UNITED STATES DISTRICT COURT
FOURTH DIVISION
DISTRICT OF MINNESOTA

Milavetz, Gallop and Milavetz PA., Robert J. Milavetz, Barbara N. Nevin,

John Doe and Mary Doe

Plaintiffs,

vs.

United States of America,

Defendant.

Civil No.: 05-CV-2626 JMR/AJB

MEMORANDUM OF LAW

INTRODUCTION

This action seeks a declaratory judgment that the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (hereinafter "BAPCPA") unconstitutionally restrict attorneys from giving accurate, lawful information to their clients. The BAPCPA restrictions on "debt relief agencies" limit attorneys' ability to ethically and competently advise and represent their clients and illegally restrict attorneys' First Amendment right to free speech. The BAPCPA's restrictions on "debt relief agencies," if applied to attorneys, also illegally restrict the public's right to receive information from attorneys, a right presumptively protected under the First Amendment. The BAPCPA restrictions on "debt relief agencies"also conflict directly with the Minnesota Rules of Professional Responsibility, which require attorneys to provide "competent representation" to their clients, (Minn. R. Prof. Resp. Rule 1.1).

The Government's motion to dismiss should be denied in its entirety. First, the restrictions on attorney advice contained in 11 U.S.C. § 526(a)(4) are violative of the First Amendment guarantee of free speech. The Government misstates the appropriate standard of review. The appropriate standard is the "strict scrutiny" test, which requires the Government to show that the speech restrictions at issue are narrowly tailored to serve a compelling state interest. *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 and 486 (1989). The speech restrictions at issue here fail on both counts.

Second, the advertising disclosure requirements of 11 U.S.C. § 528(a)(4) also violate the First Amendment. Once again, the Government misstates the standard of review. Under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), a restriction on truthful, nondeceptive advertising of lawful activities must employ means that directly advance a substantial government interest. The disclosure requirements at issue here are much broader than necessary to address the perceived evil, and must therefore be struck down.

Finally, this Court has jurisdiction to consider the claims of anonymous plaintiffs, who are considering filing for bankruptcy and have not yet done so, and who seek complete and truthful legal advice about their legitimate pre-filing options.

ARGUMENT

I. The Standard for a Motion to Dismiss

In deciding a motion to dismiss, the Court must assume all facts in the Complaint to be true and construe all reasonable inferences from those facts in the light most favorable to the complainant. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). The Court grants a motion to dismiss only if it is clear beyond any doubt that no relief could be granted under any set of facts consistent with the allegations in the Complaint. *Id.* Here, the Government has failed to meet this standard.

II. SECTION 526(a)(4) VIOLATES THE FIRST AMENDMENT UNDER A STRICT SCRUTINY STANDARD.

A. SECTION 526(a)(4)'s LIMITATIONS ARE SUBJECT TO STRICT SCRUTINY.

What is at issue is whether Congress may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients.

The standard of review on lawful and truthful attorney advice to clients is strict scrutiny. *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 and 486 (1989). *See also, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *New York State Bar Association v. Janet Reno*, 999 F. Supp. 710 (N.D. N.Y. 1998).

The BAPCPA restricts an attorney's right to free speech and is therefore subject to the strict-scrutiny test which is defined as follows:

> Under the strict-scrutiny test, respondents have the burden to prove that the [legislation] is (1) narrowly tailored, to serve (2) a compelling state interest. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989). In order for respondents to show that the [legislation] is narrowly tailored, they must demonstrate that it does not "unnecessarily circumscribe protected expression."

Brown v. Hartlage, 456 U.S. 45, 54, 71 L. Ed. 2d 732, 102 S. Ct. 1523 (1982); *Republican Party v. White*, 536 U.S. 765,774, 775(2002). Thus, the Defendant must show a compelling state interest for regulating attorney's speech. The Defendant has not shown any compelling state interest justifying the regulation of such speech, and has not shown that this restriction is narrowly tailored to serve that interest.

The government argues that the disclosure requirements of 11 U.S.C. § 526(a)(4) simply further an "ethical" rule, rather than placing substantive limitations on truthful legal advice that attorneys can give clients. The government cites no authority for the proposition that an attorney's advice to a specific client concerning the client's legally-permissible activities can be subject to any regulation, other than those most narrowly tailored to achieve a compelling governmental objective. *See, Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 and 486 (1989). The government attempts to convince this Court that the law is subject to a balancing test, instead of the "strict scrutiny" standard applicable to professional legal advice. *Fox*, 492 U.S. 469, 480 and 486 (1989). The Court draws a distinction between commercial speech which encourages a future economic transaction and speech-for-profit, the sale of ideas and words. Tutoring, providing legal advice, or giving medical advice is speech-for-profit, not commercial speech. *See Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 and 486(1989)(stating that legal advice would be fully protected under the First Amendment because such speech, even though uttered for profit, does not consist of speech that propose commercial transactions). In fact, some or our most valued forms of protected speech are uttered for profit. *See also, New York Times Co. v. Sullivan*, 376 U.S.

