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ARTICLE: Nine Traps and One Slap: Attorney Liability under the New Bankruptcy Law ©

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HIGHLIGHT: A scene from Oliver Stone's Platoon:

A Viet Cong bunker is discovered and must be searched. Two soldiers carefully enter, with weapons drawn. No enemy soldiers are present, so the soldiers look around and discover a small box. Wary of a booby trap, one soldier opens the lid very, very slowly. It's not rigged. Relieved, the soldier sorts through the box's contents. "These are important papers," he says to his buddy and as they prepare to leave the bunker, the soldier picks up the box to take it with him. Then it explodes.

TEXT:
[*283]

Like the box, the misnamed Bankruptcy Abuse Prevention and Consumer Protection Act n1 is waiting to take you down. n2 [*284] We've known it for eight years. It's a behemoth of bad policy, an illiteracy of ill-conceived provisions, an underbelly of unintended consequences. The problems we know about are bad enough. The problems we haven't yet discovered are likely to be worse.

This article cannot hope to alert lawyers to all the landmines of liability. We point out just enough to terrify you so that you will peruse its provisions with the intensity of a soldier in a minefield. n3

We present you here with nine traps: provisions of the Act that do terrible things to bankruptcy attorneys (and not just debtors' attorneys), some of them almost certainly unintentional. We could have found more, but we were on a tight deadline. Our final section is a slap in the face: a direct assault by Congress on consumer debtors' attorneys and the clients to whom they are dedicated that is even more egregious - and overt - than the traps in the Act.

[SEE TABLE IN ORIGINAL]

I. BUT FIRST, A LITTLE HISTORY

Before being enacted in the 109th Congress, BAPCPA was introduced four times, and its genesis traces back nearly a decade to the work of the National Bankruptcy Review Commission. Space considerations prevent us from detailing BAPCPA's long and storied history here. n4 Yet there are insights [*285] to be found in the history.

Like much of BAPCPA, the philosophical underpinnings of the attorney liability provisions are rooted in the minority report issued by Commission members. In its final Report, n5 the Commission noted that there "is evidence of questionable use of the bankruptcy process by both debtors and creditors," n6 and it made recommendations to remedy problems on both sides.

A minority of Commission members focused exclusively on debtors and their attorneys, portraying debtors' attorneys as willing participants in legalized theft by their clients who must be forced to submit honest pleadings on penalty of personal liability. Diabolically, they are also unethical scoundrels who take their initial fee and run off, leaving their poor clients without adequate representation, or worse, provide the necessary representation and then have the audacity to expect payment for it prior to the pre-existing creditors of the debtor. n7

The minority dismissed the Commission recommendations on false claims and other abuses by creditors, n8 stating bluntly, "There is no need for redundant rules to deter false claims." n9

Beginning in the 105th Congress, when BAPCPA was first introduced, nearly every version of the bill reflected the views of the Commission's minority. Although the language has changed slightly over time, BAPCPA consistently represented the view that debtors' attorneys were simultaneously in league with, and a threat to, their clients, with no similar distrust of creditors or their lawyers. The version of BAPCPA that was enacted is no exception.

[*286]

II. A SHORT OVERVIEW OF ATTORNEY LIABILITY UNDER BAPCPA

This is an overview of the attorney liability provisions enacted as part of BAPCPA. This is not intended to be a comprehensive discussion of them, but merely an introduction; we'll discuss several provisions in the 9 Traps below.

A. Certification and Sanctions in "Abusive" Consumer Bankruptcy Cases

Section 102 is BAPCPA's most prominent feature because of its much-discussed "means test" for consumers filing for relief under Chapter 7. Section 102 also contains some nasty provisions directed at attorneys who represent consumer debtors in Chapter 7 cases. n10 These provisions:

. alter, for consumer debtors' attorneys, the certifications made by virtue of their signatures on bankruptcy documents, and

. permit the imposition of unprecedented sanctions against these attorneys. n11

Under Rule 9011 of the Federal Rules of Bankruptcy Procedure (largely the same as Rule 11 of the Federal Rules of Civil Procedure), all attorneys make certain assurances by signing any document submitted to the court. n12 These rules are designed to prevent frivolous or bad faith filings; they require attorneys to conduct reasonable inquiries into the facts and law in their filings, and to file them only for a proper purpose. n13

Under BAPCPA, the signature of the debtor's attorney takes on greater significance through two distinct provisions:

> The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has
>
> (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and
>
> (ii) determined that the petition, pleading, or written motion
>
> (I) is well grounded in fact; and
>
> (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of [*287] existing law and does not constitute an abuse under paragraph (1). n14

The reference to "paragraph (1)" means that the filing is not an abuse as defined by the means test and good faith requirement in Section 102. This provision creates an entirely new potential for attorney liability: representing a losing debtor! n15

The second certification says:

The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect. n16

The schedules contain information about the debtor's assets and liabilities, some of which, like checking account balances, is in a constant state of flux. Verifying that information is sure to be costly and, in some cases, impossible.

