# Committee
## Educational Session

# *Consumer Bankruptcy*
# Proceed with Caution: Ethical Dilemmas Facing Today's Consumer Practitioners


Hon. Mary D. France, Moderator | U.S. Bankruptcy Court (M.D. Pa.); Harrisburg

James J. Haller | The Law Offices of Mueller and Haller, LLC
Belleville, Ill.

Dianne C. Kerns | Office of the Chapter 13 Trustee; Tucson, Ariz.

Faiq Mihlar | Heavner, Scott, Beyers & Mihlar, LLC
Decatur, Ill.



2010 Educational Materials

**AMERICAN BANKRUPTCY INSTITUTE**
**22ND ANNUAL WINTER LEADERSHIP CONFERENCE**
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**Consumer Bankruptcy**
**Proceed with Caution: Ethical Dilemmas Facing Today's Consumer Practitioners**

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# Best Practices in Preparing and Filing a Proof of Claim

## A. Preparation of the Proof of Claim

a. Obtain a complete copy of the loan and servicing file

b. Carefully review the documents for any irregularity

c. Verify the parties: Who is filing the Proof of Claim?
   i. Originator, assignee or servicer

d. Verify standing: Is the party the holder or servicer?

e. Itemize the pre-petition balances

f. Verify the figures
   i. Do not just accept the numbers from the client

   ii. Request for back-up/support of numbers (e.g. escrow analysis, payment history)

g. Attach back-up to the Proof of Claim (e.g. Affidavit describing chain of title, recorded mortgage and note, and invoices if required)

## B. Recent Decisions

a. *In re Minbatiwalla*, 424 B.R. 104 (Bankr. S.D.N.Y 2010).

   i. Facts: A Creditor filed a Proof of Claim in a debtor's bankruptcy case based on account of a home equity loan supported only by a summary containing the case number, name of the debtor, the loan number, and a list of principal, interest and late charges.. The Debtor objected to the Creditor's claim and requested proof of standing. No response was filed.

Authored by: Faiq Mihlar of Heavner, Scott, Beyers & Mihlar, LLC
Heather Giannino of Heavner, Scott, Beyers & Mihlar, LLC

ii. Holding: The Court held that the Creditor's claims were disallowed based on the Creditor's failure to substantiate the claim and failure to present evidence necessary to support that it is either the servicer, note and mortgage holder, or assignee such that it had standing to assert the claim. The Creditor's failure to respond to the request for supporting documentation warranted the entry of an order sustaining the Debtor's objection to the proof of claim, but without prejudice to reconsideration upon filing of amended proof of claim by the proper party, given that the Debtor had scheduled a very similar claim. The Court denied the Debtor's request for sanctions.

iii. Comments: Honest errors, though embarrassing, or the failure to meet a burden should result in denial of the POC of the MFR, not sanctions. To merit sanctions, the Court needs to find, by clear and convincing evidence, bad faith, which can include proof that the claims are entirely meritless or the party acted for an improper purpose.

b. *Feinberg v. Bank of New York, as trustee for the Certificate Holders CWABS, Inc. Assest-Backed Certificates, Series 2005-17, Countrywide Home Loans, Inc., CWABS, Inc. Bank of America, Mortgage Electronic Systems, Inc., BAC Home Loan Servicing, LP*, _____WL_____ (Bankr. S.D.N.Y. July 30, 2010).

i. Facts: BAC as servicer for Bank of New York as Trustee for a Countrywide securitized trust filed a proof of claim. The Debtor commenced an adversary proceeding objecting to standing based upon the Creditor's failure to attach an assignment of the mortgage to the proof of claim and the claim that the assignment subsequently produced was not valid. The Creditor provided additional documentation in the form of the note and mortgage during discovery; an assignment, created after the transfer but purportedly effective as of the date of the transfer, was also produced.

ii. Holding: The Court found that the proof of claim was valid because the Creditor, by producing the original note and mortgage, proved that it had standing to file the proof of claim and enforce its rights under the note and mortgage under New York law. The Court stated, "[t]he assignee does not need to produce a valid written assignment because it is unnecessary under New York law where the assignee can show delivery, which can be done by producing the actual note and mortgage.

iii. Notes: Check your state law as to the method of transferring a mortgage.

c. *Nosek v. Ameriquest Mortgage Co. (In re Nosek)*, 386 B.R. 374 (Bankr. D. Mass 2008).

i. Attorneys who filed proof of claim and pleadings asserting Ameriquest was holder of note and mortgage violated Rule 9011 by not making reasonable inquiry when in fact Ameriquest was only mortgage servicer.

d. *Carter v. Checkmate, Cash Advance Centers, LLC (In re Carter)*, 2009 WL 3425828 (Bankr. N.D. Ala. 2009).

i. Compensatory damages allowed when creditor failed to answer complaint alleging improper filing of proof of claim with debtor's unredacted social security and bank account numbers. Court previously ordered the striking of the proof of claim and directed creditor to file new claim with redacted information. Neither §107(c) nor E-Government Act of 2002 provides a private right of action. Creditor's conduct was inadvertent or negligent rather than intentional, but compensatory damages were awarded for bringing a test case.

e. *Udren Law Firm v. Taylor (In re Taylor)*, 2010 WL 624909 (E.D.Pa. 2010).

i. Sanctions against creditor's attorneys were not appropriate when debtors' counsel equally contributed to difficulty resolving mortgage payment status, and bankruptcy court intended sanctions to "send a message" about systematic problems concerning computer data information in mortgage disputes. Rev'g *In re Taylor*, 407 B.R. 618 (Bankr. E.D.Pa. 2009) – HSBC Mortgage's handling of proofs of claim and stay relief motions is profoundly deficient in Chapter 13 cases. The Bankruptcy Court explored HSBC's utilizations of Lender Processing Services, Inc.'s (LPS's) system known as "NewTrak" to automatically file claims and trigger stay relief motions when debtors become 60 days delinquent. In this case, NewTrak produced incorrect information for the proof of claim, with the incorrect note and balance attached to he claim, and incorrectly triggered stay relief motion when debtor was not in default. After debtor objected to HSBC's claim, creditor's attorney admitted lack of access to loan history and inability to contact client directly without use of NewTrak. The Court ordered HSBC to provide accounting and full loan history, and U.S. Trustee was invited to investigate and participate in discovery. The Court held that: the bankruptcy court had subject matter jurisdiction to address

the matters that were the subject of its order to show cause; attorney violated Rule 9011 by advocating misleading stay motion based on admissions he knew to be then untrue; attorney violated Rule 9011 by signing erroneous proof of claim without reviewing it; attorney violated Rule 9011 by failing to make reasonably inquiry before signing misleading stay motion and untrue "form" answer to claim objection; as sanctions, attorney who failed to make reasonable inquiry before signing documents would be ordered to obtain three extra CLE credits in professional responsibility/ethics; head of law firm that handled claim objection would be required to obtain training in the electronic information system used by his firm to obtain mortgage loan-related information, to spend a day observing his employees as they handled referrals and to provide training to members of firm's bankruptcy department; mortgage lender would be required to send its "network" law firms a letter outlining and encouraging use of "escalation" policy whereby counsel could contact mortgage lender directly as opposed to electronically; and sanctions against company that provided mortgage processing and default management services to mortgage lender were not warranted.

**Best Practices in Drafting and Filing a Motion for Relief**

**A. Preparation of the Motion for Relief**

a. Obtain a complete copy of the loan and servicing file

b. Carefully review the documents for any irregularity

c. Verify the parties: Who is filing the Motion for Relief?
    i. Originator, assignee or servicer

d. Verify standing: Is the party the holder or servicer?

e. Verify the figures, including the default

    i. Escrow charges; proof of advising debtor of payment changes

    ii. Post-petition payments made through the plan by the Trustee. Verify with the Trustee whether the Debtor is current.

    iii. If in doubt or have questions as to the application of funds or payment in suspense, advise the client accordingly and error on the side of caution.

Authored by: Faiq Mihlar of Heavner, Scott, Beyers & Mihlar, LLC
Heather Giannino of Heavner, Scott, Beyers & Mihlar, LLC

f. Attempt to negotiate a settlement or agreed order with the Debtor's attorney.

g. ***Communicate, Communicate, Communicate!***

h. Be Careful of Rule 9011 and 28 U.S.C. §1927.

i. Bankruptcy Rule 9011: Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) Signature. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to the Court. By presenting to the Court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon

the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated.

(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On court's initiative. On its own initiative, the Court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of sanction; limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims

made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the Court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.
(e) Verification. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.

(f) Copies of signed or verified papers. When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

ii. 28 U.S.C §1927: Counsel's Liability for Excessive Costs

1. Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

**B. Recent Decisions**

a. *In re Hill*, 2009 WL 1956174 (Bankr. D. Ariz. 2009).

i. Chase Financial was proper party under Bankruptcy Rule 7017 to bring stay relief motion when witness testified that Chase had possession of note and produced original note in court; since debtor raised no substantive defenses, stay relief was granted.

b. *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009).

i. Mortgage creditor lacked standing to seek stay relief when creditor failed to demonstrate possession of notes or to prove transactions by which it acquired ownership of notes. Under Idaho UCC, holder of a negotiable instrument must possess note and note must be payable to person in possession or to bearer, and to be "nonholder in possession of the instrument who has the rights of a holder," nonholder must "prove the transaction" through which it acquired note.

c. *In re Fitch*, 2009 WL 1514501 (Bankr. D. Ohio 2009).

i. MERS lacked standing to seek stay relief and compounded problem when attorney for Select Portfolio Services, Inc., filed affidavits of default on behalf of MERS; Court ordered audit of all cases to determine if improper affidavits of default had been filed and whether MERS had improperly been named as movant for stay relief.

**Best Practices for Chapter 13 Plan Review**

**A. Plan Review**

a. Know and understand the uniform plan in your forum.

b. Review Plans Carefully

c. Because of the *Espinosa* decision, it may be necessary to object more frequently if there is any variance.

i. Confirmation orders can become final even if they contain illegal provisions. (See *Espinosa*: discharge of non-dischargeable student loan)

**B. Recent Decisions**

a. Confirmation orders can become final even if they contain illegal provisions.

i. *Espinosa v. United Student Aid Funds, Inc.*, 130 SCT 1367 (March 23, 2010): The Supreme Court affirmed the Ninth Circuit's holding that a Debtor may obtain discharge of a student loan by including it in a Chapter 13 Plan if the Creditor fails to object after notice of the proposed plan and the Bankruptcy Court confirms the plan.

ii. Facts: The Debtor's Chapter 13 Plan proposed to pay only the principal amount of his student loan and thus discharge the accrued interest. The Creditor received a copy of the plan, and in response, filed a proof of claim for the principal and interest due on the loan. The Bankruptcy Court confirmed the plan without an adversary proceeding to determine undue hardship, in contravention of the Code's requirements. After confirmation, the Chapter 13 trustee mailed the Creditor notice that the amount claimed in the proof of claim differed from the amount listed for payment in the plan. The notice informed the Creditor that if it wanted to dispute the

treatment of its claim, it had the responsibility to notify the trustee within 30 days. The Creditor failed to notify the trustee. After the Defendant completed his Chapter 13 plan, the Creditor attempted to collect the remaining debt. The Debtor then filed a motion in Bankruptcy Court to enforce its discharge order by directing the Creditor to stop collection efforts, the Creditor filed a cross-motion to set aside as void the order confirming the plan. The question before the Court was whether the Bankruptcy Court's order confirming the Debtor's plan was void for the purpose of Federal Rule of Civil Procedure Rule 60(b)(4).

iii. Holding: The Supreme Court held the following:

1. Because the Creditor had actual notice of the Court's error and failed to object to the plan or timely appeal the order confirming the plan, the order remained enforceable;

2. The legal error in the Bankruptcy Court's confirmation of the plan without an undue hardship finding did not void the order;

   (a) The Court stressed tat a judgment is not void simply because it was erroneous and that Rule 60(b)(4) applies only when a judgment is premised on "a certain kind of jurisdictional error" or on a "violation of due process that deprives a party of notice or the opportunity to be heard."

3. The Court acknowledged the Creditor's argument that its failure to declare the confirmation order void might encourage unscrupulous debtors to abuse the Chapter 13 process. The Court noted that debtors and their attorneys are subject to a number of penalties for engaging in improper conduct in a bankruptcy case, and that if existing sanctions are not sufficient to discourage bad faith attempts to discharge student loans, Congress should enact additional provisions.

# BANKRUPTCY PLANNING

## Creditor's Response to Debtor's Running up Debt Prior to Bankruptcy Filing

### A. Recent Decisions

a. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S.Ct. 1324 (March 8, 2010).

i. Law firm brought suit against the United States seeking a declaratory judgment that certain provision of the Bankruptcy Code added by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) did not apply to attorneys and law firms and were unconstitutional as applied to attorneys.

ii. This case challenged the "Debt Relief Agency" provisions that were added by BAPCPA; specifically the Court considered the following:

1. Whether attorneys are included in the definition of "Debt Relief Agencies" (DRAs) in §101(12A) of the Code;

2. Whether §526(a)(4), which prohibits a DRA from advising an "assisted person" (defined in §101(3) as a person whose debts are primarily consumer debts and whose non-exempt property is worth less than $164,250) to incur more debt "in contemplation of bankruptcy" violates the First Amendment; and

3. Whether §528, which requires certain disclosures in advertisements by DRAs, violates the First Amendment rights of attorneys by compelling speech.

iii. The Supreme Court held the following:

1. That attorneys are included in the definition of Debt Relief Agency (DRA) in §101(12A) of the Code;

2. That §526(a)(4) prohibits a DRA from advising a client to incur more debt "in contemplation of bankruptcy;"

Authored by: Faiq Mihlar of Heavner, Scott, Beyers & Mihlar, LLC
Heather Giannino of Heavner, Scott, Beyers & Mihlar, LLC

a. In adopting a narrow reading of the statute, the Court stated that the advice prohibited by §526(a)(4) would usually consist of advise that is "abusive per se," such as advise to "load up" on debt prior to filing bankruptcy with the expectation of discharging that debt.

3. That §528, which imposes advertising disclosure requirements on DRAs, is reasonably related to the government's interest in preventing consumer deception and therefore valid.

**B. Dischargeability Limitations: Time Period and Amount**

a. The U.S. Bankruptcy Code excepts from discharge certain debts outlined in 11 U.S.C. §523(a), this section contains exceptions to discharge for money, property, or services or an extension or renewal of credit obtained by false pretenses, false representation, or actual fraud.

b. The presumption of nondischargeability for fraud was expanded by BAPCPA.

i. The amount a debtor must charge for "luxury goods" to invoke the presumption was reduced from $1225 to $500 for cases commenced before April 1, 2007 and $550 for cases commenced thereafter;

ii. The amount that the debtor must withdraw in cash advances in order to invoke the presumption is reduced from $1225 to $750 for cases commenced before April 1, 2007 and $825 for cases commenced thereafter;

iii. The period of time prior to the filing in which these charges must be made in order for the presumption to apply was increased from 60 to 90 days for luxury goods, and from 60 to 70 days for cash advances.

**C. Approach from Creditor's Perspective**

a. If Debtors obtain loans from small finance companies to pay attorney's fees or to run up their debt prior to filing bankruptcy, how should Creditors react?

i. Attend the First Meeting of Creditors

1. Although it is not necessary or required that creditors attend this meeting, the meeting provides an opportunity for a creditor to quickly and efficiently gather information about the creditor's debt and property of the estate that secures the debt. If a creditor suspects that the debtor is hiding assets, it may be that some well placed questions at the first meeting of creditors will prompt the interest of the Trustee.

ii. Ask Relevant Questions

1. While there are not specific limits to questions, time constraints necessarily limit the amount of time available to each creditor. Practically speaking, if a creditor pursues a line of questioning that is of interest to the Trustee because it is eliciting information of value to the Trustee regarding the estate and its assets, the Trustee will likely let the line of questioning continue.

iii. Letter and Request for Reaffirmation

1. If the time line supports a Complaint to Determine Dischargeability under 11 U.S.C. §523(a), prepare a Complaint and send a letter to the Debtor's attorney seeking reaffirmation.

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**Honorable Mary D. France**
**Dianne C. Kearns**
**Faiq Mihlar**
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I. **Ethical ramifications of *Espinosa v. United Student Aid Funds, Inc.*, 130 S.Ct. 1367 (2010)**.

a. Summary of ethical considerations: Can a Debtor's attorney ethically propose a Chapter 13 plan which includes non-traditional treatment to secured creditors? What obligation does the Court have if any? What obligation does the Chapter 13 Trustee or Creditor have?

b. Example:

i. Facts: The Debtor purchased a vehicle within 910 days of filing and is therefore subject to the anti-modification provision found in the "hanging paragraph" of 11 U.S.C. § 1325(a). The retail value of the vehicle ($15,000.00) however is significantly less than the amount of the debt ($30,000.00). The Debtor cannot afford to pay for the entire debt through a Chapter 13 plan but can pay $23,000.00 at the *Till* rate of interest. If the Debtor filed a chapter 7, she would lose her car and the creditor would likely receive significantly less than the retail value of the car since it would be sold at an auto auction. Debtor wants to propose to the creditor that she be allowed to pay $23,000.00 instead of the entire amount of the debt. See the attached plan.

c. Statutory requirements:

i. Section 1325(a)(5) requirements concerning secured debts:

> [T]he court shall confirm a plan if—with respect to each allowed secured claim provided for by the plan--
>
> (A) the holder of such claim has accepted the plan;
>
> (B) (i) the plan provides that--
>
> (I) the holder of such claim retain the lien securing such claim until the earlier of--
>
> (aa) the payment of the underlying debt determined under

nonbankruptcy law; or

(bb) discharge under section 1328 [11 USCS § 1328]; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if--

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder;

ii. Section 1325 "hanging paragraph" prohibiting cram down of 910 vehicles:

For purposes of paragraph (5), section 506 [11 USCS § 506] shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49 [49 USCS § 30102]) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

d. Caselaw

i. Confirmed plans bind creditors: *Espinosa v. United Student Aid Funds, Inc.*, 130 S.Ct. 1367 (2010): The Supreme Court held that a Debtor may obtain discharge of a student loan by including it in a Chapter 13 Plan, if the Creditor fails to object, if the Creditor receives notice and the Bankruptcy Court confirms the plan. But, the Court also held that the use of the chapter 13 plan to determine issues that should have been raised

procedurally as an adversary under Bankruptcy Rules 7000 et seq was effectively an unscrupulous act by Debtor's counsel.

ii. The Creditor has a duty to review the Chapter 13 Plan and object. ("Head in sand" rule.)

