

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF GEORGIA  
SAVANNAH DIVISION

FILED  
DISTRICT COURT  
SAVANNAH DIV.

DEC -2 2005  
*B. Leiden*

In re:

ATTORNEYS AT LAW AND  
DEBT RELIEF AGENCIES

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

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

\_\_\_\_\_  
FELICIA S. TURNER,  
UNITED STATES TRUSTEE,

Appellant,  
\_\_\_\_\_

BRIEF OF LEIDEN & LEIDEN, A PROFESSIONAL CORPORATION IN SUPPORT OF THE  
BANKRUPTCY COURT'S ORDER DATED OCTOBER 17, 2005

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## **INTRODUCTION AND STATEMENT OF BASIS OF APPELLATE JURISDICTION**

The United States Trustee has appealed an order of the United States Bankruptcy Court for the Southern District of Georgia (the "Bankruptcy Court") issued on October 17, 2005 (the "Order"). The Order delineated three different types of agents who were recognized as providing assistance to consumer debtors: bankruptcy attorneys; debt relief agencies who were not attorneys, but provided legal assistance; and bankruptcy petition preparers.

The Order interprets provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") that define and regulate "debt relief agencies." See 11 U.S.C. §§ 526-528. The Bankruptcy Court ruled that these provisions, which became effective on the date the Bankruptcy Court issued the Order, do not apply to attorneys admitted to practice before the Bankruptcy Court. The Bankruptcy Court ruled that the statutory definition of "debt relief agencies" includes persons that provide "legal representation" in bankruptcy proceedings, but are not licensed to practice law in Georgia.

Leiden & Leiden, a professional corporation, composed of four attorneys who have a significant bankruptcy practice would be adversely affected. The United States Trustee's (the "Appellant") own statement for the basis of appellate jurisdiction avers that they want to treat attorneys as debt relief agencies. App. Br. at 1. Appellant's position would denigrate their careers and regulate the profession as a business of debt relief. Bar licenses would be irrelevant; ethical responsibility would be abrogated; professionals would be mocked; and attorney-client privilege confidentiality would become a thing of the past.

### **STATEMENT OF ISSUES**

The issues raised herein are in response to those issues raised in the Appellant's brief:

1. Does the Trustee have proper standing to challenge a general order regulating the practice of law within the Southern District of Georgia?

2. Did the Bankruptcy Court lack authority to enter the Order?
3. Assuming *arguendo* that the Bankruptcy Court properly exercised its jurisdiction, was it correct in ruling that the provisions of the BAPCPA regulating debt relief agencies do not apply to licensed attorneys?

### **STANDARD OF REVIEW**

A bankruptcy court's factual findings are reviewed under the clearly erroneous standard, while legal conclusions are reviewed de novo. In re Club Associates, 951 F.2d 1223 (11th Cir. 1992); Fed. R. Bankr. P. 8013.

### **STATEMENT OF THE CASE**

On October 17, 2005, the effective date of the BAPCPA, Judge Lamar W. Davis issued a general order ruling that attorneys admitted to practice in the Southern District of Georgia were not covered by the provisions of the Bankruptcy Code regulating "debt relief agencies," including without limitations 11 U.S.C. §§ 101, 526, 527, and 528, so long as their activities fall within the scope of the practice of law and do not constitute a separate commercial enterprise. Order at 9. That Order was appealed on October 27<sup>th</sup>, docketed on November 3<sup>rd</sup>, and Appellant filed its brief on November 18, 2005.

The Appellant asserts three arguments in their brief. First, that the Bankruptcy Court lacked jurisdiction over the matter because of the lack of a "case or controversy," as required by Article III of the United States Constitution. Second, that the Bankruptcy Court lacked power or jurisdiction under 28 U.S.C. § 151 and §157, respectively. Third, that the Bankruptcy Court erroneously interpreted the provisions of law regulating debt relief agencies.

