Bankruptcy Lawyers' Free Speech Rights Prevail in Challenge to BAPCPA Provision

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The U.S. Court of Appeals for the Eighth Circuit has ruled that bankruptcy lawyers have the right to advise their clients "to incur more debt," notwithstanding a recently added provision to the Bankruptcy Code, but that bankruptcy lawyers must comply with a mandatory disclosure requirement now in the law.

More than three years ago, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") was signed into law, amending and adding multiple sections of the Bankruptcy Code. One BAPCPA amendment added a new term, "debt relief agency," which is defined in Section 101(12A) of the Bankruptcy Code.[1] The amended Bankruptcy Code restricts some actions of debt relief agencies, while requiring them to do others.[2] For example, Section 526(a)(4) bars a debt relief agency from advising a client "to incur more debt in contemplation" of a bankruptcy filing,[3] while Sections 528(a)(4) and (b)(2) require debt relief agencies to include a disclosure in their bankruptcy-related advertisements directed to the general public declaring: "'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code[,]'or a substantially similar statement."[4]

Recently, a law firm that practices bankruptcy law, the firm's president, a bankruptcy attorney within the firm, and two clients who sought

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bankruptcy advice from the firm brought suit against the United States in a federal district court in Minnesota seeking a declaratory judgment that these new Bankruptcy Code provisions did not apply to attorneys and law firms and, in fact, were unconstitutional as applied to attorneys. The district court granted summary judgment to the plaintiffs and issued an order declaring that: (1) attorneys in the District of Minnesota were excluded from the definition of a "debt relief agency" as defined by BAPCPA; and (2) the challenged provisions were unconstitutional as applied to attorneys in the District of Minnesota.

The government appealed the district court's decision to the U.S. Court of Appeals for the Eighth Circuit, which recently issued a ruling that reversed the district court in part and affirmed it in part. The circuit court's decision, in *Milavetz, Gallop & Milavetz, P.A. v. United States*,[5] has important practical implications for bankruptcy lawyers — and for consumers.

WHAT IS A "DEBT RELIEF AGENCY"?

In its decision, the Eighth Circuit first addressed whether attorneys fell within the Bankruptcy Code's definition of debt relief agencies.

As the circuit court noted, the term "debt relief agency" is defined to mean "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, but does not include —

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

(B) a nonprofit organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986;

(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

(D) a depository institution (as defined in Section 3 of the Federal Deposit

> Insurance Act) or any federal credit union or state credit union (as those terms are defined in Section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or
>
> (E) an author, publisher, distributor, or seller of works subject to copyright protection under Title 17, when acting in such capacity.[6]

Further, as the circuit court observed, the Bankruptcy Code defines the term "bankruptcy assistance" to mean:

> 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.[7]

Additionally, the Bankruptcy Code defines the term "assisted person" as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $164,250."[8]

The plaintiffs argued that attorneys were not "debt relief agencies" because the definition of debt relief agencies makes no direct reference to attorneys, even though "attorney" was a defined term in the Bankruptcy Code,[9] but does include the term "bankruptcy petition preparer" which, by definition, excludes debtor's attorneys and their staff.[10] The plaintiffs contended that the omission of any reference to attorneys or lawyers while specifically including bankruptcy petition preparers showed Congress's intent to exclude attorneys from the definition of debt relief agencies. Because the plaintiffs contended that constitutionality issues arose in Sections 526(a)(4) and 528(a)(4) and (b)(2) if attorneys were debt relief agencies, they asserted that the doctrine of constitutional avoidance should be used to interpret "debt relief agency" to exclude attorneys and thus avoid the potential constitutional issues.