1. A creditor cannot sleep on its rights and forego review of the terms of a Chapter 13 plan. The Supreme Court in Espinosa recognized this duty:

United's response -- that it had no obligation to object to Espinosa's plan until Espinosa served it with the summons and complaint the Bankruptcy Rules require, Brief for Petitioner 33 -- is unavailing. Rule 60(b)(4) does not provide a license for litigants to sleep on their rights. United had actual notice of the filing of Espinosa's plan, its contents, and the Bankruptcy Court's subsequent confirmation of the plan. In addition, United filed a proof of claim regarding Espinosa's student loan debt, thereby submitting itself to the Bankruptcy Court's jurisdiction with respect to that claim. See Langenkamp v. Culp, 498 U.S. 42, 44, 111 S. Ct. 330, 112 L. Ed. 2d 343 (1990) (per curiam). United therefore forfeited its arguments regarding the validity of service or the adequacy of the Bankruptcy Court's procedures by failing to raise a timely objection in that court.

*United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1380 (U.S. 2010).[1]

2. Failure to object is deemed consent to treatment of a secured creditor under Section 1325(a)(5)(A). The majority opinion is that failure to object is deemed consent to proposed treatment in a chapter 13 plan. See *In re* Andrews, 49 F.3d 1404, 32 C.B.C.2d 1826 (9th Cir. 1995) ; *In re Szostek*, 886 F.2d 1405 (3d Cir. 1989) ;

[1] See also *In re Harvey*, 213 F.3d 318, 322 (7th Cir. Ind. 2000). ("Forcing parties to raise concerns about the meaning of Chapter 13 filings at the original confirmation proceedings does not impose an unreasonable burden on bankruptcy participants. Quite the contrary--it is perfectly reasonable to expect interested creditors to review the terms of a proposed plan and object if the terms are unacceptable, vague, or ambiguous. As this court said in In re Pence, 905 F.2d 1107, 1109 (7th Cir. 1990), a creditor is "not entitled to stick its head in the sand and pretend it would not lose any rights by not participating in the proceedings." See also In re Andersen, 179 F.3d 1253, 1257 (10th Cir. 1999) ("A creditor cannot simply sit on its rights and expect that the bankruptcy court or trustee will assume the duty of protecting its interests."); In re Szostek, 886 F.2d 1405, 1414 (3d Cir. 1989) (stating that creditors must take an active role in protecting their rights).").

*In re Brown*, 108 B.R. 738 (Bankr. C.D. Cal. 1989) ; *see also In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263 (10th Cir. 1988) (failure to object deemed acceptance in chapter 11 case). *In re Tonioli*, 359 B.R. 814, 817-18 (Bankr. D. Utah 2007); *In re Schultz*, 363 B.R. 902, 907 (Bankr. E.D. Wis. 2007); *In re Wallace*, 2007 Bankr. LEXIS 4191, 2007 WL 3531551 (Bankr. M.D.N.C. Nov. 12, 2007), 5 Keith M. Lundin, Chapter 13 Bankruptcy § 445.1 (3d ed. 2000 & Supp. 2004).[2]

Collier on Bankruptcy states:

A number of courts have held that the failure of a secured creditor to object to its treatment in the plan may be deemed to be acceptance of the plan. This result is in fact mandated in some districts by local rule. Consistent with this view, it has also been held that the trustee does not have standing to object to a plan on the basis that the plan does not afford secured creditors all of their rights under section 1325(a)(5)(B). In any case, it is clear that if no party raises the plan's failure to comply with that subsection the plan may be confirmed." 8-1325 Collier on Bankruptcy P 1325.06.

iii. <u>The Debtor has the obligation to give adequate notice of the proposed treatment in the chapter 13 plan. The Debtor also has the obligation to propose plans in conformity with the Bankruptcy Code. ("Play fair, no hanky panky" rules.")</u>

1. <u>Creditors must receive adequate notice of its proposed treatment</u>.[3] All the cases concerning the binding effect of confirmation first examine whether the creditor had notice and opportunity to respond. The Supreme Court states:

Due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

[2] See William J. McLeod, *Consequences of Silence in Chapter 13 Plan Confirmation Can Bind*, XXVIII ABI Journal 7, 51, 79-81, September 2009, for a pro-Debtor perspective. See also Kirk B. Burkley, *Creditor Silence Is Not Consent in Chapter 13 Plan Confirmation*, XXVIII ABI Journal 7, 50, 78, September 2009) for a Creditor's perspective.

[3] See Hon. J. Michael Deasy, Mark N. Berman and Prof. Julet Moringiello, *A CONVERSATION ABOUT NOTICE AND DUE PROCESS IN BANKRUPTCY PROCEEDINGS*, ABI Northeast Conference, 2010.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950); see also Jones v. Flowers, 547 U.S. 220, 225, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) ("[D]ue process does not require actual notice . . ."). Here, United received actual notice of the filing and contents of Espinosa's plan. This more than satisfied United's due process rights.

*United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1378 (U.S. 2010).

2. The Debtor also has the obligation to propose plans in conformity with the Bankruptcy Code or face dicipline. Debtors and their attorneys face penalties for engaging in improper conduct in bankruptcy proceedings. See, e. g. Rule 1008 (requiring filings to "be verified or contain an unsworn declaration" of truthfulness under penalty of perjury); Rule 9011 (authorizing sanctions for signing certain documents not "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"); 18 U. S. C. § 152 (imposing criminal penalties for fraud in bankruptcy cases). *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1382 (U.S. 2010); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 644 (U.S. 1992).

iv. The Duty of the Bankruptcy Court. Under Section 1325(a) the Bankruptcy Court has a duty to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue.[4]

1. The Court must review plans to protect creditors. Several Courts have held that creditors have a reasonable expectation that the court will not approve treatment that violates the bankruptcy code. In essence, the Bankruptcy Court must make sure that Creditors' rights are not being violated by inclusion of illegal provisions in a chapter 13 plan. See *In re Garner*, 399 B.R. 267, 273 (Bankr. D. Utah 2009) and *In re Bethoney*, 384 B.R. 24, 34 (Bankr. D. Mass. 2008).[5]

e. Ethical questions

i. Debtor's counsel

[4] *Espinosa* at 1381, footnote 14.

[5] Both Courts rejected Chapter 13 plans that proposed to bifurcate secured automobile claims protected by the anti-modification provision of the "hanging paragraph" in Section 1325(a).

1. How do you propose an alternative treatment (e.g. bifurcation of a 910 car claim) in a chapter 13 plan that doesn't constitute an "illegal" provision?
2. How do you determine what is an "illegal" provision?
3. If you propose an illegal provision in your plan, what obligation do you have to discuss the potential ramifications with your client?

ii. Creditor's counsel
1. Does a creditor still have a duty to object to plan provisions that appear to be illegal since the Court now also has that duty?
2. Can creditors make a claim against the Court for failing to protect its interests and for the loss thereof?

iii. Court
1. How does the Court balance being a neutral and unbiased party when the Court is now forced to effectively protect creditor's interests in proposed chapter 13 plans?
2. How far does the Court's duty to protect creditor's interests extend? When does the Court have to intervene itself in the confirmation process? Is it limited to situations where a Debtor is intentionally trying to circumvent the Bankruptcy Code or does it extend to legitimate alternative treatments that a prima facie basis in the law that passes 9011 muster?
3. If the Court has an obligation to review the plan for compliance with Section1325(a) then does the Court also have a duty to the Debtor to ensure that the Debtor is paying unsecured creditors no more than is necessary under the code? See e.g. Section 1325(a)(4). If not, why not?

f. Best practices
i. Debtor's counsel
1. Don't file plans with the intent of hiding alternative treatments for creditors in anticipation of confirmation and then springing the surprise treatment on the Creditor.
2. When filing plans with alternative treatment, make the proposed treatment clear and obvious. Put the language in bold, caps and underline. Also, include in the plan the language of the statute or case you rely upon for the alternative treatment. This will put the creditor on notice and give the Court a better understanding of your proposed treatment.
3. Contact creditor's counsel, if any, to discuss the treatment before confirmation. This is not practical in most cases as creditors

usually don't hire attorneys unless they have seen the proposed treatment and filed an objection to confirmation.

4. Send a letter to the creditor upon filing with a description of your proposal requesting a response.
5. Don't include issues in the chapter 13 plan that are listed as adversary proceedings under Bankruptcy Rule 7000.
6. Keep your client (and malpractice insurance) advised of the potential consequences if you propose an illegal provision in a chapter 13 plan.

ii. Creditor's counsel

1. Advise Creditors to always object to chapter 13 plans when their treatment is questionable at all.
2. Advise Creditors not to rely upon the Court to protect their rights.
3. Communicate with Debtor's counsel and don't automatically assume that Debtor's counsel is trying trick your client.

iii. Court

1. Inform the bankruptcy bar of your interpretation of the requirements to become involved in the review of chapter 13 plans via local rules, standing orders or by opinion.
2. Inform the bar of the consequences of filing a plan with illegal provisions or with failure to respond.
3. Interject the Court in cases only when the proposed chapter 13 plan intentionally, and without any basis in law, contravenes the provisions of section 1325(a). Otherwise, allow the confirmation process to work.

II. **Ethical ramifications of *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S.Ct. 1324 (March 8, 2010).** [6]

a. Summary of ethical considerations: Can a Debtor's attorney ethically and legally advise a debtor to incur pre-petition debt?

b. Example:

i. Facts: A Debtor comes into your office to file bankruptcy. His car is not running. Since he has juggled his debt successfully he has great credit. He needs a car to drive to work and to support his family. He needs to file bankruptcy due to overwhelming medical bills.

[6] On March 9, 2010, ABI hosted a discussion of the *Milavetz* case entitled *Bankruptcy Experts Discuss the Supreme Court's Milavetz Opinion Upholding "Debt Relief Agency" label and Other Attorney Provisions Under BAPCPA.* To listen to this discussion go to http://www.abiworld.org/webinars/2010/Milavetz_Supreme_Court/index.html. See also Dillon E. Jackson, C.R. Bowles Jr., Prof. Margaret Howard and Prof. G. Ray Warner, *Steering Clear of Trouble:Ethical Considerations in Today's Complex World,* ABI 28th Annual Spring Meeting 2010 pages 1452-1474attached for a discussion of the history and opinion in *Milavetz*.

c. Statutory requirements:

i. Section 526(a)(4) limits the advice Debtor's counsel can give. It states in relevant part that:

(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…

ii. Sections 526(c)(2) – (5) set forth the penalties that Debtors' counsel face for failure to follow the requirements of this section:

(2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have--

(A) intentionally or negligently failed to comply with any provision of this section, section 527 [11 USCS § 527], or section 528 [11 USCS § 528] with respect to a case or proceeding under this title for such assisted person;

(B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521 [11 USCS § 521]; or

(C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency.

(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State--

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court.

(4) The district courts of the United States for districts located in the State shall have concurrent jurisdiction of any action under subparagraph (A) or (B) of paragraph (3).

(5) Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may--

(A) enjoin the violation of such section; or

(B) impose an appropriate civil penalty against such person.

d. Caselaw

i. Debtor's counsel can advise Debtors to incur debt when the reason for incurring the debt is for enhanced financial prospects. : *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S.Ct. 1324 (March 8, 2010). The Supreme Court narrowed the scope of Section 526(a)(4) to restrict Debtor's attorneys from advising their clients to load up on debt in anticipation of filing bankruptcy. However, counsel can advise clients to take out debts that will benefit them post-petition or that are necessary for the support and maintenance of the debtor or her dependant. The Court states:

The hypothetical questions Milavetz posits regarding the permissibility of advice to incur debt in certain circumstances, see Brief for Milavetz 48-51, are easily answered by reference to whether the expectation of filing for bankruptcy (and obtaining a discharge) impelled the advice. We emphasize that awareness of the possibility of bankruptcy is insufficient to trigger § 526(a)(4)'s prohibition. Instead, that provision proscribes only advice to incur more debt that is principally motivated by that likelihood. Thus, advice to refinance a mortgage or purchase a reliable car prior to filing because doing so will reduce the debtor's interest rates or improve his ability to repay is not prohibited, as the promise of enhanced financial prospects, rather than the anticipated filing, is the impelling cause. Advice to incur additional debt to buy groceries, pay medical bills, or make other purchases "reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor," § 523(a)(2)(C)(ii)(II), is similarly permissible.

*Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339, Footnote 6, (2010)

ii. Debtors counsel can discuss taking out pre-petition debt in anticipation that such debt will be discharged, but can't advise them to take those

debts. The Court reinforced Debtor's counsel's ability to discuss these issues with clients. However, the Court made clear that there is a line that can't be crossed. The Court states:

> [We] reject Milavetz's suggestion that § 526(a)(4) broadly prohibits debt relief agencies from discussing covered subjects instead of merely proscribing affirmative advice to undertake a particular action. Section 526(a)(4) by its terms prevents debt relief agencies only from "advis[ing]" assisted persons "to incur" more debt. Covered professionals remain free to "tal[k] fully and candidly about the incurrence of debt in contemplation of filing a bankruptcy case." Brief for Milavetz 73. Section 526(a)(4) requires professionals only to avoid instructing or encouraging assisted persons to take on more debt in that circumstance. Cf. ABA Model Rule of Professional Conduct 1.2(d) (2009) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a [*1338] client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law"). Even if the statute were not clear in this regard, we would reach the same conclusion about its scope because the inhibition of frank discussion serves no conceivable purpose within the statutory scheme. Cf. Johnson v. United States, 529 U.S. 694, 706, n. 9, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000).
>
> *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1337-1338 (U.S. 2010).

e. Ethical questions
   i. If the Debtor is going to file a chapter 7 bankruptcy, could the Debtor's attorney still advise the Debtor to take out a loan for a new car? The new car will probably not benefit any of the existing creditors and may actually push the Debtor below the Section 707(b) guidelines with this additional expense.
   ii. What advice should counsel give to Debtors when debating whether to take out additional pre-petition debt concerning the non-dischargeability of that debt or potential ramifications in the bankruptcy?
   iii. Should a Debtor's attorney advise his client about the recourse Debtors have against counsel under 526(c)?
   iv. What obligation or duty does a Creditor have to notify the Court if the Creditor has knowledge that Debtor's counsel has violated this section?

v. What obligation does the Court have to investigate these complaints?

f. Best practices

i. Debtors' counsel should be conservative about advising clients to take out debt prior to filing bankruptcy and should do so when there is a clear benefit to the debtor.

ii. Counsel should advise clients of the potential ramifications including the non-dischargeability provisions of per-petition debt under Sections 523(a)(2)(C).[7]

iii. Counsel giving advise to incur debt should follow up verbal advice with a letter to confirm the limits of the advice.

iv. A creditor that has reasonable information to report misconduct should do so to improve the practice of the bankruptcy bar.

v. The Court should investigate poor advice and enforce this section as narrowly determined by the Supreme Court.

[7] This code section states:
(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title [11 USCS § 727, 1141, 1228(a), 1228(b), or 1328(b)] does not discharge an individual debtor from any debt--
(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by--
(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;…
(C) (i) for purposes of subparagraph (A)--
(I) consumer debts owed to a single creditor and aggregating more than $ 600 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and
(II) cash advances aggregating more than $ 875 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and
(ii) for purposes of this subparagraph--
(I) the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act [15 USCS § 1602]; and
(II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor.

United States Bankruptcy Court
Southern District of Illinois

| | |
|---|---|
| In re: | ) |
| Ima Debtor, | ) Case No.: EXAMPLE #1 |
| | ) ☐Original Chapter 13 Plan |
| | ) ☒Amended Plan Number 2 |
| | ) (Changes must be underlined) |
| | ) |
| Debtor(s). | ) |

## CHAPTER 13 PLAN AND NOTICE OF TIME TO OBJECT

***GENERAL ORDERS 07-5 and 08-3:*** The provisions of the Court's General Orders 07-5 and 08-3 are incorporated herein by reference and made part of this plan. These Orders are available at www.ilsb.uscourts.gov.

***YOUR RIGHTS WILL BE AFFECTED:*** You should read these papers carefully and discuss them with your attorney. Anyone who wishes to oppose any provision of this plan set out below must file a timely written objection. This plan may be confirmed without further notice or hearing unless written objection is filed and served within 21 days after the conclusion of the § 341 meeting of creditors. Objections to an amended plan must be filed and served within 21 days after the date of filing of the amended plan. **If you have a secured claim, this plan may void or modify your lien if you do not object to the plan.**

***THIS PLAN DOES NOT ALLOW CLAIMS:*** Except for the payment of current on-going mortgage payments paid by the Trustee, creditors must file a timely proof of claim to receive distribution under a confirmed plan and to receive average monthly payments as set forth in the Debtor(s)' Plan.

