IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN RE:	)	
	)	Case No. 4:05-cv-00206-WTM
ATTORNEYS AT LAW AND DEBT RELIEF AGENCIES	)	Honorable William T. Moore
	)	

BRIEF OF INTERVENORS – APPELLEES, BARBARA B. BRAZIEL, R. WADE GASTIN AND HUNTER, MACLEAN, EXLEY & DUNN, P.C.

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ATTORNEYS FOR INTERVENORS

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STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal under the provisions of 28 U.S.C. §158 since the appeal is from a General Order of the United States Bankruptcy Court for the Southern District of Georgia entered on October 17, 2005 pursuant to Local Bankruptcy Rule 9029-1 promulgated by this court.

STATEMENT OF THE ISSUES

Whether the Bankruptcy Court properly entered a *sua sponte* general order holding that attorneys admitted to practice before the court and acting as such are not subject to the regulations applicable to "debt relief agencies" within the meaning of certain provisions of the Bankruptcy Code, 11 U.S.C. §101 *et. seq*. as amended by the Bankruptcy Abuse and Consumer Protection Act of 2005, Pub. L. No. 109-08, 119 Stat. 23, 11 U.S.C. §§101 *et. seq.*

STATEMENT OF THE CASE

(a) NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND THE DISPOSITION IN THE COURT BELOW.

In April of 2005, President Bush signed into law the Bankruptcy Abuse and Consumer Protection Act of 2005 ("BAPCPA"). Most of its provisions took effect on October 17, 2005.

The portion of BAPCPA which is the subject of this appeal regulates and imposes certain obligations on a newly defined entity known as a "debt relief agency." 11 U.S.C. §101(12A). Although the definition does not expressly encompass attorneys, it provides that a debt relief agency is an entity which provides "bankruptcy assistance" to an "assisted person," and the term "bankruptcy assistance" includes certain activities that would encompass the practice of law if performed by an attorney, and which may constitute the unauthorized practice of law if performed

by a non-attorney. Virtually all of the provisions of the new law which are at issue in this appeal duplicate, modify, or directly conflict with the duties and obligations imposed on attorneys under the codes of professional conduct adopted by most state and federal courts, or by state law.

On October 17, 2005, the Honorable Lamar W. Davis, Jr., Chief Judge of the U.S. Bankruptcy Court for the Southern District of Georgia, entered a general order determining that BAPCPA's regulation of "debt relief agencies" does not apply to attorneys admitted to practice before the U.S. Bankruptcy Court for the Southern District of Georgia while they act in their capacity as attorneys. The United States Trustee ("UST") appealed Judge Davis' general order. The UST contends that Judge Davis lacked the authority to enter the appealed order, and that BAPCPA applies to attorneys.

Appellees have direct and pecuniary interests in the subject matter of this appeal as set forth in their Motion to Intervene. Appellees/Intervenors R. Wade Gastin and Barbara B. Braziel are attorneys admitted to practice before U.S. Bankruptcy Court for the Southern District of Georgia. They represent a large number of consumer debtors each year, many of whom would be classified as "assisted persons" under BAPCPA. *See* Affidavits of R. Wade Gastin and Barbara B. Braziel in Support of Motion to Intervene, at ¶ 5. Appellee/Intervenor Hunter, Maclean, Exley & Dunn, P.C., is a law firm in the Southern District of Georgia whose bankruptcy practice group principally represents creditors, but from time to time advises individuals considering a bankruptcy filing or who otherwise are seeking advice regarding their rights under the Bankruptcy Code. As explained in the Affidavit of Frank J. Perch, III, in Support of Motion to Intervene at ¶ 5-7, the question whether such individual clients or prospective clients are or could be "assisted persons" is not an easy or straightforward one. Furthermore, any uncertainty about whether the "debt relief agency" provisions of BAPCPA could be deemed to apply to Hunter Maclean because of such client consultations or

worse yet as a result of Hunter Maclean's representation of creditors is of great concern to the firm because the term "debt relief agency" would be especially inaccurate and misleading as applied to the firm's practice.

The UST consented to Appellees' request for permissive intervention in this appeal to defend Judge Davis' order.

In her Statement of the Case, the UST asserts without citation of authority, and as a fact, that Congress enacted BAPCPA for the "protection of consumers involved in the bankruptcy process." Brief of UST at p. 4. While that "fact" is not technically material to this Court's decision on appeal, the Appellees cannot let the assertion of that "fact" go unchallenged.

Contrary to the UST's characterization, BAPCPA is not a benign consumer protection statute. Numerous bankruptcy scholars who have published articles about BAPCPA conclude that BAPCPA is a blunt instrument, badly crafted, but designed simply to reduce the raw number of bankruptcy filings–in part by making it especially difficult for poorer consumer debtors to get competent assistance to file a bankruptcy petition.[1] Judge Davis cited a number of those commentators at pages 3 and 4 of his order. His order was entered against that backdrop.