## SUMMARY OF THE ARGUMENT

This Court should affirm the Order because the Bankruptcy Court exercised its authority and jurisdiction in a manner consistent with the United States Constitution, federal law, and local rules. The Order represents a general order regulating the practice of law with the Southern District of Georgia and is not subject to the “case” or “controversy” limitations of Article III; rather, the United States trustee lacks standing to appeal the Order. Within this permissible exercise of judicial powers, the Bankruptcy Court properly interpreted the statute regulating debt relief agencies as inapplicable to attorneys. Reversal of the Order gives rise to a myriad of constitutional challenges in contravention to the rules of statutory construction and canon of constitutional avoidance.

## ARGUMENT

### **I. THE UNITED STATES TRUSTEE LACKS STANDING TO CHALLENGE THE ORDER AND EXCEEDED ITS STATUTORY AUTHORITY BY APPEALING THE ORDER.**

#### **a. Trustee lacks standing under 11 U.S.C. § 307 because there is no “case” or “proceeding.”**

The United States Trustee is an official of the United States Department of Justice charged by statute with the duty to oversee and supervise the administration of bankruptcy *cases*. In re Glados, Inc., 83 F.3d 1360, 1361 (11th Cir. 1996) (emphasis added); 28 U.S.C. § 586(a)(3). Section 307 of title 11 provides that, “[t]he United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to § 1121(c) of this title.” That right, however, is not unconditional and is limited first by 11 U.S.C. § 307 and further by 28 U.S.C. § 586 which outlines the duties of the trustee. See In re Washington Mfg. Co., 123 B.R. 272 (Bankr. M.D. Tenn 1991) (neither § 307 nor § 586 gives Trustee “unconditional right to intervene” in adversary proceeding). While the role of the trustee

may include enforcement of the bankruptcy laws, that role, by the very language that grants the authority, is limited to ensuring that actual cases are conducted in accordance with the law. See In re Clark, 927 F.2d 793, 795 (4th Cir. 1991) (citing In re Revco D.S., Inc., 898 F.2d 498, 500 (6th Cir.1990)).

Appellant's threshold argument is that the Bankruptcy Court exceeded its jurisdiction because there was no "case or controversy." Although Leiden & Leiden, P.C. disputes the applicability of that argument as it applies to the issuing of the Order, *infra*, the absence of a "case" precludes the trustee from having standing. The general order issued by the Bankruptcy Court is nothing more than an internal order regulating the practice of law within the Bankruptcy Court for the Southern District of Georgia. This Order was issued pursuant to 11 U.S.C. § 105(a), which permits the court, *sua sponte*, to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

Certain provisions of the Code regulate attorneys engaged in the practice of consumer bankruptcy, which necessarily results in the regulation of attorneys admitted to practice before the Southern District. The bankruptcy court may issue a General Order regulating the practice of law in any manner not inconsistent with the Bankruptcy Rules or the District Court Local Rules. L. Bankr. R. 9029-1. Leiden & Leiden, P.C. is not aware of any Bankruptcy Rules or Local Rules that are inconsistent with the Order issued by the Bankruptcy Court. Leiden & Leiden, P.C. submits that the United States trustee has no standing to appeal the Order because of the express limitation found in § 307 limiting standing to a "case" or "proceeding."

**b. Permitting the trustee to appeal this matter is an impermissible intrusion into the long recognized sphere of the judiciary's role as regulators of the profession.**

It is recognized that the practice of law is so intimately connected with the exercise of judicial power in the administration of justice that the right to define and regulate the practice naturally and logically belongs to the judicial department. Wallace v. Wallace, 225 Ga. 102, 109 (1969); see also Atwell v. Nichols, 466 F. Supp. 206 (N.D. Ga. 1979). It follows that the legislative branch of government may not encroach on what is inherently judicial power. U.S. v. Rojas, 53 F.3d 1212, 1214 (11th Cir. 1995). Section 526(d)(2) of title 11 expressly provides that, "[n]o provisions of this section, section 527, or section 528 shall be deemed to limit or curtail the authority or ability of a Federal court to determine and enforce the qualifications for the practice of law before that court."