**1. *PAYMENTS***

The Debtor or Debtors (hereinafter "Debtor") submit to the Standing Chapter 13 Trustee all projected disposable income to be received within the applicable commitment period of the plan. The payment schedule is as follows:

| Start Month # | End Month # | Monthly Payment | Total |
|---|---|---|---|
| 1 | 10 | TPI | $16,409.31 |
| 11 | 60 | $2,296.00 | $114,800.00 |
| | | | |
| **Total Months:60** | | **Grand Total Payments: $131,209.31** | |

**The payment shall be withheld from the debtor's paycheck: ☒Yes ☐ No**

**Employee's name from whose check the payment is deducted:**
**Employer's name, address, city, state, phone:**

**Debtor is paid: ☐ Monthly ☒Twice monthly ☐ Weekly ☒Biweekly ☐ Other**

**☒ This plan cures any previous arrearage in payments to the Chapter 13 Trustee under any prior plan filed in this case.**

**NOTE: PLAN PAYMENTS TO THE TRUSTEE MUST COMMENCE WITHIN 30 DAYS OF THE FILING OF THE PETITION. THE DEBTOR MUST MAKE DIRECT PAYMENTS TO THE TRUSTEE BY MONEY ORDER**

**OR CASHIER'S CHECK UNTIL THE EMPLOYER DEDUCTION BEGINS.**

**ORDER OF DISTRIBUTION**

The following order of priority shall be utilized by the Trustee with respect to all payments received from the Debtor:

1. Any unpaid portion of the filing fee;
2. Notice fees equal to $.50 per page of the Plan, multiplied by the number of names listed on the Debtor's mailing matrix;
3. The trustee's fees for each disbursement, the percentage of which is fixed by the U.S. Trustee;
4. Other allowed administrative expenses;
5. On-going mortgage payments as set forth in the Debtor's Plan (or as later modified), attorney's fees, secured creditors, and executory contracts/leases (to be paid pro-rata based upon the average monthly payment amount);
6. Priority creditors as set forth in the Debtor's Plan;
7. Any special class of Unsecured Creditors as set forth in the Debtor's Plan; and
8. General Unsecured Creditors.

**ATTORNEY FEES**

Attorney's fees (select one):
[ X ] Debtor's counsel elects the following fixed fee: [ X ] $ 1,000.00 ($3,500.00 or less for a consumer case); or [ ] $_____ ($4,000.00 or less for a business case), of which counsel has received $ 1.00 pre-petition. The average monthly payment amount to be received by Debtor's counsel is $ 250.00 (not to exceed $500.00 per month).

[ ] Debtor's counsel elects to be paid on an hourly basis and will file a fee application(s) for approval of fees. No fees shall be disbursed until a fee application is approved by the Court; however, the Trustee shall reserve a total of $3,500.00 for payment toward such application, pursuant to the Order of Distribution. Said funds shall be reserved at the average monthly amount of $300.00.

**2. OTHER ALLOWED ADMINISTRATIVE EXPENSES**

**Such Claims are as follows:**

Name:_____ Est. Amount of Claim: $_____

***3. PRIORITY CLAIMS***

***Such Claims are as Follows:***

**A) Domestic Support Obligations:**

1) X None. If none, skip to Other Priority Claims.
2) Name of Debtor owing Domestic Support Obligation _____
3) The name(s) and address(es) of the holder(s) of ALL domestic support obligation(s) as defined in 11 U.S.C. § 101 (14A) and, if applicable, the estimated arrearage:

| Name | Address, City and State | Zip Code | Est. Arrearge |
|---|---|---|---|
| **1.** | | | |

| | | | |
|---|---|---|---|
| **2.** | | | |
| **3.** | | | |

4) **The Debtor is required to pay all post-petition domestic support obligations directly to the holder of the claim and not through the Chapter 13 Plan**.

**B) Domestic Support Obligations assigned to or owed to a governmental unit under 11 U.S.C. §507(a)(1)(B):**

1) __X___None. If none, skip to Other Priority Claims.
2) Name of Creditor, total estimated arrearage claim, estimated amount to be paid through the Plan, and the state agency case number:

| Creditor | Total Est. Arrearage Claim | Est. Amount to Be paid | State Agency Case # |
|---|---|---|---|
| **1.** | | | |
| **2.** | | | |

**C) Other Priority Claims:**

| Creditor | Basis for Priority | Estimated Claim |
|---|---|---|
| | | |
| | | |

4. ***REAL ESTATE - CURING DEFAULTS AND MAINTAINING PAYMENTS:*** Payments shall be made by the trustee if the plan addresses a pre-petition default. Otherwise, payments may be made directly by the Debtor to the creditor. Where there are arrearages, all post-petition payments are to begin on the first due date after the month in which the petition is filed. All fees and/or charges incurred by the creditor prior to the date of the entry of discharge, which are assessed against the debtor either before or after discharge, must be approved by the Court. All payments received from the trustee must be credited by the creditor as the Plan directs. See Amended General Order 07-5 and General Order 08-3.

**A) Payment of arrearages are as follows**:

| Creditor | Description of Collateral | Est. Arrearage | Int. Rate (if any) | Avg. Monthly Pymt |
|---|---|---|---|---|
| First Horizon | Residence | $5,000.00 | 0% | $84.00 |
| First Horizon | Residence | $600.00 (post-petition atty fees) | 0% | $12.00 |

**B) Payment of on-going mortgage payments made by the Trustee are as follows**:

| Creditor | Account # | Payment Address | Monthly Mort. Pymt. | Date 1st Pymt Due |
|---|---|---|---|---|
| First Horizon | 4647 | 4000 Horizon Way<br>Irving TX 75063 | $1,127.66 | 8/1/09-<br>10/1/09 |
| First Horizon | 4647 | 4000 Horizon Way<br>Irving TX 75063 | $1,066.40 | 11/1/09 |

**C) Payment of on-going mortgage payments made directly by the Debtor are as follows**:

| Creditor | Account # | Payment Address | Monthly Mort. Pymt. | Date 1st Pymt Due |
|---|---|---|---|---|
| | | | | |
| | | | | |

**D) Real Estate Property Tax Claims shall be paid as follows**:

☐ By Debtor Directly
☒ Included in the mortgage payment
☐ Debtor is not required to pay real estate taxes

5. ***SECURED CLAIMS AND VALUATION OF COLLATERAL UNDER 11 U.S.C. § 506***

**A) Secured Claims to which §506 Valuation is NOT Applicable ("910 Claims"):**

Claims listed in this subsection are debts secured by a purchase money security interest in a personal motor vehicle, incurred within 910 days preceding the date of the filing of the bankruptcy OR debts secured by a purchase money security interest in "any other thing of value," incurred within one year preceding the date of the filing of the bankruptcy. These claims will be paid in full with interest as provided below and in average monthly payments as specified below.

| Creditor | Collateral to be Retained | Est. Claim Amt. | Interest Rate | Avg. Monthly Pymt. |
|---|---|---|---|---|
| Village Bank | 2004 Dodge Dakota | $14,984.05 | 5.25% | $284.50 |
| | | | | |

**B) Secured Claims to which §506 Valuation is Applicable ("Cram Down Claims")**:

Claims listed in this subsection are debts secured by personal property NOT described in the immediately preceding paragraph of this plan. These claims will be paid either the scheduled value of the secured property or the secured amount of that claim, whichever is less, with interest as provided below and in estimated monthly payments as specified below. Any portion of a claim that exceeds the scheduled value of the secured property will be treated as an unsecured claim without the necessity of an objection.

| Creditor | Collateral to be Retained | Scheduled Debt | Value | Interest Rate | Avg. Monthly Pymt |
|---|---|---|---|---|---|
| Chrysler Financial NOTE: THIS IS DEBTORS' PROPOSAL TO PAY LESS THAN THE FULL AMOUNT OF THE LOAN TO BE ACCEPTED BY CREDITOR PURSUANT TO 1325 (a)(5)(A). FAILURE TO OBJECT SHALL CONSTITUTE ACCEPTANCE OF THE PLAN PURSUANT TO SHAW V AURGROUP, 552 F.3d 447 (6TH Cir. 2009) | 2008 Dodge Grand Caravan | $28,384.15 | $17,225.00 *A 910 CAR BEING CRAMMED DOWN, DUE TO DEPRECIATION THE SCHEDULED DEBT IS ABOUT 1.5 TIMES MORE THAN THE VALUE | 8.000% | $349.87 |
| | | | | | |

**C) Surrender of Property:**

The Debtor surrenders any and all right, title and interest in the following collateral. If applicable, any

unsecured deficiency claim must be filed within 160 days of the Petition date.

| Creditor | Collateral to be surrendered | Location | Est. Monies Previously Paid by the Trustee |
|---|---|---|---|
| | | | |
| | | | |

**6. *SEPARATELY CLASSIFIED CLAIMS***

| Creditor | Secured/Unsec | Amount | Int. Rate (If Any) | Avg. Monthly Pmt. | Paid by Trustee/Other |
|---|---|---|---|---|---|
| | | | | | |
| | | | | | |

**7. *EXECUTORY CONTRACTS AND UNEXPIRED LEASES* All executory contracts and unexpired leases are REJECTED, except the following which are assumed:**

**A) Payment of executory contracts and unexpired leases made by the Debtor are as follows**:

| Creditor | Account # | Payment Address | Monthly Pymt | Date 1st Pymt Due |
|---|---|---|---|---|
| | | | | |
| | | | | |

**B) Payment of executory contracts and unexpired leases made by the trustee are as follows**:

| Creditor | Account # | Payment Address | Monthly Pymt | Date 1st Pymt Due |
|---|---|---|---|---|
| | | | | |

**C) Payment of arrearages by the Trustee are as follows**:

| Creditor | Description of Collateral | Est. Arrearage | Int. Rate (If Any) | Avg. Monthly Pmt. |
|---|---|---|---|---|
| | | | | |

**8. *UNSECURED CLAIMS***: The amount necessary to pay all classes of unsecured creditors pursuant to 11U.S.C. §§ 1325(a)(4) and 1325(b) is $__0__. The amount estimated to be paid to non-priority unsecured creditors is $__0__. All non-priority unsecured creditors may share in any pool of money left after all administrative, priority, and secured claims have been paid. Non-priority unsecured creditors to be paid pro-rata. *If the Plan proposes to pay all classes of unsecured creditors 100% of their allowed claims, leave the above spaces blank and check here ____.*

**9. *POST PETITION CLAIMS***: Post-petition claims shall not be paid by the Trustee unless the Debtor amends the plan to specifically address such claims. Absent such an amendment, the trustee shall not disburse any monies on said claims and these debts will not be discharged.

**10. *LIEN RETENTION***: With respect to each allowed secured claim to be paid in full through the plan , the holder of such claim shall retain the lien securing its claim until the earlier of a) the payment of the underlying debt determined under non-bankruptcy law or b) entry of the discharge order under 11 U.S.C. § 1328.

**11. *PROOF OF LIEN PERFECTION***: Any creditor(s) asserting a secured claim must provide the chapter 13

Trustee, the Debtor, and Debtor's counsel with proof of lien perfection at the time its claim is filed and may attach such documentation to its Proof of Claim. See General Order 08-4.

12. ***VESTING OF PROPERTY OF THE ESTATE*:** Property of the estate shall revest in Debtor upon confirmation of the Debtor's plan, subject to the rights, if any, of the Trustee to assert a claim to additional property of the estate acquired by Debtor post-petition pursuant to 11 U.S.C. § 1306.

13. ***PAYMENT NOTICES***: Creditors in Section 3 (whose rights are not being modified) and in Section 6 (whose executory contracts/unexpired leases are being assumed) may continue to mail customary notices or coupons to the Debtor or Trustee notwithstanding the automatic stay.

14. ***OBJECTIONS TO CLAIMS***: Any objection to a timely filed unsecured claim shall be filed within forty-five (45) days following the expiration of the claims bar date for that claim. Objections to secured and/or amended claims shall be filed within forty-five (45) days from the claims bar date, or within forty-five (45) days from the date of filing of the claim, whichever is later.

15. ***STAY RELIEF***: Notwithstanding any provision contained herein to the contrary, distribution to a secured creditor(s) who obtains relief from the automatic stay will terminate immediately upon entry of an Order lifting or terminating the stay, except to the extent that an unsecured deficiency claim is subsequently filed and allowed. Absent an Order of the Court, relief from the automatic stay shall also result in the Trustee ceasing distribution to all junior lien holders.

16. ***DEBTOR REFUNDS***: Upon written request of the Debtor, the Trustee is authorized to refund to the Debtor, without Court approval, any **erroneous** overpayment of **regular** monthly payments received during the term of the Plan that have not been previously disbursed.

17. ***PLAN NOT ALTERED FROM OFFICIAL FORM***: By filing this Plan, the Debtor and Debtor's counsel represent that the Plan is the official form authorized by the Court. Changes, additions or deletions to this Plan are permitted **only** with Leave of Court.

18. ***REASON(S) FOR AMENDMENT(S)***: to cure Debtors' arrearage in payments to the Chapter 13 Trustee and to provide for the post-petition claim of First Horizon for attorney's fees for filing the Motion for Relief

Debtor(s)' Declaration Pursuant to 28 U.S.C. §1746.

I declare under penalty of perjury that the foregoing statements of value contained in this document are true and correct to the best of my knowledge and belief.

6/5/10
Dated

/s/
Signature of Counsel for Debtor(s)

/s/
Signature of Debtor

/s/
Signature of Joint Debtor (if applicable)

**NOTICE OF ELECTRONIC FILING AND CERTIFICATE OF SERVICE BY MAIL**

STATE OF ILLINOIS )
) SS
CITY OF BELLEVILLE )

Case No.: 09-31892

Chapter 13

Jennifer Schweiger, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age, and resides in St. Clair County, Illinois.

On June 7, 2010, Deponent electronically filed with the Clerk of the U. S. Bankruptcy Court **Amended Plan Number 2**.

The Deponent served electronically the **Amended Plan Number 2** to the following parties:

U.S. Trustee

U. S. Bankruptcy Court

Bob G. Kearney

and served by mail to all creditors who filed a claim before the claims bar date:

| | | |
|---|---|---|
| Belleville Family Medical Assoc. Ltd.<br>311 W. Lincoln, Ste. 300<br>Belleville, IL 62220 | St. Elizabeth Hospital<br>c/o State Collection Service, Inc.<br>PO Box 6250<br>Madison, WI 53716 | AmerenIP<br>Attn: Collections A-10<br>PO Box 2543<br>Decatur, IL 62525 |
| Chrysler Financial Services Americas<br>c/o Riezman Berger, PC<br>7700 Bonhomme Ave., 7th Floor<br>St. Louis, MO 63105 | Washington County Hospital<br>705 S. Grand St.<br>Nashville, IL 62263 | MetLife Home Loans<br>c/o Pierce & Assoc., PC<br>1 N. Dearborn, Ste. 1300<br>Chicago, IL 60602 |
| The Village Bank<br>720 E. Lyons St.<br>PO Box 49<br>Marissa, IL 62257 | Capital One Bank USA NA<br>c/o TSYS Debt Mgmt.<br>PO Box 5155<br>Norcross, GA 30091 | Matthew & Kelley Geralds<br>9505 Risdon School Rd.<br>Marissa, IL 62257 |

by depositing a true copy of same, enclosed in a postage paid properly addressed wrapper, in a Belleville City Branch, official depository under the exclusive care and custody of the United States Postal Service, within the State of Illinois.

By: /s/ Jennifer Schweiger

# Consequences of Silence in Chapter 13 Plan Confirmation Can Bind

**Written by:**
*William J. McLeod*
*McLeod Law Offices PC; Boston*
*wjm@mcleodlawoffices.com*

**About the Author**

*William McLeod is principal at McLeod Law Offices PC in Boston, where he represents consumers and small businesses in bankruptcy matters and debt-related litigation. He is also the author of a recent ABI publication,* Chapter 13 in 13 Chapters*, available for purchase at www.abiworld.org/abistore.*

When spooning out vegetables, my mother instructed me to "say 'when.'" Rarely did she say that when dishing out desert, but that's another story altogether.

If we did not say "when," we could expect our plates to be filled with peas, cabbage or another overboiled delight until eventually we spoke up. When we asked "when" or "why are you making me eat all this," she would stop and move onto the next plate.[1] Our silence implied a desire for more. While silence rose to acceptance at my mother's dinner table, does it do so in chapter 13?

Chapter 13 is a hybrid of chapters 7 and 11.[2] Simply stated, the statutory mechanism provides an opportunity for consumers with debts below a threshold to reorganize their finances and pay debts without having to go through the complex and often more expensive scheme set forth in chapter 11, but there are big differences.

It might be months before a chapter 11 debtor makes any sort of plan payment, but chapter 13 debtors must tender their first plan payment within 30 days of the filing of the case.[3] A chapter 13 plan must be filed with the petition and schedules (or shortly thereafter as rules may permit), whereas in chapter 11 some debtors may have up to 300 days to file a plan.[4] Another big difference: In chapter 11, a balloting mechanism is contemplated where creditors are given a voice as to whether they accept or reject the debtor's proposed reorganization plan.[5] In chapter 13, there is no comparable provision. In the absence of any balloting mechanism, may a debtor propose plan provisions and terms that may run afoul of the Code, and in the absence of an objection to confirmation, may the court confirm the plan? The short answers are no, but the longer answer is a bit more complicated.

## Hoping for Silence (Part I)

Section 1327(a) provides that:

> The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

Section 1325(a)(1) provides that a court may confirm a plan if "the plan complies with the provisions of this chapter and with the other applicable provisions of this title."

In *In re Bethoney*,[6] a chapter 13 debtor attempted to modify the rights of a lender with a "910" car claim.[7] No timely objection to the §506(a) motion was filed. Nevertheless, because the relief sought in the motion went to the proposed treatment of the claim in the plan, the court denied the motion. The court found that the debtor proposed modifying the lender's rights in contravention of the hanging paragraph. The court opined:

> I cannot infer [that the lender consents] to this treatment from the lack of objection because it has a reasonable expectation that I will not approve treatment which violates the Bankruptcy Code.[8]

In *In re Garner*,[9] the debtor's plan proposed the bifurcation of a 910-car claim in the absence of an objection to confirmation. While recognizing the lack of the chapter 11 balloting mechanism in chapter 13, the court found that "simply because a creditor fails to object to the Plan's treatment of its claim does not allow the Debtors to disregard the explicit language in the statute prohibiting such treatment."[10] Following these scenarios, it should be considered that silence, indicated by the lack of a timely filed objection to confirmation, does not constitute acceptance of modification of a claim that is expressly prohibited by the Code.

The *Bethoney* court left open the question as to whether a creditor could assent to treatment of its claim that would be otherwise prohibited by the Code.[11] While at first glance it might be difficult to contemplate a scenario where a creditor might voluntarily forgo statutorily protected rights, as chapter 13 practice becomes more complex and more challenging, creditors and their counsel may find themselves facing such decisions. One example might be in the modification limitations imposed by the "hanging paragraph" in §1325(a).