(b) STATEMENT OF MATERIAL FACTS

There are three principal definitional provisions and four substantive provisions of BAPCPA which are at issue in this appeal:

Sec. 101 Definitions

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[1] Congress used a time-honored tool to discourage debtors from filing:
"For by the common law, the plaintife or defendant, demandant or tenant, could not appeare by attornie without the king's special warrant by writ or letters patents, but ought to follow his suite in his owne proper person (by reason whereof there were but few suits)." *Coke upon Littleton, Butler & Hargrave's Notes* (19th Ed.) 128a." *cited in State v. Cannon*, 206 Wis. 374, 240 N.W. 441 at 445 (1932).

(3) The term `assisted person' means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000.

(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 . . . .

Sec. 526. Restrictions on debt relief agencies

(a) A debt relief agency shall not--
(1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;
(2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue and misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;
(3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to--
(A) the services that such agency will provide to such person; or
(B) the benefits and risks that may result if such person becomes a debtor in a case under this title; or
(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.
(b) Any waiver by any assisted person of any protection or right provided under this section shall not be enforceable against the debtor by any Federal or State court or any other person, but may be enforced against a debt relief agency.
(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.
(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State--
(A) may bring an action to enjoin such violation;
(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and
(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.
(4) The district courts of the United States for districts located in the State shall have concurrent jurisdiction of any action under subparagraph (A) or (B) of paragraph (3).
(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may--
(A) enjoin the violation of such section; or
(B) impose an appropriate civil penalty against such person.
(d) No provision of this section, section 527, or section 528 shall--
(1) annul, alter, affect, or exempt any person subject to such sections from complying with any law of any State except to the extent that such law is inconsistent with those sections, and then only to the extent of the inconsistency; or
(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.

Sec. 527. Disclosures

(a) A debt relief agency providing bankruptcy assistance to an assisted person shall provide--
(1) the written notice required under section 342(b)(1); and
(2) to the extent not covered in the written notice described in paragraph (1), and not later than 3 business days after the first date on which a debt relief agency first offers to provide any bankruptcy assistance services to an assisted person, a clear and conspicuous written notice advising assisted persons that--
(A) all information that the assisted person is required to provide with a petition and thereafter during a case under this title is required to be complete, accurate, and truthful;
(B) all assets and all liabilities are required to be completely and accurately disclosed in the documents filed to commence the case, and the replacement value of each asset as defined in section 506 must be stated in those documents where requested after reasonable inquiry to establish such value;

(C) current monthly income, the amounts specified in section 707(b)(2), and, in a case under chapter 13 of this title, disposable income (determined in accordance with section 707(b)(2)), are required to be stated after reasonable inquiry; and
(D) information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including a criminal sanction.
(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.
`The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.
`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. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, as well as in some cases a Statement of Intention need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a `trustee' and by creditors.
`If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.
`If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.
`If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.
`Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice.'.
(c) Except to the extent the debt relief agency provides the required information itself after reasonably diligent inquiry of the assisted person or others so as to obtain such information reasonably accurately for inclusion on the petition, schedules or statement of financial affairs, a debt relief agency providing bankruptcy assistance to an assisted person, to the extent permitted by nonbankruptcy law, shall provide each assisted person at the time required for the notice

required under subsection (a)(1) reasonably sufficient information (which shall be provided in a clear and conspicuous writing) to the assisted person on how to provide all the information the assisted person is required to provide under this title pursuant to section 521, including--
(1) how to value assets at replacement value, determine current monthly income, the amounts specified in section 707(b)(2) and, in a chapter 13 case, how to determine disposable income in accordance with section 707(b)(2) and related calculations;
(2) how to complete the list of creditors, including how to determine what amount is owed and what address for the creditor should be shown; and (3) how to determine what property is exempt and how to value exempt property at replacement value as defined in section 506.
(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.

Sec. 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.

(c) STATEMENT OF THE STANDARD OR SCOPE OF REVIEW.

This Court will conduct a *de novo* review of the Bankruptcy Court's order which involves issues of law. *In re Sublett*, 895 F.2d 1381 (11th Cir. 1990).

SUMMARY OF ARGUMENT

The Bankruptcy Court had both inherent power and statutory authority to enter its order. The Bankruptcy Court's inherent power derives from the power of the court to regulate the conduct of attorneys practicing before it, a power which may be exercised by general order or other *sua sponte* order and does not depend on the existence of a case or controversy. Moreover, the Bankruptcy Court was specifically empowered by BAPCPA to act *sua sponte*. In light of the potential applicability of the challenged provisions of the statute to actions occurring outside the context of a particular case and which may not even involve or lead to the filing of a petition, the Bankruptcy Court acted appropriately in addressing a situation which recurs on a daily, if not hourly, basis but which would otherwise evade judicial review. The decision is an appropriate act by the court to clarify the court's expectations of the members of its bar, and is necessary to provide due process to the bar.

