

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION**

In re:)	
)	
FRANCIS I. McCARTNEY)	
BEVERLY E. McCARTNEY)	Case No. 05-58001-RFH
)	
Debtors)	Chapter 7 (Joint)
)	

**UNITED STATES TRUSTEE’S OBJECTION TO
MOTION TO DETERMINE ATTORNEY STATUS**

Felicia S. Turner, United States Trustee for Region 21, objects to the Motion to Determine Attorney Status (the “Motion”) filed by the Debtors, and states:

BACKGROUND

On October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “BAPCPA”) became effective.

On that same date, the Debtors filed a joint voluntary petition for relief under chapter 7 of title 11 *et seq.* of the United States Code (the “Bankruptcy Code”). As a result, the provisions of the BAPCPA apply to this case.

On October 31, 2005, counsel for the Debtors filed the Motion. The facts of this case have no bearing on the issues the Motion raises or the relief requested therein. Indeed, the Motion only seeks to inquire whether attorneys are subject to the “debt relief agency” provisions contained in Sections 526, 527 and 528 of the Bankruptcy Code. As set forth below, the answer to that question is an unequivocal yes.

ARGUMENT

**AN ATTORNEY CONSTITUTES A “DEBT RELIEF AGENCY”
UNDER THE BAPCPA AND MUST COMPLY WITH ITS REGULATIONS.**

In arguing that an attorney should be excluded from the definition of “debt relief agency” and its attendant regulations, the Motion ignores the statutory framework, legislative history and

Congressional intent.¹ Those three aspects, when viewed together, point to the obvious conclusion that an attorney qualifies as a debt relief agency.

A. The Statutory Framework Contemplates that an Attorney is a Debt Relief Agency.

The BAPCPA creates a new term, “debt relief agency,” defined in Section 101(12A) of the Bankruptcy Code as “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. Section 101(4A) defines the term “bankruptcy assistance” to mean:

[A]ny 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.*

(Emphasis added). Section 101(3) defines the term “assisted person” to mean “any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000”, *i.e.*, persons of moderate and less than moderate means.

New Sections 526, 527 and 528 of the Bankruptcy Code impose obligations and prohibitions on debt relief agencies designed to, *inter alia*: (i) protect consumer debtors of modest means from becoming debtors under the Bankruptcy Code without full awareness that they are doing so or without knowledge of the obligations and consequences attendant on doing so; and (ii) prevent those in the business of providing document preparation, planning, or other bankruptcy-related services from engaging in misleading or exploitative conduct in their dealings with debtors or prospective debtors.

Section 526 prohibits a debt relief agency from: (1) failing to perform any service that it promised an assisted person or prospective assisted person it would perform in connection with a

¹ The sole authority relied on in the Motion is a recent order entered *sua sponte* by Judge Lamar W. Davis, Jr. (Bkrtcy. S.D. Ga.) on the morning of the effective date of the BAPCPA. To the best of the undersigned’s knowledge, that order has not been enforced in any proceeding and, to the contrary, is pending on appeal before the United States District Court for the Southern District of Georgia (Case No. 4:05-cv-00206-WTM). Moreover, the order itself acknowledges that: (i) “the language defining debt relief agencies is broad enough on its face to include attorneys”; (ii) “the reference to ‘providing legal representation’ in § 101(4A) suggests that attorneys are covered [under the definition of ‘debt relief agency’]”; and (iii) the published legal commentary on the BAPCPA has assumed that the term “debt relief agency” includes attorneys.

bankruptcy case; (2) making any statement or counseling or advising any assisted person or prospective assisted person to make a statement in a document filed in a bankruptcy case that is untrue or misleading or that, upon the exercise of reasonable care, it should have known was untrue or misleading; (3) misrepresenting to an assisted person or prospective assisted person the services that it will provide or the benefits and risks that may result if the person becomes a debtor in a bankruptcy case; or (4) advising an assisted person or prospective assisted person to incur more debt in contemplation of filing a bankruptcy case or for the purpose of paying an attorney or bankruptcy petition preparer for services performed in preparing for or representing the assisted person.

Section 526 further specifies that any waiver by an assisted person of these protections is unenforceable. It also provides civil remedies and penalties for any violation of Sections 526, 527 or 528.

Section 527 requires debt relief agencies to provide assisted persons with certain information, notices and disclosures pertaining to the rights and obligations of bankruptcy debtors, including: (i) notice of the right to proceed *pro se* or to hire an attorney or bankruptcy petition preparer; (ii) information on how to complete the bankruptcy schedules, value assets and determine what property is exempt; and (iii) notice of the obligation of debtors under the Bankruptcy Code to provide truthful and accurate information and of the potential consequences of failing to do so.