The courts will set the standards of conduct that apply to these two provisions, including defining what it means to conduct a "reasonable investigation" or when an attorney has "knowledge" of "incorrect" information after an "inquiry." Still, it's crystal clear that BAPCPA creates a significant risk of liability for consumer bankruptcy attorneys faced by no other attorney. n17

Section 102 also has a generalized provision allowing the court to assess a civil penalty if it finds the attorney violated Rule 9011. n18 The goal of this [*288] provision is far from clear, given that a violation of Rule 9011 already provides a basis for imposing sanctions. It's worth mentioning that this provision once mandated sanctions against the attorney; if there's any good news, it's the change to a discretionary standard. n19

Sanctions may also be imposed when the trustee has successfully prosecuted a motion to dismiss the debtor's case based on "abuse," as defined in the remainder of BAPCPA Section 102. n20 Specifically, if the court finds that the bankruptcy filing constituted:

. abuse on the part of the debtor, and

. a violation of Rule 9011 on the part of the attorney

the court may order the attorney to reimburse the trustee all reasonable costs and fees associated with the motion to dismiss. At its heart, this provision is little more than a fee-shifting statute, but with a remarkable distinction - the fees are shifted not to the debtor, but to the attorney alone. This provision was also mandatory in earlier versions of BAPCPA.

B. Regulating Consumer Debtors' Attorneys as "Debt Relief Agencies"

BAPCPA redefines debtors' attorneys as "debt relief agencies" and dramatically regulates an attorney's practice, from advertising to representation, mandating what the attorney must do and what the attorney is forbidden from doing with no regard for the best interests of the client. To accomplish its mission, BAPCPA creates three important definitions:

. "Assisted Person" ["AP"] is any person whose debts consist primarily of consumer debts, and whose non-exempt assets are worth less than $ 150,000. n21

. "Bankruptcy Assistance" includes any goods or services [*289] sold or otherwise provided n22 to an assisted person, such as legal advice or representation, document preparation or filing, or attendance at a creditors' meeting or the like, in connection with a case or proceeding under the Bankruptcy Code. n23

. "Debt Relief Agency" is any person who provides bankruptcy assistance to an AP in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under Section 110 of the Code. n24

Some folks are expressly (and inexplicably, in some cases) excluded from BAPCPA's definition of "debt relief agency." Trap #1 below discusses the counterintuitive and even dangerous results these definitions and their exceptions produce when determining who is and isn't a "debt relief agency."

For debtors' attorneys, these definitions bring into play a hideous array of new restrictions that apply in three main areas. The first is advertising. The second and third are flip sides of the communication coin: attorneys are prohibited from making some statements and forced to make others.

1. Attorney Advertising

Any attorney who fits the definition of a "debt relief agency" under BAPCPA must comply with its regulation of advertisements. If the attorney's advertisement is directed to the general public and

. includes a description of bankruptcy assistance, n25 or

. uses language that could lead a reasonable consumer to believe that debt counseling is being offered when in fact the services are directed to providing bankruptcy assistance, or

. offers assistance with credit defaults, mortgage foreclosures, or eviction, excessive debt, debt collection pressure, or an inability to pay any consumer debt,

then the attorney is required to disclose that the services relate to bankruptcy and to include this statement clearly and conspicuously in the advertisement:

[*290]

"We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." n26

This provision is not only offensive, it's confusing. It may seem simple on its face, but there is plenty more to say about it. It's discussed at length in Trap #2 below.

2. Required Disclosures

No fewer than five disclosures are required by the attorney to the client - "assisted person" in the new bankruptcy parlance - under BAPCPA.

The first notice must provide descriptions of the relief available under the different chapters of the Bankruptcy Code, and must also include language designed to scare the debtor about criminal liability and Attorney General investigations. n27

The second notice, which we discuss more in Trap #5 below, sets out specific "advice" the attorney must give, some of which is actually inconsistent with the law. As in the first notice, the debtor's potential criminal liability must be mentioned. n28

Third, the attorney must provide the client with a written contract, which every lawyer should do anyway. n29

Fourth, BAPCPA also mandates a disclosure statement that is very much like those required under federal consumer protection statutes. n30

Finally, the attorney must provide "reasonably sufficient information" that, like the second notice, is inconsistent with what the law actually requires. Here, the attorney is also required to advise the client how to perform tasks - such as valuation of assets - that have perplexed attorneys and courts alike for some time. n31

If the attorney fails to provide any of these five "disclosures," or makes prohibited statements (discussed below), statutory penalties include both the ability of the client to avoid the contract - but enforce it against the attorney - and the power of state Attorneys General to take action against attorneys. n32

[*291]

3. Prohibited Statements

The flip side of the required statements is BAPCPA's prohibition on what an attorney can say or do. In some respects, these prohibitions are unnecessary reiterations of ethics and disciplinary rules. For example, BAPCPA says an attorney can't advise a debtor to make false statements in the bankruptcy papers, n33 which an attorney isn't allowed to do under any circumstances.

But some prohibitions are also foolhardy - and dangerous. They reach "prospective assisted persons" in addition to actual clients, preclude what could be the best legal advice for a particular client, and create thresholds for liability that are frightfully low. The attorney can't even tell the client, whose financial distress has become so dire that he sought out the attorney's help, that it's okay to borrow the money needed to pay the legal expenses of the bankruptcy. n34

C. Requiring Attorneys to Certify the Debtor's Ability to Pay in a Reaffirmation Agreement

Among the substantial changes BAPCPA makes to reaffirmation agreements is a bizarre requirement for debtors' attorneys. In addition to the certification that has long been required in every reaffirmation agreement, if the agreement triggers the statutory presumption of hardship, n35 the attorney has to go further, and give assurance that the client can perform the promise to pay the debt. n36 BAPCPA provides:

If a presumption of undue hardship has been established with respect to [a reaffirmation] agreement, such certification shall state that in the opinion of the attorney, the debtor is able to make the payment. n37

Obviously, this creates a serious problem for the attorney. n38 If the client wants to reaffirm a debt, that is the client's decision, even if doing so flies in the face of the attorney's sound legal advice. After all, attorneys can't force their clients to do anything. But BAPCPA disregards this reality and goes a step further by requiring the attorney to certify that the debtor - who has a [*292] demonstrated inability to pay a reaffirmed debt - is somehow able to pay it. And the penalty for being wrong could be severe: liability to the creditor for what the debtor owes.