The Bankruptcy Court's Order is legally correct and consistent with long-settled principles of statutory construction. The plain and ordinary meaning of the term "debt relief agency" cannot be stretched to include "lawyer" and would never be understood by a consumer as such. Indeed, very similar terms have been found to be misleading and to engender confusion with credit counseling firms, which would seem to be precisely the sort of confusion BAPCPA seeks to avoid. The UST's attempt to read the term "lawyer" back into the definition of "debt relief agency" involve an erroneous mode of reasoning that has been discredited in fundamentally the same factual context. The Bankruptcy Court's decision construes BAPCPA in a manner that avoids an irreconcilable

conflict with the professional obligations of Southern District of Georgia attorneys under the Georgia Rules of Professional Conduct. The Bankruptcy Court's decision should be affirmed.

ARGUMENT

I. THE BANKRUPTCY COURT HAD THE INHERENT AUTHORITY, STATUTORY AUTHORITY AND A CONSTITUTIONAL MANDATE TO ENTER THE ORDER.

A. The Bankruptcy Court's General Order Clarifies The Practice Of Law Under BAPCPA.

The provisions of the BAPCPA relating to debt relief agencies have caused confusion among legal scholars and commentators over whether the definition of "debt relief agency" includes attorneys. Because such an interpretation would duplicate, modify or conflict with the existing regulation of attorneys crafted largely by the state and federal judicial branches of government, the Bankruptcy Court clearly had the authority to determine whether these regulations apply to officers of its court. The Order deals exclusively with the application of certain provisions of BAPCPA to "attorneys regularly admitted to the Bar of this Court or those admitted *pro hac vice*." Order at page 9. Second, the Order deals only with those provisions of BAPCPA which, under the UST's interpretation of the law, would regulate the way in which this limited group of attorneys practice bankruptcy law. In light of the confusion among scholars of the applicability of the provisions of BAPCPA which regulate debt relief agencies to attorneys, the Bankruptcy Court simply put the members of its bar on notice that the provisions relating to debt relief agencies do not affect the practice of law.

B. The Bankruptcy Court Has Authority To Regulate The Practice Of Law Of The Members Of Its Bar.

Congress has delegated the authority to the judicial branch to regulate the practice of law through various statutes. *See In re Kelton Motors, Inc.*, 109 B.R. 641, 648 (Bankr.D.Vt. 1989),

citing *Brown v. McGarr*, 774 F.2d 777, 782 (7th Cir. 1985) (*rehearing and rehearing en banc denied,* October 31, 1985.). The Judiciary Act of 1789 empowered the federal courts to regulate the admission of attorneys to practice law. *Id.* (citing 28 U.S.C. § 1654). Congress later declared that "[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." *Id.* (citing 28 U.S.C. §2071). The Supreme Court received rulemaking authority to promulgate rules of procedure for the practice of law in the federal courts. *Id.* (citing 28 U.S.C. §2072). With this authority, the Supreme Court fashioned Federal Rule of Civil Procedure 83 in which the judges and magistrates "may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act." *Id.* (citing FED.R.CIV. P. 83). 28 U.S.C. §2075 delegated the power to the Supreme Court "to prescribe by general rules, the forms and process, writs, pleadings, and motions, and the practice and procedure in cases under title 11." *Id.* (emphasis added).

In addition to the statutory authority given to the federal courts to regulate the practice of the law, the Supreme Court has repeatedly recognized that a federal court has inherent power to regulate the way the members of its bar practice law.

> "It has long been understood that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *United States v. Hudson*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980) (*citing Hudson*). . . . These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631, 82 S.Ct. 1386, 1388-1389, 8 L.Ed.2d 734 (1962).

Chambers v. NASCO, Inc., 501 U.S. 32, 43, 111 S.Ct. 2123, 2132 (1991). This power to regulate practice extends to both conduct within the courtroom and beyond its walls. *In re Fletcher,* 71

U.S.App.D.C. 108, 110, 107 F.2d 666, 668 (D.C. Cir., 1939). Therefore, bankruptcy courts have authority beyond the relevant statutes to regulate the practice of law. 2 COLLIER'S ON BANKRUPTCY § 105.04[7][b](citing *Karsch v. LaBarge* (*In re Clark*), 223 F.3d 859 (8th Cir. 2000) (court has power under section 105(a) to sanction attorney, in the amount of the opposition's attorney's fees, for engaging in course of conduct that resulted in non-attorney handling representation of chapter 13 debtors, with attorney only meeting clients at the meeting of creditors); *Caldwell v. Unified Capital Corp.* (*In re Rainbow Mag.*), 77 F.3d 278, 284 (9th Cir, 1996)(bankruptcy court has power to sanction beyond that authorized in Bankruptcy Rule 9011)).

The inherent powers bestowed on a federal court have historically included the "power to control and discipline attorneys appearing before it." *Glatter v. Mroz,* 65 F.3d 1567, 1575 (11th Cir. 1995). Section 526(b)(5) requires the Bankruptcy Court to enjoin the violation of the debt relief agency provisions or "impose an appropriate civil penalty against such person." If this "person" includes an attorney as the UST argues, the statute regulates the practice of law. If the provisions relating to debt relief agencies are an attempt to regulate the practice of law, then the bankruptcy court had authority to enter a general order clarifying BAPCPA's affect on the practice of law as it is a realm of law delegated to the courts by Congress and one that the Supreme Court has found to be a necessary power for courts to carry out their business.