Conversely, the government argued that attorneys were debt relief agencies because the broadly worded definition of the term plainly includ-

ed attorneys,[11] and providing legal representation was included in definition of bankruptcy assistance.[12]

The Eighth Circuit noted that whether attorneys fell within the Bankruptcy Code's definition of debt relief agencies was an issue of first impression among the courts of appeals. It stated that although the plain language of the definition appeared to include bankruptcy attorneys and did not appear to be ambiguous, lower courts that had addressed the issue of whether attorneys were debt relief agencies had "not been unanimous."[13] Nevertheless, it added, the majority of courts have held that compensated bankruptcy attorneys were debt relief agencies as that term is defined in the Bankruptcy Code.[14]

In this case, the Eighth Circuit observed, the district court acknowledged that the definition of debt relief agency, "at first glance," appeared to include attorneys, but it ultimately relied on the doctrine of constitutional avoidance to conclude that attorneys did not fall within the definition because if they did portions of Sections 526 and 528 would be unconstitutional as applied to attorneys. The doctrine of constitutional avoidance, the circuit court continued, dictated that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[15] Thus, if interpreting "debt relief agency" to include attorneys "would raise serious constitutional problems," the Eighth Circuit said that it should look for another interpretation "that may fairly be ascribed" to the definition that did not raise these concerns.[16] The Eighth Circuit then stated that it would not adopt an alternative interpretation that was "plainly contrary to the intent of Congress."[17]

It found that the "plain reading" of the definition of debt relief agency, and the defined terms that made up that definition, led it to conclude that attorneys who provided "bankruptcy assistance" to "assisted persons" were unambiguously included in the definition of "debt relief agencies." The broad statutory language "clearly" covered the legal services provided by attorneys to debtors in bankruptcy unless excluded by another provision.

As the circuit court noted, Congress specifically listed five exclusions from the definition of "debt relief agency," and the circuit court said that

if Congress meant to exclude attorneys from that definition it could have explicitly done so. Moreover, the Eighth Circuit reasoned, if attorneys were not included in the definition of debt relief agencies, Congress would have had no reason to include Section 526(d)(2), which expressly provides that nothing in Sections 526, 527, or 528 (the sections covering debt relief agencies) "shall be deemed to limit or curtail the authority or ability of a State…to determine and enforce qualifications for the practice of law under the laws of that State; or of a Federal court to determine and enforce the qualifications for the practice of law before that court."[18] The legislative history provided further indication that attorneys are included in the definition, the Eighth Circuit added.[19]

Because attorneys were not specifically excluded from the definition of debt relief agencies, the Eighth Circuit held that attorneys that provide "bankruptcy assistance" to "assisted persons" are "debt relief agencies" as that term is defined by the Bankruptcy Code. Interpreting the definition of "debt relief agency" to exclude bankruptcy attorneys would be contrary to Congress's intent, according to the Eighth Circuit.

CONSTITUTIONALITY OF SECTION 526(A)(4)

Having concluded that attorneys providing bankruptcy assistance to assisted persons are debt relief agencies under the Bankruptcy Code, the Eighth Circuit then examined whether the provisions challenged by the plaintiffs placing restrictions and requirements on debt relief agencies were unconstitutionally overbroad as applied to these types of attorneys.[20] One of the sections challenged by the plaintiffs in this case was Section 526(a)(4), which states:

(a) A debt relief agency shall not–

. . .

(4) 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.[21]

The plaintiffs asserted that the prohibition against advising an assisted person or prospective assisted person to incur more debt in contemplation of bankruptcy violated the First Amendment. The parties disagreed as to the level of scrutiny the Eighth Circuit should apply to the constitutional analysis of this limitation on speech. The plaintiffs claimed that the circuit court should review the constitutionality of Section 526(a)(4) under the strict scrutiny standard as the restriction on attorney advice was content-based.[22] Under strict scrutiny review, the government has the burden to prove that the constraints on speech were supported by a compelling governmental interest and were narrowly tailored, such that the statutory effect did not prohibit any more speech than was necessary to serve the governmental interest.[23]

In contrast, the government argued that Section 526(a)(4)'s restrictions were a type of ethical regulation, invoking the more lenient standard outlined in *Gentile v. State Bar of Nev.*[24] Under the *Gentile* standard, the circuit court would have to balance the First Amendment rights of the attorneys against the government's legitimate interest in regulating the activity in question — the prohibition of advising assisted persons to incur more debt in contemplation of bankruptcy — and then determine whether the regulations imposed "only narrow and necessary limitations on lawyers' speech."[25]