The trustee's duties are set forth in 28 U.S.C. § 586, none of which concern attorneys, debt relief agencies, or bankruptcy petition preparers. The trustee is now attempting to limit or curtail the authority of the Bankruptcy and District Court to regulate the bar. The trustee's claim that it can regulate consumer attorneys emasculates the code section that it claims to enforce. The court has the authority over all attorneys and must govern uniformly. Under the trustee's scheme, non-consumer debtor attorneys (debtor with non-exempt assets over \$150,000) and creditor's attorneys would not be regulated by the Trustee. If an attorney does debtor work on Monday and creditor work on Wednesday, would the rules change?

Public policy further supports the argument that Congress did not intend to bestow unto the United States trustee the power to regulate the bar or attorneys. The Eleventh Circuit stated in Dunn v. The Florida Bar, 889 F.2d 1010, 1017 (11<sup>th</sup> Cir. 1989):

That the prohibition of the practice of law is not to aid or protect members of the legal profession, but to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe. (citation omitted)

The Order clearly expresses concern on this public policy issue. Congress “intended to establish regulation of entities who interface with debtors in shadowy, gray areas not already covered by bankruptcy petition preparers regulations and to bolster the existing regulation of bankruptcy petition preparers, but it did not intend to regulate attorneys.” Order at 6. In fact, many of these non-profit entities are generally unregulated by state law,<sup>1</sup> so the need for regulation is sensible. The websites referenced in footnote 3 of the Order belong to entities operating in Arizona and London, England.<sup>2</sup> The Order commented that the regulation of internet debt relief agencies located in other states was beyond the jurisdiction of federal courts in Georgia, the Georgia State Bar, and the Georgia Attorney General. This task, i.e. regulating these entities, but not attorneys, has been given to the U.S. Trustee.

Therefore, Leiden & Leiden, P.C. respectfully submits that the Trustee has no standing to appeal the Order since it is simply a General Order regulating the practice of law within the Southern District of Georgia. To permit standing by the Trustee impedes and disrupts a function

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<sup>1</sup> Slates, Sue Ann, *A New Role for the United States Trustees: Approval of Credit Counseling Services*, American Bankruptcy Institute Journal, Vol. XVIII, No. 5, June 1999. <http://www.usdoj.gov/ust/press/articles/credit-01.htm>. Last visited November 14, 2005.

<sup>2</sup> See Addendum. [www.bankruptcyez.com](http://www.bankruptcyez.com) and [www.debtoraid.com](http://www.debtoraid.com). Numerous websites offering petition preparation and debt relief exists. [www.bankruptcypreparers.com](http://www.bankruptcypreparers.com), for example advertises as, “Be Your Own Lawyer” and is headquartered in Arizona. Other entities such as [www.usabankruptcyassociates.com](http://www.usabankruptcyassociates.com) offer same day service. Clearly the obligation of due diligence is not a concern for these entities, although it remains fundamental to the profession of law.

inherently within the powers of the judiciary and is an impermissible violation of the separation of powers contained in the U.S. Constitution.

**II. ALTERNATIVELY, THE BANKRUPTCY COURT POSSESSED BOTH JURISDICTION AND POWER TO ISSUE ITS ORDER BECAUSE A "PROCEEDING" EXISTED UNDER BOTH 11 U.S.C. § 151 AND § 157.**

"Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a). A bankruptcy court is further permitted, *sua sponte*, to issue an order or judgment necessary or appropriate to carry out the provisions of the title 11. 11 U.S.C. § 105(a). More narrowly, the Bankruptcy Court may by General Order regulate its practice in any manner not inconsistent with the Bankruptcy Rules or the District Court Local Rules. L. Bankr. R. 9029-1.

