. *See* Robert Wann, Jr., *Revisiting "Debt Relief Agencies" Three Years After Bankruptcy Reform*, BANKING & FIN. SERVICES POL'Y REP., Aug. 2008, at 6 (arguing that § 526(a)(4) violates attorneys' free speech rights and predicting that courts "would find it

maintains that "the plain language of the statute does not permit" a narrow construction of § 526(a)(4) as an ethical regulation.[245] Consequently, the court found that a law that restricts the ability of an attorney to advise her client regarding his beneficial and lawful options cannot pass even more lenient standards of constitutional requirements.[246] Ultimately, it held that, even in light of Congress's legitimate goals, § 526(a)(4) violates the Constitution due to its substantial overbreadth in application.[247] The Eighth Circuit's opinion garnered praises from scholar Erwin Chemerinsky, who, having written extensively on the subject, noted that the court "made the right call on this."[248]

On the contrary, the Fifth Circuit's employment of a narrow construction of § 526(a)(4) has incited some criticism[249] from

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unconstitutional"); Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1309 (2006) (informing lawyers that the debt relief agency provisions of the BAPCPA may be an unconstitutional infringement upon free speech).

245. *Milavetz*, 541 F.3d at 793. The Eighth Circuit maintained that the plain language of the statute instead created a broad prohibition, and that as written, it "prevents attorneys from fulfilling their duty to clients to give them appropriate and beneficial advice[.]" *Id.*

246. *Id.*

247. *Id.* at 794.

248. David L. Hudson Jr., *A Debt-Defying Act*, 95 A.B.A. J., Jan. 2009, at 18. *See generally* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 571 (2005) (addressing the many problems that the BAPCPA poses under the Constitution); Symposium, *Ethics: New Challenges for Attorneys Under the New Code*, 4 DEPAUL BUS. & COM. L.J. 567, 567 (2006) (holding a discussion on the BAPCPA). Erwin Chemerinsky took part in a symposium designed to ventilate new ethical issues that the BAPCPA introduced for attorneys who practice bankruptcy. *See* Symposium, *Ethics: New Challenges for Attorneys Under the New Code*, 4 DEPAUL BUS. & COM. L.J. 567, 572 (2006) (discussing the implication of the BAPCPA mandates). He maintained that § 526(a)(4) is "disturbed" because it creates the "kind of attorney liability that I can't think of in any other area of the law." *Id.* He urged that challenges to the new laws are worth considering, adding, "I think that restriction on professional communication, accurate professional communication, raises very serious First Amendment problems." *Id.* at 578.

249. *See, e.g.*, Posting of Todd Zywicki to The Volokh Conspiracy, http://volokh.com/posts/1229705846.shtml#contact (Dec. 19, 2008, 14:24 EST) (discussing *Hersh*). Online bloggers took to the web to discuss the Fifth Circuit ruling immediately. *Id.* (discussing the Fifth Circuit ruling). One commentator accused the court of being "spineless when it comes to striking down statutes." *Id.* (comment by Bruce_M, Dec. 19, 2008, 15:37 EST); Posting by Tara Twomey to Credit Slips: A Discussion on Credit and Bankruptcy, http://www.creditslips.org/creditslips/2008/12/bapcpa-gag-rule-found-

those in the legal community who decry the BAPCPA for what is decidedly (and perhaps euphemistically) imprecise drafting.[250] Some scholars suggest that approaches such as that taken by the Fifth Circuit do not further a beneficial dialogue between the judiciary and the legislature on the proper constitutional contours of federal law.[251] Rather, they argue, when courts allow Congress to legislate in an unconstitutionally broad manner and then construe the statute to satisfy constitutional demands, they avoid meaningful communication otherwise essential to fundamental questions such as those relating to the constitutional rights of bankruptcy attorneys.[252]

The ability of attorneys to speak freely to their clients is essential to their role in representing those clients zealously. Attempts to proscribe the content of that communication are

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constitutional-by-fifth-circuit.html#comments (Dec. 19, 2008, 14:50 EST) (comment by JJ, Dec. 19, 2008, 20:05 EST) ("The Fifth Circuit made an unreasonable and idiotic ruling[.]"). The reaction is divided, however, as one writer exclaimed: "Thank god the [Fifth] Circuit is here to save us from the 'tyranny of literalness.'" Posting by Tara Twomey to Credit Slips: A Discussion on Credit and Bankruptcy, http://www.creditslips.org/creditslips/2008/12/bapcpa-gag-rule-found-constitutional-by-fifth-circuit.html#comments (Dec. 19, 2008, 14:50 EST) (comment by Dave, Dec. 19, 2008 1:05 EST). Otherwise, he writes, the court would be forced to admit that the BAPCPA was "drafted by lobbyist hacks, not Congress" and is "one of the most poorly drafted statutes out there[.]" *Id.*

250. *See* Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL L. REV. 93, 93, 142 (characterizing the BAPCPA as "*badly designed and drafted*," full of "*waste and chaos*" and responsible for the "rotten assignment" handed to judges and professionals in its wake); Ralph Brubaker, *Consumer Credit and Bankruptcy: Assessing a New Paradigm*, 2007 U. ILL. L. REV. 1, 2–3 (referring to the BAPCPA as "dreadfully inept legislative drafting" and asserting that the BAPCPA is an "assault" on the bench and bar); Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, AM. BANKR. INST. J., Sept. 2005, at 1 (describing the unintended effects of the BAPCPA, which were pushed by "arrogant" lobbyists and executives unfamiliar with the facts).