C. The Bankruptcy Court May Exercise Its Delegated and Inherent Powers to Regulate the Practice of Law By Members of Its Bar Through General Orders or Other Sua Sponte Orders

Bankruptcy Rule 9029 allows the court to regulate the practice of law through General Order. Local Bankruptcy Rule 9029-1 expressly provides that, "Pursuant to Bankruptcy Rule 9029, the Bankruptcy Court may by General Order regulate its practice in any manner not inconsistent with these Rules or the District Court Local Rules." For example, in *In re White*, 231 B.R. 551

(Bankr.D.Vt. 1999), the bankruptcy court issued a general order requiring all redemption agreements and supporting documentation to be filed and setting forth procedures for same. The general order recited that it was issued "to conserve judicial resources and to assure compliance with the law." 231 B.R. at 552. Sears, Roebuck & Co. filed a "motion to reconsider"[2] the general order, asserting it exceeded the court's authority. The court upheld its general order, finding that the order did not conflict with the Bankruptcy Code but rather clarified the obligations of parties in showing to the Court that redemption agreements complied with the Code. Similarly, Judge Davis' order herein was an appropriate exercise of the court's power, designed to conserve judicial resources and to assure compliance with the law.

Contrary to the UST's position, the Court may exercise these powers *sua sponte*. For example, in *Matter of Egwim*, 291 B.R. 559 (Bankr.N.D.Ga. 2003), the Bankruptcy Court issued a *sua sponte* order directing counsel for the chapter 7 debtors to show cause why counsel should not be sanctioned for inappropriately limiting the scope of representation of the debtors and, for example, not appearing on the debtors' behalf at stay relief and nondischargeability proceedings. Notwithstanding the court's determination that the particular debtor's counsel involved should not be sanctioned because counsel had acted in good faith and on a widely held belief that the conduct at issue was permissible, the court nevertheless issued an opinion setting forth in significant detail the court's position on when and how debtors' counsel could limit the scope of representation. The court explained as follows:

> Because it is important that lawyers representing chapter 7 debtors in this Court understand the Court's expectations with regard to their professional responsibilities, this Opinion discusses these issues at length. . . . Although the Court . . . makes no findings or conclusions with regard to counsel's representation in this matter, it is appropriate to explain the

[2] *White* is therefore also relevant to another issue in this appeal, which is discussed in the brief filed by intervenor/appellee Leiden, of whether the UST has appropriately invoked the appellate jurisdiction of this Court by taking a direct appeal from the entry of a general order, or whether the order should be challenged in the context of its proposed application to a particular case, as was done by Sears in *White*.

> requirements of professional conduct for lawyers for chapter 7 debtors that appear to be violated when a represented chapter 7 debtor appears *pro se* in a bankruptcy case or related adversary proceeding and which this Court has the duty to enforce through disgorgement of fees, appropriate sanctions, or other discipline.

291 B.R. at 562-63. The court further noted that its authority to issue the opinion derived from "the inherent power [of courts] to regulate the conduct of attorneys who practice before them." *Id.* at 563.

In other words, the Northern District bankruptcy court in *Egwim* engaged in fundamentally the same process that Judge Davis engaged in herein. The *Egwim* opinion is quite explicit about the fact that it does not rest on the facts of the particular case under which it is captioned, and its discussion goes far beyond any conduct which occurred in that case. Rather, recognizing the importance of the issue to the bar, and in light of a widespread misconception about what the statute permitted and required, the court issued an extended opinion of general applicability clarifying the court's expectations of the attorneys practicing before it. The foundation for the court's power and authority to enter the *Egwim* opinion is exactly the same foundation on which the Bankruptcy Court's opinion rests herein.

D. BAPCPA Itself Grants the Bankruptcy Court The Power to Act Sua Sponte

Furthermore, Section 526(b)(5) of the Bankruptcy Code permits the Bankruptcy Court to *sua sponte* declare a person in violation of the debt relief agency provisions including behavior outside a case or controversy. The mandate allows "the court, on its own motion" to punish acts that violate the section including acts that show that the person "engaged in a clear and consistent pattern or practice of violating this section." 11 U.S.C. §526(b)(5). If this section applies to attorneys, the BAPCPA reaches conduct beyond the courtroom (i.e. beyond cases and controversies) such as disclosures in the preliminary stages of the attorney-client relationship and advertisements in the phone book, i.e. conduct which may never lead to the filing of a bankruptcy petition. Therefore, if

this section applies to attorneys, this section allows the bankruptcy court to regulate practice outside a case or controversy consistent with Bankruptcy Court Rule 9029 and the inherent power of courts to regulate the practice of law. If the Bankruptcy Court is empowered by BAPCPA to reach beyond the walls of the courthouse, to investigate and punish violations of the law, presumably the Bankruptcy Court must be able to act even where no bankruptcy case was filed, and therefore may make the *sua sponte* declaration that the members of its bar are not subject to such discipline.[3]

E. Attorneys Practicing Before The Bankruptcy Court Were Entitled To The Benefit Of The Order As A Matter Of Due Process

The attorneys who are admitted to practice before the U.S. Bankruptcy Court for the Southern District of Georgia have an absolute constitutional right to know–in advance of an attempt to sanction them–to what standards they must adhere.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.

Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99 (1972).

Southern District bankruptcy lawyers are entitled to know, in advance, if they are obligated to comply with Local Rule 83.5, adopting the Georgia Bar Rules of Professional

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[3] For this reason the UST's indirect suggestion that the Bankruptcy Court acted prematurely by issuing the Order on the date upon which most of BAPCPA became effective should be disregarded. If the provisions of BAPCPA at issue applied to attorneys, they would apply to the very first client inquiry any bankruptcy attorney received on the morning of October 17. Federal jurisprudence has long recognized an exception to the "case or controversy" requirement for matters that are capable of repetition but would otherwise evade review. *E.g.*, *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004); *Irish Lesbian and Gay Organization v. Giuliani*, 143 F.3d 638 (2d Cir. 1998). While the factual context of this appeal may seem somewhat different from the election disputes and protest rallies that often give rise to such rulings, there is the common element of a short term, but recurring event which would not otherwise be judicially reviewable -- here, a telephone conversation with a consumer on the morning of October 17, 2005, which does not lead to any bankruptcy case in which a motion could be filed, but which raises the same issues of BAPCPA's applicability as the phone conversation on October 18, 2005 or for that matter a similar conversation on January 5, 2006.

Conduct and the American Bar Association's Model Rules of Professional Conduct. For example, the Georgia Rule of Professional Conduct 2.1 provides that, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." The maximum penalty for violation of the rule is disbarment. Yet, BAPCPA at §527(b)–if applicable to Southern District bankruptcy attorneys–would require the attorney to give canned advice specified by Congress.

> *The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.*

Or,

> *If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.*

That advice would necessarily *not* be the result of the attorney's exercise of independent professional judgment and would almost certainly not be the kind of candid advice contemplated by Rule 2.1. Would the attorney be obliged to hand-out the statement required by §527 and then disparage it to satisfy Rule 2.1? Thanks to Judge Davis' order, neither bankruptcy attorneys nor their clients in the Southern District are subjected to this confusion and uncertainty.

II. THE BANKRUPTCY COURT CORRECTLY DETERMINED THAT THE TERM "DEBT RELIEF AGENCY" DOES NOT INCLUDE ATTORNEYS ACTING IN THEIR CAPACITY AS SUCH

A. The Plain and Ordinary Meaning of "Debt Relief Agency" Does Not Include "Lawyer"

This Court must take on the question of the interpretation of the term "debt relief agency" "where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision." *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000). Statutory words should be given their ordinary and generally accepted meaning. *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1092 (11th Cir. 2004) (determining that "in no ordinary sense of the word" can the use of 15-passenger vans to transport visitors across a protected area be considered "necessary to meet minimum requirements for the administration of the area" under the Wilderness Act, 16 U.S.C. § 1133(c)). The fundamental principle that must govern the Court's analysis is that Congress is presumed to say what it means and mean what it says. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149 (1992).

In determining what is the plain and ordinary meaning of the term "debt relief agency," this Court may look to dictionaries for assistance. *United States v. Gonzales*, 520 U.S. 1, 6, 117 S.Ct. 1032, 1035 (1997); *Harris v. Garner*, *supra*, 216 F.3d at 973. Appellees further submit that inasmuch as the term is part of a disclosure the statute directs to be made to consumers, that a general-purpose dictionary, rather than a legal dictionary, is an appropriate reference source. *Webster's Third New International Dictionary, Unabridged* (Merriam-Webster, 2002) defines "agency" as follows:

> **1 :** the capacity, condition, or state of acting or of exerting power **:** action or activity **: OPERATION** <I have no intention to dispute her free *agency* -- Tobias Smollett>
> **2 :** a person or thing through which power is exerted or an end is achieved **: INSTRUMENTALITY, MEANS** <through the *agency* of Benjamin Rush he renewed relations with Jefferson -- W.C.Ford> <example is still ... the greatest *agency* by which men help each other -- G.F.Kennan>
> **3 a :** the office or function of an agent **b :** the relationship between a principal and his agent
> **4 a :** an establishment engaged in doing business for another <an advertising *agency*> <an employment *agency*> **b :** the place of business or the district of such an

> agency
> **5 a :** a department or other administrative unit of a government <the War Department, the only *agency* equipped to administer occupied areas -- E.J.Hayward> <the independent *agencies* are generally regulatory in nature -- H.M.Somers> **b :** the office or headquarters of a government agent (as of an Indian agent) <the house had once been used as an Indian *agency*> **c :** the district administered by a government agent (as by a former British agent in India)

None of the definitions of "agency" reasonably would be understood by a consumer to suggest a lawyer or a law firm. This is not surprising, as lawyers and law firms practicing in fields other than bankruptcy are not generally called any kind of "agencies." No one would call a criminal defense lawyer a "sentence reduction agency" or a personal injury firm an "injury compensation agency." Nor are lawyers specializing in employment law or real estate law called "employment agencies" or "real estate agencies."