254(1964); *Buckley v. Valeo,* 424 U.S. 1 (1976); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761(1976).

The paradigm adopted by the government makes a critically misleading assumption – it assumes that somewhere in the body of substantive state or federal law there actually exists an independent rule which prohibits the conduct included within the statute (that is, incurring "more debt") for the reason set forth in the statute (that is , "in contemplation of" a bankruptcy filing). The so-called "ethical" rule only exists in the government's pleadings. Indeed, under certain circumstances it is completely appropriate, advisable, and permitted by the bankruptcy laws, to incur more debts in contemplation of a bankruptcy filing. For example, knowing that a bankruptcy filing is approaching, many clients should be encouraged pre-bankruptcy to incur new secured debt (*e.g.* a car loan) that will survive the bankruptcy, since they may be able to obtain better terms (*e.g.* a lower interest rate, or a lesser down payment) prior to their bankruptcy filing than afterward. It is likewise completely appropriate to incur some debt, such as a home equity line of credit, prior to a bankruptcy filing, since such credit terms may not be available after bankruptcy.

Recognizing that there exists no independent basis which prohibits the lawful attorney advice contained in 11 U.S.C. § 526(a)(4), the government would have this Court refer to 11 U.S.C. § 707 as an "ethical" guideline. 11 U.S.C. § 707 is not an "ethical" guideline but rather a substantive rule of law, applicable in Chapter 7 cases only, which describes conduct which can result in denial of a debtor's discharge in a bankruptcy proceeding or dismissal of the proceeding. It does not make such conduct illegal or otherwise subject the actor to civil penalties (as 11 U.S.C. § 256(c) impose on the attorney). *In re Aiello*, 284 B.R. 756 (Bankr. E.D. N.Y. 2002).

Finally, the "ethical standard" paradigm adopted by the government is also inapposite to the case at bar since all of the cases cited by the government relate to public or commercial speech. In the *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) and *Accord United States v. Scarfo,* 263 F.3d 80, 92-93 (3rd Cir. 2001) cases, the speech at issue was made to third parties – i.e. the press. In *Ohralik*, the speech subject to regulation was solicitation of potential clients. In this case, however, the speech at issue limits attorneys' individual advice to actual clients with whom Plaintiffs already have an established attorney-client relationships.

Defendant's Argument that this law is subject to lesser scrutiny is without merit.

In support of their argument that Section 526(a)(4) is an ethical rule, and therefore is not subject to the "strict scrutiny" rule, the government cites *Gentile*, 510 U.S. at 1073. The attorney advice at issue here is not similar to the attorney's conduct in *Gentile*.

However, even in *Gentile*, the justices rejected the balancing test. In *Gentile*, a trial court prohibited an attorney from making public pre-trial statements to the press in a high profile criminal case. The Supreme Court upheld the first amendment right of the attorney to make public comments to the press.

The government argues that public speech by an attorney is subject to greater regulation than speech by others, and restrictions on an attorney's public speech should be assessed under a balancing test that weighs the State's interest in the regulation of a specialized profession against the lawyer's First Amendment interest in the kind of public speech that was at issue. The cases cited by the government to support this balancing, *Bates v. State Bar of Arizona,* 433 U.S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977); *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110 L. Ed. 2d 83, 110 S. Ct. 2281 (1990); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 56 L. Ed.

2d 444, 98 S. Ct. 1912 (1978); and *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984), involved either commercial speech by attorneys, public speech, or restrictions upon release of information that the attorney could gain only by use of the court's discovery process. None of these categories, nor the underlying interests which justified their creation, were implicated here. In *Gentile*, the petitioner was disciplined because he proclaimed to the community what he thought to be a misuse of the prosecutorial and police powers. Wide open balancing of interests is not appropriate in non-commercial speech cases that involve legal advice.

The government would justify a substantial limitation on speech by attorneys because lawyers have special access to information, including confidential statements from clients and information obtained through pretrial discovery or plea negotiations, and so, lawyers' statements are likely to be received as especially authoritative. Rule 177, however, does not reflect concern for the attorney's special access to client confidences, material gained through discovery, or other proprietary or confidential information. The Courts have upheld restrictions upon the release of information gained "only by virtue of the trial court's discovery processes." *Seattle Times Co. v. Rhinehart, supra*, at 32. *Seattle Times* would prohibit release of discovery information by the attorney as well as the client. Similar rules require an attorney to maintain client confidences. *See, e. g., ABA Model Rule of Professional Conduct* Rule 1.6 (1981).

