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U.S. Supreme Court Weighs in on Applicability of 2005 Bankruptcy Law to Attorneys' Advice and Advertising

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Lawyers for the Profession® Alert

Milavetz, Gallop & Milavetz v. United States, --- S. Ct. ----, 2010 WL 757616 (2010)

Brief Summary
The Supreme Court held that attorneys are “debt relief agencies” under the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). The Court also held that two provisions of BAPCPA were constitutional under the First Amendment. The first provision prohibits advising consumer debtors to incur debt because of impending bankruptcy, but does not prohibit giving such advice for other valid reasons. The second provision imposes certain advertising disclosure requirements on debt relief agencies.

Complete Summary
The three issues in this case involve the application of the BAPCPA to attorneys. BAPCPA regulates a broad category of professionals known as “debt relief agencies.” Such professionals are prohibited under 11 U.S.C. § 526(a)(4) from advising consumer debtors “to incur more debt in contemplation of filing” for bankruptcy. They are also required, under 11 U.S.C. § 528, to make disclosures in their advertisements regarding the advertiser’s legal status and the type of assistance provided.

Plaintiffs in this litigation argued that the term “debt relief agencies” does not include lawyers, and that sections 526(a)(4) and 528 are unconstitutional under the First Amendment. The Eighth Circuit held for plaintiffs only on the § 526(a)(4) issue. The United States Supreme Court granted certiorari on all three issues, reversing on the §526(a)(4) issue and otherwise affirming.

Justice Sotomayor wrote for the majority. The Court first held that attorneys, including partnerships and partners, fall under the definition of debt relief agencies. That term includes anyone who provides qualifying bankruptcy services to assisted persons. Justice Sotomayor noted that, under the BAPCPA, some forms of bankruptcy assistance (e.g., legal advice) must be provided by attorneys.

The Court also addressed plaintiffs' argument that including attorneys among those regulated by the BAPCPA impermissibly encroached on states' authority

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to regulate the practice of law. This argument was supported to some degree by the BAPCPA itself, which provides that sections 526, 527 and 528 should not "be deemed to limit or curtail" states' authority to "determine and enforce qualifications for the practice of law . . . ." Justice Sotomayor rejected this argument because "bankruptcy courts have long overseen aspects of attorney conduct in this area of substantial federal concern." *Id.* at *5.

The Court then reversed the Eighth Circuit's holding regarding section 526(a)(4). The Eighth Circuit found the section to be substantially overbroad, namely, the language prohibiting "advis[ing] an assisted person . . . to incur more debt in contemplation of" filing for bankruptcy. Although the Eighth Circuit interpreted this language to prohibit certain types of reasonable financial advice, the Supreme Court interpreted the statute narrowly, to avoid vagueness or overbreadth, to merely prohibit "advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose." *Id*. at *8.

In reaching this narrower reading, Justice Sotomayor relied on the historical meaning and historical and statutory context of "in contemplation of" filing for bankruptcy, and the need for open communications between attorney and client. The Court held that the inhibition of frank discussion between lawyers and clients would serve no conceivable statutory purpose here. On this point, the Court noted that under ABA Model Rule of Professional Conduct 1.2(d), lawyers are free to talk candidly about the consequences of criminal conduct, and cited to its recent decision in *Mohawk Industries, Inc. v. Carpenter,* 558 U.S.----, 130 S. Ct. 599, 606 (2009) regarding the importance of privilege in protecting the attorney-client relationship and robust communications.

Finally, the Court held that § 528 was constitutional as applied to plaintiffs. Starting with the understanding that § 528 pertained to inherently misleading commercial speech, the Court contrasted two of its prior decisions—both involving attorney advertising rules—to decide between intermediate and low level scrutiny. The court noted that intermediate scrutiny applied to *affirmative limitations* which restrict speech that is not inherently misleading. In contrast, where a disclosure requirement is intended to combat inherently misleading commercial advertisements, it need only be rationally related to the goal of preventing consumer deception. Because § 528 imposes a disclosure requirement, the Court applied the latter and held that § 528 was rationally related to the Government's interest in preventing consumer deception.

Justice Scalia concurred, except to the extent the Court cited legislative history in support of its definition of "debt relief agency." Justice Thomas concurred, but disagreed with the Court's line between disclosure requirements and prohibitions and the resulting effect on standard of review.

Significance of Opinion
This opinion affects both the practice of bankruptcy law and First Amendment jurisprudence. The opinion is another in a series of recent federal court decisions opining on the authority of Congress to directly or indirectly regulate the practice of law. Here, the Court recognized a broad scope of congressional authority in the area of bankruptcy law but also interpreted the statute so as not to unduly impinge on the ability of lawyers to represent and advise their clients.

Also notable is the Court's focus on the difference between limiting commercial speech and imposing disclosure requirements in determining the applicable standard of scrutiny. This analytic construct should inform future decisions concerning the constitutionality of regulations on attorney advertising.

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