Consider a scenario in which a hypothetical chapter 13 debtor believes that the feasibility of his or her plan rests on the modification of the rights of the secured lender of a "910 vehicle." The debtor needs the car for his or her employment, but cannot keep the car and home obligations and continue priority payments (and an appropriate dividend to unsecured creditors as required by §1325(a)(4) and/or §1325(b)). Since the mortgage lender is refusing to voluntarily modify the mortgage and the tax authority will not budge, the debtor's remaining alternative is to convince the auto lender to modify its 910 claim. As the lender may not want the vehicle and might benefit from successful completion of the plan, it agrees.

Since the hanging paragraph precludes adverse treatment of the 910 vehicle, the debtor and lender propose a stipulation that is either made a part of, or filed contemporaneously with, the chapter 13 plan. Notwithstanding that agreement, is the court bound by it, or must the court enforce the terms of the hanging paragraph? This conflict

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Consumer Counterpoint

1 Perhaps ironically, she retained the right to overrule our say of "when," thus thwarting any attempt to avoid more vegetables, but that is another story altogether.
2 *In re Griner*, 240 B.R. 432, 436 (Bankr. S.D. Ala. 1999).
3 §1326(a)(1).
4 §1121.
5 §1126.
6 384 B.R. 24 (Bankr. D. Mass. 2008)
7 *See* the last paragraph of §1325(a), also dubbed the "hanging paragraph."
8 *Id.* at 34.
9 399 B.R. 267 (Bankr. D. Utah. 2009).
10 *Id.* at 273.
11 *In re Bethoney*, 384 B.R. 24 at 34, fn. 55.

# Consumer Counterpoint: Silence Can Bind in Chapter 13 Plan Confirmation

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is easily resolved. If home lenders and debtors can agree to modify claims despite §1322(b)(2), certainly debtors and 910 lenders may as well. In chapter 13 plans, consent to adverse treatment that the Code otherwise prohibits can be ascertained by express affirmation, which then allows the court to confirm the plan.

## Hoping for Silence (Part II)

Let's assume that our hypothetical chapter 13 debtor also seeks to discharge otherwise nondischargeable tax obligations, student loans or domestic support obligations by inserting a provision in the chapter 13 plan that says, "successful completion of the chapter 13 plan discharges thee!" or something just as clever. Does a creditor's silence constitute assent to the plan and allow the court to confirm it?

The dischargeability of tax obligations and domestic-support obligations is determined by §523(a)(1) and (5) respectively, as well as §1328(a)(2). Both tax obligations and domestic-support obligations each enjoy priority status under §507, and §1322(a)(4) requires a chapter 13 plan to provide for full payment to priority creditors, such as the tax or DSO claim, unless the creditor agrees otherwise. Absent an agreement, §1325(a)(1) precludes the court from confirming the confirm the plan.[12] The discharge of those claims remains precluded by §1328(a)(2). With student loan claims, the same analysis compels a different result.

Unlike tax obligations and domestic-support obligations, nothing in §507 confers priority status on a student loan creditor or guarantor. Full payment of a student loan claim is not a requirement for confirmation. Student loans are dischargeable if the debtor can establish that the claim imposes an undue hardship.[13] To prove an undue hardship, courts have required the filing of an adversary proceeding by chapter 7 debtors. The Ninth Circuit permits chapter 13 debtors to essentially "discharge by declaration" student loan debts, and that issue, raised in the case of *Espinosa v. United Student Aid Funds Inc.*, 553 F.3d 1193 (9th Cir. 2008), is now headed to the U.S. Supreme Court.[14]

In *Espinosa,* the debtor's plan provided for less than full payment of the student loan claim and the trustee sent a notice to United Student Aid Funds Inc., advising it of the steps it needed to take if it disputed the proposed treatment of the claim.[15] The creditor did not take those steps, and the plan was confirmed.

After the plan was completed and the case closed, United Student Aid Funds Inc. intercepted the debtor's tax refund.[16] The debtor contended that the debt was discharged. The creditor argued that since no adversary proceeding was commenced pursuant to Bankruptcy Rule 7001(6), and no undue hardship proven, the student obligation survived the discharge by operation of §523(a)(8).

The Ninth Circuit opined that if the creditor believed that the debtor had not established an undue hardship through an adversary proceeding, it could have and should have objected to plan confirmation on that basis. By doing so, the objection might have evolved into a contested matter wherein the rules of adversary proceedings apply (or alternatively, an order requiring that the debtor file a separate adversary proceeding). As the Ninth Circuit noted:

> [W]hen the creditor is served with notice of the proposed plan, it has a full and fair opportunity to insist on the special procedures available to studnet loan creditors by objecting to the plan on the ground that there has been no undue hardship finding. Rights may, of course, be waived or forfeited, if not raised in a timely fashion. This doesn't mean that these rights are ignored, or that a judgment that is entered after a party fails to assert them conflicts with the statutory scheme or is somehow invalid.[17]

This "discharge by declaration" seemingly applies only in §523(a)(8) cases where there is an exception to the discharge prohibition. There is no "undue hardship" or "hardship" exception in cases where claim were incurred by fraud, defalcation or as result of operation of a motor vehicle while intoxicated. *See* §523(a)(2), (4) and (9). Even in cases where there is an arguably nondischargeable claim pursuant to §523(a)(2) or (4), §523(c) compels the discharge of the debtor unless the properly noticed creditor brings an adversary proceeding, objects to confirmation—or contemplates a wiser strategy: does *both*.

A properly noticed creditor may challenge the plan through a timely objection to confirmation, which could evolve into a contested matter and the application of the adversary proceeding rules.[18] The elements of the *Brunner* test can be raised and appropriately litigated under the auspices of an objection to confirmation.[19]

This author is unaware of any district that requires a debtor to affirmatively declare that his or her chapter 13 plan is proposed in good faith, or delineate the elements of any debt that prove its dischargeability or modification (although some of those elements, such as the purchase date of an automobile may be evident from debtor's schedules and statements). All creditors have the right to challenge the terms of the plan and their treatment. Their silence rises to an implied acceptance of a debtor's plan.

For those reasons, unless it violates the mandatory provisions of §§1322 or 1325 (which may, or may not, be evident from the terms of the plan), the debtor's plan may be confirmed in the absence of an objection to confirmation, or alternatively, in the presence of a stipulation allowing the modification or discharge of a claim that would be otherwise nonmodifiable or nondischargeable.

Properly noticed creditors who fail to timely file an objection to confirmation, should do so at their own peril. There is no need for adversary proceedings to clutter up the court's docket when an objection to confirmation will suffice. With no balloting mechanism in chapter 13, creditors should not rest on the hope that a bankruptcy court will do the job they should be doing themselves. As §1327 makes crystal clear, silence and the failure to object have consequences. ■

12 Section 1322(a)(4) also requires that in such a scenario, the debtor's plan must provides for "all of the debtor's projected disposable income for a 5-year period" to be paid into the plan.

13 §523(a)(8).

14 *Certiorari* granted by *United Student Aid Funds Inc. v. Espinosa,* 129 S.Ct. 2791, 77 USLW 3531, 77 USLW 3673, 77 USLW 3678, (June 15, 2009) (NO. 08-1134). Additional cites now available: 174 L. Ed. 2d 289; 2009 U.S. LEXIS 4361.

15 *Id.,* 553 F.3d at 1197.

16 *Id.*

17 *Id.,* 553 F.3d. at 1199.

18 *See* Fed. R. Bankr. P. 9014.

19 *Brunner v. New York state Higher Educ. Serv. Corp.,* 831 F.2d 395, 396 (2d Cir. 1987).

# Creditor Silence Is Not Consent in Chapter 13 Plan Confirmation

**Written by:**
*Kirk B. Burkley*[1]
*Bernstein Law Firm PC; Pittsburgh*
*kburkley@bernsteinlaw.com*

**Editor's Note:** *In the debut of this new column, the two authors discuss whether a creditor's lack of an objection to a chapter 13 plan provision that is prohibited or otherwise improper constitutes consent. Please also see p. 40 of this issue for an in-depth discussion of the* Espinosa *case pending before the Supreme Court, which is briefly addressed herein. If you have suggested topics for this column, which will run every other issue, or you want to volunteer to write for it, please contact Elizabeth Stoltz at estoltz@abiworld.org.*

**About the Author**

*Kirk Burkley is a partner in the Bernstein Law Firm PC in Pittsburgh, where he practices in bankruptcy, financial restructuring and creditors' rights, and supervises the Bankruptcy and Restructuring practice group.*

What happens when a chapter 13 plan proposes to treat a claim in a manner that is prohibited by the Bankruptcy Code or other law? In many districts, if the claimant is properly served and fails to object, the plan is approved and the treatment becomes the law of the case.

However, recent decisions have rejected this practice. Many courts hold that §1325(a)(1)[2] mandates that plans comply with all of the Code's requirements regardless of whether an affected creditor objects. Some courts even refuse to enforce the offending provisions after the plan has been completed and the case has closed.

From the creditor's perspective, this is welcome news. For large institutional creditors in particular, it is burdensome to scour every plan for provisions that blatantly violate the law. Debtor's counsel should not include such provisions in chapter 13 plans, and they should be held unenforceable *per se*. Silence is not consent.

## Common Practice vs. The Law

### The Law Is Winning

As creditors' lawyers know all to well, many plans contain provisions that violate clear provisions of the Code. Prevailing wisdom has held that a properly noticed creditor's acceptance of the offending provision may be implied by its failure to file an objection. Such "wisdom" believes that if a creditor is amenable to the treatment (by virtue of its implied acceptance), then it is not the court's responsibility to deny confirmation. Section 1327(a) provides that a confirmed plan is binding on all creditors, whether or not such creditor has objected to, accepted or rejected the plan.[3]

However, there is a conflict between respect for the finality of confirmed plans and the requirement that plans comply with the law. Courts are beginning to hold that the creditor's silence does not mean consent to offending provisions. The courts have an independent, nondiscretionary obligation to review plans for conformity with the Code, and the requirement to draft a plan that does not violate other sections of the Code is "clearly mandatory."[4] In the following examples, courts have refused to confirm or enforce the unlawful provision despite the lack of an objection from the affected creditor.

## Consumer Point

In *In re Mansaray-Ruffin*, EMC Mortgage Corporation held a first-lien mortgage on the debtor's residence. The debtor had filed a Truth-in-Lending Act (TILA)[5] complaint against EMC just prior to her bankruptcy filing. EMC ignored the debtor's first plan and did not file a proof of claim. The debtor then filed an amended plan that stated in part:

> EMC has not filed a proof of claim in this bankruptcy case. The Debtor will therefore file a proof of claim in the amount of $1,000 on behalf of EMC… upon confirmation of this plan, in which the claim of EMC will be fixed as an unsecured claim in the amount of $1,000 unless it is able to object to this claim, the debtor will cease making payments to EMC, and EMC will be obliged to satisfy its mortgage against the Debtor's home upon the discharge of its debt as filed or allowed.

EMC did not object to the amended plan, and the plan was confirmed. EMC continued to send billing statements. When the debtor responded that EMC had a $1,000 unsecured claim by virtue of the plan confirmation, EMC filed a "Complaint to Determine Secured Status" seeking a determination that its mortgage lien could only be invalidated through an adversary proceeding filed pursuant to Federal Rule of Bankruptcy Procedure (FRBP) 7001(2).[6] The Third Circuit determined that the debtor could not invalidate a lien *simply by proposing to do so in a confirmed plan*, but instead was required to file an adversary proceeding, holding:

> EMC's failure to object to the plan did not do away with Mansarey-Ruffin's duty to file a complaint and serve EMC pursuant to Rules 7001, 7003 and 7004. EMC had the legal right to do nothing and insist upon being served with a summons and a complaint in order for its lien to be invalidated.[7]

The Third Circuit emphasized that the duty to comply with the FRBP trumped the well-recognized contention that a confirmed plan should have finality and certainty. The court held "that the policy of finality must yield to the principle that a plan cannot violate a mandatory provision

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1 Peter Ashcroft, an associate the Bernstein Law Firm PC's Bankruptcy and Restructing group, provided invaluable research and assistance in the writing of this article.

2 11 U.S.C. §1325(a)(1), "Confirmation of plan. (a) Except as provided in subsection (b), the court shall confirm a plan if (1) the plan complies with the provisions of this chapter [11 U.S.C.S. §§1301 *et seq.*] and with the other applicable provisions of this title [11 U.S.C.S. §§101, *et seq.*]."

3 11 U.S.C. § 1327(a). "The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, accepted or rejected the plan."

4 *See In re Garner*, 399 B.R. 267, 272 (Bankr. D. Utah 2009), ruling that the court did not have the discretion to confirm a plan that proposed to cram down the secured value of a vehicle purchased within 910 days of the bankruptcy filing in contravention of the hanging paragraph in 11 U.S.C. §1325(a).

5 15 U.S.C. §1601, *et seq.*

6 *In re Mansaray-Ruffin*, 530 F.3d 230, 233 (3d Cir. 2008). Rule 7001(2) states: "The following are adversary proceedings...(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d)."

7 *Id.* at 237-38.

## Consumer Point: Silence Is Not Consent in Plan Confirmation

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of the Code."[8] The same principle has been applied to a number of cases where debtors have proposed to discharge their student loans through a chapter 13 plan rather than filing the required adversary proceeding pursuant to FRBP 7001(6),[9] an issue now pending before the Supreme Court.

In *In re Banks,* the plan proposed to discharge the debtor's student loan debt. The affected lender received notice of the plan, did not object and the plan was confirmed. When the debtor received his discharge five years later, the creditor sent the debtor a statement. The debtor sought a declaration from the bankruptcy court that the loan had been discharged. The bankruptcy court agreed with the debtor, but the Fourth Circuit overruled.

The Fourth Circuit held that being served with an adversary proceeding was a due process right that could not be overridden, stating: "We agree a bankruptcy court confirmation order generally is afforded a preclusive effect. But we cannot defer to such an order if it would result in a denial of due process in violation of the Fifth Amendment of the United States Constitution."[10]

In *In re Northrup,* the debtor proposed to pay less than the full amount of the priority claim of two taxing bodies in violation of 11 U.S.C. §1322(a)(2), which requires that the claims of priority creditors be paid in full.[11] Despite the fact that the taxing bodies had not objected, the court refused to confirm the plan because it was in violation of the Code. The court asked the pertinent question: "Does the failure to file a written objection constitute agreement, or is an affirmative act of acceptance of the plan required?"[12]

Section 1322(a)(2) requires that the creditor "agree" to a different treatment of its claim other than full payment. The court stated that it believed that "the structure of the Bankruptcy Code and the general meaning of the word 'agrees' suggest express consent."[13]

The only area of the law where some courts have agreed with the contention that "silence is consent" is the issue of whether plans can propose unequal monthly payments to secured creditors, such as balloon or step payments, in violation of 11 U.S.C. §1325(a)(5)(B)(iii). To briefly summarize the opposing argument on unequal monthly payments, §1325(a)(5) provides for three options: (1) the holder of the claim accepts the plan; (2) the plan provides for equal monthly payments on the claim; or (c) the debtor surrenders the property.[14] If the holder of the secured claim does not object to the proposed balloon or step payments that would otherwise violate §1325(a)(5)(B), then they are deemed to have "accepted" the unequal payments in the plan.[15]

*If the creditor did not object, courts would assume that the creditor was in favor of such treatment and therefore would enforce the plan. Fortunately, such logic is being rejected, and courts will no longer give the debtor a free pass and deem silence to be consent.*

This author disagrees with that reasoning. Courts have held that the qualifier that a creditor "agree" to have its priority claim not paid in full as required by §1322(a)(2) is evidence that Congress intended that the creditor affirmatively assent to the treatment. Section 1325(a)(5)(A) requires that the creditor "accept" unequal monthly payments. Accept and agree are synonomous, and both require some affirmative action. The reasoning that a debtor must obtain the creditor's assent to the modified treatment of its claims should apply to both situations.[16]

However, as shown, where the Code clearly restricts certain claim treatments, those treatments cannot be confirmed or enforced whether or not a creditor objects. Perhaps the clearest expression of the new vigilance against plans that contain provisions that violate the Bankruptcy Code is set forth in *In re Montoya*. In this case, the debtor proposed to cram down the secured value of a vehicle that had been purchased within the 910-day period prior to the bankruptcy filing in violation of the so-called hanging paragraph of §1325(a). Again, the creditor did not object to the plan. Regardless, the court held:

> The concept of implied acceptance of an otherwise compliant plan, or even voting on similar provisions in Chapter 11, however, is quite different from proposing a plan intentionally inconsistent with the Code and then waiting for the trap to spring on a somnolent creditor. Creditors are entitled to rely on the few unambiguous provisions of the BAPCPA for their treatment. They should not be required to scour every Chapter 13 plan to ensure that provisions of the BAPCPA specifically inapplicable to them will not be inserted in a proposed plan in the debtor's hope that the improperly secured treatment will become *res judicata*.[17]

Both practioners and the courts should be mindful of whether plans contain provisions that violate the Code. Even if a creditor does not object, the stretched logic that a creditor "consented" (without actually affirmatively agreeing or accepting) to having its property rights violated in contravention of the law is yielding to common sense and the plain language of the law. If silence as consent was truly the law, would courts enforce a provision in a plan that required a creditor to pay the debtor (possible in relation to a TILA claim)? If the creditor did not object, courts would assume that the creditor was in favor of such treatment and therefore would enforce the plan. Fortunately, such logic is being rejected, and courts will no longer give the debtor a free pass and deem silence to be consent. ■

8 *Id.* at 238.

9 Rule 7001(6) states: "The following are adversary proceedings...(6) a proceeding to determine the dischargeability of debt."

10 *In re Banks,* 299 F.3d 296, 302 (4th Cir. 2002). *See also In re Ruehle,* 412 F.3d 679 (6th Cir. 2005), and *In re Hanson,* 397 F.3d 482 (7th Cir. 2005). However, for the opposing viewpoint, *see In re Espinosa,* 545 F.3d 1113 (9th Cir. 2008).