In the present case, the government is attempting to convince this Court that this law falls within a "balancing test" other than the "strict scrutiny" standard applicable to attorneys' providing lawful and truthful legal advice to their clients.

Attorney speech in the present case is not similar to commercial speech of attorneys which was regulated in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447. In *Ohralik*, the conduct of the attorney was in violation of the rules of professional responsibility and was for the purpose of solicitation of a potential client. The matter before this Court involves non-commerical speech that is lawful, being restricted, and is subject to strict scrutiny.

In fact, in cases where attorneys must advise their clients, the United States Supreme Court has stressed the need for clients to be able to trust the representation of their counsel. As stated in *Legal Services v. Velaquez*, 531 U.S. 533 (2001) Congress attempted to prohibit legal representation funded by recipients of government money if the representation involved an effort to amend or otherwise challenge existing welfare law. *Legal Services Corporation v. Velaquez*, 531 U.S. 533, 547, 548 (2001).

The restrictions in *Legal Services Corporation* prevented attorneys working within the confines of a government-funded program from arguing to a court that a state statute conflicted within a federal statute or that either a state or federal statute was violative of the United States Constitution:

> The restriction imposed by the statute here threatens severe impairment of the judicial function. Section 504(a)(16) sifts out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry. If the restriction on speech and legal advice were to stand, the result would be two tiers of cases. In cases where LSC counsel were attorneys of record, there would be lingering doubt whether the truncated representation had resulted in complete analysis of the case, full advice to the client, and proper presentation to the court. The courts and the public would come to question the adequacy and fairness of professional representations when the attorney, either consciously to comply with this statute or unconsciously to continue the representation despite the statute, avoided all reference to questions of statutory validity and constitutional authority. A scheme so inconsistent with accepted separation-of-powers restriction on speech.

Legal Services v. Velaquez, 531 U.S. 533, 543(2001). Here, as in *Velaquez,* the restriction imposed by the BAPCPA would result in the public questioning the adequacy of their counsel's representation since the attorney is limited in his or her ability to adequately advise the client about pre-petition incurring of debt or risk penalty for not complying with the BAPCPA. This could necessarily cause the attorney to avoid the very issues for which the client may need to seek counsel and advice. The government's assertion that attorney advice to clients is not forbidden if the client was not filing bankruptcy is meritless and confusing.

B. 11 U.S.C. § 526(a)(4) DOES NOT PASS THE STRICT SCRUTINY STANDARD, BECAUSE THE GOVERNMENT HAS NO COMPELLING INTEREST IN THE GOALS ALLEGEDLY ADVANCED BY 11 U.S.C. § 526(a)(4).

In light of the lack of any blanket restriction on incurring new debt contemplation of a bankruptcy filing without restriction, this Court must conclude that there is likewise no governmental interest, let alone a compelling interest, in prohibiting lawyers from giving truthful, non-fraudulent advice about which debts can lawfully be incurred.

When the government defends restrictions on speech, "it must do more than simply posit the existence of the disease to be cured." *Turner Broad. Sys. Inc. v. FCL*, 512 U.S. 622, 664(1994). When first amendment rights are at stake, "the Government must present more than anecdote and supposition." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822 (2000). The government has not even attempted to meet this burden and therefore must fail the compelling government interest standard.

Further, the government has no legitimate interest in regulating the attorney speech at issue here. As in the case at bar, *Legal Services Corporation* presented an instance where the government sought to control an existing medium of private expression (legal advice between private parties) in ways which distorted its usual functioning; and the limitations foreclosed a particular type of advice or legal assistance. The *Legal Services Corporation* Court, however, dismissed the notion that the government has any legitimate interest other than in an informed, independent bar which counsels clients in an objective manner. Hindering advocates in the legal system is inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of their clients' case. By seeking to prohibit the recommendation of certain legitimate legal strategies, and thereby truncate the presentation of such strategies to the Courts, laws restricting attorney advice to clients prevent the very speech and expression upon which courts must depend for the proper exercise of judicial power. *Legal Services Corporation*, 531 U.S. at 545 *citing Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803)(It is empathetically the province and the duty of the judicial department to say what the law is.).