III. LET'S TACKLE THE TRAPS.

TRAP #1: POOF! YOU'RE A "DEBT RELIEF AGENCY" (BUT AMERIDEBT ISN'T)

The first question is: Who is a "debt relief agency"? That simple question produces some surprising results. The answer lies in three definitions provided in Code 101:

. "Assisted person" means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $ 150,000. n39

. "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. n40

. "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 ... n41

What's missing from all these definitions? Any reference to a bankruptcy debtor! Common sense would suggest that these provisions apply only to attorneys and others who assist consumers who are in debt and looking at bankruptcy as an option to get out. Everyone who has followed this law knows these provisions were intended to apply to debtors' counsel, and to petition preparers. But the language of the statute contains no such limitation. The plain language defies common sense - and common understanding - but unfortunately, in a battle like this, plain language usually prevails.

1. Who's Out?

The statute provides some guidance. The definition of "debt relief agency" [DRA] specifically excludes:

[*293]

. officers, directors, employees, or agents of persons (including petition preparers) providing assistance

. 501(c)(3) organizations

. a creditor of an assisted person, if the creditor is assisting in the restructuring of that creditor's debt

. a depository institution or credit union

. an author, publisher, or seller of works subject to copyright protection (thank goodness!) n42

One unanswered question is whether creditors' attorneys are excluded. If they are acting in their traditional, adversarial role on behalf of a bank, credit card issuer, or other institutional creditor, they will certainly be excluded because they are providing assistance to the creditor, not the debtor, and institutional creditors cannot be "assisted persons." Attorneys representing any creditor, institutional or not, would be excluded if the creditor is working with the debtor to get that creditor's debt restructured, because of the specific exception for that situation. n43

Another specific exception is that those entities that we normally think of as "debt relief agencies" - that is, credit counselors and other organizations that purport to help people deal with their creditors and restructure their debts - are likely to be excluded by the exception for non-profits. n44 AmeriDebt, for example, once one of the nation's largest credit counselors, would be exempt due to its non-profit status. n45

2. Who's in?

You're a DRA if you:

. are a person

. who provides "bankruptcy assistance"

. to an "assisted person"

. for money or other consideration. n46

[*294]

If any of the four elements don't apply to you, you are not a "debt relief agency" and you are relieved of the many obligations and restrictions placed on these entities. For example, bankruptcy clinics that provide free advice to debtors are not included in this provision, because they don't receive a fee. n47

It's safe to assume debtors' attorneys are included and petition preparers unquestionably are included. n48 Who else may be swept up in its terms?

Imagine a woman goes to an attorney and says, "My ex-husband has just filed for bankruptcy. How will this affect me?" Like most folks, this woman's own debts are primarily consumer obligations, and her non-exempt assets are worth less than $ 150,000. Now, suppose the attorney:

. Looks over the property and debt allocation in the divorce decree and tells the woman which items might be excepted from the ex-husband's discharge.

. Attends the ex-husband's 341 meeting of creditors.

. Files a complaint to determine the dischargeability of any of the divorce debts.

Under the plain language of the definitions, the woman is an "assisted person" and the attorney has rendered "bankruptcy assistance." This attorney is a "debt relief agency" and must comply with all the mandates of Code 526-528.

Suppose all the attorney says to the woman is, "Let me look over the papers and I'll get back to you." That might be enough to become a DRA; the definition of "bankruptcy assistance" includes "services sold or otherwise provided ... with the express or implied purpose of providing information, advice, [or] counsel." n49

Suppose instead of the debtor's ex-wife, it's the debtor's mother who shows up at the attorney's office because the trustee served her with a complaint to recover her Mother's Day gift as a preference or a fraudulent transfer. The "debt relief agency" definition would apply, so long as Mom's debts and assets meet the "assisted person" standard. Informing, advising, or counseling Mom about the complaint is "bankruptcy assistance," as is representing her against the trustee.

[*295] Lawyers who do no more than fill out a proof of claim form on behalf of their consumer clients could get swept into the torture chamber Congress has created. "Document preparation," without more, appears to be enough to constitute "bankruptcy assistance."

Just to drive home the point, imagine one last scenario: the pharmaceutical giant Merck goes into bankruptcy. What becomes of counsel in the individual and class action suits over Vioxx? What about counsel for the creditors' committee, whose constituents include those individual and class action plaintiffs? Again, the definition of "bankruptcy assistance" is broad enough to apply and the matter comes down to the nature of the claimants' debts and the value of the claimants' non-exempt assets.

We are not trying to argue that this is the right result. This is all patently ridiculous. But that's the problem with the poorly-written language of the statute. It doesn't clearly identify its intended victims and, having failed to name them, it could trap lots of unintended victims. Let's hope that the courts can apply the magic descriptor "absurd" to results like these and free themselves from the constraints of a "plain language" regime that elevates words over practicalities, common sense, and good law.

3. In or Out - Who Knows?

Between the margins of who's in and who's out of the "debt relief agency" definition there is a lot of gray. To show how complicated this new area of law could become, let's take a look at a company called "We The People."