11 11 U.S.C. §1322(a)(2). The plan shall provide for the full payment, in deferred cash payments, of all claims entitled to priority under §507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim.

12 *In re Northrup,* 41 B.R. 171 (Bankr. N.D. Iowa 1991).

13 *Id. See also In re Ferguson,* 27 B.R. 672 (Bankr. S.D. Ohio 1982), and *In re Ramski,* 102 B.R. 269 (Bankr. S.D. Fla. 1989).

14 11 U.S.C. §1325(a)(5)(A) states: "(a) Except as provided in subsection (b), the court shall confirm a plan if...(5) with respect to each allowed secured claim provided for by the plan—(A) the holder of such claim has accepted the plan...(B)(iii)(I) if—property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts...or (C) the debtor surrenders the property securing such claim to such holder.

15 *See In re Flynn,* 402 B.R. 437 (1st Cir. 2009), overturning *In re Melillo,* 385 B.R. 476 (Bankr. D. Mass. 2008).

16 According to *Webster's Dictionary and Thesaurus,* accept and agree are related words. Agree means to "consent to as a course of action" or to "accept or concede something." Accept means to "make a favorable response to." *Merriam-Webster Online Dictionary,* www.merriam-webster.com/dictionary.

17 *In re Montoya,* 341 B.R. 41, 44 (Bankr. D. Utah 2006). *See also In re Montgomery,* 341 B.R. 843 (Bankr. E.D. Ky. 2006); *In re Williams,* 2007 Bankr. LEXIS 4475 (Bankr. M.D. N.C. 2007); and *In re Bethoney,* 384 B.R. 24 (Bankr. D. Mass. 2008), among others.

# ABI Northeast Conference

## Seaside Chat

## A Conversation About Notice and Due Process in Bankruptcy Proceedings

**Hon. J. Michael Deasy**
**U.S. Bankruptcy Court, Manchester, NH**

**Mark N. Berman**
**Nixon Peabody LLP, Boston, MA and New York City, NY**

**Prof. Juliet Moringiello**
**Widener University School of Law, Harrisburg, PA**

Notice and due process issues are common in all bankruptcy cases, big and small because of the effect that bankruptcy has on the property and contract rights of creditors. Several recent bankruptcy decisions, including the recent decision of the Supreme Court in *United Student Aid Funds v. Espinosa*, have reinforced the importance of the issue. Following is a short summary of established law on the sufficiency of notice to satisfy due process requirements, followed by a summary of recent bankruptcy decisions discussing notice and due process in bankruptcy cases.

### Notice and Due Process: General Concepts

***Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).** This case, described by some as the "granddaddy of all notice cases," sets forth the basic requirements that must be met for notice to satisfy the Due Process Clause. The key statement in *Mullane* is that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

The type of notice in question in *Mullane* was notice by newspaper publication to the beneficiaries of 113 trusts. The Court held that notice by publication was sufficient for beneficiaries whose addresses could not be found with due diligence but not for beneficiaries with known addresses. Because this latter group could easily be informed of the action by mail, publication notice was not reasonably calculated to reach them.

Not long after deciding ***Mullane***, the Supreme Court had the opportunity to address notice requirements in bankruptcy in ***City of New York v. New York, N.H. & H. R.R*, 344 U.S. 293 (1953)**. In that case, the City of New York was a creditor of the debtor railroad, which was reorganizing under § 77 of the Bankruptcy Act. At the beginning of the bankruptcy case, the court had issued an order directing creditors to file their claims by a prescribed date and had directed the debtor to mail copies of the order to the mortgage

trustees and to all creditors who had already appeared in court. Other creditors had to rely on newspaper publication for their notice of the order. The City did not receive a copy of the order even though the Debtor could have ascertained that the City had a claim and knew its address, and the City did not file its lien claims.

The Court in ***City of New York*** rejected notice by publication when the names, addresses and interests of persons can be ascertained, stressing that "[n]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. . . But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication." The Court stated that because the City was a known creditor with a known address, there was no justification for subjecting its claims to "the hazard of forfeiture arising from 'constructive notice' by newspaper."

The Court recognized that the City knew of the railroad's bankruptcy but held that "even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred." According to the Court, a basic principle of justice is that a party must have reasonable opportunity to be heard before its claimed rights are judicially denied.

The First Circuit, in ***Matter of Intaco Puerto Rico, Inc., 494 F.2d 94*** **(1st Cir. 1974)**, applied the rule from ***City of New York*** to reorganizations under Chapter X of the Act. The court reiterated that the fact that a known creditor may be aware of the bankruptcy does not relieve the trustee from providing the required notice.

**RECENT BANKRUPTCY DECISIONS:**

***United Student Aid Funds v. Espinosa,*** 130 S.Ct. 1367 (2010). The debtor, Espinosa, filed for Chapter 13 in 1992. In his plan, Espinosa proposed to pay only the principal amount of his student loan due to the petitioner, United Student Aid Funds (United), and thus discharge the accrued interest. United received a copy of the plan, and in response, filed a proof of claim for the principal and interest due on the loan. The Bankruptcy Court confirmed the plan without an adversary proceeding to determine undue hardship, in contravention of the Code's confirmation requirements. After confirmation, the Chapter 13 trustee mailed United a notice informing United that the amount claimed in its proof of claim differed from the amount listed for payment in the plan. That notice also informed United that if it wanted to dispute the treatment of its claim, it had the responsibility to notify the trustee within 30 days. United did nothing after receiving this notice. After Espinosa completed his plan, United attempted to collect the remaining debt. After Espinosa filed a motion in the Bankruptcy Court to enforce its discharge order by directing United to stop collection efforts, United filed a cross-motion under FRCP 60(b)(4) to set aside as void the order confirming the plan. This cross-motion was filed in 2003, 10 years after Espinosa's plan was confirmed.

The question before the Court was whether the Bankruptcy Court's order confirming the debtor's plan was void for the purpose of Federal Rule of Civil Procedure Rule 60(b)(4). Rule 60(b) (4) permits a court to relieve a party from a final order or judgment if that

order or judgment is void. United argued that the order confirming the plan was void for two reasons. First, United claimed that it was denied due process because it had not been served with a summons and complaint in an adversary proceeding to determine undue hardship. Second, United argued that the confirmation order was void because the Bankruptcy Court lacked statutory authority to confirm Espinosa's plan absent a finding of undue hardship.

The Supreme Court held that because United had actual notice of the court's error and failed to object to the plan or timely appeal the order confirming the plan, the order remained enforceable. United had received notice of Espinosa's intent to discharge his student loan debt twice: when it received a copy of Espinosa's plan after his Chapter 13 filing, and when the trustee sent notice after confirmation. The Court found that the two notices received by United satisfied United's due process rights because due process requires notice reasonably calculated to apprise interested parties of the pending action and afford them an opportunity to present their objections.

Last year the Supreme Court in ***Travelers Indemnity Co. v. Bailey***, **129 S.Ct. 2195 (2009)** remanded the case back to the Second Circuit to deal with the due process argument rejected by the District Court, but not considered by the Circuit. Id. at 2207. On remand, the Circuit held that Chubb Indemnity's due process rights were not observed and reversed the District Courts as to Chubb and affirmed as to all other objecting plaintiffs. ***In re Johns-Manville Corp.,* 600F.3d 135, 159 (2d Cir. 2010)** the Circuit found that Chubb's claims against Travelers were *in personam* claims and not *in rem* claims. Chubb's claims against Travelers were characterized by the Circuit as inchoate, non-derivative, post-petition claims against Travelers. Id. at 156. Therefore, they were not the type of claim contemplated, or noticed when the 1986 bankruptcy court orders were noticed and entered, and absent notice and an opportunity to be heard, are not binding as to Chubb. Id. at 154-158.

***Paging Network, Inc. v. Arch Wireless* (In re *Arch Wireless*), 534 F. 3d 76 (1st Cir. 2008)** This opinion clarifies the distinction between known creditors, who, under ***City of New York***, must receive mailed notice to satisfy due process, and unknown creditors, for whom publication notice may suffice. The creditor, Nationwide, had notified the debtor, Arch, that some of the pagers that Arch had sold to Nationwide were defective. Nationwide had also notified Arch of billing errors. When Arch filed for Chapter 11 several months later, it did not include Nationwide on its schedules, therefore, Nationwide received no notices from Arch or the court regarding the proceedings. Notification was given in two ways: known creditors received mailed notices and notices were published in the *Wall Street Journal* and *USA Today*. After Arch's discharge, Nationwide sued Arch in state court for harm caused by Arch's overbilling and defective pagers.

The court relied on ***Mullane*** in defining "unknown creditor" as one whose "interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge [of the debtor]." A "known creditor," on the other hand, is one "whose claims and identity are actually known or 'reasonably

ascertainable' by the debtor." It found that Nationwide was a known creditor because its claim was reasonably ascertainable from the correspondence between the two companies.

Arch argued that the discharge injunction should bar Nationwide's claim because Nationwide had actual knowledge of the bankruptcy proceedings. The court rejected this argument because the Bankruptcy Rules specify that known creditors must receive notice of deadlines for filing proofs of claim, a copy of the reorganization plan, notice of the confirmation hearing, and the confirmation order. Nationwide received none of these notices.

The opinion explains the relationship between statutory provisions that promise notice of a certain kind and constitutional due process. The statutory notice requirement informs the reasonable expectations of creditors. Therefore, the court rejected Arch's argument that because creditors of individuals are bound by the discharge if they have actual knowledge of the bankruptcy, creditors like Nationwide should be bound as well. This argument failed because the statute puts creditors of individuals on notice that actual knowledge of the case will be enough to render the discharge injunction effective against them. The opinion also points out differences between the results that would follow if the case were a chapter 7 or 13 proceeding rather than a chapter 11.

***Maloni v. Fairway Wholesale Corp. (*In re *Maloni)*, 282 B.R. 727 (1st Cir. B.A.P. 2002)**. The debtor, Maloni, filed for Chapter 7 in 1996. He filed a Motion to Avoid Judicial Liens on certain real estate pursuant to § 522(f) shortly thereafter. Fairway was one of the lienholders. The bankruptcy court granted the motion and discharged Maloni. Several years later, Fairway attempted to enforce its lien and in 2001, it filed a motion to reopen the bankruptcy case to vacate the order removing its judicial lien on Maloni's real estate.

Fairway claimed that the bankruptcy court never obtained personal jurisdiction over it because it had never been served with Maloni's Motion to Avoid Judicial Liens. Indeed, Maloni presented no evidence of personal service, nor did he present any evidence that notice had been mailed to Fairway. Fairway thus argued that the bankruptcy court's order was void under FRCP 60(b)(4). Relief under Rule 60(b)(4) can be requested at any time, therefore, Fairway's motion was not time barred.

Both the bankruptcy court and the BAP agreed with Fairway. Motions to avoid judicial liens are governed by Rule 4003(d) of the Bankruptcy Rules, which require that the motion be served personally or by mail. Because the debtor could not prove that any service had been made on Fairway, the court held that the order to avoid the liens was void and a nullity. The court also granted Fairway's request for sanctions against Maloni, finding that Maloni's appeal was frivolous because he pursued an issue on appeal without having the necessary evidence to prove his allegations.

***Western Auto Supply v. Savage Arms, Inc. (*In re *Savage Industries, Inc.)*, 43 F.3d 714 (1st Cir. 1994)** In this case, the court made the following statement about due process: "We hold only that the parties to an all-asset transfer

conducted under the auspices of chapter 11 are not entitled to rely on the protective jurisdiction of the bankruptcy court to enjoin the prosecution of a state-law based successor product-line liability action against an all-asset transferee when the state court plaintiff was neither afforded appropriate notice of the material terms of the all-asset transfer, nor of the chapter 11 plan. Moreover, even assuming appropriate notice under Bankruptcy Code Sec. 102(1), prior to dispensing injunctive relief the bankruptcy court must ascertain, at the threshold, that the particular successor liability action poses a genuine threat to the legitimate operation of the provisions of the Bankruptcy Code, and not merely to
the private enforcement of a closet term in an agreement negotiated between the chapter 11 debtor and its successor. As there was no threshold showing in the present case, we need not consider the other prerequisites to permanent injunctive relief."

***Jeld-Wen, Inc. v. Van Brunt, (*In re *Grossman's, Inc.*), __ F.3d __ (3rd Cir. 2010).** Van Brunt was harmed by asbestos from the debtor's product. Even though Van Brunt had purchased the debtor's product prior to its bankruptcy case and knew there were allegations that it contained harmful asbestos, Van Brunt was not provided with any notice of the date by which to file claims. At the time of the debtor's bankruptcy, Van Brunt did not even know that she had been harmed as the first signs of harm did not materialize for many years after the bankruptcy case. Ten years after the plan of reorganization was confirmed, Van Brunt sued the debtor's successor, Jeld-Wen. The Bankruptcy Court and District Court, following ***Avellino & Bienes v. M. Frenville Co. (Matter of M. Frenville Co.),* 744 F.2d 332 (3d Cir.1984)**, held that Van Brunt's claim was not discharged because it accrued after the debtor's petition was filed. The Third Circuit overruled the much-criticized *Frenville* and thus held that Van Brunt had a pre-petition claim.

Van Brunt's pre-petition claim was not necessarily discharged, however, because it was not clear that she had received notice sufficient to satisfy due process. The Third Circuit therefore remanded the case for findings on that issue. In this case, there was no trust to deal with unknown claims as there was in ***Johns-Manville***, so the § 524(g) due process safeguards do not apply. The court listed several factors that the lower court should consider in deciding the due process issue, including: "the circumstances of the initial exposure to asbestos, whether and/or when the claimants were aware of their vulnerability to asbestos, whether the notice of the claims bar date came to their attention, whether the claimants were known or unknown creditors, whether the claimants had a colorable claim at the time of the bar date, and other circumstances specific to the parties, including whether it was reasonable or possible for the debtor to establish a trust for future claimants as provided by § 524(g).

# Steering Clear of Trouble: Ethical Considerations in Today's Complex World

Professor Margaret Howard
Washington and Lee University School of Law

## I.

## Milavetz, Gallop & Milavetz, P.A., v. United States

(Docket numbers 08-1119 and 08-1225)

Questions Presented in 08-1119:

1. Whether the appellate court's interpretation of attorneys as "debt relief agencies" is contrary to the plain meaning of 11 U.S.C. § 101(I2A).

2. Whether 11 U.S.C. § 528, which as applied to attorneys, restrains commercial speech by requiring mandatory deceptive disclosures in their advertisements, violates the First Amendment free speech guarantee of the United States Constitution.

3. Whether 11 U.S.C. § 528 requiring deceptive disclosures in advertisements for consumers and attorneys, violates Fifth Amendment Due Process.

Questions Presented in 08-1225:

1. Whether Section 526(a)(4) precludes only advice to incur more debt with a purpose to abuse the bankruptcy system.

2. Whether Section 526(a)(4), construed with due regard for the principle of constitutional avoidance, violates the First Amendment.

* * * * * *

### Summary of the Argument, from Petitioners' Brief*

This case involves a series of statutory provisions that, if applicable to attorneys, strike at the heart of fundamental First Amendment values, place attorneys in conflict with

* Some references have been deleted or edited.

applicable state ethical regulations, and compel attorneys to make confusing and misleading disclosures.

Section 526(a)(4) provides that a "debt relief agency" shall not "advise" an "assisted person or prospective assisted person" to "incur more debt in contemplation of" filing a case under the Bankruptcy Code or "to pay an attorney." If section 526(a)(4) is interpreted to apply to attorneys, it is unconstitutional because it impermissibly interferes with a lawyer's obligation to truthfully advise a client regarding a client's entirely lawful conduct. It is also unconstitutional because it impermissibly interferes with the client's right to receive the attorney's advice.

In turn, sections 528(a)(4) & (b)(2)(B) collectively provide that a "debt relief agency" shall clearly and conspicuously state in any advertisement regarding *inter alia* "bankruptcy assistance services," the "benefits of bankruptcy," "mortgage foreclosures," and "eviction proceedings," that "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." If these compelled statements are interpreted to apply to attorneys, they are likewise unconstitutional because they impermissibly regulate the content of truthful, non-deceptive advertising, and additionally render this advertising confusing and misleading.

In this case, there are numerous reasons to conclude that sections 526(a)(4), 528(a)(4), and 528(b)(2)(B) do not apply to attorneys, thus avoiding these constitutional questions. Each provision applies to attorneys only if "attorney" is included within the definition of "debt relief agency." For a number of reasons, the phrase "debt relief agency" does not unambiguously include attorneys. Likewise, including attorneys within the scope of the phrase "debt relief agency" would generate absurd results. Further, it is "fairly possible" to construe the phrase "debt relief agency" as not encompassing "attorneys," thus avoiding the question of the constitutionality of these statutory provisions. In addition, the Court should determine that "debt relief agency" does not encompass attorneys because concluding otherwise would interfere seriously with the relationship between attorneys and their clients—an area of traditional state regulation. Before the Court will interpret a federal statute to have this effect, it generally requires that Congress' intent to interfere must be "clear and manifest." Because the requisite "clear and manifest" expression of intent is lacking in this case, the Court should conclude that Congress did not intend to include "attorneys" within the scope of "debt relief agency."

If "debt relief agency" *does* include attorneys, section 526(a)(4) is unconstitutional. Section 526(a)(4) improperly purports to prevent an attorney from providing truthful information to a client regarding the client's lawful conduct. Although the Government contends that section 526(a)(4) properly constrains only certain narrow categories of wrongful behavior, the statute cannot be limited in this way, and is substantially overbroad. Among other reasons, construing the statute in the manner the Government suggests would render the statute impermissibly vague.

Alternatively, section 526(a)(4) is an improper content-based restriction that fails to satisfy the requirements of strict scrutiny. To begin with, the Government cannot articulate a compelling interest to justify the statute's interference with an attorney's advice to a client regarding the client's activities. In addition, section 526(a)(4) is not narrowly tailored to serve any such interest.