The BAPCPA impairs the judicial function by preventing private attorneys from advising their clients, whether to incur new debt "in contemplation of" a bankruptcy filing. By so doing, the law limits Court consideration of when debts can legitimately be incurred "in contemplation of" a bankruptcy filing, and the effect of such new debts on a debtor's repayment plans, a debtor's discharge and the bankruptcy process as a whole. The Courts and the public would have reason to doubt the adequacy and fairness of advice provided by attorneys and will have no alternative legal advocate to whom to turn for advice – all attorneys are equally muzzled from counseling their clients in the same manner. *Legal Services Corporation*, 531 U.S. at 546. If Congress has no legitimate governmental interest in excluding certain arguments and theories Congress finds unacceptable even within a federally funded program, it certainly has no interest in similarly regulating the accurate, lawful advice private litigants receive from their attorneys.

C. THE PROHIBITIONS IMPOSED UPON ATTORNEYS' SPEECH BY SECTION 526(a)(4) ARE NOT NARROWLY DRAWN.

11 U.S.C. § 526(a)(4) is not narrowly drawn due to the ambiguity created by the terms "assisted person", "prospective assisted person"and "incur more debt in contemplation". Because the statute is unclear as to these definitions, people of reasonable intellect are required to speculate as to its meaning. The Supreme Court has, on a multitude of occasions, held that any law which can restrict free speech bears a heavy presumption as to its invalidity. In *Simon & Schuster, Inc. v. Members of the New York State Crime Board,* 502 U.S. 105(1991), a regulation seeking to forbid communication of specific legal ideas was held presumptively unconstitutional because the regulation placed a burden on speech content. If a statute limiting first amendment rights is vague, and reasonable persons can differ as to its meaning, the Courts have consistently held the offending statute to be unconstitutional. The general test of vagueness applies with particular force in review of laws dealing with speech. "[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California*, 361 U.S. 147, 151 (1959). *See also Buckley v. Valeo*, 424 U.S. 1, 76-82 (1976); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-612 (1973).

Section 526 of the BAPCPA is overbroad and violates Plaintiffs' first amendment right to advise their clients as to lawful strategies, and to provide truthful information, and their clients' right to receive the information.

The government argues that the statute prevents an attorney from advising a debtor to incur debt because "he or she intends to file bankruptcy, as such advice is aimed at allowing the debtor to take unfair advantage of discharge (by running up debt primarily because it will not need to be repaid) or "game" the means test (by piling on enough debt to avoid a presumption of abuse). The government implies that attorneys giving such advice are somehow violating an ethical rule and their speech is not subject to a strict scrutiny test, but is subject to a lesser standard.

Much debt incurred prior to filing is not fraudulent; yet the statute prohibits even lawful advice. Pre-bankruptcy planning is an important aspect of an attorney's responsibility in advising a client who intends to file bankruptcy. Fraud involving pre-bankruptcy planning was unlawful prior to the BAPCPA and it was previously left to the Courts to determine fraudulent intent. *See, Whitney v. Whitney* 107 BR 645, 650 (1989).[1]

The law, as passed by Congress does not prohibit an attorney from "advis[ing] an assisted person or prospective assisted person to incur more debt **which they intended to discharge** in contemplation of such person filing a case under this title." The law was not narrowly drawn to prohibit that advice, and is therefore overbroad.

Now, any pre-planning advice attorneys wish to give their clients, concerning incurring

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[1] In *Whitney,* Judge Nancy Dreher reasoned:

Since pre-bankruptcy planning is not per se improper, courts have used a variety of tests to determine how much, in addition to and apart from the conversion of assets, is enough to establish the requisite intent. Some cases examine the debtor's motivation as a factor. For instance, courts have held that if the debtor's motivation was solely to remove property from the reach of creditors with no intention of using it, the act may be wrongful. *See e.g., Ford v. Poston (In re Ford),* 53 B.R. 444 (W.D. Va. 1984), aff'd 773 F.2d 52 (4th Cir. 1985). "Another approach is euphemistically referred to as "pigs and hogs" analysis. This approach recognizes that, while some limited pre-bankruptcy estate planning is appropriate, wholesale conversion of non-exempt assets into exempt assets is not." *See, e.g., Albuquerque Nat'l Bank v. Zouhar (In re Zouhar),* 10 B.R. 154 (Bktcy. D.N.M. 1981).