Section 528 requires debt relief agencies to provide assisted persons to whom they provide bankruptcy assistance a copy of a written contract explaining clearly and conspicuously the services the agency will provide, the fees or charges for such services, and the terms of payment. In addition, Section 528 requires debt relief agencies to disclose in their advertising that they are debt relief agencies, that the assistance they provide may involve bankruptcy relief, and that they are in the business of helping people file for relief under the Bankruptcy Code.

In interpreting the above provisions of the BAPCPA, this Court must follow the plain meaning rule. As explained by the Supreme Court, “[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

The language of Sections 101(12A) and (4A) is broad enough on its face to include attorneys. Section 101(12A) defines a “debt relief agency” as “any person who provides any bankruptcy assistance to an assisted person ... *or* who is a bankruptcy petition preparer under section 110 ...” (Emphasis added). Section 101(4A) defines “bankruptcy assistance” to include “providing legal representation with respect to a case or proceeding under the [Bankruptcy Code].” There is no doubt that bankruptcy attorneys are persons that provide legal representation with respect to bankruptcy cases. While section 101(12A) lists several exclusions from the definition of debt relief agency (*e.g.*, nonprofit organizations, depository institutions, and distributors of copyrighted works), attorneys are not among them. Thus, the plain and ordinary meaning of the statutory language used to define “debt relief agency” encompasses attorneys, and the reference to “legal representation” should not be narrowly read as “unauthorized legal representation.”

Aside from the statutory language used to define “debt relief agency” and “bankruptcy assistance,” other provisions of the legislation also indicate that Congress intended to include attorneys and lawful legal representation within the purview of the provisions regarding debt relief agencies. Notably, Section 526(d)(2) provides that no language in Sections 526, 527, or 528 shall be deemed to:

- limit or curtail the authority or ability –
- (A) of a State or subdivision or instrumentality thereof to determine and enforce qualifications for the practice of law under the laws of that State; or
- (B) of a Federal Court to determine and enforce the qualifications for the practice of law before that court.

Simply, this provision would be meaningless if the provisions regarding debt relief agencies did not apply to attorneys.

Also, Section 527(b) requires debt relief agencies to provide assisted persons with a written notice containing the following disclosures:

If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. **THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST.** Ask to see the contract before you hire anyone.

It makes little sense to require someone other than an assisted person's attorney to disclose to the assisted person that the law requires the attorney to provide the assisted person with a written contract specifying what the attorney is going to do and how much it will cost. While one may argue that this requirement is a bit redundant, it is commensurate with the requirement of a non-attorney bankruptcy petition preparer who, before preparing a voluntary petition or other bankruptcy documents for his/her client, must disclose that "you can get help in some localities from a bankruptcy petition preparer who is not an attorney."

Accordingly, when reviewing these statutory provisions together as a whole, one can only conclude that an attorney falls within the definition of a "debt relief agency."

B. The Legislative History of the BAPCPA Evidences Congressional Intent to Treat Attorneys as Debt Relief Agencies.

The legislative history of the BAPCPA eliminates any doubt that Congress intended the term "debt relief agency" to encompass attorneys and lawful legal representation. In March 2005, while the BAPCPA was under consideration by the Senate, Senator Russ Feingold offered an amendment to exclude attorneys from the definition of "debt relief agency." The amendment would have changed Section 101(12A) to read, in relevant part, as follows:

The term "debt relief agency" means any person, other than an attorney or an employee of an attorney, 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 ...

Id. It would also have deleted the words "an attorney or" from the title of the notice required by Section 527(b) to make it read, "IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM A BANKRUPTCY PETITION PREPARER," rather than "IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER." (Emphasis added).

Senator Feingold discussed his amendment on the floor of the Senate as follows:

Another of my amendments deals with a provision that bankruptcy lawyers are very concerned about. This is amendment No. 93 on debt relief agencies. The amendment is strongly supported by the American Bar Association. This amendment would exclude lawyers from the provisions dealing with "debt relief agencies" in sections 226 to 228 of the bill. As currently written, the bill would impose a number of unnecessary burdens on the attorney/client relationship in bankruptcy proceedings. Subjecting attorneys to the "debt relief

agency" provisions will add little substantive protection for consumers, but require substantial amounts of extra paperwork and cost.

Requiring lawyers to call themselves "debt relief agencies" will do more to confuse the public than to protect it. I think members of the public generally understand what the word "lawyer" means, but the phrase "debt relief agency" is vague and unhelpful. It is also misleading, because there are significant differences between lawyers and nonlawyers, but both would be identifying themselves as debt relief agencies under this bill.