251. *See* Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 18–19 (1996) (explaining the Court's justifications for employment of the doctrine of avoidance). Kloppenberg points out that, even though a justification offered for the Supreme Court's use of the so-called "avoidance canon" is that it "may afford Congress a chance to clarify its intent[,]" rarely does Congress respond when the Court employs the doctrine. *Id.* She points out that Congress is much too overwhelmed with its workload to push constitutional boundaries. *Id.* at 19. Such a cycle, she argues, perpetuates the Court's need to employ the doctrine and promotes a lack of legislative responsibility. *Id.*

252. *Id.* at 23.

surely a topic worthy of judicial scrutiny and discussion.[253] Moreover, the appearance of legislation such as § 526(a)(4) raises implications for attorneys in other areas of practice as well.[254] For example, as the former chair of the ABA Consumer Bankruptcy Committee noted, "Congress could apply the same rationale to the tax arena and start to regulate the content of advice that tax attorneys give to clients about lawful ways to minimize tax liabilities."[255] The Fifth Circuit avoided the necessity of addressing such issues for attorneys by incorporating a purposive abuse requirement into § 526(a)(4)'s "gag" rule.[256] In so doing, the court risks withholding "meaningful interaction . . . among legislatures and courts[.]"[257]

For attorneys in the Fifth and Eighth Circuits, however, the coast is significantly clearer: they may advise their clients to incur debt before filing for bankruptcy so long as that advice is given in a good faith manner.[258] The "Hobson's Choice" that presented

253. *See* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 579 (2005) (pointing out that the Supreme Court has traditionally been supportive of attorneys' rights to zealously represent their clients); *see also* Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 488–90 (1988) (discussing the role ethical regulations play in the guidance of attorney practices). Justice O'Connor explained that, "[l]ike physicians, lawyers are subjected to heightened ethical demands on their conduct [toward] those they serve." *Shapero*, 486 U.S. at 490 (O'Connor, J., dissenting). She posited that regulations such as those constraining attorney advertising play a pivotal role in "preserving the legal profession as a genuine profession." *Id.* at 491. Justice O'Connor also maintained, however, that such regulations serve to remind attorneys that they are in a profession like no other. *Id. But see* Gentile v. State Bar of Nev., 501 U.S. 1030, 1054 (1991) (discussing ethical regulations in light of attorneys' free speech rights). The Court, even when espousing the need for ethical guidelines, noted, "[a]t the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment[.]" *Id.*

254. David L. Hudson Jr., *A Debt-Defying Act*, 95 A.B.A. J., Jan. 2009, at 18.

255. *Id.*

256. *See* Hersh v. United States *ex rel.* Mukasey, 553 F.3d 743, 761 (5th Cir. 2008) (holding § 526(a)(4) constitutional under a narrow construction).

257. *See* Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 20 (1996) (examining the Court's justifications for frequent use of the avoidance doctrine).

258. *Compare* Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 797 (8th Cir. 2008) (holding § 526(a)(4) unconstitutional), *cert. granted*, 129 S. Ct. 2766 (U.S. June 8, 2009) (No. 08-1119), *with Hersh*, 553 F.3d at 761 (construing § 526(a)(4) as carrying an implicit requirement of bad faith or abuse).

itself prior to these opinions need not be made anymore.[259] Specifically, an attorney does not have to withhold lawful information that she knows is beneficial to her client in order to shield herself from potential sanction under § 526(a)(4).[260] Ultimately, the debate raises several issues in regard to the proper role of the judiciary when adjudicating statutes which, under a literal reading, violate the Constitution.[261] After all, such tensions are inherent in a branch of government not only charged with expounding the Constitution,[262] but whose stated commitment is "to save and not to destroy."[263]

259. In addition to the situations already discussed, several other practical scenarios illustrate the problem that § 526(a)(4) posed, prior to the Fifth Circuit ruling, for an attorney who is obligated, as always, to zealously represent her client. *See* MODEL RULES OF PROF'L CONDUCT pmbl. 9 (1989) (explaining an attorney's ethical duties when representing a client); *see also* TEX. DISCIPLINARY R. PROF'L. CONDUCT 1.01 cmt. n.6, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 2005) (stating that "[a] lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer"). For example, any advice given to the assisted person by the attorney to seek loans from family or friends to pay filing costs would plainly violate the literal reading of § 526(a)(4). *See* 11 U.S.C. § 526(a)(4) (2006) (prohibiting an attorney from advising a client to incur debt in contemplation of filing for bankruptcy). Another example arises if, after initially advising a client who is going to file for bankruptcy *not* to incur additional debt, the assisted person contacts his attorney regarding a need to obtain the additional debt. Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 312 (2005). Should the client need to purchase medication for himself, or a child, or to cosign on a student-loan perhaps, an attorney cannot advise the client to do so—even though the aim of the debt is not to defraud the system. *Id.*

260. *See* Megan A. Taylor, Comment, *Gag Me with a Rule of Ethics: BAPCPA's Gag Rule and the Debtor's Attorney's Right to Free Speech*, 24 EMORY BANKR. DEV. J. 227, 244 (2008) (citing the MODEL RULES OF PROF'L CONDUCT pmbl. cmt. 9 (1989)) (detailing the conflicts apparent in the Model Rules of Professional Conduct and the so-called "Gag Rule" of § 526(a)(4)).

261. *See* Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 18–19 (1996) (exploring the avoidance doctrine as justified through the Supreme Court's prudential concerns).

262. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget that it is *a constitution* we are expounding.").

263. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937); *see also* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1016 (1994) (explaining that the overall reluctance to use judicial review stems from the Court's recognition that the branches must not "encroach upon the domain of another" (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring))).