The Government contended below that, rather than apply strict scrutiny, section 526(a)(4) should be reviewed under the somewhat more relaxed standard applied in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). *Gentile*, however, has no application here. In any event, the Government cannot satisfy the *Gentile* standard because, among other things, section 526(a)(4) is not narrowly tailored to serve the Government's alleged interest.

If "debt relief agency" includes attorneys, sections 528(a)(4) & (b)(2)(B) are also unconstitutional. These sections improperly purport to restrict the content of truthful and non-deceptive advertising. The Government contends that Congress' interest in regulating advertising under these sections is to prevent a particular type of deception. The advertising that petitioners engage in, however, is not of the allegedly proscribed type. Accordingly, there is no legitimate reason to require petitioners to make the disclosures that these statutory provisions direct. Worse, the compelled disclosures are themselves unwanted, confusing, and misleading.

The provisions of sections 528(a)(4) & (b)(2)(B) do not meet the requirements of intermediate scrutiny. Petitioners' advertising is truthful and non-misleading, and the Government lacks a substantial interest in regulating advertising that is truthful and non-deceptive. The Government cannot demonstrate that its regulation directly and materially advances its interest. Finally, sections 528(a)(4) & (b)(2)(B) are not narrowly drawn.

Even if intermediate scrutiny were inapplicable in this case, sections 528(a)(4) and 528(b)(2)(B) are not "reasonably related" to any interest in preventing deception. The sections themselves are confusing and misleading, and impose regulations—and sanctions for failure to comply with them—that are vastly disproportionate to any harm the Government seeks to redress.

For these reasons, and as explained more fully below, the Court should conclude that the phrase "debt relief agency" does not include attorneys, and, therefore, that sections 526(a)(4), 528(a)(4), and 528(b)(2)(B) do not apply to petitioners. Alternatively, the Court should affirm the decision of the Eighth Circuit that section 526(a)(4) is unconstitutional, and reverse the decision of the lower court upholding the constitutionality of sections 528(a)(4) & (b)(2)(B).

## Summary of the Argument, from Respondent's Brief*

I. Attorneys are not exempt from the definition of "debt relief agency" under the Bankruptcy Code. The definition encompasses "any person" who provides specified services to specified clients, subject to five specific exceptions. None of those exceptions includes attorneys, either expressly or by implication. 11 U.S.C. § 101(12A). Attorneys therefore are debt relief agencies if they provide the specified clients with the specified services, known as "bankruptcy assistance." Indeed, "bankruptcy assistance" is expressly defined to include certain services that can *only* be performed by lawyers, such as providing "legal representation" or "appearing in a [bankruptcy] case" on behalf of a consumer debtor. 11

* Some references have been deleted or edited.

U.S.C. § 101(4A). That language would be surplusage if attorneys were categorically ineligible to be debt relief agencies. And the legislative history confirms that Congress was targeting abusive conduct *by attorneys* in bankruptcy cases.

Petitioners contend, on various theories, that their reading must prevail in the absence of an express reference to "attorneys" in the statute. But the statute's application to attorneys is clear. In light of the broad statutory definition of "debt relief agency" and the unmistakable inclusion of legal services within the scope of "bankruptcy assistance," the absence of the term "attorney" from the definitions is immaterial. When a person provides the services specified, he falls within the coverage of the statute, regardless of whether he possesses a law license. Nor, contrary to petitioners' arguments, does this natural reading of the statute create any absurd results.

In any event, there is no reason to adopt a clear statement rule, as petitioners suggest, in interpreting the term "debt relief agency." Congress's regulation of debt relief agencies does not infringe on any traditional power of the States; federal laws, agencies, and courts (including this Court) have long regulated the conduct of attorneys and other professionals within federal spheres of interest, such as bankruptcy. And the doctrine of constitutional avoidance provides no reason to adopt petitioners' proposed construction of the statute. That construction itself would not fully cure the constitutional problem petitioners perceive, and it would exempt attorneys from a variety of client-protection measures to which there is *no* constitutional objection. The Court therefore should reject petitioners' proposed interpretation even if it finds that the statute does not plainly cover lawyers.

II. Section 526(a)(4) is not unconstitutionally overbroad. The court of appeals' decision to the contrary rested on its view that the statute prohibits advice "to incur any additional debt when the assisted person is contemplating bankruptcy." But the statute does not use the temporal term "when" at all; rather, it uses the phrase "in contemplation of [bankruptcy]," a phrase that has long been read to incorporate an element of intent to abuse the bankruptcy laws. Read in accordance with that long history, Section 526(a)(4) prohibits only advice to take on debt with an intent to abuse the bankruptcy laws, such as advice to charge a vacation, concert tickets, or some similar purchase to a credit card, knowing that the purchaser will enjoy the full benefit of the purchase and then shed most or all of the debt in bankruptcy.

The structure and legislative history of the statute confirm that Congress regulated only *abusive* bankruptcy advice. The problem that Congress sought to combat was the phenomenon of "loading up" on debt with the intent of gaining relief through bankruptcy. That purpose is manifest in the other provisions Congress adopted to limit eligibility for a complete discharge under Chapter 7 of the Bankruptcy Code; indeed, those provisions create incentives to take on more debt to affect the eligibility determination. Section 526(a)(4) is properly read as a reasonable and targeted way of combating those incentives. Surrounding provisions of the statute, which specify other rules of professional conduct and provide remedies for clients injured by the unethical advice, confirm the correctness of this reading.

The court of appeals rejected this construction in a single terse reference to the "plain language" of the statute. Petitioners likewise insist that Section 526(a)(4) should be

read more broadly—unconstitutionally broadly. But petitioners must establish not only that their reading of Section 526(a)(4) is the better one (which they cannot), but that it is the only plausible one. In light of the long history of the key phrase that Congress used and the history and structure of the statute, petitioners cannot rebut "the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *E.g.*, Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436, 1445 (2009).

Adopting the correct interpretation of Section 526(a)(4) eliminates the overbreadth that the court of appeals perceived. By narrowly prohibiting attorneys from advising clients to commit acts that are criminal, fraudulent, or (at a minimum) abusive of the federal judicial system, Section 526(a)(4) parallels a long-accepted principle of legal ethics that has been enshrined in state law for decades. This Court has established that attorneys in judicial proceedings may be "subject to ethical restrictions on speech to which an ordinary citizen would not be." *Gentile* v. *State Bar*, 501 U.S. 1030, 1071 (1991). Attorneys representing clients at the bar of a federal bankruptcy court owe a professional obligation to the tribunal not to counsel their clients to take action that directly subverts the bankruptcy system. The First Amendment does not excuse attorneys from that obligation, nor does it prevent Congress from providing federally enforceable remedies for clients harmed by their attorneys' breach of that obligation.

III. The court of appeals correctly upheld the advertising-disclosure requirements of Section 528. Disclosure requirements applied to commercial speech receive more deferential scrutiny than do restrictions on the content of commercial advertising. As this Court has squarely held, a requirement that attorney advertising include specified factual disclosures need only be "reasonably related to the State's interest in preventing deception of consumers." *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 651 (1985). Petitioners' reliance on cases involving forced political speech and outright restrictions on truthful commercial speech therefore is unavailing: *Zauderer* sets out the controlling standard here.

The advertising-disclosure requirements readily satisfy that standard. Congress documented the problem it sought to combat: misleading attorney advertisements that offered to provide relief from debt, a halt to foreclosure, and the like, without adequately disclosing that obtaining these forms of relief requires filing for bankruptcy and suffering the attendant consequences. Congress was entitled to determine that such advertisements are misleading unless they properly disclose that the benefits touted entail a bankruptcy filing.

Petitioners contend that the two-sentence disclaimer specified in the statute is misleading and, therefore, unconstitutional. But petitioners principally object to including the phrase "debt relief agency," a statutorily defined term whose natural *and* legal meanings encompass consumer bankruptcy attorneys. Requiring debt relief agencies to identify themselves as such is entirely accurate and proper. Petitioners may well desire to call themselves "attorneys" in their advertising, but nothing in Section 528 precludes them from doing so, or from providing any additional information they wish. Indeed, Congress also specified that debt relief agencies may vary the text of the prescribed disclosure and use any "substantially similar statement." 11 U.S.C. §§ 528(a)(4) and (b)(2)(B). Accordingly, Section 528 is constitutional on its face.

Petitioners also argue, for the first time in this litigation, that *their* advertising is not misleading and does not require any disclaimer. But petitioners' past advertisements are not in the record, nor are their plans for future advertising. This late-raised as-applied challenge therefore provides no basis to disturb the judgment of the court of appeals.

# MILAVETZ, GALLOP & MILAVETZ, P. A. v. UNITED STATES

No. 08–1119. Decided March 8, 2010*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or Act) to correct perceived abuses of the bankruptcy system. Among the reform measures the Act implemented are a number of provisions that regulate the conduct of "debt relief agenc[ies]"—*i.e.*, professionals who provide bankruptcy assistance to consumer debtors. See 11 U. S. C. §§ 101(3), (12A). These consolidated cases present the threshold question whether attorneys are debt relief agencies when they provide qualifying services. Because we agree with the Court of Appeals that they are, we must also consider whether the Act's provisions governing debt relief agencies' advice to clients, § 526(a)(4), and requiring them to make certain disclosures in their advertisements, §§ 528(a) and (b)(2), violate the First Amendment rights of attorneys. Concluding that the Court of Appeals construed § 526(a)(4) too expansively, we reverse its judgment that the provision is unconstitutionally overbroad. Like the Court of Appeals, we uphold § 528's disclosure requirements as applied in these consolidated cases.

## I

In order to improve bankruptcy law and practice, Congress enacted through the BAPCPA a number of provisions directed at the conduct of bankruptcy professionals. Some of these measures apply to the broad class of bankruptcy professionals termed "debt relief agenc[ies]." That category includes, with limited exceptions, "any person who provides any bankruptcy assistance to an assisted person in return for . . . payment . . . , or who is a bankruptcy petition preparer." § 101(12A).[1] "Bankruptcy assistance" refers to goods or services "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" in bankruptcy. § 101(4A). An "assisted person" is someone with limited nonexempt property whose debts consist primarily of consumer debts. § 101(3). The BAPCPA subjects debt relief agencies to a number of restricttions and requirements, as set forth in §§ 526, 527, and 528. As relevant here, § 526(a) establishes several rules of professional conduct for persons qualifying as debt relief agencies. Among them, § 526(a)(4) states that a debt relief agency shall not "advise an assisted person . . . to incur more debt in contemplation of such person filing a case under

* Together with No. 08–1225, *United States* v. *Milavetz, Gallop & Milavetz, P. A., et al.,* also on certiorari to the same court.

[1] Congress excluded from the definition of "debt relief agency" any "officer, director, employee, or agent of a person who provides [bankruptcy] assistance"; any "nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986"; "a creditor of [an] assisted person" who is helping that person "to restructure any debt owed . . . to the creditor"; "a depository institution"; or "an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity." §§ 101(12A)(A)–(E).

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."

Section 528 requires qualifying professionals to include certain disclosures in their advertisements. Subsection (a) provides that debt relief agencies must "clearly and conspicuously disclose in any advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public . . . that the services or benefits are with respect to bankruptcy relief under this title." § 528(a)(3). It also requires them to include the following, "or a substantially similar statement": "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." § 528(a)(4). Subsection (b) requires essentially the same disclosures in advertisements "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." § 528(b)(2). Debt relief agencies advertising such services must disclose "that the assistance may involve bankruptcy relief," § 528(b)(2)(A), and must identify themselves as "debt relief agenc[ies]" as required by § 528(a)(4), see §528(b)(2)(B).

II

The plaintiffs in this litigation—the law firm Milavetz, Gallop & Milavetz, P. A.; the firm's president, Robert J. Milavetz; a bankruptcy attorney at the firm, Barbara Nilva Nevin; and two of the firm's clients (collectively Milavetz)—filed a preenforcement suit in Federal District Court seeking declaratory relief with respect to the Act's debt-relief-agency provisions. Milavetz asked the court to hold that it is not bound by these provisions and thus may freely advise clients to incur additional debt and need not identify itself as a debt relief agency in its advertisements.

Milavetz first argued that attorneys are not "debt relief agenc[ies]" as that term is used in the BAPCPA. In the alternative, Milavetz sought a judgment that §§ 526(a)(4) and 528(a)(4) and (b)(2) are unconstitutional as applied to attorneys. The District Court agreed with Milavetz that the term "debt relief agency" does not include attorneys, App. to Pet. for Cert. in No. 08–1119, p. A–15, but only after finding that §§ 526 and 528—provisions expressly applicable only to debt relief agencies—are unconstitutional as applied to this class of professionals.

The Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. 541 F. 3d 785 (2008). Relying on the Act's plain language, the court unanimously rejected the District Court's conclusion that attorneys are not "debt relief agenc[ies]" within the meaning of the Act. The Court of Appeals also parted ways with the District Court concerning the constitutionality of § 528. Concluding that the disclosures are intended to prevent consumer deception and are "reasonably related" to that interest, the court upheld the application of § 528's disclosure requirements to attorneys. *Id.*, at 796–797 (citing *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651 (1985)).

A majority of the Eighth Circuit panel, however, agreed with the District Court that § 526(a)(4) is invalid. Determining that § 526(a)(4) "broadly prohibits a debt relief agency from advising an assisted person . . . to incur *any* additional debt when the assisted person is contemplating bankruptcy," even when that advice constitutes prudent prebankruptcy

planning not intended to abuse the bankruptcy laws, 541 F. 3d, at 793, the majority held that § 526(a)(4) could not withstand either strict or intermediate scrutiny. In dissent, Judge Colloton argued that § 526(a)(4) should be read narrowly to prevent only advice to abuse the bankruptcy system, noting that this construction would avoid most constitutional difficulties. See *id.*, at 799 (opinion concurring in part and dissenting in part).

In light of a conflict among the Courts of Appeals,[2] we granted certiorari to resolve the question of § 526(a)(4)'s scope. 556 U. S. ___ (2009). We also agreed to consider the threshold question whether attorneys who provide bankruptcy assistance to assisted persons are "debt relief agenc[ies]" within the meaning of § 101(12A) and the related question whether § 528's disclosure requirements are constitutional.

III

A

We first consider whether the term "debt relief agency" includes attorneys. If it does not, we need not reach the other questions presented, as §§ 526 and 528 govern only the conduct of debt relief agencies, and Milavetz challenges the validity of those provisions based on their application to attorneys. The Government contends that "debt relief agency" plainly includes attorneys, while Milavetz urges that it does not. We conclude that the Government has the better view.

As already noted, a debt relief agency is "any person who provides any bankruptcy assistance to an assisted person" in return for payment. § 101(12A). By definition, "bankruptcy assistance" includes several services commonly performed by attorneys. Indeed, some forms of bankruptcy assistance, including the "provi[sion of] legal representation with respect to a case or proceeding," § 101(4A), may be provided only by attorneys. See § 110(e)(2) (prohibiting bankruptcy petition preparers from providing legal advice). Moreover, in enumerating specific exceptions to the definition of debt relief agency, Congress gave no indication that it intended to exclude attorneys. See §§ 101(12A)(A)–(E). Thus, as the Government contends, the statutory text clearly indicates that attorneys are debt relief agencies when they provide qualifying services to assisted persons.[3]

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[2] Compare 541 F. 3d 785, 794 (CA8 2008) (case below), with *Hersh* v. *United States ex rel. Mukasey*, 553 F. 3d 743, 761, 764 (CA5 2008) (holding that §526(a)(4) can be narrowly construed to prohibit only advice to abuse or manipulate the bankruptcy system and that, so construed, it is constitutional).

[3] Although reliance on legislative history is unnecessary in light of the statute's unambiguous language, we note the support that record provides for the Government's reading. Statements in a Report of the House Committee on the Judiciary regarding the Act's purpose indicate concern with abusive practices undertaken by attorneys as well as other bankruptcy professionals. See, *e.g.,* H. R. Rep. No. 109–31, pt. 1, p. 5 (2005) (hereinafter H. R. Rep.). And the legislative record elsewhere documents misconduct by attorneys. See, *e.g.,* Hearing on H. R. 3150 before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary, 105th Cong., 2d Sess., pt. III, p. 95 (1998) (hereinafter 1998 Hearings). (While the 1998 Hearings preceded the BAPCPA's enactment by several years, they form part of the record cited by the 2005 House Report. See H. R. Rep., at 7.)

In advocating a narrower understanding of that term, Milavetz relies heavily on the fact that § 101(12A) does not expressly include attorneys. That omission stands in contrast, it argues, to the provision's explicit inclusion of "bankruptcy petition preparer[s]"—a category of professionals that excludes attorneys and their staff, see § 110(a)(1). But Milavetz does not contend, nor could it credibly, that only professionals expressly included in the definition are debt relief agencies. On that reading, no professional other than a bankruptcy petition preparer would qualify—an implausible reading given that the statute defines "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person . . . *or* who is a bankruptcy petition preparer." § 101(12A)(emphasis added). The provision's silence regarding attorneys thus avails Milavetz little. Cf. *Heintz* v. *Jenkins*, 514 U. S. 291, 294 (1995) (holding that "debt collector" as used in the Fair Debt Collection Practices Act, 15 U. S. C. §1692a(6), includes attorneys notwithstanding the definition's lack of an express reference to lawyers or litigation).

Milavetz's other arguments for excluding attorneys similarly fail to persuade us to disregard the statute's plain language. Milavetz contends that 11 U. S. C. § 526(d)(2)'s instruction that §§ 526, 527, and 528 should not "be deemed to limit or curtail" States' authority to "determine and enforce qualifications for the practice of law" counsels against reading "debt relief agency" to include attorneys, as the surest way to protect the States' role in regulating the legal profession is to make the BAPCPA's professional conduct rules inapplicable to lawyers. We find that § 526(d)(2) supports the opposite conclusion, as Congress would have had no reason to enact that provision if the debt-relief-agency provisions did not apply to attorneys. Milavetz's broader claim that reading § 101(12A) to include attorneys impermissibly trenches on an area of traditional state regulation also lacks merit. Congress and the bankruptcy courts have long overseen aspects of attorney conduct in this area of substantial federal concern. See, *e.g., Conrad, Rubin & Lesser* v. *Pender*, 289 U. S. 472, 477–479 (1933) (finding broad authorization in former § 96(d) (1934 ed.) (repealed 1978) for courts to examine the reasonableness of a debtor's prepetition attorney's fees).