We The People ("WTP") calls itself "the national leader in legal document preparation services." WTP claims to provide document preparation services and offers its business as a franchise opportunity. One such franchise, WTP Mid-Atlantic, describes its operation as follows (as you read through it, look for DRA application triggers):

We The People provides a broad range of services that offer an economically attractive alternative to anyone who has a need to handle a legal action that does not require the advice of an attorney. We are best in support of customers who have a need for uncontested legal actions. These range from activities as simple as preparing a bill of sale for an automobile to a divorce to that of a complex bankruptcy.

Our process generally involves certain simple steps to accomplish the end result which is the preparation, and where appropriate, the filing of a legal action:

1. Decide - The Customer comes to a We The People office and tells us the action he/she has decided to take.

2. Purchase - Once the decision is made to proceed with [*296] our help, the customer purchases the service commitment for the action and we provide a workbook to be completed by the customer. This workbook simply documents all of the relevant facts and detailed decisions that the you (sic) must provide us so that we can prepare the appropriate forms and documents required to accomplish your desired goal.

3. Questions - In the event that you have questions about the legal issues with respect to the action your are (sic) taking, you will be given access to our supervising attorney. Our supervising attorney will answer simple and general questions you may have with respect to the actions. He will not give you advice about your specific action; simply answer questions about the law. This level of service is provided free to all our customers as a part of the forms and document preparation fee paid. If you need more legal advice, you will need to hire an attorney.

4. Advice from an Attorney if Required - Should you need more complex legal advice and counsel and or legal support during your action our supervising attorney could conclude that you need the representation of an attorney. In that case you are free to either consult with another attorney or to engage our supervising attorney.

5. Workbook Completion - Once we have received the completed workbook, we check it for completeness and then the workbook is sent to our paralegal department and they begin the process of preparing the forms and documents.

6. Completed Documents - Within a few days, we will notify you of the completion of the documents and request that you make an appointment to return to the office to review the documents for accuracy.

7. Sign Documents & File - When you are satisfied with the accuracy, you will sign the documents and, if a filing is required with the courts, we will handle that part of the process for you.

8. At Your Service - In some instances, there are follow-up actions required that may cause you to use our services again, or it might cause you to need further work from an attorney.

9. Services not Listed - Please also recognize that, even if you do not find the specific action you need to take, we [*297] probably can still help you. We have offices through the country and many lawyers on our staff. They are all available to find a way to help us help you. n50

To make the whole matter more interesting, on May 4, 2005, WTP announced in a press release the publication of "We The People's Guide to Bankruptcy," written by WTP's co-founders. n51 Noting that BAPCPA would be effective in just six months, the press release states:

"In essence, there's only a six-month window for average Americans to get out of debt and re-chart their financial destiny through the protection of bankruptcy," says [co-author] Ira Distenfield. "Right now, for perhaps the last time in our history, Americans have the power to easily file for bankruptcy on their own, without an attorney, and gain the benefits of debt relief. That's what 'We The People's Guide to Bankruptcy' is all about. It provides a step-by-step, easy-to-read guide for filing for bankruptcy, without an attorney, and gaining a fresh financial start in life." n52

Just two months before the WTP book was announced, a different press release was issued, informing the world that WTP had been acquired by Dollar Financial, a self-described "leading international financial services company offering a range of consumer financial products to our customers, many of whom receive income on an irregular basis or from multiple employers." n53 Those financial products include "check cashing, short-term consumer loans, money orders and money transfers." n54

Now look at the definitions of "assisted person," "bankruptcy assistance" and "debt relief agency." Here's what we think would happen:

. WTP as a document services company IS a debt relief agency. This one is a no-brainer because WTP's services make it a bankruptcy petition preparer, which is expressly included in the DRA definition.

. The WTP "supervising attorney" IS NOT a debt relief agency because he is an employee or agent of a bankruptcy [*298] petition preparer and fits into one of the specific exceptions.

. The authors of the book ARE NOT debt relief agencies because they fit into the exception for authors of copyrighted works. n55

. Suppose the WTP supervising attorney is engaged by the customer after it's determined, presumably with the assistance of the supervising attorney, that the customer really does need a lawyer to handle the bankruptcy. If the supervising attorney takes on the engagement, but remains an employee or agent of WTP, then the DRA provisions still DO NOT apply. If the attorney takes the case independently of his WTP agency, the attorney IS a debt relief agency.

What about WTP's new owner, Dollar Financial? The answer here is tricky and will be affected by the company's corporate structure and how WTP is treated within it, although we note that there's no exception in the DRA definition for corporate relatives. But it's possible that Dollar Financial is a debt relief agency because it is, through WTP, providing bankruptcy assistance to assisted persons. The creditor exception doesn't apply because Dollar Financial isn't working out an arrangement with respect to its own debt, but the debtor's obligations to all of her creditors.

If you caught all these liability triggers, congratulations (and if you caught some we missed, tell us)! Our point here is to demonstrate that application of the DRA provisions is going to be far from easy; the possibilities for complicated arrangements like that of WTP are limited only by the human imagination, combined with a desire to make money. n56

TRAP #2: DROP THE YELLOW PAGES AND PUT YOUR HANDS IN THE AIR!

Attorneys experienced in consumer bankruptcy cases may be shocked to learn that liability problems loom before a client walks in your office. You cannot even advertise your services without BAPCPA governing your behavior. Under BAPCPA, debtors' attorneys are required by law to make several "disclosures" beginning with their advertisements. n57

Any attorney who fits the definition of a "debt relief agency" under [*299] BAPCPA must comply with its regulation of advertisements of bankruptcy services. n58 There are two separate, though similar, provisions on advertising. n59 These provisions are among the most confusing and convoluted in BAPCPA. Code 528(a) says that a debt relief agency shall:

(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. n60

Code 528(b) states:

(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 [*300] 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. n61

This whole provision reminds us of "The Scarlet Letter." According to Congress, sinful bankruptcy attorneys must be branded in order to warn society of their wicked ways.