Only lawyers are permitted to give legal advice, to file pleadings, or to represent debtors in bankruptcy hearings. Perhaps most importantly, only lawyers are bound to confidentiality by the attorney-client privilege. These distinctions are important to consumers, but they would be obscured by the bill as written.

Furthermore, these provisions would apparently apply to any law firm that provides bankruptcy services, even if that law firm were primarily providing landlord-tenant advice even to landlords criminal defense services, or other unrelated services. Large firms with only one bankruptcy practitioner may be required to advertise themselves as "debt relief agencies."

I think this will be immensely confusing to consumers without any apparent benefit. The substantive provisions on "debt relief agencies" would add little to the already existing laws and regulations governing attorney conduct. Attorneys currently have extensive duties relating to disclosures, fees, and ethical obligations. These provisions would micromanage that relationship without adding any meaningful substantive protection. I think the intention of the bill's drafters was to prevent attorneys from tricking consumers into bankruptcy by not telling consumers from the beginning that they work on bankruptcy issues, and then sort of springing the idea of bankruptcy on the consumer. But rather than simply prohibiting this sort of unethical behavior, the bill tries to micromanage the attorney-client relationship by requiring large amounts of additional paperwork and disclosure. Extra paperwork substantially burdens the consumer and adds to the cost of bankruptcy. Given that attorney conduct is already regulated, I believe these provisions are unnecessary as applied to attorneys and provide no clear benefit.

151 Cong Rec. S2306 (daily ed. Mar. 09, 2005) (statement of Sen. Feingold).

Because Congress did not adopt Senator Feingold's amendment, it is clear from the legislative history of the BAPCPA, as well as its plain language and the design of the statute as a whole, that Congress intended for the provisions governing debt relief agencies to apply to attorneys.

C. Congress Has Consistently Imposed Regulations on Attorneys Beyond Basic State Law Requirements.

The Motion asserts that the “professional and ethical standards of the State Bar of Georgia” should supplant the new regulations contained in the BAPCPA. In so doing, the Motion ignores Congress’ power, and consistent practice, to regulate attorneys in areas of consumer protection, notwithstanding existing standards of professional conduct enacted by state legislatures or local rules of court.²

This is not the first time Congress has extended the reach of consumer protection legislation to attorneys. There is no question, for example, that debt collection attorneys are subject to the requirements of The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1601 *et seq.* See *Crossley v. Lieberman*, 868 F2d 566, 569 (3rd Cir. 1989). If a debt collection attorney qualifies as a “person ... who regularly collects or attempts to collect ... debts owed or due or asserted to be owed or due another” within the contemplation of Section 1692a(6) of title 15, there is no reason why a bankruptcy attorney would not qualify as a “person who provides any bankruptcy assistance” within the contemplation of Section 101(12A) of the Bankruptcy Code.

Likewise, Congress has subjected attorneys to federal regulation for the purpose of protecting investors. Section 307 of the Sarbanes-Oxley Act of 2002 (codified as 15 U.S.C. § 7245) requires the U.S. Securities and Exchange Commission to “issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission ... in the representation of issuers,” including certain specified requirements regarding the reporting of evidence of violations of the securities laws.

Accordingly, the provisions of the BAPCPA governing debt relief agencies are not unique in their application to attorney conduct. They are simply another effort by Congress to protect a segment of the public – in this case a vulnerable class of consumer debtors — from the detrimental acts of third parties, including attorneys, and emanate from an established and consistent pattern of

² The application of the BAPCPA in this regard is constitutional under the Tenth Amendment because Congress has express constitutional authority to establish federal bankruptcy laws (U.S. Const., Art. I, sec. 8), and nothing in the relevant provisions involves any federal commandeering of state resources. See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

Congressional action in this area.

CONCLUSION

Based on the foregoing arguments, the United States Trustee believes that an attorney qualifies as a debt relief agency under the BAPCPA. Accordingly, the United States Trustee requests that the Court hold that an attorney is included within the definition of “debt relief agency” contained within Section 101(12A) of the Bankruptcy Code and, therefore, must comply with the applicable provisions of Sections 526, 527 and 528 of the Bankruptcy Code. The United States Trustee further requests that the Court deny the relief requested in the Motion and grant such other and further relief as is just and equitable.

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Region 21

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2005, a copy of the foregoing Objection was served electronically via the Court's CM/ECF system to all parties so subscribed and by mailing a true copy first class mail to John K. James, Attorney for the Debtors, 1109 Russell Parkway, Suite 2, Warner Robins, GA 31088, to the Debtors, Francis and Beverly McCartney, 415 Nanette Drive, Byron, GA 31008, and to the Trustee, Joy Webster, Akin Webster and Matson, PC, P.O. Box 1098, Macon, GA 31202.

/s/ Elizabeth A. Hardy