These last two examples are particularly instructive because "employment agencies" and "real estate agencies" do exist, but they are entities performing services relating to employment or real estate other than the practice of law. Thus, the use of such terms to refer to law firms would be confusing and misleading, rather than helpful or informative. Indeed, courts in at least two states have observed that terms similar to "debt relief agency" would be misleading if used as the name, or part of the name, of a law firm. In *Medina County Bar Association v. Baker*, 102 Ohio St.3d 260, 809 N.E.2d 659 (Ohio 2004), an attorney who also operated a credit counseling business was disciplined for violating the provisions of the Ohio Code of Professional Responsibility relating to practicing under a misleading trade name. The Ohio Supreme Court held that the attorney's advertisements which read "Confidential Credit Counselors, Inc./Martin Baker, Attorney at Law/The Center for Debt Relief" (emphasis added) were misleading precisely because they "failed to distinguish for the public between CCC's credit counseling company and respondent's law firm." 102 Ohio St. 3d at 261, 809 N.E.2d at 660.

Similarly, in *Rodgers v. Commission for Lawyer Discipline*, 151 S.W.3d 602 (Tex.App. 2004), in disciplining a personal injury attorney for advertising under the name "Accidental Injury Hotline,"[4] the Court of Appeals of Texas cited to a publication by the State Bar of Texas giving examples of non-compliant trade names including "Debt Relief Clinic." 151 S.W.2d at 613, citing 58 Tex.B.J. 664 (1995).

Statutory language should not be construed in a manner that would produce an absurd result. *CBS, Inc. v. Primetime 24 Joint Venture*, 245 F.3d 1217, 1226-29 (11th Cir. 2001). Additionally, Congress is presumed to have knowledge of existing judicial construction of statutory terms. *Harris v. Garner, supra*, 216 F.3d at 974. Therefore, it is unreasonable to interpret the Bankruptcy Code as requiring bankruptcy lawyers, in the name of "consumer protection," to label themselves with a term that "in no ordinary sense of the word" (*Wilderness Watch v. Mainella, supra*) would be understood by a consumer to refer to a law firm and which has been ruled by courts to be a misleading and unethical way to describe a law practice. Indeed, in the context of the purposes of BAPCPA and the role accorded by the legislation to credit counseling agencies, it is difficult to conceive of any interpretation of the statute more absurd than one requiring bankruptcy lawyers to identify themselves with a designation that has been judicially determined to blur the distinction between lawyers and credit counselors and cause consumer confusion.

B. The Inclusion of "Providing Legal Representation" in the Definition of "Bankruptcy Assistance" Does Not Require a Different Construction of "Debt Relief Agency"

The United States Trustee argues that because section 101(4A) of the Bankruptcy Code includes "providing legal representation" among the activities which constitute "bankruptcy assistance," and a "debt relief agency" is, per section 101(12A), a person who provides "bankruptcy

[4] Thereby illustrating why personal injury law firms are not called "Injury Compensation Agencies."

assistance" to an "assisted person," that the term "debt relief agency" must be read to include lawyers engaged in the practice of bankruptcy law. In other words, even though "attorney" is not included in the definition of "debt relief agency," the UST seeks to read the term "attorney" into the definition because the definition of the subsidiary term "bankruptcy assistance" includes some things that lawyers can do.

The fallacy of this backward-looking mode of reasoning is well illustrated in a recent opinion of the Court of Appeals for the District of Columbia Circuit addressing a fundamentally similar issue under a different federal statute. In *American Bar Ass'n v. Federal Trade Commission*, ___ F.3d ___, 2005 WL 3287968 (D.C.Cir. Dec. 6, 2005), the issue before the Court was whether the Federal Trade Commission (the "FTC") correctly determined that attorneys engaged in the practice of law were subject to regulation under the Gramm-Leach-Bliley Financial Modernization Act, Pub.L. No. 106-102, 113 Stat. 1338, 15 U.S.C. §§ 6801 *et seq.* (the "GLB Act"). The GLB Act empowered the FTC to prescribe regulations relating to protecting customer privacy with respect to "financial institutions" subject to the FTC's jurisdiction. The statute further defined "financial institution" as "any institution the business of which is engaging in financial activities as described in section 1843(k) of Title 12." 15 U.S.C. § 6809(3)(A). Section 1843(k) of Title 12 is a provision of the Bank Holding Company Act which in turn incorporates other statutes and regulations, leading to a long list of possible "financial activities" that encompasses activities in which lawyers may engage, such as "real estate settlement servicing," "[p]roviding advice in connection with mergers, acquisitions, divestitures, investments, joint ventures, leveraged buyouts, recapitalizations, capital structurings, financial transactions and similar transactions," "[p]roviding . . . advice with respect to any transaction in foreign exchange, swaps, and similar transactions" and "[p]roviding tax-planning and tax-preparation services." 2005 WL 3287968 at *3, n. 3.