There's a lot of substance to complain about as well. First, we are not constitutional scholars by any stretch, but you don't have to be one to wonder about First Amendment issues. n62 Expect constitutional challenges of this (and other) provision mandating or prohibiting attorney speech. n63

Second, we confess that we are not precisely clear how the two subsections interact. We have developed a 6-color, 4-column side-by-side comparison chart, highlighting the similar language in the two provisions, and we still can't make sense of it. Here is the chart (sans color) for your perusal:

[*301]

Cite	Provision	Cite	Provision

528(a)(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	528(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.
528(a)(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.	528(b)(2)	(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.

Key: Language in italics is definitional.
Small Caps identify the defined term.
CAPITALIZED language describes how the disclosure must appear.
Language in bold is the required disclosure.
As you can see, there is a lot of duplication in the language of the two provisions. Whether (a) and (b) are to be read together, or whether each is intended to address only the advertisements specifically described within it is a mystery.

Let's start with subsection (a)(3), which describes what we call an "explicit bankruptcy ad." It requires that:

[*302]

any ad of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public clearly and conspicuously disclose that the services or benefits are with respect to bankruptcy relief.

Subsection (a)(4) requires that ads described in (a)(3) clearly and conspicuously include the "Scarlet Letter" disclosure:

"We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."

Subsection (b)(2)(A) describes another kind of ad, which we call a "credit assistance ad." It requires that:

any ad indicating that the DRA provides assistance with respect to

. credit defaults,

. mortgage forclosures,

. eviction proceedings,

. excessive debt,

. debt collection pressure or

. inability to pay any consumer debt

directed to the general public clearly and conspicuously disclose that the assistance may involve bankruptcy relief.

Subsection (b)(2)(B) requires that credit assistance ads include the Scarlet Letter disclosure.

As you can see, the difference between Code 528(a) and 528(b)(2) is only in the description of the ads. In both cases, the mandated disclosures are the same: you must mention "bankruptcy relief" under Title 11, and include the Scarlet Letter statement.

Disclosure must be clear and conspicuous (although what "clear" might have meant to this anonymous drafter is anyone's guess.) n64 Although 528(b)(2)(B) doesn't require it to be disclosed "clearly and conspicuously," you wouldn't want to do otherwise.

Subsection (a)(3) includes examples of what "directed to the general public" means. But it is unclear whether these examples also apply to the phrase as used in subsection (b).

Subsection 528(b)(1), although awkwardly constructed, is apparently an attempt to define "advertisement of bankruptcy assistance services." Subparagraph (A) brings in Chapter 13 ads, whether they mention Chapter 13 or not. Subparagraph (B) includes ads that "could lead a reasonable consumer to [*303] believe that debt counseling was being offered," which we call debt counseling ads.

It is not clear whether this definition applies only within 528(b), or whether it also applies to the phrase as used in subsection (a)(3). n65

With these definitions, there are four different descriptions of the covered advertisements:

[il3.] . Explicit bankruptcy ads 528(a)(3): an advertisement of bankruptcy assistance or of the benefits of bankruptcy.

. Chapter 13 ads 528(b)(1)(A): an advertisement of bankruptcy assistance services or of the benefits of bankruptcy includes Chapter 13, whether it is mentioned or not.

. Debt counseling ads 528(b)(1)(B): an advertisement of a "federally supervised repayment plan" or similar statement that could lead a reasonable consumer to believe that debt counseling is being offered when in fact the services are directed to providing bankruptcy assistance, either under Chapter 13 or otherwise.

. Credit assistance ads 528(b)(2): an advertisement indicating that the DRA provides assistance with credit defaults, mortgage foreclosures, eviction, excessive debt, debt collection pressure or inability to pay consumer debts.

Setting aside all the terrible drafting, if an ad by a DRA falls within one of these four descriptions, two clear and conspicuous disclosures are required:

. the Scarlet Letter statement must be included, and

. the ad must disclose that the assistance may involve bankruptcy relief.

What happens if you make a mistake? BAPCPA provides several means of enforcement. n66 First, the debtor can avoid any obligation to the attorney, based solely on a non-complying advertisement. n67 Code 526(c)(1) provides:

Any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of ... section 528 shall be void [*304] and may not be enforced by any Federal or State court by any other person, other than such assisted person. n68

This provision allows a debtor who received competent and effective representation to walk away from any liability to the attorney because the attorney's ad failed to include the required disclosures. There is no express requirement that reliance be shown, nor even that the client prove she saw the ad.

Second, Code 526(c)(2) gives the client several affirmative remedies for any violation of the advertising requirements. The debtor may recover:

. all fees and charges that the attorney received,

. actual damages, and

. attorney's fees and costs

if the client has been harmed by the attorney's intentional or negligent violation. n69 Unlike the enforcement bar in subsection (c)(1), this section appears to require a causal relationship between the advertisement and the harm. n70

Injunctions and other remedies are available to state officials on behalf of their citizens. n71

Here's the real booby trap: As discussed below in Trap #4, BAPCPA prohibits the attorney from advising the debtor to incur debt in contemplation of filing, including incurring debt to pay the attorney's fee. (Even before BAPCPA, attorneys who let their clients pay them after filing found themselves holding nothing but a dischargeable debt. n72)

So what does this provision accomplish by declaring the debtor's obligation voidable? Since payment has to be made before filing, what other obligation does the debtor have to the attorney after the petition is filed? n73 Although only a few consumer cases see any action beyond the 341 meeting and reaffirmation negotiations, this language will be important in those cases that do. In jurisdictions where the courts do not permit the attorney to [*305] withdraw for nonpayment in post-petition proceedings, this provision is not an issue. The attorney remains in the case and the debtor has no payment obligation. But in jurisdictions where the courts permit the attorney to withdraw if a post-petition fee is not paid, this provision becomes critical. This provision prevents the attorney from enforcing that payment obligation against the debtor.