The analysis in most cases, however, has rested on a "badges of fraud" approach. *See, e.g., Johnson,* 880 F.2d at 82. These badges of fraud may include conduct intentionally designed to mislead or deceive creditors, conveyances of property for less than adequate consideration, or conveyances which are illusory because the debtor retains possession and control of the property. *Id.* Courts often look to the financial situation of the transferor at transfer, whether there has been a series of questionable transactions, and to the general chronology of events.

indebtedness is deemed to be fraudulent, regardless of the intent of the debtor. There is, however, lawful, appropriate advice that attorneys are now not allowed to give their clients.[2] Many attorneys, including Plaintiffs, counsel their clients to refinance a home prior to filing bankruptcy, because their credit will worsen after filing. Such advice is not fraudulent because the mortgage will usually survive the filing. Also, Plaintiffs have had instances where clients have been requested to co-sign student loans, which are not dischargeable, for their children. Frequently, clients will also state their cars are inoperable and that prior to filing bankruptcy they wish to purchase a new car, with a loan which they intend to reaffirm and keep once they file bankruptcy. Further, clients are now required to pay for credit counseling and attorneys' fees prior to filing for bankruptcy. A literal reading of this portion of the law would not allow attorneys to advise clients to do this.

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[2] Erwin Chemerinsky in his article for the 2005 National Conference of Bankruptcy Judges in the *American Bankruptcy Law Journal* states:

> New Code 526 imposes restrictions on the kind of advice such a "debt relief agency" can provide. Most of this prohibited advice would be inappropriate for other reasons, such as making misrepresentations, but one of them might be entirely appropriate: Code 526(a)(4) forbids a debt relief agency to advise an assisted person or prospective assisted person to incur additional debt in contemplation of filing for bankruptcy relief or for the purpose of paying fees for services rendered by an attorney or petition preparer in connection with the bankruptcy case.
>
> This prohibition is particularly troubling when it might be completely legal and even desirable for the client to incur such debt. For example, there may be instances where it is advisable for a client to obtain a mortgage, to refinance an existing mortgage to obtain a lower interest rate, or to buy a new car on time. There would be no fraud in doing so if the client intended to pay such debt notwithstanding the filing of a contemplated bankruptcy case. For example, the client may intend to keep all payments fully current and to reaffirm such debt once the case is filed.
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> Moreover, most of an attorney's fee for handling a Chapter 13 case is paid over time through the Chapter 13 plan. But that means that at the time the case is filed, the client has incurred additional debt in contemplation of filing a bankruptcy case. Indeed, such debt was specifically incurred for the purpose of paying the fees of the attorney filing the case.
>
> But 526(a)(4) appears to prohibit any attorney from advising a client to incur any such debt, regardless of how appropriate or advisable. The clause directly regulates the content of speech of lawyers to their clients, even when it is accurate, legal, and desirable. In addition to First Amendment considerations on this issue, there are strong public policy considerations implicated when the government restricts the type of advice attorneys can give their clients.

There is no compelling government interest in regulating such pre-planning bankruptcy advice. Attorneys counsel their clients in many areas to allow them to pre-plan regarding future financial consequences. Tax attorneys may counsel clients to give money to charity to help avoid greater tax consequences. Family law attorneys may advise clients to take retirement deductions on their checks to minimize child support obligations. It is in the best interest of the United States Government to assure taxes are collected and that parents pay child support. The BAPCPA chills attorneys' rights to give the aforementioned advice if at any time the client has contemplated bankruptcy. Nowhere in the U.S. Constitution or case law is such a chilling effect allowed by the government on private citizens.

D. THE GOVERNMENT HAS LESS RESTRICTIVE ALTERNATIVES BECAUSE ATTORNEY BEHAVIOR IS ALREADY REGULATED.

If an attorney engages in fraudulent behavior, there are many avenues for the attorney to be reprimanded. The United States Trustee for Minnesota is an investigator of bankruptcy fraud. Lawyers' conduct is further regulated by state rules of professional responsibility. Further, Bankruptcy Rule 9011 provides sanctions against attorneys for substantial abuse.

The BAPCPA threatens sanctions against attorneys who violate its provisions. The punishment for the debt relief agencies' violations of section 526(a)(4) create a chilling effect on attorney speech.[3]

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[3]The sanctions for violations of the BAPCPA include, but are not limited to, the following:

If an 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.

These sanctions will chill the behavior of attorneys who wish to honestly advise their clients. Plaintiffs are bringing this action in order that this matter be resolved prior to them facing such sanctions.

III. PLAINTIFFS ARE NOT "DEBT RELIEF AGENCIES"

While Plaintiffs concede that the new legislation could be read to include attorneys such as Plaintiffs within the scope of a "debt relief agency" the doctrine of constitutional avoidance belies Congress' attempt to avoid the serious constitutional questions raised herein. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 523(2002); *Gomez v. United States,* 490 U.S. 858, 864(1989); *Ashwander v. TVA*, 297 U.S. 288, 346-348(1936)(Brandeis, J., concurring). However, reading the statute to exclude attorneys from the scope of the definition of "debt relief agency" furthers the statute's constitutional application and is consistent with the literal text of the BAPCPA.

