

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

**In Re: Francis I. & Beverly E. McCartney,
Debtors**

**Chapter 7
Case No. 05-58001 RFH**

**BRIEF IN SUPPORT OF
MOTION TO DETERMINE ATTORNEY STATUS**

Introduction

This brief is submitted in support of the Motion To Determine Attorney Status filed by John K. James, attorney for the debtors in the above chapter 7 case. The petitioner is a member in good standing of the Georgia Bar and practices before this Court, representing both debtors and creditors. John K. James represents the above debtors and as such has standing to seek the relief sought in the Motion To Determine Attorney Status. The chapter 7 case has been filed and there is a case or controversy.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) was passed by Congress with the express intent of reducing chapter 7 and increasing chapter 13 bankruptcy filings. There were also several measures added to protect the consumer.

BAPCPA added a category of persons who file bankruptcies, a “debt relief agency” (Bankruptcy Code § 101(12A)), and defined their duties, limitations, and responsibilities (Bankruptcy Code §§ 526, 527, and 528). The issue before the Court is whether an “attorney” is a “debt relief agency.” If so, it would place unwarranted and unconstitutional restrictions and burdens on an attorney’s ability to practice law and to provide the proper and necessary information to an “assisted person,” or consumer debtor. Consequently, he would be unable to fulfill his legal responsibilities to his clients.

The Motion To Determine Attorney Status has been filed asking this Court to exclude members of the Middle Georgia Bankruptcy Bar from the definition of a “debt relief agency.” If this Motion is granted, these attorneys will be able to provide bankruptcy clients competent, accurate, and complete information and representation.

Three primary arguments support the Motion. First, the First Amendment guarantee of free

speech. If an “attorney” is a “debt relief agency” and subject to Bankruptcy Code §§ 526, 527 and 528, there will be an impermissible restriction on the attorney’s free speech. An attorney can not advise clients to incur debt when such advice may be appropriate. In addition, the restrictions on advertising language violates the First Amendment of the Constitution. As applied, the BAPCPA includes mandated advertising language that limits an attorney’s ability to effectively and accurately communicate with potential bankruptcy clients.

Second, the statutory interpretation of the relevant Code Sections. A statute must be interpreted for its plain meaning. Does a careful reading of the relevant Code sections require an “attorney” to be a “debt relief agency?” If statutes are ambiguous, the plain meaning must prevail. The plain meaning of Code §§ 101(4), 101(4A), and 101(12A), considered together, do not classify an “attorney” as a “debt relief agency.”

And third, the Congressional intent. Bankruptcy reform was first considered in 1994. Many of the enacted statutes were drafted in 1995 and the legislative history regarding attorneys and debt relief agencies is scant. Without a clear history, it is difficult to ascertain the specific intent of the lawmakers. Statutory interpretation, however, is the Court’s responsibility; in this case it must do so with little guidance. Absent this historical guidance, the plain language of Bankruptcy Code §§ 101(4), 101(4A), 101(12A), 526, 527, and 528 indicates Congress did not intend an attorney to be a debt relief agency.

First Amendment Issues

A. Restrictions on Attorney Advice

Bankruptcy Code § 526(a)(4) limits the advice a debt relief agency may provide an assisted person. 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. . .” Thus, if a client must surrender a vehicle, as is often the case when a depositor owned federal credit union is the secured creditor, a debt relief agency can not inform the client and advise an alternative measure. This may be the purchasing of another vehicle and incurring a debt the client fully intends to repay. Therefore, the post

filing scenario: the credit union will refuse to allow reaffirmation, the vehicle will then be surrendered, and the debtor will be unable to purchase a replacement. But if the attorney had provided proper legal counsel, this unintended result of bankruptcy reform would have been avoided. Hence, the restriction of the attorney's message not only produces an undesirable result, but also is a content based violation of the First Amendment.

Code § 526(a)(4) further prohibits a "debt relief agency" from advising a prospective debtor ". . . 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." Filing a bankruptcy petition, particularly after BAPCPA, involves the time and expertise of an experienced bankruptcy attorney. This attorney will charge fees, fees that were not contemplated prior to the bankruptcy consultation. Literal compliance with this Code section prohibits an attorney from advising a client to incur his own bankruptcy fees. This is an absurd result.

These examples of Code § 526, as applied, clearly substantiate violations of an attorneys' First Amendment guarantees, violations that prohibit him from "giving important, lawful information to their clients [which] cannot be reconciled with the First Amendment." Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 571, 580 (2005). Code § 526(a)(4) regulates the communications or messages between an attorney and the client. If the message or content was illegal or fraudulent, there would be an argument for the control; but the blanket restriction precludes advice that is often correct, necessary, and legal. To not give the advice would be an abrogation of an attorney's responsibilities.

Code § 526 only applies to a "debt relief agency." A stated purpose of BAPCPA is to insure assisted persons are provided competent legal assistance in Bankruptcy Courts. There are other bankruptcy preparing services, not attorneys or bankruptcy petition preparers, but still deemed debt relief agencies, who assist in the preparation of bankruptcy petitions. These services purport to provide "professionally prepared documents" for a flat fee, often under \$200.00. But what is really provided for

this low price? The competent legal advice required to file a bankruptcy can not be provided for under \$200.00. The clear implication, however, is that all advice necessary to file a bankruptcy is provided, when in reality it is not.

Attached as Exhibits A and B is web site information from two internet bankruptcy petition preparers. An assisted person reading Bankruptcy EZ's web page will conclude it is their salvation; all problems will be easily solved. In fact, this provider even claims to be a law firm. These are the debt relief agencies whose misleading message, inaccurate advertising, and incorrect advice must be regulated. (see www.bankruptcyez.com, & www.debtoraids.com.)

B. Restrictions on Attorney Advertising

Bankruptcy Code § 528 includes language that must be included in "debt relief agency" advertising. The requirement is specific: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." This express, content based requirement applies to all providing bankruptcy assistance, including those not licensed to practice law. This Code section's application is so inclusive that it will "actually create more confusion among debtors seeking assistance." Chemerinsky, at 578.

If all bankruptcy preparers must similarly advertise, an assisted person seeking to file bankruptcy will find it difficult to choose between a trained lawyer and a non legal petition preparer. An attorney can represent the debtor in court, file pleadings, and invoke the attorney-client privilege. Under the Code, however, an attorney is not permitted to advertise that he is an attorney. As a result, the assisted person may unwittingly retain non legal assistance.

The Supreme Court requires justification when statutes that regulate legal advertising restrict the free flow of information to the public. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) the Court sought justification for a ban on attorney advertising. The Arizona State Bar argued that restrictions on advertising helped decrease the incidence of poor legal assistance. The Court, however, was not persuaded and noted that "[r]estrictions on advertising, however, are an ineffective way of deterring shoddy

work. An attorney who is inclined to cut quality will do so regardless of the rule on advertising.” *Id.* at 378. Because the State Bar could not provide what the Court considered sufficient justification for the restriction, it allowed price advertising for services deemed routine, such as “the uncontested personal divorce, the simple adoption, the uncontested personal bankruptcy. . .” *Id.* at 372.

Attorney advertising must be accurate and not misleading. The Supreme Court will not tolerate otherwise: “. . . the Court has made it clear in *Bates* and subsequent cases that regulation - and imposition of discipline - are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive.” *In re RMJ*, 455 U.S. 191, 202 (1982). And the Court continued that “[t]ruthful advertising related to lawful activities is entitled to the protection of the First Amendment.” *Id.* at 203. An example of truthful advertising, attached as Exhibit C, is from the Bell South Warner Robins, Georgia Telephone Directory. It is related to a lawful activity, it is accurate, it is truthful, and it is not misleading. There is no overriding governmental interest in regulating the content of this advertising. The advertisement is commercial free speech entitled to First Amendment protection.

Attorney advertising is considered commercial speech and the standard for judicial review is “intermediate scrutiny.” If the speech is not misleading or does not support an unlawful activity, a three prong test is applied: (1) the government have a substantial interest in the regulation; (2) the regulation must support and advance the particular interest; and (3) the regulation must be “narrowly drawn”. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624, 2005 (citing *Central Hudson Gas & Elec. Corp. V. Public Servo Comm’n of N.Y.*, 447 U.S. 557 (1980)).

The Government has a substantial interest in promoting accurate, non misleading attorney advertising. Consumers contemplating bankruptcies have no knowledge of the process and must be properly and correctly advised. Thus, prong one is satisfied.

The second and third prongs, however, are problematic. Does Code § 528 support the government’s substantial interest? The goal of the statute is to limit the dissemination of misleading

information, allowing the consumer to make an informed hiring decision. However, if all providers are required to use precisely the same advertising language, how is the assisted person to distinguish between an attorney with legal training, and a bankruptcy petition preparer with no legal training? The former can represent the consumer in court proceedings, the latter can not. The former can provide legal advice, the latter can not. The BAPCPA advertising requirement will confuse, not assist, the consumer. This result does not support or advance the particular government interest. The second prong is not satisfied.

And finally, the advertisement requirement is not “narrowly drawn.” It applies to all debt relief agencies whether or not false and misleading advertising is used. Proper advertising that clearly states the services are provided for bankruptcy filing, the stated goal of the statute, is prohibited by Bankruptcy Code § 527 (see Exhibit A). Advertising should be reviewed on a case by case basis and not be subject to blanket restrictions. There are other less burdensome ways to control misleading commercial advertising. The third prong is also not satisfied.

The restriction on advertising is overbroad and overinclusive in the language and application. It will not guarantee the general public the accurate information necessary to properly select bankruptcy representation. How is the assisted person to know if he is retaining a lawyer, a bankruptcy petition preparer, or a service to fill out the forms? Thus, the compulsory disclosure of Code § 528 violates the First Amendment, and will, in practice, confuse the people it was intended to protect.

Statutory Interpretation

BAPCPA added a new term, “debt relief agency,” to the Bankruptcy Code, Code § 101(12A). A “debt relief agency” is “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money . . . or who is a bankruptcy petition preparer. . .” A person who is an officer, director, employee or agent of a person who provides this assistance is **not** a “debt relief agency.”

The term “attorney” does not appear in Code § 101(12A). Congress was certainly aware that attorneys are the primary preparers of bankruptcy petitions, yet it excluded them from the definition.

The term “attorney” is defined in Code § 101(4). An “‘attorney’ means attorney, professional

law association, corporation or partnership, authorized under applicable law to practice law.” Compare this definition to that in Code § 101(12A). In §101(4) there is no mention of a “debt relief agency.” Congress added the new category “debt relief agency” but neglected to include in the definition the term “attorney.” The lack thereof must be interpreted as an intended omission.

This interpretation is supported because § 101(12A) specifically includes a “bankruptcy petition preparer” as a “debt relief agency,” yet it excludes an “attorney.” Furthermore, an “attorney” is specifically excluded from the definition of a “bankruptcy petition preparer.” The plain meaning of the language in these interrelated statutes is that an “attorney” is not a “debt relief agency.”

Bankruptcy Code § 526(a)(4) prohibits, as mentioned above, a debt relief agency from advising an assisted person to incur additional debt. But there are instances when this is advisable and in the client’s best interests. It may be best for a client to purchase a vehicle. It may be best to refinance his residence in order to take advantage of lower interest rates. Or it may be best if the potential debtor’s daughter needs a cosigner on an application for a student loan. Is it proper for the attorney to advise the client not to cosign the student loan application? If an attorney is a debt relief agency, Code § 526 has a chilling effect on his primary responsibility, which is to provide competent legal advice and counsel.

In addition, suppose the client decides to file a chapter 13 bankruptcy. After a thorough review and extensive discussion of the client’s circumstances, a chapter 13 is determined to be the best option. During this discussion attorney fees have been disclosed, in fact disclosure is mandated by Code § 528(a)(1)(B). Since most debtors do not have the ability to pay these fees up front, the fee will be paid through the chapter 13 office. The attorney now is placed in the untenable position of complying with the disclosure required by Code § 528(a)(1)(B) but violating Code § 516(a)(4) by advising the client to file a chapter 13 and pay attorney fees. This result is both absurd and illogical. Only an attorney can give the legal advice required to file a bankruptcy. The conflict occurs only if an attorney is considered a debt relief agency.

Bankruptcy Code § 527 requires a debt relief agency to disclose specific information to an

assisted person. One disclosure is that an attorney may be retained for representation in legal proceedings. Why require an attorney to advise a potential debtor that he has the right to hire an attorney? Is the advice that he can hire a different attorney? More than likely this disclosure is to apply to a bankruptcy service provider, not to an attorney. Classifying an attorney as a debt relief agency leads to a confusing and illogical interpretation of Code § 527. This confusion will be remedied if an attorney is not a debt relief agency.

Bankruptcy Code §§ 528(a)(4) and 528(b)(2)(B) require a “debt relief agency” to use specific advertising language. There must be words to the effect that: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.” The implied purpose is to insure assisted persons are aware the services provided by the advertising party relate to bankruptcy filings. This is a substantial governmental interest, but the language is overinclusive when applied to an attorney who performs services other than bankruptcy. Is he a debt relief agency even though 90% of his income is from real estate closings and 10% from bankruptcy filings? Why should an attorney be required to advertise himself as a debt relief agency when he is, in fact, an attorney? The general public will be confused, and his business will suffer. This again is an illogical, misleading, and absurd result.

Congress is responsible for legislative language, and statutes must be carefully drafted. If ambiguous, statutes will be interpreted by the plain meaning of the words and phrases used. “The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not sufficient reason for refusing to give effect to its plain meaning.” *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991).

Judge Lamar W. Davis, Chief United States Bankruptcy Judge, Southern District of Georgia, has addressed this issue and concluded that “[b]ecause the definition of ‘debt relief agency’ omits express reference to attorneys and includes a term that excludes attorneys, it is difficult to imagine that Congress meant otherwise.” Judge Davis continues “[t]he interpretation of a statute that is logical or sensible is preferred over interpretation that is illogical or absurd.” (citing *United States v. Katz*, 271 U.S. 354, 357 (1926)) ORDER, *ATTORNEYS AT LAW AND DEBT RELIEF AGENCIES*, October 17, 2005. (Judge

Davis' opinion is attached to and incorporated by reference as part of this brief).

The rational conclusion that an attorney is not a debt relief agency will allow reasonable applications of the Code Sections defining and placing requirements on debt relief agencies and will not lead to absurd, illogical, misleading, and harmful results.

Legislative History

A National Bankruptcy Review Commission was formed in 1995 to review existing bankruptcy laws and report existing problems and potential solutions. The Commission's report was filed in October, 1997, and is the starting point for BACCAP. Many of the recommendations were not included in the final bankruptcy reform bill, and there were many provisions added never envisioned by the Commission members.

The first bankruptcy reform bill was introduced in 1997 in the Senate by Senators Charles Grassley and Richard Durbin. This bill was consumer oriented and did not garner much support. Later, on February 3, 1998, H.R. 3150 was introduced in the House of Representatives by Representative George Gekas, the bill which is the basis for BAPCPA. This bill, while gaining substantial support, did not pass. Similar measures introduced through 2004 suffered the same fate.

The term "debt relief counseling agency" and the "Debtor's Bill of Rights" first appeared in H.R. 3150. Bankruptcy Code §§ 526 and 527 were part of the "Debtor's Bill of Rights," §528 was added in 1998. In his remarks introducing H.R. 3150 Representative Gekas explained the Debtor's Bill of Rights:

This provision would protect consumers from 'bankruptcy mills' – law firms and other entities that steer consumers into filing bankruptcy petitions without adequately informing consumers of their rights and the potential harm bankruptcy can cause. . . The bill would also crack down on misleading advertisements about an organization's services, and sets out a series of rules under which for-profit 'debt relief counseling organizations' must operate so that consumers are assured that they will get proper and

adequate advice. . . .

A unique portion of our legislation is what I call the ‘Debtor’s Bill of Rights,’ which outlines protection for those who legitimately require bankruptcy’s safety net and in particular would save them from becoming victims of the ‘bankruptcy mills.’ 144 Cong Rec. H.R.3150 (February 4, 1998)

The series of rules, presumably the Bill Of Rights, were applicable to a “*debt relief counseling organization*,” not a “debt relief agency,” that does not properly and adequately advertise its services. He specifically said the protection was from “*bankruptcy mills*.” It is significant that Mr. Gekas could have, but did not, use the word “attorney” in place of “debt relief counseling organization” or “bankruptcy mill.”

Mr. Gekas, in June, 1998, further stated

H.R. 3150 creates a debtor’s “bill of rights” with regard to the services and notice that a consumer should receive from those that render assistance in connection with the filing of bankruptcy cases. Through misleading advertising and deceptive practices, “petition mills” deceive consumers about the benefits and detriments of bankruptcy. H.R. 3150 responds to this problem by instituting mandatory disclosure and advertising requirements as well as enforcement mechanisms.

144 Cong Rec H.R.3150 (June 10, 1998)

Here again, Mr. Gekas could have explicitly referred to attorneys; however, he chose to refer to “*petition mills*,” a term which appears to exclude a sole practitioner bankruptcy attorney.

Prior to its passage in March, 2005, there were 125 United States Senate amendments to BAPCPA. Senator Russ Feingold introduced several, one of which was an effort to exclude “attorney” from the definition of a “debt relief agency.” The amendment was never voted on by the Senate. Instead, it was withdrawn. In *Lockhart v. United States et al.*, 546 U.S. ___, (2005) the Court, among other

things, was asked to draw a conclusion from a failed attempt by Congress to amend a law. “[W]e decline to read any meaning into the failed 2004 effort to amend the Debt Collection Act. . . [F]ailed legislative proposals are a ‘particularly dangerous ground on which to rest an interpretation of a prior statute.’” (quoting *United States v. Craft*, 535 U.S. 274, 287 (2002) further quoting *Pension Benefit Guarantee Corporation v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

Legislative history is not clear as to whether an attorney was to be included as a debt relief agency. Representative Gekas appears to have exercised painstaking care not to specifically mention the word “attorney” when he introduced and discussed H.R. 3150.

Conclusion

The Bankruptcy Reform Act was passed to curb alleged abuses of the system, both real and imagined. To this end, many changes were made to the existing Bankruptcy Code limiting the availability of chapter 7 and encouraging the filing of chapter 13 bankruptcies. Incident to these changes is the creation of a new category of petition filers, the “debt relief agency.” Possibly included in this new category are “attorneys.” The inclusion, however, is not a foregone conclusion, and presents serious issues and problems.

If an attorney is designated a debt relief agency, he would be subject to the restrictions and requirements of Bankruptcy Code §§ 526, 527, and 528. These sections prohibit certain communications, require certain communications, and specify advertising requirements.

The First Amendment of the Constitution guarantees free speech. Attorneys have long been among those protected by this Amendment. If an attorney’s advice is not illegal, does not foster an illegal purpose, or is not misleading, it is protected. The restrictions and requirements in the new Code stifle an attorney’s obligation to provide reliable and accurate consultation. He is prohibited from offering proper advice. If an attorney does not offer the proper counseling, he may very well commit malpractice and be liable to the client. Thus, the suppression of his Constitutionally guaranteed First Amendment rights could easily subject him to a legal malpractice claim.

A bankruptcy attorney's right to advertise a proper and just legal service is restricted by BAPCAP. He must use in his advertising a misnomer never contemplated. But all other bankruptcy providers, with or without law degrees, are required to use the same terminology. Who does the potential debtor choose? How does the potential debtor recognize the party who will provide the most competent representation? Will the standard for bankruptcy representation decline? Is the government promoting non legal representation in the Bankruptcy Courts?

The statute defining a "debt relief agency" omits the word "attorney." Congress was certainly aware that the majority of bankruptcy petitions are filed by an attorney, yet chose not to include an "attorney" in the definition. The non listing must have been express and intentional, the language of the statutes so indicates. This argument is supported by a plain interpretation of other relevant Code sections. If an attorney is a debt relief agency, literal readings of Code §§ 526, 527, and 528 would lead to absurd and illogical results. The interpretation of statutes must not lead to these results, and can only be avoided by concluding an attorney is not a debt relief agency.

A review of legislative history is inconclusive. The initial bankruptcy reform legislation proposed in the House of Representatives in 1998 included the new term "debt relief counseling agency" and a "Debtor's Bill of Rights." Specifically mentioned were "bankruptcy mills," a term which seemingly does not include "attorneys." Prior to the final passage of BAPCPA in 2005 there was an amendment introduced in the Senate to specifically exclude an "attorney" as a "debt relief agency." The amendment was withdrawn, however, with no explanation. The Supreme Court has declined to place import on withdrawn amendments.

To summarize, First Amendment guarantees and statutory interpretation firmly support the proposition that an attorney is not a debt relief agency and is not subject to the restrictions, prohibitions, and requirements of Bankruptcy Code §§ 526, 527, 528. Of course, an attorney must adhere to the professional standards and ethical requirements of this Court and the State Bar of Georgia.

The undersigned thus asks this Court to hold that an attorney who is licensed to practice law in

the State of Georgia and who practices before this Honorable Court is not a debt relief agency and is not subject to the provisions of Bankruptcy Code §§ 101(4A), 101(12A), 526, 527, and 528.

Respectfully submitted this the 18th day of December, 2005.

/s/ John K. James
John K. James, Petitioner

Certificate of Service

This is to certify that the undersigned has this day served a copy of the Brief In Support of Motion to Determine Attorney Status to the undersigned by hand delivery, fax, or by United States Mail with sufficient postage to insure proper delivery.

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This the 18th day of December, 2005.

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