Although Title 11 does not define "proceeding," other sources define the term as "a course of action;" the "instituting or conducting of legal action." THE AMERICAN HERITAGE DICTIONARY, 4<sup>th</sup> Ed. 2000. Black's Law Dictionary defines the term as an "action or hearing...whether conducted by a court or other person authorized by law," and "any act done by authority of a court." BLACK'S LAW DICTIONARY, 6<sup>th</sup> Ed. These broad definitions, read in conjunction with 11 U.S.C. § 105 (a), 28 U.S.C. § 151,<sup>3</sup> and the local bankruptcy rules demonstrates that the "proceeding" requirement was satisfied by the actions undertaken by the Bankruptcy Judge. The independence of presiding alone, ability to hold special sessions, and the authority to act *sua sponte* evidences that the statutory authority given to the bankruptcy courts in issuing general orders should be liberally given.

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<sup>3</sup> "Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court."

When the Bankruptcy Court undertook the task of researching in preparation of issuing an order, it began a “proceeding” in the common everyday understanding – it initiated a course of action. The Order regulated the practice of law within its jurisdiction by determining that certain provisions of title 11 of the Code were applicable to debt relief agencies but not to attorneys. Leiden & Leiden, P.C. therefore submits that a “proceeding” existed under 28 U.S.C. §§ 151, 157, and that Appellant’s second argument should likewise fail.

**III. THE BANKRUPTCY COURT WAS CORRECT AS A MATTER OF LAW IN CONCLUDING THAT ATTORNEYS ARE NOT DEBT RELIEF AGENCIES. TO HOLD OTHERWISE WOULD RENDER THE PROVISIONS UNCONSTITUTIONAL AND RUN CONTRARY TO THE CANON OF CONSTITUTIONAL AVOIDANCE.**

It is an axiom of statutory construction that in deciding which of two plausible statutory constructions to adopt, the courts must consider the necessary consequences of its choice, and if one construction would raise constitutional problems, then the alternate construction should prevail under the canon of constitutional avoidance. Clark v. Martinez, 126 S. Ct. 716, 724 (2005). Assuming *arguendo*, that the terms “debt relief agency” and “attorney” were synonymous, such an interpretation raises a multitude of constitutional problems which is contrary to the reasonable presumption that Congress did not intend its act to raise serious constitutional doubts. Id.

The Order reasoned, using the rules of statutory construction, why the terms “debt relief agency” and “attorney” are not synonymous.<sup>4</sup> As a matter of plain language, “attorney” and “debt relief agency” are not synonymous nor do they in common understanding include each

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<sup>4</sup> “Because the definition of ‘debt relief agency’ omits express reference to attorneys and includes a term which excludes attorneys, it is difficult to imagine that Congress meant otherwise. Even though the definition of debt relief agency is facially broad enough to cover bankruptcy petition preparers and attorneys, it is instructive that Congress saw the necessity of expressly including ‘bankruptcy petition preparers’ (who clearly provide ‘bankruptcy assistance’) in the definition of debt relief agency, yet omitted any express inclusion of attorneys.”

other. The Order, as it stands, upholds the constitutionality of the statutes and avoids the constitutional problems that Congress presumably did not intend.

- a. **Section 526(a)(4), prohibiting a “debt relief agency” from advising an “assisted person” to incur more debt in contemplation of filing a bankruptcy is unconstitutionally vague and seriously limits an attorney’s ability to ethically and competently advise their clients as to their rights.**

A legislative enactment is impermissibly vague and the constitutional requirement of definiteness is violated if a statute “fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.” United States v. Harriss, 347 U.S. 612, 617, (1954). The Georgia Rules of Professional Conduct 1.4 mandates that a lawyer explain a matter to the extent reasonably necessary to permit a client to make an informed decision.

Section 526(a)(4) operates to chill an attorney’s ethical obligation to comply with Rule 1.4 and unconstitutionally limits an attorney’s obligation in pre-bankruptcy counseling. Such a restriction on an attorney’s ability to advise their clients distorts the legal system and alters the traditional roles of an attorney vis a vis their client. Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001). By way of illustration, an attorney must be able to advise their client whether to refinance a home with a lower interest rate prior to filing. No fraud, injustice, or abuse arises where the debtor intends to continue making regular, but lower monthly payments.