First, the definition of "debt relief agency," while extremely broad, does not literally include the word "attorney" or "lawyer," which is separately defined in 11 U.S.C. § 101(4). Further, even though the definition of "debt relief agency" is facially broad enough to cover bankruptcy petition preparers and attorneys, Congress included "bankruptcy petition preparers" in the definition of "debt relief agency," yet omitted any express inclusion of attorneys. By negative inference, this Court should conclude that attorneys are therefore not within the scope of the statute.

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(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.
11 U.S.C. §§ 526(a)(4).

Second, Section 527(b) requires "debt relief agencies" to inform "assisted persons" that they have the right to hire an attorney or to represent themselves, that only an attorney can render legal advice, and how to perform *pro se* that would be universally provided if the person would have to conclude that the statute (which, again, conspicuously omits the word "attorney") requires attorneys to tell clients that they have the right to hire an attorney or how to prepare documents *pro se* that the attorney is poised to prepare on that person's behalf. It is far more likely that the provision is a consumer protection provision intended to regulate that the universe of entities who assist persons but are not attorneys. This interpretation of the statute, which is both logical and sensible is preferred over the alternative interpretation which would be illogical and absurd.

IV. SECTION 528's DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL UNDER *ZAUDERER*.

The burden of the disclosure requirement as a "debt relief agency" is exacerbated by the timeliness of disclosure requirements, that require Plaintiffs to publish such disclosures on all materials, including previously published telephone, internet, television and other forms of media advertising commencing October 17, 2005.

The Government asserts that Count II of Plaintiff's Complaint does not violate the First Amendment because a mandatory disclosure requirement for commercial speech is materially different than an outright prohibition on speech. *Government's Memorandum of Law at 27, citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 650 (1985)*. The Government claims such disclosure requirements are allowable if they are "reasonably related to the State's interest in preventing the deception of consumers" and, are not "unjustified or unduly burdensome." *Id. citing Zauderer*, 471 U.S. at 651.

In *Zauderer*, however, the Court also held that "Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Id.* at 638 (citing, *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980)). State regulation of commercial speech "may extend only as far as the interest it serves." *Central Hudson,* at 565.

> The Government claims that the disclosure requirements of 11 U.S.C. §528 were directed at some bankruptcy lawyers and websites which did not "mention in their advertisements that their ability to make "debts disappear" derived from the use the bankruptcy process."

Gov't Memo. of Law at 28. However, the definition of "debt relief agency" is not so narrowly drawn:

> 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 section 110.

11 U.S.C. §110(*emphasis added).*

The statute further provides certain exceptions to the above definition, including, "a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor." 11 U.S.C. §101 (12)(a)(C). The statute does not exempt all creditor's attorneys, nor attorneys who do not regularly practice bankruptcy.

Further, bankruptcy assistance is defined as:

> 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.

11 U.S,C § 101 (4)(a).

If, as the Government claims, an attorney or law firm is in fact a "debt relief agency," providing any type of bankruptcy assistance to even a single client would require an attorney or law firm to declare in their bankruptcy advertisements: "We help people file for bankruptcy relief under the Bankruptcy Code." The disclosure requirement is overly broad. The government's sweeping definition prevents an attorney, even a creditor's attorney, from discussing or providing any information, advice or counsel to a client about bankruptcy, unless that attorney forevermore declares that he or she helps people file for bankruptcy.

Because bankruptcy is a fairly specialized field, many lawyers do not help debtors file for bankruptcy, but will refer the client to a bankruptcy attorney. In addition, many lawyers practice bankruptcy law solely on behalf of creditors. However, if a lawyer who does not normally engage in debtor bankruptcy practice, discusses even the most basic functions of the bankruptcy process with one client, that lawyer must henceforth hold him or herself out as debtors' attorneys who "helps people file for bankruptcy relief," even if that statement is false.

The rationale behind *Zauderer* is that certain types of mandatory disclosures which are "reasonably related to the State's interest in preventing deception of consumers" do not violate the First Amendment. *Zauderer,* 471 U.S. at 626. In this case, unlike *Zauderer*, the disclosure requirements force creditors' attorney who has discussed bankruptcy with a client to mislead the public even if that attorney does not prepare and file bankruptcy petitions.[4] It is well settled that

[4] The required disclosures force those attorneys who do not file bankruptcy petitions on behalf of debtors to claim that they "...help people file for bankruptcy relief under the Bankruptcy Code" even if that is false. Complying with such a disclosure requirement could expose the attorney or law firm to penalties for false advertisement under

"state rules that are designed to prevent the potential for deception and confusion . . . may be no broader than reasonably necessary to prevent the "perceived evil."" *In re R. M. J.*, 455 U.S. 191, 203 (1982).