According to the government, Section 526(a)(4) should be interpreted as merely preventing an attorney from advising an assisted person (or prospective assisted person) to take on more debt in contemplation of bankruptcy when the incurrence of such debt was done with the intent to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy discharge. However, the Eighth Circuit found that the plain language of the statute did not permit this narrow interpretation. Rather, it said, Section 526(a)(4) broadly prohibits a debt relief agency from advising an assisted person (or prospective assisted person) to incur *any* additional debt when the assisted person was contemplating bankruptcy. The statute's blanket prohibition applied even if the additional debt would not be discharged during the bankruptcy proceedings.[26]

Thus, the Eighth Circuit held, regardless of whether the government's interest in prohibiting the speech was legitimate (*Gentile* standard) or

compelling (strict scrutiny standard), Section 526(a)(4) was unconstitutionally overbroad as applied to attorneys falling within the definition of debt relief agencies because it was not narrowly tailored, nor narrowly and necessarily limited, to restrict only that speech that the government had an interest in restricting. Instead, Section 526(a)(4) prohibited attorneys classified as debt relief agencies from advising any assisted person to incur any additional debt in contemplation of bankruptcy; this prohibition included advice constituting prudent pre-bankruptcy planning that was not an attempt to circumvent, abuse, or undermine the bankruptcy laws. Section 526(a)(4), as written, prevented attorneys from fulfilling their duty to clients to give them appropriate and beneficial advice not otherwise prohibited by the Bankruptcy Code or other applicable law, the Eighth Circuit emphasized.

The Eighth Circuit acknowledged that there were certain situations where it would likely be in the assisted person's, and even the creditors', best interest for the assisted person to incur additional debt in contemplation of bankruptcy. However, under Section 526(a)(4)'s plain language an attorney was prohibited from providing this beneficial advice — even if the advice could help the assisted person avoid filing for bankruptcy altogether. The Eighth Circuit noted that, for instance, it might be in the assisted person's best interest to refinance a home mortgage in contemplation of bankruptcy to lower the mortgage payments. This could free up additional funds to pay off other debts and avoid the need for filing bankruptcy all together. Moreover, it might be in the client's best interest to incur additional debt to purchase a reliable automobile before filing for bankruptcy, so that the debtor would have dependable transportation to travel to and from work, which would likely be necessary to maintain the debtor's payments in bankruptcy. Incurring these types of additional secured debt, which would often survive or could be reaffirmed by the debtor, might be in the debtor's best interest without harming the creditors, the Eighth Circuit explained.

The circuit court added that factual scenarios other than these hypothetical situations "no doubt" existed and could further illustrate why incurring additional debt in contemplation of bankruptcy might not be abusive or harmful to creditors. Nonetheless, it pointed out, Section

526(a)(4), as written, did not allow attorneys falling within the definition of debt relief agencies to advise assisted persons (or prospective assisted persons) — i.e. clients (or prospective clients) meeting the definition of assisted person — to incur such debt. Thus, Section 526(a)(4) was not narrowly tailored nor narrowly and necessarily limited to prevent only that speech that the government had an interest in restricting. Therefore, it held that Section 526(a)(4) was substantially overbroad,[27] and unconstitutional as applied to attorneys who provide bankruptcy assistance to assisted persons, as those terms are defined in the Code.[28]

CONSTITUTIONALITY OF SECTIONS 528(A)(4) AND (B)(2)

The plaintiffs also challenged the constitutionality of Sections 528(a)(4) and (b)(2)(B), claiming that the advertising disclosure requirements mandated by those sections violated the First Amendment rights of bankruptcy attorneys through compelled speech. The disclosure requirements of Section 528(a)(4) are supplemented by § 528(a)(3). These sections state:

(a) 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.[29]

Similarly, Section 528(b)(2)(B) states:

(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 —

. . .