Other examples include the decision whether to co-sign on a child’s educational loan or obtain non-emergency medical services.<sup>5</sup> The absence of a distinction between a debtor who intends to pay and one who will discharge the debt, renders § 526(a)(4) unconstitutionally vague as it does not apprise an attorney of what advice or counseling is permissible and further impedes his ability to comply with the Professional Rules of Conduct.

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<sup>5</sup> Tonsillectomy, appendectomy, mammogram, or prostate examination to name a few.

- b. If a debt relief agency and an attorney were synonymous, §§ 526 & 528 would be inconsistent with the normal operations of a law practice.**

Section 528 requires a written contract not later than five days after providing any bankruptcy assistance. This would result in an attorney prematurely forcing upon a potential client the obligations and liabilities of a contract. Such an action would cause an attorney to appear concerned with only collecting fees and would adversely affect his professional reputation, especially in those circumstances where an individual does not want to file bankruptcy. Furthermore, the independent verification required of attorneys under Bankruptcy Rule 9011 makes compliance with the five day requirement impossible.

Section 526(a)(4) prohibits a “debt relief agency” from advising an individual to pay an attorney fee or charge for their own services. The restrictions on “debt relief agencies” contained in this section could not logically apply to attorneys because it prevents an attorney from collecting payment for services rendered.

In addition, if the terms were synonymous, the disclosure requirement of § 527(b)(a)(1) requiring that a statement telling a prospective assisted person of his or her right to a bankruptcy attorney is simply illogical and could not possibly be the intentions of Congress. In other words, a bankruptcy attorney, sitting in his office with a prospective client, must tell that person of their right to an attorney.

- c. The effect of § 526(c)(1) in voiding any contract between a “debt relief agency” and an “assisted person” for failure to comply with the material requirements of 11 U.S.C. §§ 526 - 528 renders Bankruptcy Rule 2016 and 11 U.S.C. § 330 superfluous.**

Courts should avoid interpreting a legislative enactment in such a way that renders another provision of that law superfluous. Mackey v. Lanier Collection Agency & Service, Inc.,

486 U.S. 825, 837 (1988). Section 330 of title 11 addresses the compensation of officers, including attorneys, and sets forth what factors the court shall consider in determining reasonable compensation. Section 562(c) of title 11 makes void any contract between a “debt relief agency” and an “assisted person” for failure to comply with the material requirements of 11 U.S.C. §§ 526 – 528. The compensation of the attorney is already reviewed under § 330 and Bankruptcy Rule 2016. Section 526 makes no reference to § 330 nor reconciles the application of the two statutes which suggests that § 526 is not applicable to attorneys. If attorneys are deemed to be debt relief agencies, then the result is that Congress passed a law where there was already an enactment in place.

As mentioned earlier, section 526(d) states that no provision of §§ 526-528 shall be deemed to curtail the authority or ability of a Federal court to determine and enforce the qualifications for the practice of law. If “debt relief agencies” are synonymous with “attorneys” this section is absolutely meaningless because a court’s ability to prescribe the qualifications of practicing law is undermined. What was once left to the profession of attorneys can now be engaged in by other “debt relief agencies.” Congress, not the courts, would now have the authority to determine who may practice before the courts.

**d. Permitting an audit of a prospective client’s information under § 527(d) violates an attorney’s ethical obligation of confidentiality and destroys the attorney-client privilege.**

Georgia Rule of Professional Conduct 1.6 requires that a lawyer “maintain in confidence all information gained in the professional relationship with a client.” Exceptions to that rule concern preventing serious injury or death and prevention of substantial financial loss. The attorney-client privilege is for the protection of the client, not the attorney, so that the client’s disclosures may not be used against him in controversies with third persons. Marriott Corp. v.