The FTC contended that practicing lawyers were subject to regulation under the GLB Act because "financial activities" includes services performed by lawyers, and nothing in the definition of "financial institution" excluded lawyers; therefore, lawyers must be included within the term "financial institution." *Id.* at *4. In rejecting the FTC's interpretation, the Court of Appeals held that "[t]he statute does not so plainly grant the Commission the authority to regulate attorneys engaged in the practice of law" as to entitle the FTC's interpretation to deference. *Id.* at *5. Further holding that the statutory language made "an exceedingly poor fit with the FTC's apparent decision that Congress, after centuries of not doing so[5], has suddenly decided to regulate the practice of law," the Court of Appeals observed that "[a]n attorney, or even a law firm, does not fit very neatly into the niche of a 'financial institution,' and further that it would be quite a stretch to bring attorneys within the meaning of "institution" let alone "financial institution." *Id.* at *8.

The similarity between the FTC's line of reasoning discredited by the D.C. Circuit and the UST's reasoning herein should now be quite apparent. Presented with a statute that authorized it to regulate "financial institutions" and defined financial institutions as entities engaged in "financial activities," the FTC reasoned that because "financial activities" included some things that practicing lawyers do, practicing lawyers must be "financial institutions," even though the plain and ordinary meaning of "institution" does not encompass "lawyer." Likewise, the UST has taken a statute that regulates "debt relief agencies" and defines "debt relief agencies" as persons providing "bankruptcy assistance" and reasoned that because "bankruptcy assistance" includes some things that lawyers do, practicing lawyers must be "debt relief agencies," even though the plain and ordinary meaning of "agency" does not encompass "lawyer." The UST's interpretation of BAPCPA is entitled to no

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[5] This statement is not hyperbole. Congress clarified that the federal courts have the authority to regulate the practice of attorneys before such courts in 1789 as part of the Judiciary Act. *See In re Kelton Motors, Inc.*, 109 B.R. 641, 647-48 (Bankr.D.Vt. 1989).

greater deference than the D.C. Circuit accorded to the FTC's erroneous interpretation of the GLB Act.

C. The Legislative History Does Not Support a Finding That Congress Rejected a Proposal to Exclude Attorneys From the Definition of "Debt Relief Agency"

The UST refers in her brief to an amendment proposed by Senator Feingold which would have expressly carved out attorneys from the definition of "debt relief agency" and argues that "[b]ecause Congress did not adopt Senator Feingold's amendment," it is clear that Congress intended the provisions of BAPCPA regarding debt relief agencies to regulate the practice of law by bankruptcy attorneys. UST Brief at 18.

A reader of the UST's brief might be led to infer that the Senate voted down Sen. Feingold's proposed amendment. The reader would be wrong. The Feingold amendment was never put to a vote of the Senate or even a committee thereof. Rather, it was withdrawn by Sen. Feingold the next day without ever having been put to a vote, and without any substantive remarks as to the reason for its withdrawal. *See* 151 Cong.Rec. S2462-02 (March 10, 2005). Thus, "Congress" never decided anything or expressed any opinion or intention regarding the Feingold amendment. Rather, one senator proposed something one day and withdrew it the next day. The UST has cited no authority for the proposition that the actions of one senator in proposing and the next day withdrawing an amendment say anything authoritative about the interpretation of the subsequently enacted statute. Appellees submit that the factual record is at least equally as consistent with an interpretation that the amendment was withdrawn because Sen. Feingold decided on further reflection that it was redundant and unnecessary. There is no legislative history that requires the Court to depart from the plain and ordinary meaning of "debt relief agency."

D. The Bankruptcy Court Properly Construed BAPCPA In a Manner That Does Not Constitute an Impermissible and Unprecedented Legislative Intrusion Into The Authority of the State and Federal Courts to Regulate the Practice of Law.

The UST makes the curiously inconsistent alternative arguments that (a) the challenged provisions of BAPCPA can be applied to attorneys without improperly interfering with the practice of law because the statute says it does not mean to interfere, and (b) federal regulation of the practice of law is not unusual in any respect. Neither argument withstands careful scrutiny.

The UST's arguments may be intended to correspond to the two subsections of section 526(d) of the Bankruptcy Code, added by BAPCPA. Section 526(d)(1) provides that nothing in sections 526, 527 or 528 shall "annul, alter, affect, or exempt any person subject to such sections from complying with any law of any State except to the extent that such law is inconsistent with those sections, and then only to the extent of the inconsistency." The Bankruptcy Court's decision should be upheld because the only way to give effect to subsection 526(d)(1) is to determine that attorneys engaged in the practice of law are not "debt relief agencies." As noted above, courts in two states have previously held that the similar terms "debt relief center" and "debt relief clinic" are misleading as a descriptor for a law firm. One of those courts specifically found that it engendered confusion between a law firm and a credit counselor.