(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.[30]

As both Sections 528(a)(4) and (b)(2)(B) require debt relief agencies — including attorneys providing bankruptcy assistance to assisted persons — to disclose in their advertising that "'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.' or some substantially similar statement," the statutes compel speech that, similar to a restriction on speech, receives constitutional protection under the First Amendment.[31]

The government contended that Congress enacted Section 528's disclosure requirements to address problems with deceitful or unclear advertising by bankruptcy attorneys, bankruptcy petition preparers, or other debt relief entities. The Eighth Circuit found this position supported by legislative history.[32] Before determining whether the government's justification for mandating the disclosures passed constitutional scrutiny, the Eighth Circuit stated that it first had to decide the appropriate standard for reviewing the constitutionality of the required disclosures.

Toward that end, the circuit court looked to the U.S. Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.[33] In *Zauderer*, the Supreme Court considered the constitutionality of a state bar disciplinary regulation requiring attorneys that advertised contingent-fee representation to disclose in their advertisements that clients may still have to bear certain costs even if the case was unsuccessful.[34] The Supreme Court found that because the regulation only required an attorney to include in his or her advertising purely factual and uncontroversial information about the terms under which the attorney's services would be available, and the extension of First Amendment protection to commercial speech was justified principally by the value to con-

sumers of the information such speech provides, the attorney's constitutionally protected interest in not providing any particular factual information in his or her advertising was "minimal."[35] The Court recognized that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech, but held that an advertiser's rights were adequately protected as long as disclosure requirements were reasonably related to the state's interest in preventing deception of consumers.

On the other hand, the Eighth Circuit observed, restrictions on nondeceptive advertising are reviewed under intermediate scrutiny.[36] Under this standard, the limitation must be narrowly drawn.[37] The Eighth Circuit then noted that the district court reviewed Section 528's disclosure requirements under the intermediate scrutiny standard, but the circuit court concluded that rational basis review was proper. The circuit court reasoned that the disclosure requirements in this case, like those in *Zauderer*, were intended to avoid potentially deceptive advertising.[38]

The Eighth Circuit explained that, by definition, debt relief agencies provide bankruptcy assistance to assisted persons (or prospective assisted persons) "with respect to a case or proceeding under [the Bankruptcy Code]."[39] Section 528 generally requires debt relief agencies to disclose on advertisements of bankruptcy assistance services directed to the general public that their services do in fact relate to bankruptcy and that they assist people in filing for bankruptcy.[40] The Eighth Circuit then decided that, as in *Zauderer*, the plaintiffs' "constitutionally protected interest in not providing [such] factual information in [their] advertising is minimal."[41] Further, it found, the disclosure requirements were reasonably and rationally related to the government's interest in preventing the deception of consumer debtors, as the disclosure requirements were directed precisely at the problem targeted by Congress: ensuring that persons who advertised bankruptcy-related services to the general public made clear that their services did in fact involve filing for bankruptcy.

Section 528 requires debt relief agencies to disclose: "'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.' or a substantially similar statement," in all of their bankruptcy-related advertising materials directed to the general public.[42]

In the Eighth Circuit's view, the requirement did not prevent those attorneys meeting the definition of debt relief agencies "from conveying information to the public; it…only require[s] them to provide somewhat more information than they might otherwise be inclined to present."[43] Moreover, it added, if any of these attorneys were concerned that the required disclosures would confuse the public, nothing in the Bankruptcy Code prevented them from identifying themselves in their advertisements as both attorneys and debt relief agencies.[44] Simply put, attorneys that provide bankruptcy assistance to assisted persons are debt relief agencies under the Bankruptcy Code, and the disclosure requirements of § 528 only require those attorneys to disclose factually correct statements on their advertising. The Eighth Circuit declared that this did "not violate the First Amendment."

CONCLUSION

The Eighth Circuit decided that attorneys who provide bankruptcy assistance to assisted persons are debt relief agencies under the Bankruptcy Code, that Section 526(a)(4) was unconstitutional as applied to these attorneys, but that Sections 528(a)(4) and (b)(2) were constitutional. As a result, at least in the Eighth Circuit, bankruptcy attorneys are freer to speak to their clients, although they still must meet the requirements of Section 528 by including a disclosure on certain advertisements.