Indeed, if the advertising rules have been violated, this provision appears to give the debtor - or trustee - a claim against the attorney for return of all fees - pre-and post-petition - and any other actual damages, including the attorneys fees and costs expended to recover it. After all, if the contract is voidable (or according to the statute, "void" at the option of the debtor), isn't the next step to demand the money be returned? The attorney can't get his work back, but it looks like the debtor can get her fee back. And if the debtor doesn't ask for it, the trustee will. The advertising violation occurs before the bankruptcy is filed, so the debtor's cause of action against the attorney is property of the estate.

Finally, if the trustee can enforce the debtor's cause of action for violations of the advertising provisions, then this is also the case for all violations of Code 526, 527, and 528! n74

This is obviously a bad result, and one the attorney will want to avoid. So debtors' attorneys are going to do their best to comply. Despite the messy language, compliance with the advertising provisions seems easy enough: say the services relate to bankruptcy and include the Scarlet Letter language.

Yet think about the nature of advertising. What do you do if the statute goes into effect before your ad in the Yellow Pages renews? What if someone retains an old firm brochure? And what if you advertise in another language? The statute does not require (or permit) translation.

We don't have answers for these questions, but we bet your local bankruptcy judges will use their good sense.

This advice won't help the domestic relations attorney or class action lawyer whose legal advice brands him a DRA. He won't be thinking about bankruptcy at all when he places his ads and won't have time to comply before his advice comes out of his mouth! In our opinion that's a good reason to exclude him from the heavy burdens imposed on DRAs.

TRAP #3: SHHHH! BE CAREFUL WHAT YOU SAY

Consumer bankruptcy attorneys n75 have always been required to perform according to their retainer agreements, by both contract law and ethics rules. [*306] BAPCPA turns a natural and normal part of the attorney-client relationship - "You pay, I perform" - into a draconian series of duties and penalties destined (and surely intended) to snag debtors' attorneys.

Section 526 is the "sadistic" provision of BAPCPA. It will tie you up in knots and then punish you for any failure to perform exactly as instructed. Section 526 addresses 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; n76

... .

(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;

... .

(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. n77

Let's break this provision down into its component parts.

First, this section applies to debtors' attorneys, since they are the attorneys intended to be included in the definition of "debt relief agency" under Code 101(12A). n78

Second, the subsection says that DRAs shall not fail to perform any service that they "informed" a prospective/actual assisted person ["PAAP"] they would provide in connection with a case or proceeding under title 11. n79

Note that the DRA does not have to "promise" or "contract" or otherwise be legally or even morally obligated to perform the service in order to be stung by this provision's lash. You merely have to "inform" a PAAP that you will provide it. No casual statement appears to be excluded. Yellow Pages [*307] ads would seem to fall within its scope. Absence of consideration or reliance offers no apparent defense because prospective clients are included. And finally, failure to cooperate with the attorney does not seem to be an excuse.

So, for example, if you say, "I'll pick you up on my way to court" and your car breaks down, you could be in violation of this provision!

Third, as a DRA, you violate subsection (3) if you:

. misrepresent to a PAAP

. directly or indirectly

. affirmatively or by material omission

. the services you will provide, or

. the benefits and risks that may result by filing bankruptcy. n80

This requirement is in addition to the obligation in subsection (1) to perform all the services you say you will. Here, you are liable for "misrepresentation," a term not defined by the statute. n81 The misrepresentation does not need to be material; "material" modifies only the "omission" provision. n82

You could run afoul of this provision if your prospective client dissolves in a pool of tears and you say to the sobbing debtor, "everything will be okay" when you know that everything is a mess and might continue to be even after filing. n83 This statement is made by a DRA to a PAAP and directly and affirmatively misrepresents the benefits that may result by filing. It also indirectly and materially omits certain disclosures, like the loss of non-exempt property or the possibility of being hounded into the grave by creditors if you fail to make payments in your Chapter 13.

You could even be found to have violated the language of this provision if you understate the services that you will provide. Suppose your client pulled a disappearing act and a deadline is fast approaching. To protect your client, you call the trustee to arrange an extension and prepare and file an agreed order to that effect. You've upheld your duty as an attorney, but failed as a DRA if you didn't tell your client you'd perform such a service. We hope the courts would find the statement is not a "misrepresentation" or, perhaps, an omission that isn't material.

The language of paragraphs (1) and (3) does not seem to admit the possibility of correction based upon new facts, as in:

[*308]

. "I told you we would file a Chapter 7 but that was before I discovered that your wife earned $ 25,000 last year as a teacher's aide, putting you over the median income. I know she lost her job in a school cutback but when we met, you described her as 'unemployed,' which is correct but not for this purpose."

. "Yes, I told you that we would represent you in bankruptcy but before we filed, your check for our retainer bounced."

. "Yes, we agreed that we would file your petition and your schedules for you but the information you provided has turned out to be, after inquiry, totally fraudulent and you won't give us the real figures." n84

Although a court may properly find that these statements do not constitute "misrepresentations" under paragraph (3), they fall clearly under the language of paragraph (1) as services a DRA informed a PAAP would be provided.