The result here is that creditors' attorneys are discouraged from fully discussing a client's legal rights, unless the attorney declares himself as a bankruptcy filer. As the Court in *Zauderer* pointed out: "The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, misleading, *see Friedman v. Rogers,* 440 U.S. 1(1979). . . . "Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial government interest, and only through means that directly advance that interest." *Id.* at 638.

In *In re R. M. J.*, the Supreme Court pointed out that a reviewing court "must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 452 U.S. 904; 101 S. Ct. 3028; 69 L. Ed. 2d 404 (1981). In this case the "disclosure requirements," which allegedly serve to protect consumers from being misled about how an attorney or other person makes a debt disappear, in fact prevent the free flow of accurate information between attorney and client. Creditors'attorneys and law firms which do not regularly practice bankruptcy but wish to give advice to a client about debtor bankruptcy which is otherwise not deceptive, misleading or harmful, now face a choice. They can choose not to give that advice, and send their client to another lawyer who advertises as a "debt relief agency", or they can state, in all of their future bankruptcy related advertisements, that they "are a

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state law or professional responsibility rules. The breadth of the disclosure net cast by the Government begs the question: Which law does the attorney violate?

debt relief agency" and that they "...help people file for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. §528 a (4).

The Government's burden is not, as their memorandum asserts, slight. "The "free flow" of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer,* 471 U.S. at 646; 648-649 (State's "unsupported assertions" insufficient to justify prohibition on attorney advertising; "broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force").

The Supreme Court has held:

> It is well established that "the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.

Edenfield v. Fane, 507 U.S. 761, 770-771 (1993).

The Government appears to be arguing that these disclosure requirements which suppress the dissemination of concededly truthful information about entirely lawful activity are necessary, because of the potential effect on the nation's economy. The Supreme Court, in discussing the limits of disclosure requirements, stated "...however long the pedigree of such mandates may be, and however broad the government's authority to impose them, *Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages." *Glickman v. Wileman Bros. & Elliott* 521 U.S. 457, 491 (1997).

Not only are the disclosure requirements unjust, they are unduly burdensome. Instead of limiting large law firms or "bankruptcy mills", the requirements favor them. The solo attorney or smaller firm that advertises in the Yellow Pages under more than one area of practice will have more difficulty paying for the additional disclosure requirement. The two required sentences would dramatically inflate the price of an attorney's one line Yellow Pages listing. Since these attorneys are actually advertising their bankruptcy practice, there is no potential for deception. The law also did not take into account that Yellow Pages are only published one time per year and that attorneys can not change the Yellow Pages advertisement until the next publication cycle, resulting in every bankruptcy attorney listing in the Yellow Pages to be in violation of the BAPCPA until the new advertising cycle.

Because the disclosure requirements placed upon "debt relief agencies" who provide "bankruptcy assistance" mandated in 11 U.S.C. §528, far exceed what is necessary to directly advance the Government's interest, those requirements violate the First Amendment.

IV. THE COURT HAS JURISDICTION TO CONSIDER THE CLAIMS OF THE ANONYMOUS PLAINTIFFS.

The government alleges that no legal basis exists for Plaintiffs John Doe and Mary Roe to proceed anonymously with their claims. Plaintiffs acknowledge that there exists a strong presumption against allowing parties to proceed with litigation in Federal Courts using a pseudonym. *Luckett v. Beaudet*, 21 F. Supp. 2d 1029, 1029 (D. Minn. 1998). Rule 10(a) of the Federal Rules of Civil Procedure requires that the names of all parties be included in the title of the complaint. The government admits, however, that an exception to this rule exists when the issues involved are of a sensitive and highly personal nature. Def. Memorandum at 12, *citing Southern Methodist University Ass'n v. Wynne & Jaffe*, 599 F.2d 707, 712-713 (5th Cir. 1979).