American Academy of Psychotherapists, Inc., 157 Ga. App. 497 (1981). It is designed to secure the client's confidence in the secrecy of his communication, and to promote greater freedom of consultation between himself and his legal advisor. Id. A debt relief agency, however, is required to furnish notices and under § 527(d) must maintain a copy of the notices required under (a) of this section for two years after the date on which the notice is given the assisted person. Explicit is the probability of an audit by a Chapter 7 or U.S. Trustee to come and review the information on all people who sought counseling in the previous two years.

Such a record keeping requirement would be an anathema to an attorney if Congress maintained that an attorney had to keep notices and records of every client that he had counseled in the previous two years. An attorney may have counseled many clients. Some would not be eligible for a Chapter 7 because they had too much equity. Some may not be eligible for a Chapter 13 because they did not earn enough money and a plan would be unfeasible. Others may not have even wanted to file a bankruptcy but were merely seeking advice. Some may have been ineligible for a Chapter 7 for reasons of a too recent prior filing, while others may not have wanted a bankruptcy and instead sought a non-judicial workout.

If debt relief agencies were broad enough to encompass the concept of attorneys, it would mean that the United States Trustee or other law enforcement officers could come into an attorney's office and demand to know names, dates, times, and addresses of everyone who had come in and met with attorney. This would be the ultimate intrusion on the attorney-client privilege and makes fulfilling Rule 1.6 impossible.

In addition, the U.S. Trustee would be faced with the ultimate Catch-22. The attorney-client privilege belongs to the client. The attorney would not be allowed to reveal the name of the client, so how would the U.S. Trustee be able to contact the client to obtain a waiver of the

privilege? In any event, what reason would a client have to waive the attorney-client privilege? Of all the provisions in the law this is the one that most strongly points to the fact that a debt relief agency could not be an attorney because no agency of the United States Government or any State or Subdivision could compel an attorney to turn over such information.

**e. The Trustee's comparison of BAPCPA to the Fair Debt Collections Act and Sarbanes-Oxley Act is inapposite and further illustrates why the Order is correct as a matter of law.**

Appellant argues that BAPCPA is not the first time Congress has extended the reach of consumer protection legislation to attorneys. Leiden & Leiden, P.C. agrees that debt collection agents are subject to the requirements of the Fair Debt Collection Practices Act, 15 U.S.C. § 1601 et seq.. App. Br. at 19 (citing Crossley v. Lieberman, 868 F.2d 566, 569 (3rd Cir. 1989)). Appellant posits that a collection attorney who regularly collects debts falls within the condition of a debt collection agency. However, when that attorney enters a judicial tribunal and files a complaint, the provisions of the Fair Debt Collections Practices Act do not apply. Vega v. McKay, 351 F.3d 1334, 1336 (11<sup>th</sup> Cir. 2003)( the term "communication" as used in the Act does not include a "legal action" or pleadings or orders connected therewith); In re Martinez, 311 F.3d 1272 (11th Cir.2002) (noting that the purpose of the FDCPA is to "curb abusive debt collection practices, not legal actions").

Secondly, the Trustee cites the fact that attorneys are subject to federal regulation for the purpose of protecting investors under § 307 of the Sarbanes-Oxley Act of 2002 (codified at 15 U.S.C. § 7245). Prior to the Sarbanes-Oxley Act, practice before the United States Securities and Exchange Commission (a non-judicial tribunal) was not held to the standard of practicing before a court. Papers could be filed with the Securities and Exchange Commission by attorneys, accountants, non-attorneys, and investors. After the demise of Enron and WorldCom,

this act provided accountability for the disclosures made by people to the Commission. The purpose of the act, however, was to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and not so much as a means of regulating the practice of law.

Comparatively speaking, all bankruptcy work is done in Bankruptcy Court. In fact, there can be no bankruptcy relief until the petition is filed with the court. The nature of the relationship between a consumer and bankruptcy attorney, versus a consumer and a debt collection attorney, is fundamentally distinct. The debt collection process of an agency prior to filing is an adversarial relationship with the consumer, while in a bankruptcy situation, the bankruptcy attorney and consumer are on the same side. The need to protect consumer debtors from bankruptcy attorneys is overstated in Appellant's brief and overlooks this fundamental difference.