Now that the provision has snagged you, what is the penalty? At a minimum:

As in Trap #2, a contract for bankruptcy assistance between the DRA and the assisted person that doesn't comply with the "material requirements" of Code 526, 527 or 528 is unenforceable by the DRA but may be enforced against the DRA. n85 The debtor can make you perform and you can't make the debtor pay.

What happens? The DRA is liable to the AP for:

. Any fees or charges received by the DRA from the AP for providing bankruptcy assistance

. Actual damages, and

. Reasonable attorneys' fees and costs. n86

As we mentioned in Trap #2, these damages may become a claim of the estate if they arose from conduct (or omission) prior to filing.

The news isn't all bad. Even though BAPCPA regulates a lawyer's relationship with a prospective assisted person, that same person is left high and [*309] dry when it comes to enforcement. When Code 526 gets to the debt relief agency's actual liability, only the "assisted person" gets mentioned, meaning the prospective assisted person has no remedy. Why scoop all these potential clients into the statute's grasp and give them no remedy? It's another example of the sloppy drafting that is the hallmark of this legislation. n87

TRAP #4: "WE TAKE CHICKENS BUT NOT VISA."

Code 526 sets out specific activities and conduct that are forbidden if you are a debt relief agency. Among them is this mandate:

A debt relief agency shall not - advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title. n88

Four different interpretations of this language are possible, each presenting a different description of what the DRA is prohibited from doing. To understand these interpretations, we need to break down the statutory language, and understand the use of "or." n89

Here are the statutory building blocks we are working with:

Interpretation 1

A debt relief agency shall not advise an assisted person or prospective

assisted person
. to incur more debt
. in contemplation of such person filing a case
or
. to pay an attorney fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

Translation: A debt relief agency shall not:

1. Advise an assisted person or prospective assisted person [collectively, "PAAP"] to incur more debt in contemplation of filing a case; or

2. Advise a PAAP to incur more debt to pay an attorney [*310] fee or charge for services performed as part of preparing for or representing a debtor in a case.

Interpretation 2

A debt relief agency shall not advise a PAAP
. to incur more debt in contemplation of such person filing a case
or
. to pay an attorney fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

Translation: A debt relief agency shall not:

1. Advise a PAAP to incur more debt in contemplation of filing a case; or

2. Advise a PAAP to pay an attorney fee or charge for services performed as part of preparing for or representing a debtor in a case.

Interpretation 3

A debt relief agency shall not
. advise a PAAP
. to incur more debt in contemplation of such person filing a case
or
. to pay an attorney fee
or
. charge for services performed as part of preparing for or representing a debtor in a case under this title.

Translation: A debt relief agency shall not:

1. Advise a PAAP to incur more debt in contemplation of filing a case; or

2. Advise a PAAP to pay an attorney fee; or

3. Charge for services performed as part of preparing for or representing a debtor in a case.

[*311]
Interpretation 4

A debt relief agency shall not

. advise a PAAP

. to incur more debt

in contemplation of such person filing a case

or

. to pay an attorney fee

or

. charge for services performed as part of preparing for or

representing a debtor in a case under this title.

Translation: A debt relief agency shall not:

1. Advise a PAAP to incur more debt in contemplation of filing a case; or

2. Advise a PAAP to incur more debt to pay an attorney fee; or

3. Charge for services performed as part of preparing for or representing a debtor in a case.

The correct interpretation is the first one: Congress doesn't want debtors borrowing when they know they're going to file bankruptcy, not even to pay the attorney. Let's forget for a moment how unlikely it is that the attorney will get paid otherwise. (That's a policy disaster, not a drafting one.)

What this means is that debtors' attorneys can no longer do four things:

1. They can no longer take credit cards. n90 (They can take debit cards, but as with a check, they cannot file the petition until they are sure the amount has arrived in their account.)

2. They can't suggest that the debtor borrow the money from a family member or friend.

3. They cannot answer if the debtor asks whether borrowing money to pay the attorney's fee is an option.

4. They can't accept money that the debtor insists was a gift from family or friends, unless the intent to make a gift is clearly documented.

We've established that the likely intent of the statute is not to deny debtors' attorneys all payment, nor to prohibit them from charging for their services but only to prohibit payment obtained by incurring debt. What more does this mean for debtors' attorneys? Can they acquire unencumbered assets of the debtor to pay their fees (however unlikely it is that the debtor [*312] has unencumbered assets)? Probably yes, so you can drain the debtor's bank account or take his chickens, but not his promise to pay.

Under this prohibition, can attorneys barter for future goods or services from the debtor - say, eggs, or labor? Probably not, as this contractual obligation would not only be dischargeable in bankruptcy, it would create an impermissible debt.

The bottom line of this trap is that attorneys representing debtors will have to document carefully how their fees are paid or risk falling "afowl" of this prohibition.

It's also important to remember that the debt prohibition doesn't just apply to the attorney's fee. Under this provision, counsel can't advise the debtor to incur additional debt for any purpose, even if it's in the best interest of the client to do so. n91

Suppose you properly instruct your client in your first meeting not to use her credit card or incur any other debt. Between the initial consultation and the filing of the petition, your client calls and says, "My son is sick and he has to go to the doctor. I don't have insurance or any money to pay for the doctor or for my son's medicine. Can I put it on my Visa?"