The government fails, however, to discuss the specific factors in *Southern Methodist* that allow a party to retain his or her anonymity. *Id.* at 712. In *Doe v. Stegall,* 653 F.2d 180, 32 Fed. R. Serv. 2d (Callaghan) 59 (5th Cir. Miss. 1981), the Court found three main factors to be considered in determining the propriety of permitting anonymous parties: (1) plaintiffs seeking anonymity were suing to challenge governmental activity; (2) prosecution of the suit compelled plaintiffs to disclose information "of the utmost intimacy;" and (3) plaintiffs were compelled to admit their intention to engage in illegal conduct, thereby risking criminal prosecution. As the Court in *Stegall* noted: "it would be a mistake to distill a rigid, three-step test for the propriety of party anonymity from the fact-sensitive holding in *Southern Methodist University Ass'n.* ...Moreover, the cases examined in [the] opinion belie the notion that a party must admit criminal conduct or criminal intent in order to proceed under a fictitious name." *Stegall*, 653 F.2d at 185, *citing, Southern Methodist*, 599 F.2d at 713 fn.11.

In this case, the anonymous Plaintiffs unquestionably satisfy the first two factors of the *Stegall* test. First, the anonymous Plaintiffs are challenging the recent action of the United States Government which enacted impediments to seek legal advice which is not fraudulent or violative of the law, i.e., bankruptcy and financial planning consultation.

Second, the disclosure of anonymous Plaintiffs' identities would require that they disclose information of the utmost intimacy. The Complaint states, "Plaintiffs John Doe and Mary Roe are members of the public who wish to obtain legal advice from plaintiff attorneys, and other similarly situated persons about possible bankruptcy and pre-bankruptcy planning, including their present and future assets, liabilities, income, and expenses." Amended Complaint ¶ 10.

The second *Stegall* factor is satisfied because the anonymous Plaintiffs here are *potential* bankruptcy filers seeking attorney-client privileged advice about their finances. Persons in need of bankruptcy advice from attorneys are usually persons whose financial situation is precarious. The financial situations of private citizens is clearly a matter of the utmost intimacy, especially when they feel the need to seek advice about bankruptcy. The third factor in *Stegall* is inapplicable to Plaintiffs.

The Court in *Doe v. Hartz,* 52 F. Supp. 2d 1027 (N.D. Iowa 1999), noted that there are additional factors that should be considered in these cases:

> Some recent decisions have added to the three pertinent considerations suggested in *Frank* and *Stegall*. These decisions suggest consideration of (4) whether the plaintiff would risk injury if identified; (5) whether the party defending against a suit brought under a pseudonym would thereby be prejudiced, *see Free Speech*, F. Supp. 2d at , 1999 WL 47310 at *2 (citing *Shakur*, 164 F.R.D. at 360, as considering these factors in addition to the three cited in *Frank*); (6) the extent to which the identity of the litigant has been kept confidential; (7) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigants' identities, *see id.* (citing *Doe v. Provident Life and Acc. Ins. Co.*, 176 F.R.D. 464, 467 (E.D. Pa. 1997), for these last two factors)***.

52 F. Supp. 2d. at 1046-47.

Objective analysis of these additional factors strengthens the case for Plaintiffs' continued anonymity. First, Plaintiffs potentially risk injury to their credit and reputations. Second, the Government will not be prejudiced by the anonymity of these Plaintiffs, who are typical of thousands of similarly situated persons and who are seeking determination of a purely legal issue. Third, their identities have so far been kept confidential, and the subject of this lawsuit – the scope of the advice their attorneys can give them– is one which arises out of the confidential attorney-client relationship. Finally, there is an atypically weak public interest in knowing the identities of these individual plaintiffs, since these claims could as easily have been brought by any of thousands of individuals who seek bankruptcy advice every year.

In *Hartz*, the Court ruled "The ultimate test, however, remains "whether the plaintiff has a substantial privacy right which outweighs the 'customary and constitutionally-embedded presumption of openness in judicial proceedings."" *Id.* at 1047, citing *Frank*, 951 F.2d at 323 (further citations omitted).

Bankruptcy filings are of course a matter of public record. However, the anonymous Plaintiffs in this case are *considering* filing for bankruptcy. The Plaintiffs have a substantial privacy right in keeping their personal finances private, and there is very little public interest in their identities. That privacy right far outweighs the government's desire to know the identities of these Plaintiffs. For that reason, Plaintiffs' anonymity should be preserved.

CONCLUSION

The government's motion to dismiss should be denied because the BAPCPA limitation on attorney advice and the unnecessary burdens placed on attorney advertisement are unconstitutional restrictions on freedom of speech. Further, lawyers are not debt relief agencies and if lawyers are debt relief agencies the doctrine of constitutional avoidance would prevent application to lawyers. Lastly, anonymity of Plaintiffs should be allowed as the public's interest in the Plaintiffs identity is outweighed by the privacy concerns of the Plaintiffs.

Respectfully submitted,

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