The broad definitions of debt relief agency, bankruptcy assistance, and assisted persons might result in certain attorneys meeting the definition of debt relief agencies even though they do not represent debtors in bankruptcy and do not help people file for bankruptcy relief under the Bankruptcy Code. Nevertheless, based on the Eighth Circuit's decision, these attorneys still are subjected to the disclosure requirements of Section 528(a)(4) when they advertise "bankruptcy assistance services or…the benefits of bankruptcy directed to the general public,"[45] or when they advertise to the general public that they "provide[] assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt."[46] But because Section 528 permits a "substantially similar" disclosure to the

one suggested by the Code, these attorneys can — and probably should — tailor their advertisement disclosure statements to factually represent the "bankruptcy assistance" they provide. These tailored disclosures will meet the requirements of Sections 528(a)(4) and (b)(2) as long as they are "substantially similar" to the suggested disclosure, a decision that will require a case-by-case determination.[47]

NOTES

[1] 11 U.S.C. § 101(12A). Prior to BAPCPA, the term "debt relief agency" did not exist in the Bankruptcy Code.

[2] *See* 11 U.S.C. § 526 ("Restrictions on debt relief agencies"); 11 U.S.C. § 528 ("Requirements for debt relief agencies").

[3] 11 U.S.C. § 526(a)(4).

[4] 11 U.S.C. § 528(a)(4), (b)(2).

[5] No. 07-2405 (8th Cir. Sept. 4, 2008).

[6] *See* 11 U.S.C. § 101(12A).

[7] *Id.* at § 101(4A).

[8] *Id.* at § 101(3). When this lawsuit was commenced, the dollar amount in Section 101(3) was $150,000. Subsequently, on April 1, 2007, the amount was adjusted pursuant to 11 U.S.C. § 104. The change, however, was inconsequential for purposes of this case.

[9] *Id.* at § 101(4). "The term 'attorney' means attorney, professional law association, corporation,
or partnership, authorized under applicable law to practice law." 11 U.S.C. § 101(4). This definition makes no reference to "debt relief agencies."

[10] *See* 11 U.S.C. § 110(a)(1). "'[B]ankruptcy petition preparer' means a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation a document for filing [by the debtor in connection with the debtor's bankruptcy case]." 11 U.S.C. § 110(a)(1); *see also id.* at Section 110(a)(2) (defining "document for filing" as used in Section 110(a)(1)).

[11] *See* 11 U.S.C. § 101(12A) (defining "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person in return for the payment").

[12] See *id.* at Section 101(4A) ("bankruptcy assistance means any goods or services sold or otherwise provided to an assisted person with the express or

implied purpose of providing…advice, counsel,…or legal representation with respect to a case or proceeding under this title").

[13] *In re Irons*, 379 B.R. 680, 685 (Bankr. S.D. Tex. 2007) (citing cases).

[14] *Id.* (finding debtor's counsel was a debt relief agency); *Olsen v. Gonzales*, 350 B.R. 906 (D. Or. 2006) (same); *In re Robinson*, 368 B.R. 492 (Bankr. E.D. Va. 2007) (finding debtor's counsel was debt relief agency); *Hersh v. United States*, 347 B.R. 19 (N.D. Tex. 2006) (finding that bankruptcy attorneys were debt relief agencies); *In re Norman*, No. 06-70859, 2006 WL 3053309 (Bankr. E.D. Va. 2006) (finding debtor's counsel qualified as a debt relief agency); *but see In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66 (Bankr. S.D. Ga. 2005) (holding that attorneys were not debt relief agencies); *In re Reyes*, 361 B.R. 276 (Bankr. S.D. Fla. 2007) (finding that attorneys, generally, were not debt relief agencies, but ruling that debtor's counsel in case was not a debt relief agency because service was provided pro bono and thus counsel did not receive valuable consideration in return for the bankruptcy assistance provided).

[15] *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

[16] *Id.* at 576–77.

[17] *Id.* at 575.

[18] 11 U.S.C. § 526(d)(2)(A) and (B).