What is the attorney to do? The attorney has given the required advice at the initial meeting, and the client has scrupulously followed it. Because a bankruptcy is in the works for this client, the Visa charge would be a debt incurred in contemplation of filing, so Code 526(a)(4) prevents the attorney from saying "You can use your Visa." This is true even though nothing else in the law makes this type of debt improper; it's certainly not enough to warrant a dischargeability complaint for fraud, and the client isn't gaming the system in an effort to take advantage of her creditors. n92

The attorney can avoid this conundrum by following the lead of generations of criminal lawyers. At the initial meeting, the attorney can give the required advice ("I cannot advise you to use your credit cards any more") and follow up later with a warning ("Don't tell me if you did it.") This protects the lawyer from giving the prohibited advice, and it will protect the right of the client to incur additional debt in emergency situations. Of course, it's terrible lawyering, but it's the only real option for the attorney.

[*313]

TRAP #5: "I CAN'T TELL YOU THAT WHAT I'M TELLING YOU IS WRONG."

Code 527 is benignly entitled, "Disclosures," but let's look at some of the information DRAs must provide under pain of sanctions.

Code 527(a)(2)(B) requires the DRA, via written disclosure, to advise the assisted person that:

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. n93

Hear the snap of a trap closing? In Code 527(c), we learn that the DRA must provide the assisted person with "reasonably sufficient information" on, among other things, "how to value assets at replacement value" and "how to value exempt property at replacement value as defined in section 506." n94

The problem here actually comes from amended Code 506, which defines "replacement value" as "the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time the value is determined." n95

The trouble is that this definition only applies to personal property that secures a consumer debt. n96 Code 527, then, requires the attorney to give the AP advice that isn't an accurate statement of the law. What's worse is that the debtor, acting on the attorney's "advice," could attempt to ascertain the "replacement value" of all her property, which would lead to incorrect information being included in the schedules.

Plenty of retail outlets sell used household goods, but the price they charge for those goods is not the same as what they'd pay the debtor to buy them. Between these two measures of value, it's the latter that better reflects what the debtor's property is worth, especially since most debtors plan to keep, not replace, their property.

For the debtor, this means the property will be overvalued in the schedules. It could also mean that property that would be exempt if valued properly is worth more than the available exemption. For the attorney, it could mean trouble under the new Code 707(b)(4)(D) certification standard: the schedules are incorrect and the attorney knows it.

[*314]

TRAP #6: SURPRISE! THE JOKE MAY BE ON YOU

Attention creditors' attorneys: Did you know that you now have to certify that what is in your client's motion isn't true?

Okay, maybe we're being a bit dramatic, but the fact is that, while sanctions provisions against debtors' attorneys are a well-known part of the new bankruptcy law, creditors and their attorneys aren't completely off the hook. Buried deep under Code 707(b)'s layers of expense allowances and income reductions is a little-noticed provision that would allow courts to punish creditors and their lawyers who abuse the abuse provisions of 707(b). Here it is, in full:

(A) Except as provided in subparagraph (B) and subject to paragraph (6), the court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may award a debtor all reasonable costs (including reasonable attorneys' fees) in contesting a motion filed by a party in interest (other than a trustee or United States trustee (or bankruptcy administrator, if any)) under this subsection if -

(i) the court does not grant the motion; and

(ii) the court finds that -

(I) the position of the party that filed the motion violated rule 9011 of the Federal Rules of Bankruptcy Procedure; or

(II) the attorney (if any) who filed the motion did not comply with the requirements of clauses (i) and (ii) of paragraph (4)(C), and the motion was made solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title. n97

Let's take the statute one provision at a time.

[*315] [mg f:'abk20402.eps',w28.,d25.8]

1. The court does not grant the motion

Neither the creditor nor its attorney will be liable to the debtor if the motion to dismiss or convert the case as an abuse is successful. That much is obvious from the language of the section.

The case that gets litigated all the way to a decision on the merits, however, is the exception, so the phrase "the court does not grant the motion" takes on a shade of ambiguity. Does it mean that the debtor must prevail on the merits in order to recover or that sanctions are precluded only when the court actually orders dismissal (or, with the debtor's consent, conversion) of the case?

We don't think this ambiguity will cause much problem. The main point of Code 707(b)(5) is to punish misconduct. Faced with a creditor that settles a motion that should never have been made, courts aren't likely to focus on the debtor's lack of success on the merits but on enforcing the remainder of the section, to which we now turn.

2. The position of the party that filed the motion violated Rule 9011

This language seems to state the obvious because sanctions are allowed [*316] any time a motion violates Rule 9011. But if you compare this language with other sections of the Code directed at misbehaving creditors, we think there's an argument that the language makes sense and is not redundant. It's just another check on creditor behavior, which are common in the Code:

. If a creditor alleges fraud in a dischargeability complaint, its position must be "substantially justified." n98

. Damage awards for violations of the automatic stay require "willfulness." n99

. Involuntary petitions have to be in "bad faith" if the debtor wants actual and punitive damages. n100

Viewed in context, the "position of the party violated Rule 9011" requirement is simply the standard Congress chose to limit abusive filings by creditors. Rule 9011 remains in full force and effect.

There could be an important difference, however, between Rule 9011 as a standard in 707(b)(5) and the Rule itself. The Rule is tied to documents filed with the court, which would be the motion to dismiss. The "position of the party" language goes beyond the document, looking instead to the party's overall conduct, including what it did (or should have done) before making any filing with the court.

3. The attorney who filed the motion did not comply with the requirements of clauses (i) and (ii) of paragraph (4)(C)

The phrase "the requirements of clauses (i) and (ii) of paragraph (4)(C)" means that when you sign your creditor client's motion to dismiss the debtor's case as an abuse, you are certifying that you have: