

No. 07-2405

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

**MILAVETZ, GALLOP & MILAVETZ P.A., ROBERT J. MILAVETZ,  
BARBARA N. NEVIN, JOHN DOE, and MARY DOE,  
Plaintiffs-Appellees,**

**v.**

**UNITED STATES OF AMERICA,  
Defendant-Appellant.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA (ROSENBAUM, C.J.)**

**BRIEF OF AMICUS CURIAE COMMERCIAL LAW LEAGUE OF  
AMERICA IN SUPPORT OF THE PLAINTIFFS/APPELLEES AND IN  
SUPPORT OF AFFIRMANCE OF THE DECISION OF THE DISTRICT  
COURT**

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The Commercial Law League of America (the “CLLA”), by and through its undersigned counsel, with the consent of all parties, files this amicus curiae brief in support of the Plaintiffs/Appellees Milavetz, Gallop & Milavetz P.A. *et al* (the “Appellees”)<sup>1</sup> and in support of affirmance of the decision and order of the District Court.

### **INTEREST OF THE AMICUS**

The CLLA, founded in 1895, is the nation’s oldest organization of attorneys and other experts in credit and finance actively engaged in the field of commercial law, bankruptcy and reorganization. Its membership, which includes attorneys from large and small firms and bankruptcy judges representing virtually every state, consists of representatives of divergent interests in bankruptcy cases. As recognized by the Appellees, applying the provisions of the Bankruptcy Code relying on the term “debt relief agencies” to attorneys would severely restrict the availability of competent representation to consumer debtors. The provisions’ extremely broad scope also affects the interests of the membership of the CLLA by compromising the representation of non-debtors, including creditors.

Although the CLLA members represent all interests in the bankruptcy forum (e.g., debtors, trustees, creditors, committees), the CLLA’s extensive experience with unsecured creditors provides it with a different perspective from

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<sup>1</sup> Reference to the Brief of the Appellees filed on September 20, 2007 shall be designated as “App. Br.”.

that of the Appellees. The CLLA submits this brief to support the Appellees and to focus on the interests of attorneys who represent creditors, an area particularly within the expertise of the CLLA. To the extent an attorney may be a “debt relief agency,” the challenged provisions impair the constitutional rights of attorneys, including members of the CLLA, and their clients. Even if the challenged provisions apply only to debtors' attorneys, the regulations are not in the interest of creditors. Creditors are served if debtors are fully and accurately informed, and receive complete and unfettered advice from their attorneys.

## **ARGUMENT**

### **I. IF BAPCPA PROVISIONS APPLY TO ATTORNEYS, THEY INCLUDE ATTORNEYS WHO REPRESENT CREDITORS**

The government has taken the position that all attorneys who provide “bankruptcy assistance to an assisted person” are debt relief agencies as defined by section 101(12A) of BAPCPA. As argued by the Appellee’s, the plain meaning of section 101(12A)’s definition of “debt relief agency” omits reference to attorneys and therefore should be read to exclude attorneys from the scope of the term. *See* App. Br., at 19. Assuming, as the government has argued, attorneys are within the scope of section 101(12A), the express language of section 101(12A) would apply to any attorney engaged by a debtor, creditor or any other non-debtor party. While the remainder of section 101(12A) does provide five exceptions, no exception exempts attorneys, let alone attorneys who only provide bankruptcy assistance to

creditors. The section's language does not distinguish between representation of a debtor versus representation of a creditor.

Counsel for a creditors' committee, whose constituents would include individual and class action plaintiffs, may be a "debt relief agency." Again, the definition of "bankruptcy assistance" is broad enough to apply to advice given by counsel for the plaintiffs and for the creditors' committee. Similarly, counsel for a retirees' committee under section 1114 of the Bankruptcy Code represents clients with claims for retirement and healthcare benefits. *See* 11 U.S.C. § 1114. Many, if not most of the retirees, would fit within the definition of an "assisted person" rendering the retirees' committee's counsel a "debt relief agency."

Reference to the terms "bankruptcy assistance" and "assisted person" does not exclude non-debtor representation from the scope of section 101(12A). Conspicuously absent from the definition of "bankruptcy assistance" is any reference to a debtor, let alone a specific type of representation. The plain language provides no basis to find services provided to non-debtor parties are excluded from the scope of "bankruptcy assistance."

Similarly, the plain language of the definition of "assisted person" is not limited to persons who have filed for bankruptcy relief or who are contemplating filing for bankruptcy. *See, e.g.,* App. Br., at 47. Section 101(3) defines "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.” 11 U.S.C. § 101(3). The term’s scope is sufficiently broad to encompass not only persons who are presently debtors, but also any person who may potentially become a debtor, creditors of a debtor, and persons who are potential creditors of potential debtors. *See In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66, 67 (Bankr. S.D. Ga. 2005) (“Although attorneys are not expressly included in the definition, the language defining “debt relief agencies” is broad enough on its face to include attorneys and the reference to ‘providing legal representation’ in § 101(4A) suggests that attorneys are covered.”); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,”* 79 Am. Bankr. L.J. 191, 206-07 (Spring 2005).

If the government’s interpretation is adopted and attorneys are not excluded from the scope of section 101(12A), the plain language of the terms “assisted person” and “bankruptcy assistance” fails to exclude non-debtor attorneys within the meaning of "debt relief agency." Therefore, the conduct of attorneys representing creditors would be subject to the regulations governing debt relief agencies. Such a result demonstrates that the government’s interpretation is not reasonable and should be rejected.

## II. IF APPLIED TO CREDITORS' ATTORNEYS, SECTION 528 IMPOSES UNCONSTITUTIONAL LIMITATIONS ON PROTECTED SPEECH

As is more fully set forth by the Appellees, the compelled statements set forth by section 528 fail each of the four prongs of the *Central Hudson* test. *See App. Br.*, at 42 *et seq.*, citing *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). All attorneys' advertising of bankruptcy services is not deceptive and the section does not advance a substantial government interest. Even if such a government interest does exist, the section is overbroad because it applies to all attorneys regardless of the nature of their practice. By forcing a creditors' attorney to include the disclosures, section 528 renders such an attorney's communications false. For these reasons, section 528 abridges commercial speech rights and should be found unconstitutional.

### A. **The Government Cannot Demonstrate A Substantial Interest Justifying The Regulation**

As argued by the Appellees, as applied to attorneys and non-debtors' attorneys in particular, section 528 will compel attorneys to utter false statements. *See App. Br.*, at 48 *et seq.* The advertisements of non-debtor attorneys are rendered false by the inclusion of the government's message. Regulated advertising includes bankruptcy assistance with respect to typical creditor remedies such as mortgage foreclosures and eviction proceedings. *See* 11 U.S.C. § 528(b)(2) (applying to advertisements with respect to "credit defaults, mortgage

foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt...”). The section requires attorneys who represent creditors or who represent landlords in eviction proceedings to include in their advertising directed to the general public that their services may involve bankruptcy relief and that the attorney helps people file for bankruptcy. As applied to a creditors' attorneys' advertising, the disclosure would not be true.

Even though a creditor's attorney may never represent a debtor, section 528 requires non-debtor attorneys to include the false statement: “We help people file for bankruptcy relief under the Bankruptcy Code.” Similarly, the same attorneys would have to clearly and conspicuously advertise that the services may involve bankruptcy relief even when the services would not. Under the standards articulated by the Supreme Court, the government can never show that it has an interest in deceiving, misleading or creating confusion in the minds of citizens. *See Zaudere v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 643 (1985) (“The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights.”).

In addition and as recognized by the Appellees, by requiring an attorney to issue a patently false statement, compliance with section 528 would subject attorneys to possible penalties under State rules of professional

responsibility,<sup>2</sup> whereas non-compliance will subject the attorneys to penalties under section 526(c).<sup>3</sup> See App. Br., at 45 *et seq.* There can be no legitimate government interest in prohibiting attorneys from counseling their clients in regard to lawful matters. See *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) (“A clear and precise enactment may nevertheless be ‘overbroad’ if in its reach it prohibits constitutionally protected conduct.”).

**B. Section 528 Is Not Narrowly Tailored To Directly Advance A Substantial Government Interest**

By failing to exclude non-debtors’ attorneys, section 528 is not narrowly tailored. See *Central Hudson*, 447 U.S. at 566 (striking down a ban on promotional advertising by electrical utilities because despite the government’s interest in conserving energy, less restrictive means were available to further that interest); App. Br., at 47-48. Even assuming an interest of the government exists to require debtors’ attorneys to include the disclosures, said interest cannot justify

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<sup>2</sup> Minnesota Rule of Professional Conduct 7.1, states in full: “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it: (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; ...” Minn. Rule of Prof’l Conduct R. 7.1 (2007).

<sup>3</sup> Section 526(c) provides for civil liability for violations of sections 526, 527 and 528. Section 526(c) authorizes penalties that include disgorgement of attorneys’ fees, payment of costs relating to an enforcement action and civil penalties that may be imposed sua sponte. See 11 U.S.C. § 526(c)(2), (c)(3)(C) and (c)(5)(B) respectively.

application of the section to non-debtors' attorneys. Because of its indiscriminate application, section 528 does not directly advance any interest, let alone a substantial government interest.

Statutes may be written to exclude unintended parties from its application. For example, the Fair Debt Collection Practices Act (the "FDCPA") regulates the conduct of debt collectors. "Debt collector" is a defined term under the FDCPA. The section defining "debt collector" begins:

The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692a(6) (emphasis added). Limiting "debt collector" to entities whose "principal purpose" is debt collection or to persons who "regularly collect" debts, Congress limited the FDCPA's statutory class. *See, e.g., Pollice v. Nat'l. Tax Funding, L.P.*, 225 F.3d 379, 404 (3d Cir. 2000) (recognizing that the FDCPA excludes from the definition of "debt collector" creditors who collect debts on their own behalf); *Schroyer v. Frankel*, 197 F.3d 1170, 1176 (6th Cir. 1999). Congress could have similarly limited "debt relief agency" to persons who regularly represent consumer debtors or whose principal purpose is to assist consumers in filing bankruptcy cases.

### III. SECTION 526(A)(4) VIOLATES RIGHTS PROTECTED BY THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

Section 526(a)(4) constitutes a content-based restriction on speech protected by the First Amendment and is thus subject to strict judicial scrutiny.<sup>4</sup> The government has construed this section as rendering it unlawful for an attorney to advise a client who is an assisted person to incur debt to pay fees to an attorney or petition preparer or to charge for services performed in connection with preparing or representing a debtor under this title. The Appellees correctly observe that the plain language of the statute does not provide a basis for the government's narrow interpretation. *See* App. Br., at 30. By prohibiting all attorneys from advising their clients “to incur more debt in contemplation of such person filing a case under this title,” the statute necessarily implicates the representation of non-debtors. As a content-based regulation, the government cannot demonstrate that the regulation (1) advances a compelling government interest and (2) is narrowly tailored. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 653 (1994).

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<sup>4</sup> Section 526 may also be an unconstitutional violation of substantive due process guaranteed by the Fifth Amendment because it deprives the public of its fundamental right of access to court. Regulations that impair fundamental rights are subject to strict judicial scrutiny. Pursuant to section 526(a)(4), persons with less than \$150,000 in nonexempt property will be deprived of the complete advice of competent counsel whereas a person with \$150,001 will have such access. Why should a difference in one dollar determine whether a person is allowed access to such advice? Not only is there no compelling government interest for denying this class this right, there is also no rational reason for drawing a line at \$150,000.

A. **Section 526(a)(4) Does Not Advance A Compelling Government Interest**

Unfettered attorney advice is necessary to the proper exercise of judicial power. As the Supreme Court has made clear, restricting the scope of legal advice “distorts the legal system by altering the traditional role of attorneys” and is a “serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.” *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544 (2001). By disabling the traditional role of an attorney, BAPCPA interferes with the proper functioning of the judiciary and therefore constitutes an impermissible abridgement of the judicial power. *See, e.g.*, App. Br., at 47.

There is no policy justification for prohibiting any attorney, but especially one representing a creditor, from providing the advice that section 526(a)(4) prohibits. The Bankruptcy Code already provides for those situations where the debtor is “gaming the system” or otherwise engaging in behavior that is impermissible. *See, e.g.*, App. Br., at 45. With respect to creditors’ attorneys, however, section 526(a)(4) is even less defensible. For example, section 526(a)(4) would include advice given by an attorney to a creditor relating to the filing of an involuntary petition. The filing of the involuntary petition may increase the creditor client’s assets if the involuntary petition results in a larger dividend to creditors because it stops the debtor from dissipating the debtor’s assets. By restricting the advice an attorney may provide, Congress effectively restricts the

strategies an attorney may pursue on behalf of her client which in turn restricts the relief a court may fashion. *See Velazquez*, 531 U.S. at 545-46.

**B. Section 526(a)(4) Is Not Narrowly Tailored**

Not all conduct implicated by advice banned by section 526(a)(4) is illegal nor does it run afoul of other provisions of the Bankruptcy Code. As the Appellees correctly observe, there is nothing inherently improper about incurring debt on the eve of bankruptcy. *See App. Br.*, at 31 *et seq.* “For example, there may be instances where it is advisable for a client to obtain a mortgage, to refinance an existing mortgage to obtain a lower interest rate, or to buy a new car on time.” Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 *Am. Bankr. L.J.* 571, 579 (2005). Similarly, an attorney representing a creditor may counsel a client to borrow money to pay the filing fee in connection with an involuntary bankruptcy or to pay the attorney’s fee. Such conduct is not fraudulent or illegal under any law, including any provision of the Bankruptcy Code. However, under section 526(a)(4), an attorney who advises her client in regard to such lawful activities will subject herself to possible penalty under section 526(c). There can be no legitimate government interest in prohibiting attorneys from counseling their clients in regard to lawful matters. *See Grayned*, 408 U.S. at 114 (“A clear and

precise enactment may nevertheless be ‘overbroad’ if in its reach it prohibits constitutionally protected conduct.”).

#### **IV. SECTION 101(12A) SHOULD BE INTERPRETED TO EXCLUDE ATTORNEYS FROM ITS SCOPE**

As the Appellees argue, attorneys may be excluded from the definition of “debt relief agency” by relying on the plain language of sections 101(12A), 101(3) and 101(4A). *See, e.g.*, App. Br., at 18 *et seq.* Despite being a defined term under the Bankruptcy Code, section 101(12A) does not incorporate “attorney” in its language or in the language of any of its related definitions. *See, e.g.*, 11 U.S.C. § 101(4) (defining the term “attorney”). As argued by the Appellees and as held by the District Court, the constitutional infirmities of sections 526 and 528 may be remedied by excluding attorneys from the scope of the term “debt relief agency.” *See* App. Br., at 16 *et seq.*; *see also In re Attorneys at Law*, 332 B.R. at 70 (holding that attorneys were expressly omitted from the definition of “debt relief agency”).

In accord with the District Court's opinion below discussed by the Appellees, the bankruptcy court in the Southern District of Georgia ruled *sua sponte* that the definition of debt relief agencies set forth by section 101(12A) does not include attorneys. *See In re Attorneys at Law*, 332 B.R. at 71 (ruling that “attorneys regularly admitted to the Bar of this Court or those admitted pro hac vice are not covered by the provisions of the Code regulating debt relief

agencies”); App. Br., at 8 *et seq.* The court recognized that section 101(12A) omits reference to attorneys despite the fact the term “attorney” is a separately defined term under section 101(4). The court concluded by negative inference that attorneys should therefore be excluded from the definition of “debt relief agency.”

Alternatively, if the plain language is not sufficient to limit the scope of “debt relief agency,” canons of statutory construction require that attorneys be excluded from the term. As discussed in by the Appellees, sections 526 and 528 would superimpose federal rules of professional conduct upon attorneys. *See* App. Br., at 46. Attorneys will be forced to adopt practices to assure that they do not inadvertently violate section 526 and 528. For example, until attorneys have the necessary information to make the determination of a client’s status, attorneys must treat every new individual client as an “assisted person” and limit the representation of that client in order to avoid inadvertently violating the requirements imposed upon debt relief agencies. In the absence of such practices, attorneys will risk inadvertently violating these sections.

By requiring creditors' attorneys to make false statements to their current and prospective clients, sections 526 and 528 force attorneys to choose between (1) complying with BAPCPA and violating state rules of professional conduct; or (2) complying with state rules of professional conduct and violating BAPCPA. *See, e.g.,* App. Br.f, at 49. By arguing attorneys may be designated a

"debt relief agency," the government's interpretation necessitates an outcome that is patently absurd. Accordingly, this Court should reject the government's interpretation and exclude all attorneys from the scope of section 101(12A). *See Kui Rong Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (rejecting and affording no deference to a legal interpretation that "leads to absurd and wholly unacceptable results").

### **CONCLUSION**

For the foregoing reasons, the Commercial Law League of America respectfully requests that this Court affirm the Order of the District Court holding sections 526(a)(4) and 528(a)(4) of the Bankruptcy Code unconstitutional as they apply to attorneys and holding that "debt relief agency" as defined by section 101(12A) of the Bankruptcy Code does not include attorneys.

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