Milavetz next argues that § 101(12A)'s exception for any "officer, director, employee, or agent of a person who provides" bankruptcy assistance is revealing for its failure to include "partners." § 101(12A)(A). In light of that omission, it contends, treating attorneys as debt relief agencies will obligate entire law firms to comply with §§ 526, 527, and 528 based on the conduct of a single partner, while the agents and employees of debt relief agencies not typically organized as partnerships are shielded from those requirements. Given that the partnership structure is not unique to law firms, however, it is unclear why the exclusion would be revealing of Congress' intent only with respect to attorneys. In any event, partnerships are themselves "person[s]" under the BAPCPA, see § 101(41), and can qualify as "debt relief agenc[ies]" when they meet the criteria set forth in § 101(12A). Moreover, a partnership's employees and agents are exempted from § 101(12A) in the same way as the employees and agents of other organizations. To the extent that partners may be subject to the debt-relief-agency provisions by association, that result is consistent with the joint responsibilities that typically flow from the partnership structure, cf. *Strang* v. *Bradner*, 114 U. S. 555, 561 (1885). Accordingly, we decline to attribute the significance

Milavetz suggests to § 101(12A)(A)'s failure to include partners among the exempted actors.[4]

All else failing, Milavetz urges that the canon of constitutional avoidance requires us to read "debt relief agency" to exclude attorneys in order to forestall serious doubts as to the validity of §§ 526 and 528. The avoidance canon, however, "is a tool for choosing between competing plausible interpretations of a statutory text." *Clark* v. *Martinez*, 543 U. S. 371, 381 (2005). In applying that tool, we will consider only those constructions of a statute that are "'fairly possible.'" *United States* v. *Security Industrial Bank*, 459 U. S. 70, 78 (1982). For the reasons already discussed, the text and statutory context of § 101(12A) foreclose a reading of "debt relief agency" that excludes attorneys. Accordingly, we hold that attorneys who provide bankruptcy assistance to assisted persons are debt relief agencies within the meaning of the BAPCPA.

B

Having concluded that attorneys are debt relief agencies when they provide qualifying services, we next address the scope and validity of § 526(a)(4). Characterizing the statute as a broad, content-based restriction on attorney-client communications that is not adequately tailored to constrain only speech the Government has a substantial interest in restricting, the Eighth Circuit found the rule substantially overbroad. 541 F. 3d, at 793–794, and n. 10. For the reasons that follow, we reject that conclusion. Section 526(a)(4) prohibits a debt relief agency from "advis[ing] an assisted person" either "to incur more debt in contemplation of" filing for bankruptcy "or to pay an attorney or bankruptcy petition preparer fee or charge for services" performed in preparation for filing. Only the first of these prohibitions is at issue. In debating the correctness of the Court of Appeals' decision, the parties first dispute the provision's scope. The Court of Appeals concluded that "§ 526(a)(4) broadly prohibits a debt relief agency from advising an assisted person . . . to incur *any* additional debt when the assisted person is contemplating bankruptcy." *Id.*, at 793. Under that reading, an attorney is prohibited from providing all manner of "beneficial advice—even if the advice could help the assisted person avoid filing for bankruptcy altogether." *Ibid.*

Agreeing with the Court of Appeals, Milavetz contends that § 526(a)(4) prohibits a debt relief agency from advising a client to incur any new debt while considering whether to file for bankruptcy. Construing the provision more broadly still, Milavetz contends that § 526(a)(4) forbids not only affirmative advice but also any discussion of the advantages,

[4] Reviving an argument that Milavetz abandoned, *amici* contend that § 527(b) undermines the Government's reading of § 101(12A) because it requires a debt relief agency to inform an assisted person of his right to hire an attorney, and it would be nonsensical to require attorneys to provide such notice. See Brief for National Association of Consumer Bankruptcy Attorneys et al. as *Amici Curiae* 34. This argument fails on its own terms. Even if § 101(12A) excluded attorneys, as Milavetz contends, § 527(b) would still produce the result of which its *amici* complain, as that provision also requires a debt relief agency to inform assisted persons that they "'can get help in some localities from a bankruptcy petition preparer,'" and there is no question that bankruptcy petition preparers are debt relief agencies and thus subject to that requirement. It is in any event not absurd to require debt relief agencies—whether attorneys or bankruptcy petition preparers—to inform prospective clients of their options for obtaining bankruptcy assistance services.

disadvantages, or legality of incurring more debt. Like the panel majority's, Milavetz's reading rests primarily on its view that the ordinary meaning of the phrase "in contemplation of" bankruptcy encompasses any advice given to a debtor with the awareness that he might soon file for bankruptcy, even if the advice seeks to obviate the need to file. Milavetz also maintains that if § 526(a)(4) were construed more narrowly, as urged by the Government and the dissent below, it would be so vague as to inevitably chill some protected speech.

The Government continues to advocate a narrower construction of the statute, urging that Milavetz's reading is untenable and that its vagueness concerns are misplaced. The Government contends that § 526(a)(4)'s restriction on advice to incur more debt "in contemplation of" bankruptcy is most naturally read to forbid only advice to undertake actions to abuse the bankruptcy system. Focusing first on the provision's text, the Government points to sources indicating that the phrase "in contemplation of" bankruptcy has long been, and continues to be, associated with abusive conduct. For instance, Black's Law Dictionary 336 (8th ed. 2004) (hereinafter Black's) defines "contemplation of bankruptcy" as "[t]he thought of declaring bankruptcy because of the inability to continue current financial operations, often coupled with action designed to thwart the distribution of assets in a bankruptcy proceeding." Use of the phrase by Members of Congress illustrates that traditional coupling. See, *e.g.*, S. Rep. No. 98–65, p. 9 (1983) (discussing the practice of "'loading up' [on debt] in contemplation of bankruptcy"); Report of the Commission on the Bankruptcy Laws of the United States, H. R. Doc. No. 93–137, pt. I, p. 11 (1973) ("[T]he most serious abuse of consumer bankruptcy is the number of instances in which individuals have purchased a sizable quantity of goods and services on credit on the eve of bankruptcy in contemplation of obtaining a discharge"). The Government also points to early American and English judicial decisions to corroborate its contention that "in contemplation of" bankruptcy signifies abusive conduct. See, *e.g., In re Pearce*, 19 F. Cas. 50, 53 (No. 10,873) (D. Vt. 1843); *Morgan* v. *Brundrett*, 5 B. Ad. 288, 296–297, 110 Eng. Rep. 798, 801 (K. B. 1833) (Parke, J.).

To bolster its textual claim, the Government relies on § 526(a)(4)'s immediate context. According to the Government, the other three subsections of § 526(a) are designed to protect debtors from abusive practices by debt relief agencies: § 526(a)(1) requires debt relief agencies to perform all promised services; § 526(a)(2) prohibits them from making or advising debtors to make false or misleading statements in bankruptcy; and § 526(a)(3) prohibits them from misleading debtors regarding the costs or benefits of bankruptcy. When § 526(a)(4) is read in context of these debtor-protective provisions, the Government argues, construing it to prevent debt relief agencies from giving advice that is beneficial to both debtors and their creditors seems particularly nonsensical.

Finally, the Government contends that the BAPCPA's remedies for violations of § 526(a)(4) similarly corroborate its narrow reading. Section 526(c) provides remedies for a debt relief agency's violation of § 526, § 527, or § 528. Among the actions authorized, a debtor may sue the attorney for remittal of fees, actual damages, and reasonable attorney's fees and costs; a state attorney general may sue for a resident's actual damages; and a court finding intentional abuse may impose an appropriate civil penalty. § 526(c). The Government also relies on the Fifth Circuit's decision in *Hersh* v. *United States ex rel. Mukasey*, 553 F. 3d 743 (2008), and Judge Colloton's dissent below for the observation that

"Congress's emphasis on actual damages for violations of section 526(a)(4) strongly suggests that Congress viewed that section as aimed at advice to debtors which if followed would have a significant risk of harming the debtor." *Id.*, at 760; see 541 F. 3d, at 800 (opinion concurring in part and dissenting in part). By contrast, "legal and appropriate advice that would be protected by the First Amendment, yet prohibited by a broad reading of § 526(a)(4), should cause no damage at all." *Ibid.;* see *Hersh*, 541 F. 3d, at 760.

Milavetz contends that the Government's sources actually undermine its claim that the phrase "in contemplation of" bankruptcy necessarily refers to abusive conduct. Specifically, Milavetz argues that these authorities illustrate that "in contemplation of" bankruptcy is a neutral phrase that only implies abusive conduct when attached to an additional, proscriptive term. As Black's states, the phrase is "*often coupled with* action designed to thwart the distribution of assets" in bankruptcy, Black's 336 (emphasis added), but it carries no independent connotation of abuse. In support of that conclusion, Milavetz relies on our decision in *Pender*, 289 U. S. 472, contending that we construed "in contemplation of" bankruptcy in that case to describe "conduct with a view to a probable bankruptcy filing and nothing more." Brief for Milavetz 61.

After reviewing these competing claims, we are persuaded that a narrower reading of § 526(a)(4) is sounder, although we do not adopt precisely the view the Government advocates. The Government's sources show that the phrase "in contemplation of" bankruptcy has so commonly been associated with abusive conduct that it may readily be understood to prefigure abuse. As used in § 526(a)(4), however, we think the phrase refers to a specific type of misconduct designed to manipulate the protections of the bankruptcy system. In light of our decision in *Pender*, and in context of other sections of the Code, we conclude that § 526(a)(4) prohibits a debt relief agency only from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose.

*Pender* addressed the meaning of former § 96(d), which authorized reexamination of a debtor's payment of attorney's fees "in contemplation of the filing of a petition." Recognizing " 'the temptation of a failing debtor to deal too liberally with his property in enabling counsel to protect him,' " 289 U. S., at 478 (quoting *In re Wood & Henderson*, 210 U. S. 246, 253 (1908)), we read "in contemplation of . . . filing" in that context to require that the portended bankruptcy have "induce[d]" the transfer at issue, 289 U. S., at 477, understanding inducement to engender suspicion of abuse. In so construing the statute, we identified the "controlling question" as "whether the thought of bankruptcy was the impelling cause of the transaction." *Ibid.* Given the substantial similarities between §§ 96(d) and 526(a)(4), we think the controlling question under the latter provision is likewise whether the impelling reason for "advis[ing] an assisted person . . . to incur more debt" was the prospect of filing for bankruptcy.

To be sure, there are relevant differences between the provision at issue in *Pender* and the one now under review. Most notably, the inquiry in *Pender* was as to payments made on the eve of bankruptcy, whereas § 526(a)(4) regards advice to incur additional debts. Consistent with that difference, under § 96(d) a finding that a payment was made "in contemplation of" filing resolved only a threshold inquiry triggering further review of the reasonableness of the payment; the finding thus supported an inference of abuse but did not conclusively establish it. By contrast, advice to incur more debt because of bank-

ruptcy, as prohibited by § 526(a)(4), will generally consist of advice to "load up" on debt with the expectation of obtaining its discharge—*i.e.*, conduct that is abusive *per se*.

The statutory context supports the conclusion that § 526(a)(4)'s prohibition primarily targets this type of abuse. Code provisions predating the BAPCPA already sought to prevent the practice of loading up on debt prior to filing. Section 523(a)(2), for instance, addressed the attendant risk of manipulation by preventing the discharge of debts obtained by false pretenses and making debts for purchases of luxury goods or services presumptively nondischargeable. See §§ 523(a)(2)(A) and (C) (2000 ed.). The BAPCPA increased the risk of such abuse, however, by providing a new mechanism for determining a debtor's ability to repay. Pursuant to the "means tes[t], "§ 707(b)(2)(D) (2006 ed.), a debtor's petition for Chapter 7 relief is presumed abusive (and may therefore be dismissed or converted to a structured repayment plan under Chapter 13) if the debtor's current monthly income exceeds his statutorily allowed expenses, including payments for secured debt, by more than a prescribed amount. See §§ 707(b)(2)(A)(i)–(iv). The test promotes debtor accountability but also enhances incentives to incur additional debt prior to filing, as payments on secured debts offset a debtor's monthly income under the formula. Other amendments effected by the BAPCPA reflect a concern with this practice. For instance, Congress amended § 523(a)(2) to expand the exceptions to discharge by lowering the threshold amount of new debt a debtor must assume to trigger the presumption of abuse under § 523(a)(2)(C), and it extended the relevant prefiling window. See § 310, 119 Stat. 84. In context, § 526(a)(4) is best understood to provide an additional safeguard against the practice of loading up on debt prior to filing.

The Government's contextual arguments provide additional support for the view that § 526(a)(4) was meant to prevent this type of conduct. The companion rules of professional conduct in §§ 526(a)(1)–(3) and the remedies for their violation in § 526(c) indicate that Congress was concerned with actions that threaten to harm debtors or creditors. Unlike the reasonable financial advice the Eighth Circuit's broad reading would proscribe, advice to incur more debt because of bankruptcy presents a substantial risk of injury to both debtors and creditors. See *Hersh*, 553 F. 3d, at 760–761. Specifically, the incurrence of such debt stands to harm a debtor if his prepetition conduct leads a court to hold his debts nondischargable, see § 523(a)(2), convert his case to another chapter, or dismiss it altogether, see § 707(b), thereby defeating his effort to obtain bankruptcy relief. If a debt, although manipulatively incurred, is not timely identified as abusive and therefore is discharged, creditors will suffer harm as a result of the discharge and the consequent dilution of the bankruptcy estate. By contrast, the prudent advice that the Eighth Circuit's view of the statute forbids would likely benefit both debtors and creditors and at the very least should cause no harm. See *id.*, at 760; 541 F. 3d, at 800 (Colloton, J., concurring in part and dissenting in part). For all of these reasons, we conclude that § 526(a)(4) prohibits a debt relief agency only from advising an assisted person to incur more debt when the impelling reason for the advice is the anticipation of bankruptcy.

That "[n]o other solution yields as sensible a" result further persuades us of the correctness of this narrow reading. *United States* v. *Granderson*, 511 U. S. 39, 55 (1994). It would make scant sense to prevent attorneys and other debt relief agencies from advising individuals thinking of filing for bankruptcy about options that would be beneficial to both those individuals and their creditors. That construction serves none of the purposes of the

Bankruptcy Code or the amendments enacted through the BAPCPA. Milavetz itself acknowledges that its expansive view of § 526(a)(4) would produce absurd results; that is one of its bases for arguing that "debt relief agency" should be construed to exclude attorneys. Because the language and context of § 526(a)(4) evidence a more targeted purpose, we can avoid the absurdity of which Milavetz complains without reaching the result it advocates.

For the same reason, we reject Milavetz's suggestion that § 526(a)(4) broadly prohibits debt relief agencies from discussing covered subjects instead of merely proscribing affirmative advice to undertake a particular action. Section 526(a)(4) by its terms prevents debt relief agencies only from "advis[ing]" assisted persons "to incur" more debt. Covered professionals remain free to "tal[k] fully and candidly *about* the incurrence of debt in contemplation of filing a bankruptcy case." Brief for Milavetz 73. Section 526(a)(4) requires professionals only to avoid instructing or encouraging assisted persons to take on more debt in that circumstance. Cf. ABA Model Rule of Professional Conduct 1.2(d) (2009) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law"). Even if the statute were not clear in this regard, we would reach the same conclusion about its scope because the inhibition of frank discussion serves no conceivable purpose within the statutory scheme. Cf. *Johnson* v. *United States*, 529 U. S. 694, 706, n. 9 (2000).[5]

Finally, we reject Milavetz's contention that, narrowly construed, § 526(a)(4) is impermissibly vague. Milavetz urges that the concept of abusive prefiling conduct is too indefinite to withstand constitutional scrutiny and that uncertainty regarding the scope of the prohibition will chill protected speech. We disagree.

Under our reading of the statute, of course, the prohibited advice is not defined in terms of abusive prefiling conduct but rather the incurrence of additional debt when the impelling reason is the anticipation of bankruptcy. Even if the test depended upon the notion of abuse, however, Milavetz's claim would be fatally undermined by other provisions of the Bankruptcy Code, to which that concept is no stranger. As discussed above, the Code authorizes a bankruptcy court to decline to discharge fraudulent debts, see § 523(a)(2), or to dismiss a case or convert it to a case under another chapter if it finds that granting relief would constitute abuse, see § 707(b)(1). Attorneys and other professionals who give debtors bankruptcy advice must know of these provisions and their consequences for a debtor who in bad faith incurs additional debt prior to filing. Indeed, § 707(b)(4)(C) states that an attorney's signature on bankruptcy filings "shall constitute a certification that the attorney has" determined that the filing "does not constitute an abuse under [§ 707(b)(1)]." Against this backdrop, it is hard to see how a rule that narrowly prohibits an attorney from affirmatively advising a client to commit this type of abusive prefiling conduct could chill

[5] If read as Milavetz advocates, § 526(a)(4) would seriously undermine the attorney-client relationship. Earlier this Term, we acknowledged the importance of the attorney-client privilege as a means of protecting that relationship and fostering robust discussion. See *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. ___, ___ (2009) (slip op., at 7). Reiterating the significance of such dialogue, we note that § 526(a)(4), as narrowly construed, presents no impediment to " 'full and frank' " discussions. *Ibid*. (quoting *Upjohn Co.* v. *United States*, 449 U. S. 383,389 (1981)).

attorney speech or inhibit the attorney-client relationship. Our construction of § 526(a)(4) to prevent only advice principally motivated by the prospect of bankruptcy further ensures that professionals cannot unknowingly run afoul of its proscription.[6] Because the scope of the prohibition is adequately defined, both on its own terms and by reference to the Code's other provisions, we reject Milavetz's vagueness claim.