Georgia Rule of Professional Conduct 7.1(a) provides that a lawyer's communications to the public may not be "false, fraudulent, deceptive or misleading." Georgia RPC 7.5(a) provides that "[a] lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1," and Georgia RPC 7.5(e)(2) provides that a lawyer may not use a trade name that implies "a connection with a government entity, with a public or charitable legal services organization or any other organization, association, or institution or entity, unless there is, in fact, a connection." A lawyer or law firm cannot identify itself as a "debt relief agency" and comply with these precepts of the Rules of Professional Conduct. The term is misleading. It is particularly misleading in the case of a law firm that principally represents creditors but from time to time counsels individuals who are

or might be contemplating a bankruptcy filing. The term "debt relief agency," because it blurs the distinction between a lawyer and a credit counselor, implies a connection between a lawyer and a nonprofit (charitable) credit counseling organization, and thus directly violates RPC 7.5(e)(2) if used to refer to a lawyer or law firm. Therefore, section 526(d)(1) requires that the Code be interpreted so as not to create an irreconcilable conflict with attorneys' obligations under the Rules of Professional Conduct.

Section 526(d)(2) provides that nothing in sections 526-528 abridges the authority of a State or a federal court to determine the "qualifications" for the practice of law in such state or in such federal court. The term "qualifications" for the practice of law suggests an intent to refer to standards for admission to the bar and thus is probably inapposite to the question of whether lawyers must call themselves "debt relief agencies" and otherwise comply with the various directives to such "agencies." However, it does not follow that such a "savings clause" can be viewed as a basis for broad authority to permit Congress to usurp the authority of the Georgia Supreme Court, the Bankruptcy Court and this Court to regulate the practice of law by bankruptcy lawyers in the Southern District of Georgia.

The UST suggests that this Court should not view federal regulation of the practice of law as anything unusual, citing as examples the Fair Debt Collection Practices Act and the Sarbanes-Oxley Act. Neither example is relevant or instructive. The cited provisions of the FDCPA relating to attorneys' actions in debt collection require certain statements to the adverse party; they do not affect the creditor attorney's relationship with her client or with a prospective client or the attorney's conduct before a court, which are at the heart of the Rules of Professional Conduct. The relevant provision of Sarbanes-Oxley, 15 U.S.C. § 7245, authorizes the Securities and Exchange Commission to promulgate certain rules of conduct for attorneys appearing before the SEC in the representation

of issuers, including rules requiring a "noisy withdrawal" in which the attorney must reveal the client's fraud to the general counsel or CEO, and in the event that the CEO or general counsel do not act on the information, the attorney must report the violation to an audit committee. If anything, the concept of providing an administrative agency with adjudicative or quasi-adjudicative powers the power of regulating the conduct of attorneys appearing before it is more akin to a court's so regulating attorneys who practice before the court than it is to allowing Congress to dictate federal standards for what a lawyer can say to his client when no court appearance is contemplated or ever occurs.

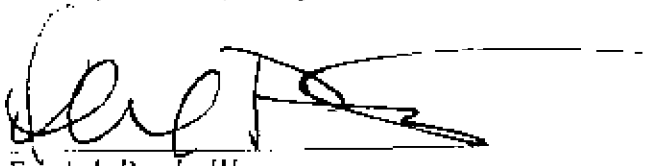
In *American Bar Ass'n v. FTC, supra*, the Court of Appeals observed that "'[Congress] does not . . . hide elephants in mouseholes.'" 2005 WL 3287968 at *5, quoting *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001). The particular concealed pachyderm which was of concern to the D.C. Circuit was the Congressional regulation of the practice of law. The court's holding reflects a determination that the court was unwilling to find that Congress indirectly and by implication intended to engage in such regulation suddenly "after centuries of not doing so," *id.* at *8. For the same reasons, this Court should find that Congress cannot be deemed indirectly and by implication to assert broad authority to regulate the relationship between a bankruptcy lawyer and her client or prospective client and to require lawyers to apply to themselves the misleading label "debt relief agency."

CONCLUSION

For the reasons set forth above, the Order of the Bankruptcy Court should be affirmed.

RESPECTFULLY SUBMITTED this 5th day of January, 2006.

Hunter, Maclean, Exley & Dunn, P.C.



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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN RE:	)	
	)	Case No. 4:05-cv-00206-WTM
ATTORNEYS AT LAW AND DEBT RELIEF AGENCIES	)	Honorable William T. Moore

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **BRIEF OF INTERVENORS – APPELLEES, BARBARA B. BRAZIEL, R. WADE GASTIN AND HUNTER, MACLEAN, EXLEY & DUNN, P.C.** upon all interested parties by depositing a true copy of same in the U. S. Mail, by postage prepaid:

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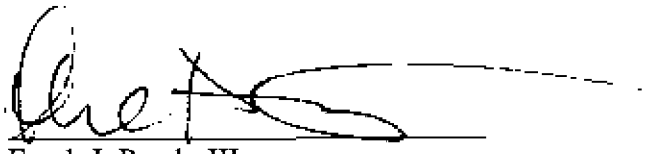
This 5th day of January, 2006.

HUNTER, MACLEAN, EXLEY & DUNN, P.C.



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