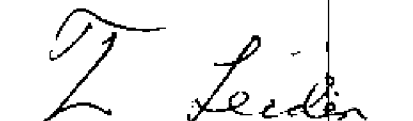
Furthermore, the obligations on attorneys under the Sarbanes-Oxley Act are nothing more than a reaffirmation to conduct themselves honestly. Even in the absence of the Sarbanes-Oxley Act, attorneys nonetheless must still adhere to Federal Rule of Civil Procedure 11 or Bankruptcy Rule 9011. BAPCPA's attempt to regulate attorneys as debt relief agencies is a unique and unwarranted application of consumer protection laws.

### **CONCLUSION**

The United States trustee lacks standing and authority to appeal a general order of the bankruptcy court, as the order is nothing more than a regulation on the practice of law within the Southern District. Alternatively, if this Court finds that a "case" or "proceeding" did exist, and that the Trustee has standing, then the court should also find that the Bankruptcy Court has jurisdiction and authority to issue the Order as part of a "proceeding" arising under title 11. Finally, to hold that "debt relief agencies" are synonymous with "attorneys" would give rise to a

multitude of constitutional challenges in contravention to the rules of statutory construction and canon of constitutional avoidance. Ruling that attorneys are “debt relief agencies” will impose different degrees of professional responsibility and accountability based simply on an attorney’s area of practice. This could not have been Congress’s intentions. Therefore, it is respectfully requested that this Court affirm the Order.

Respectfully submitted,

  
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## **ADDENDUM**

### **11 U.S.C. 101**

#### **Definitions**

(4) The term "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law.

(4A) The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

(12A) The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under § 110, but 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;

### **11 U.S.C. 105**

#### **Power of court**

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

### **11 U.S.C. 110**

#### **Penalty for persons who negligently or fraudulently prepare bankruptcy petitions**

(a) In this section--

(1) "bankruptcy petition preparer" means a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation a document for filing

### **11 U.S.C. 307**

#### **United States trustee**

The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title.

**11 U.S.C. 330**  
**Compensation of officers**

**(a)(1)** After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103--

**(A)** reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

**(3)** In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--

**(A)** the time spent on such services;

**(B)** the rates charged for such services;

**(C)** whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

**(D)** whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

**(E)** with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

**(F)** whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

**11 U.S.C. 526**  
**Restrictions on debt relief agencies**

**(a)** A debt relief agency shall not--

**(4)** advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title...

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

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

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

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

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

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

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

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

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

#### **11 U.S.C. 527**

##### **Disclosures**

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

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

If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the contract before you hire anyone...Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations.

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

**11 U.S.C. 528**  
**Requirements for debt relief agencies**

**(a)** A debt relief agency shall--

(1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously--

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

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

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

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

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

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

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

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

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

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

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

**28 U.S.C. 157**  
**Procedures**

**(a)** Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the

bankruptcy judges for the district.

**(b)(1)** Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

#### **28 U.S.C. 151**

##### **Designation of bankruptcy courts**

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

#### **28 U.S.C. 586**

##### **Duties; supervision by Attorney General**

**(a)** Each United States trustee, within the region for which such United States trustee is appointed, shall--

- (1)** establish, maintain, and supervise a panel of private trustees that are eligible and available to serve as trustees in cases under chapter 7 of title 11;
- (2)** serve as and perform the duties of a trustee in a case under title 11 when required under title 11 to serve as trustee in such a case;
- (3)** supervise the administration of cases and trustees in cases under chapter 7, 11, 12, 13, or 15 of title 11 by, whenever the United States trustee considers it to be appropriate.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing Brief of Leiden & Leiden, P.C. In Support of the Bankruptcy Court's Order Dated October 17, 2005, has this day been served upon the following by mailing a copy of the same through the United States Post Office bearing sufficient postage thereon, dated this 1<sup>st</sup> day of December, 2005.

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