As the foregoing shows, the language of the statute, together with other evidence of its purpose, makes this narrow reading of § 526(a)(4) not merely a plausible interpretation but the more natural one. Accordingly, we reject the Eighth Circuit's conclusion and hold that a debt relief agency violates § 526(a)(4) only when the impetus of the advice to incur more debt is the expectation of filing for bankruptcy and obtaining the attendant relief. Because our reading of the statute supplies a sufficient ground for reversing the Court of Appeals' decision, and because Milavetz challenges the constitutionality of the statute, as narrowed, only on vagueness grounds, we need not further consider whether the statute so construed withstands First Amendment scrutiny.

C

Finally, we address the validity of § 528's challenged disclosure requirements. Our first task in resolving this question is to determine the contours of Milavetz's claim. Although the nature of its challenge is not entirely clear from the briefing or decisions below, counsel for Milavetz insisted at oral argument that this is "not a facial challenge; it's an as-applied challenge." Tr. of Oral Arg. 26. We will approach the question consistent with Milavetz's characterization.[7]

We next consider the standard of scrutiny applicable to § 528's disclosure requirements. The parties agree, as do we, that the challenged provisions regulate only commercial speech. Milavetz contends that our decision in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), supplies the proper standard for reviewing these requirements. The Court in that case held that restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny—that is, they must "directly advanc[e]" a substantial governmental interest and

[6] The hypothetical questions Milavetz posits regarding the permissibility of advice to incur debt in certain circumstances, see Brief for Milavetz 48–51, are easily answered by reference to whether the expectation of filing for bankruptcy (and obtaining a discharge) impelled the advice. We emphasize that awareness of the possibility of bankruptcy is insufficient to trigger § 526(a)(4)'s prohibition. Instead, that provision proscribes only advice to incur more debt that is principally motivated by that likelihood. Thus, advice to refinance a mortgage or purchase a reliable car prior to filing because doing so will reduce the debtor's interest rates or improve his ability to repay is not prohibited, as the promise of enhanced financial prospects, rather than the anticipated filing, is the impelling cause. Advice to incur additional debt to buy groceries, pay medical bills, or make other purchases "reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor," § 523(a)(2)(C)(ii)(II), is similarly permissible.

[7] In so doing, we note that our ability to evaluate § 528's validity as applied to Milavetz is constrained by the lack of a developed record. Because the parties have introduced no exhibits or other evidence to ground our analysis, we are guided in this preenforcement challenge only by Milavetz's status—*i.e.*, as a law firm or attorney—and its general claims about the nature of its advertisements.

be "n[o] more extensive than is necessary to serve that interest." *Id.*, at 566. Contesting Milavetz's premise, the Government maintains that § 528 is directed at *misleading* commercial speech. For that reason, and because the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech, the Government contends that the less exacting scrutiny described in *Zauderer* governs our review. We agree.

*Zauderer* addressed the validity of a rule of professional conduct that required attorneys who advertised contingency-fee services to disclose in their advertisements that a losing client might still be responsible for certain litigation fees and costs. Noting that First Amendment protection for commercial speech is justified in large part by the information's value to consumers, the Court concluded that an attorney's constitutionally protected interest in *not* providing the required factual information is "minimal." 471 U. S., at 651. Unjustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech, but "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Ibid.*

The challenged provisions of § 528 share the essential features of the rule at issue in *Zauderer*. As in that case, § 528's required disclosures are intended to combat the problem of inherently misleading commercial advertisements—specifically, the promise of debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs. Additionally, the disclosures entail only an accurate statement identifying the advertiser's legal status and the character of the assistance provided, and they do not prevent debt relief agencies like Milavetz from conveying any additional information.

The same characteristics of § 528 that make it analogous to the rule in *Zauderer* serve to distinguish it from those at issue in *In re R. M. J.*, 455 U. S. 191 (1982), to which the Court applied the intermediate scrutiny of *Central Hudson*. The ethical rules addressed in *R. M. J.* prohibited attorneys from advertising their practice areas in terms other than those prescribed by the State Supreme Court and from announcing the courts in which they were admitted to practice. See 455 U. S., at 197–198. Finding that the restricted statements were not inherently misleading and that the State had failed to show that the appellant's advertisements were themselves likely to mislead consumers, see *id.*, at 205, the Court applied *Central Hudson*'s intermediate scrutiny and invalidated the restrictions as insufficiently tailored to any substantial state interest, 455 U. S., at 205–206. In so holding, the Court emphasized that States retain authority to regulate inherently misleading advertisements, particularly through disclosure requirements, and it noted that advertisements for professional services pose a special risk of deception. See *id.*, at 203, 207.

Milavetz makes much of the fact that the Government in these consolidated cases has adduced no evidence that its advertisements are misleading. *Zauderer* forecloses that argument: "When the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.' " 471 U. S., at 652–653 (quoting *FTC* v. *Colgate-Palmolive Co.*, 380 U. S. 374, 391–392 (1965)). Evidence in the congressional record demonstrating a pattern of advertisements that hold out the promise of debt relief without alerting consumers to its potential cost, see 1998 Hearings, pt. III, at 86, 90–94, is

adequate to establish that the likelihood of deception in this case "is hardly a speculative one," 471 U. S., at 652.

Milavetz alternatively argues that the term "debt relief agency" is confusing and misleading and that requiring its inclusion in advertisements cannot be "reasonably related" to the Government's interest in preventing consumer deception, as *Zauderer* requires. *Id.*, at 651. This contention amounts to little more than a preference on Milavetz's part for referring to itself as something other than a "debt relief agency"—*e.g.*, an attorney or a law firm. For several reasons, we conclude that this preference lacks any constitutional basis. First, Milavetz offers no evidence to support its claim that the label is confusing. Because § 528 by its terms applies only to debt relief agencies, the disclosures are necessarily accurate to that extent: Only debt relief agencies must identify themselves as such in their advertisements. This statement provides interested observers with pertinent information about the advertiser's services and client obligations.

Other information that Milavetz must or may include in its advertisements for bankruptcy-assistance services provides additional assurance that consumers will not misunderstand the term. The required statement that the advertiser "'help[s] people file for bankruptcy relief'" gives meaningful context to the term "debt relief agency." And Milavetz may further identify itself as a law firm or attorney. Section 528 also gives Milavetz flexibility to tailor the disclosures to its individual circumstances, as long as the resulting statements are "substantially similar" to the statutory examples. §§ 528(a)(4) and (b)(2)(B).

Finally, we reject Milavetz's argument that § 528 is not reasonably related to any governmental interest because it applies equally to attorneys who represent creditors, as Milavetz sometimes does. The required disclosures, Milavetz contends, would be counterfactual and misleading in that context. This claim is premised on an untenable reading of the statute. We think it evident from the definition of "assisted person"—which is stated in terms of the person's debts, see § 101(3)—and from the text and structure of the debt-relief-agency provisions in §§ 526, 527, and 528 that those provisions, including § 528's disclosure requirements, govern only professionals who offer bankruptcy-related services to consumer debtors. Section 528 is itself expressly concerned with advertisements pertaining to "bankruptcy assistance services," "the benefits of bankruptcy," "excessive debt, debt collection pressure, or inability to pay any consumer debt," §§ 528(a)(3) and (b)(2). Moreover, like the other debt-relief-agency provisions, that section is codified in a subchapter of the Bankruptcy Code entitled "DEBTOR'S DUTIES AND BENEFITS." 11 U. S. C., ch. 5, subch. II. In context, reading § 528 to govern advertisements aimed at creditors would be as anomalous as the result of which Milavetz complains. Once again, we decline Milavetz's invitation to adopt a view of the statute that is contrary to its plain meaning and would produce an absurd result.

Because § 528's requirements that Milavetz identify itself as a debt relief agency and include certain information about its bankruptcy-assistance and related services are "reasonably related to the [Government's] interest in preventing deception of consumers," *Zauderer*, 471 U. S., at 651, we uphold those provisions as applied to Milavetz.

IV

For the foregoing reasons, the judgment of the Court of Appeals for the Eighth Circuit is affirmed as to §§ 101(12A) and 528 and reversed as to § 526(a)(4), and the cases are remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join the opinion of the Court, except for footnote 3, which notes that the legislative history supports what the statute unambiguously says. The Court first notes that statements in the Report of the House Committee on the Judiciary "indicate concern with abusive practices undertaken by attorneys." *Ante*, at 6, n. 3. Perhaps, but only the concern of the author of the Report. Such statements tell us nothing about what the statute means, since (1) we do not know that the members of the Committee read the Report, (2) it is almost certain that they did not vote on the Report (that is not the practice), and (3) even if they did read and vote on it, they were not, after all, those who made this law. The statute before us is a law because its text was approved by a majority vote of the House and the Senate, and was signed by the President. Even indulging the extravagant assumption that Members of the House other than members of its Committee on the Judiciary read the Report (and the further extravagant assumption that they agreed with it), the Members of the Senate could not possibly have read it, since it did not exist when the Senate passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. And the President surely had more important things to do.

The footnote's other source of legislative history is truly mystifying. For the proposition that "the legislative record elsewhere documents misconduct by attorneys" which was presumably the concern of *Congress*, the Court cites a reproduction of a tasteless advertisement that was (1) an attachment to the written statement of a *witness*, (2) in a hearing held seven years prior to this statute's passage, (3) before a subcommittee of the House considering a *different* consumer bankruptcy reform bill that never passed.* "Elsewhere" indeed.

The Court acknowledges that nothing can be gained by this superfluous citation (it admits the footnote is "unnecessary in light of the statute's unambiguous language," *ante*, at 6, n. 3). But much can be lost. Our cases have said that legislative history is irrelevant when the statutory text is clear. See, *e.g., United States* v. *Gonzales*, 520 U. S. 1, 6 (1997); *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 254 (1992). The footnote advises conscientious attorneys that this is not true, and that they must spend time and their clients' treasure combing the annals of legislative history in *all* cases: To buttress their case where the statutory text is unambiguously in their favor; and to attack an unambiguous text that

* The Court protests that the earlier hearing was "part of the record cited by the 2005 House Report," *ante*, at 6, n. 3. The page it cites, however, does nothing more than note that the earlier hearing took place, see H. R. Rep. No. 109–31, pt. 1, p. 7 (2005). Are we to believe that this brought to the attention of the committee (much less of the whole Congress) an attachment to the testimony of one of the witnesses at that long-ago hearing? Of course not. That legislative history shows what "Congress" intended is a fiction requiring no support in reality.

is against them. If legislative history is relevant to confirm that a clear text means what it says, it is presumably relevant to show that an apparently clear text does not mean what it seems to say. Even for those who believe in the legal fiction that committee reports reflect congressional intent, footnote 3 is a bridge too far.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I concur in the judgment and join all but Part III–C of the Court's opinion. I agree with the Court that 11 U. S. C. § 528's advertising disclosure requirements survive First Amendment scrutiny on the record before us. I write separately because different reasons lead me to that conclusion.

I have never been persuaded that there is any basis in the First Amendment for the relaxed scrutiny this Court applies to laws that suppress nonmisleading commercial speech. See *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 522–523 (1996) (opinion concurring in part and concurring in judgment) (discussing *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980)). In this case, the Court applies a still lower standard of scrutiny to review a law that compels the disclosure of commercial speech—*i.e.*, the rule articulated in *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985), that laws that require the disclosure of factual information in commercial advertising may be upheld so long as they are "reasonably related" to the government's interest in preventing consumer deception, *id.*, at 651.

I am skeptical of the premise on which *Zauderer* rests— that, in the commercial-speech context, "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed," *id.,* at 652, n. 14; see *id.*, at 650 (citing "material differences between disclosure requirements and outright prohibitions on speech"). We have refused in other contexts to attach any "constitutional significance" to the difference between regulations that compel protected speech and regulations that restrict it. See, *e.g.*, *Riley* v. *National Federation of Blind of N.C., Inc.*, 487 U. S. 781, 796–797 (1988). I see no reason why that difference should acquire constitutional significance merely because the regulations at issue involve commercial speech. See *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 480–481 (1997) (Souter, J., dissenting) (arguing that "commercial speech is . . . subject to [this] First Amendment principle: that compelling cognizable speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny"); *id.*, at 504 (THOMAS, J., dissenting); cf. *United States* v. *United Foods, Inc.*, 533 U. S. 405, 419 (2001) (THOMAS, J., concurring) (stating that regulations that compel funding for commercial advertising "must be subjected to the most stringent First Amendment scrutiny").

Accordingly, I would be willing to reexamine *Zauderer* and its progeny in an appropriate case to determine whether these precedents provide sufficient First Amendment protection against government-mandated disclosures.[1] Because no party asks us to do so

[1] I have no quarrel with the principle that advertisements that are false or misleading, or that propose an illegal transaction, may be proscribed. See *44 Liquormart, Inc.* v. *Rhode Island*, 517

here, however, I agree with the Court that the *Zauderer* standard governs our review of the challenge to § 528 brought by the Milavetz law firm and the other plaintiffs in this action (hereinafter Milavetz).

Yet even under *Zauderer*, we "have not presumptively endorsed" laws requiring the use of "government-scripted disclaimers" in commercial advertising. See *Borgner* v. *Florida Bd. of Dentistry*, 537 U. S. 1080, 1082 (2002) (THOMAS, J., dissenting from denial of certiorari). *Zauderer* upheld the imposition of sanctions against an attorney under a rule of professional conduct that required advertisements for contingency-fee services to disclose that losing clients might be responsible for litigation fees and costs. See 471 U. S., at 650–653. Importantly, however, Zauderer's advertisement was found to be misleading on its face, and the regulation in that case did not mandate the specific form or text of the disclosure. *Ibid.* Thus, *Zauderer* does not stand for the proposition that the government can constitutionally compel the use of a scripted disclaimer in any circumstance in which its interest in preventing consumer deception might plausibly be at stake. In other words, a bare assertion by the government that a disclosure requirement is "intended" to prevent consumer deception, standing alone, is not sufficient to uphold the requirement as applied to all speech that falls within its sweep. See *ante*, at 20.

Instead, our precedents make clear that regulations aimed at false or misleading advertisements are permissible only 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 R.M.J.*, 455 U. S. 191, 202 (1982) (emphasis added); see *Zauderer*, *supra*, at 651 ("recogniz[ing] that unjustified or unduly burdensome disclosure requirements might offend the First Amendment"). Therefore, a disclosure requirement passes constitutional muster only to the extent that it is aimed at advertisements that, by their nature, possess these traits. See *R. M. J.*, *supra*, at 202; *Ibanez* v. *Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U. S. 136, 143, 146–147 (1994).

I do not read the Court's opinion to hold otherwise. See *ante*, at 20. Accordingly, and with that understanding, I turn to the question whether Milavetz's challenge to § 528's disclosure requirements survives *Zauderer* scrutiny on the record before us.

As the Court notes, the posture of Milavetz's challenge inhibits our review of its First Amendment claim. See *ante*, at 19, n. 7. Milavetz challenged § 528's constitutionality before the statute had ever been enforced against any of the firm's advertisements. Although Milavetz purports to challenge § 528 only "'as-applied'" to its own advertising, see

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U. S. 484, 520 (1996) (opinion concurring in part and concurring in judgment). Furthermore, I acknowledge this Court's longstanding assumption that a consumer-fraud regulation that compels the disclosure of certain factual information in advertisements may intrude less significantly on First Amendment interests than an outright prohibition on all advertisements that have the potential to mislead. See, *e.g.*, *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771–772 (1976); *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651–652, n. 14 (1985); *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796, n. 9 (1988); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 565 (1980). But even if that assumption is correct, I doubt that it justifies an entirely different standard of review for regulations that compel, rather than suppress, commercial speech.

*ante*, at 19, it did not introduce any evidence or exhibits to substantiate its claim. Thus, no court has seen a sampling of Milavetz's advertisements or even a declaration describing their contents and the media through which Milavetz seeks to transmit them. As a consequence, Milavetz's nominal "as applied" challenge appears strikingly similar to a facial challenge.

We generally disapprove of such challenges because they "often rest on speculation" and require courts to engage in " 'premature interpretation of statutes on the basis of factually barebones records.' " *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 450 (2008) (quoting *Sabri* v. *United States*, 541 U. S. 600, 609 (2004)). Milavetz's claim invites the same problems. Milavetz alleges that § 528's disclosure requirements are unconstitutional as applied to its advertisements because its advertisements are not misleading and because the disclaimer required by § 528 will create, rather than reduce, confusion for Milavetz's potential clients. That may well be true. But because no record evidence of Milavetz's advertisements exists to guide our review, we can only speculate about the ways in which the statute might be applied to Milavetz's speech.

When forced to determine the constitutionality of a statute based solely on such conjecture, we will uphold the law if there is any "conceivabl[e]" manner in which it can be enforced consistent with the First Amendment. *Washington State Grange*, *supra*, at 456. In this case, both parties agree that § 528's disclosure requirements cover, at a minimum, deceptive advertisements that promise to "'wipe out'" debts without mentioning bankruptcy as the means of accomplishing this goal.[2] Brief for Milavetz 82, 86; Brief for United States 60–62. As a result, there is at least one set of facts on which the statute could be constitutionally applied. Thus, I agree with the Court that Milavetz's challenge to § 528 must fail.

[2] At oral argument, Milavetz's counsel declined to describe Milavetz's challenge to § 528 as a facial overbreadth claim, Tr. of Oral Arg. 25–26,and Milavetz's briefs make no such contention. But even viewing Milavetz's argument as a claim that § 528 is facially overbroad because it applies to nonmisleading advertisements for bankruptcy-related services, such an argument must fail. First, as noted, Milavetz acknowledges that § 528 can be constitutionally applied to deceptive bankruptcy-related advertisements and, thus, at least one "set of circumstances exists under which [§ 528] would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). Second, Milavetz does not attempt to argue that § 528's unconstitutional applications are "substantial" in number when judged in relation to this "plainly legitimate sweep." *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449–450, and n. 6 (2008) (internal quotation marks omitted).