[19] *See* H.R. Rep. No. 109-31, 109th Cong. 1st Sess. at 4 (April 8, 2005) ("The bill's consumer protections include provisions strengthening professionalism standards *for attorneys* and others who assist consumer debtors with their bankruptcy cases") (emphasis added). Additionally, the circuit court noted that, although the Supreme Court has stated that "failed legislative proposals are a particularly dangerous ground on which to rest [a statutory interpretation]," *Lockhart v. United States*, 546 U.S. 142 (2005) (internal quotation marks and brackets omitted), on March 9, 2005, Senator Feingold proposed amendment No. 93 that would have excluded attorneys from the definition of debt relief agencies, *see* 151 Cong. Rec. S2306–02, 2316 (daily ed. Mar. 9, 2005) (statement by Sen. Feingold) ("This amendment would exclude lawyers from the provisions dealing with 'debt relief agencies'…."), but the Senate did not address the proposal.

[20] The Eighth Circuit stated that even though a more narrowly drawn version of Section 526(a)(4) would likely be valid as applied to the plaintiffs in this case, its analysis applied to all attorneys falling within the definition of debt

relief agencies, not merely the plaintiff-attorneys. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798–99 (1984) (explaining that the overbreadth doctrine allows a party to challenge a broadly written statute "even though a more narrowly drawn statute would be valid as applied to the party in the case," as "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression") (internal quotations and citation omitted).

[21] 11 U.S.C. § 526(a)(4).

[22] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content").

[23] *Republican Party of Minnesota v. White*, 536 U.S. 765, 774–75 (2002).

[24] 501 U.S. 1030 (1991).

[25] *Id.*at 1075.

[26] 11 U.S.C. § 526(a)(4).

[27] *See Veneklase v. City of Fargo*, 248 F.3d 738, 747 (8th Cir. 2001) ("For us to find a statute unconstitutionally overbroad, its 'overbreadth…must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'") (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

[28] One judge on the three judge panel dissented and would have reversed the district court's decision declaring unconstitutional the provision codified at 11 U.S.C. § 526(a)(4).

[29] 11 U.S.C. § 528 (a)(3), (4).

[30] 11 U.S.C. § 528(b)(2)(B).

[31] *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all"); *Turner Broad. Sys., Inc.*, 512 U.S. at 642 (stating that "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to" constitutional scrutiny).

[32] *See* 151 Cong. Rec. H2063-01, 2066 (daily ed. Apr. 14, 2005) (statement by Rep. Moran) (stating that certain BAPCPA provisions are intended to "[p]revent deceptive and fraudulent advertising practices by debt relief agencies…").

[33] 471 U.S. 626 (1985).
[34] *Id.* at 633.
[35] *Id.* at 651.
[36] *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980) (ruling that restrictions on commercial speech that is neither misleading nor related to unlawful activity must assert a "substantial interest to be achieved by [the] restrictions" and "the restrictions must directly advance the state interest involved").
[37] *Id.* ("[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive").
[38] *See Zauderer*, 471 U.S. at 651, n.14 (rejecting a more strict analysis of the disclosure requirements at issue in that case, and noting that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed…").
[39] 11 U.S.C. §§ 101(4A), (12A).
[40] 11 U.S.C. § 528.
[41] 471 U.S. at 650.
[42] 11 U.S.C. §§ 528(a)(4), (b)(2).
[43] *Zauderer*, 471 U.S. at 650.
[44] *Olsen*, 350 B.R. at 920.
[45] 11 U.S.C. § 528(a)(3),(4).
[46] *Id.* at § 528(b)(2).
[47] *See Olsen*, 350 B.R. at 919–20 (dismissing plaintiffs' claim that Section 528 was unconstitutional, rejecting argument that attorney who met definition of debt relief agency but did not represent bankruptcy debtors was precluded from Section 528's disclosure requirements because Section 528 permits a "substantially similar" disclosure, which could be tailored to disclose that attorney advised clients about bankruptcy assistance matters but did not represent people in bankruptcy or file bankruptcy petitions, and stating that whether disclosure was "substantially similar" would require case-by-case determination).