"DEBT RELIEF AGENCIES:" DOES THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 VIOLATE ATTORNEYS' FIRST AMENDMENT RIGHTS?

INTRODUCTION

Attorneys and courts across the country are facing difficulty interpreting the changes to the Bankruptcy Code under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[1] ("BAPCPA"). No interpretative question has a more significant impact on consumer bankruptcy attorneys than whether they are "debt relief agencies" under section 101(12A) of the Bankruptcy Code ("the Code"). Classification of consumer bankruptcy attorneys as "debt relief agencies" would impose new regulatory restrictions, including compelled advertising disclosures and changes to the way consumer bankruptcy attorneys advise bankruptcy clients, which would force consumer bankruptcy attorneys to adhere to an additional set of professional standards and to learn new substantive and procedural mandates.[2]

Part I of this note examines the definition of "debt relief agency" introduced by BAPCPA, section 101(12A) of the Code, focusing on why non-consumer bankruptcy attorneys and law firms should be concerned about the provision and why attorneys are "debt relief agencies" under the Code. Part II then turns to the new restrictions imposed on debt relief agencies under section 526(a) of the Code and considers if section 526(a)(4), which prohibits debt relief agencies from advising their clients to incur more debt, violates consumer bankruptcy attorneys' right to private speech under the First Amendment. Part III concludes with a discussion of the advertising disclosures imposed on consumer bankruptcy

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[1] Pub. L. No. 109-8, 119 Stat. 23 (2005). *See Attorneys Are Not BAPCPA "Debt Relief Agencies,"* BANKR. NEWSL., Oct. 26, 2005, *available at* http://west.thomson.com/bankruptcy/newsletter/2005-10-26.asp (last visited March 29, 2006) (indicating effective date of Bankruptcy Abuse Prevention and Consumer Protection Act). BAPCPA was enacted to address (1) the escalation of consumer bankruptcy filings; (2) the significant losses asserted to be associated with bankruptcy filings; and (3) the loopholes and incentives within the bankruptcy system that encouraged opportunistic personal filings and abuse, "debtor misconduct and abuse, misconduct by attorneys and other professionals, problems associated with bankruptcy petition preparers, and instances where a debtor's discharge should be challenged." H.R. REP. NO. 109-031, at 5 (2005).

[2] *See* Ben Slaughter, *How to Become a Debt Relief Agency . . . by Mistake*, ADVOC., Jan. 2006, at 10 (describing debt relief agency provisions under BAPCPA and its effect on attorneys). These new requirements have rallied consumer bankruptcy attorneys across the country against the newly enacted BAPCPA and prompted scholarly debate over the First Amendment implications of BAPCPA. *See* Amy L. Zitka, *CBA Joins Bankruptcy Act Fight*, CONN. L. TRIB., Nov. 21, 2005, at 10 ("The Connecticut Bar Association is joining consumer bankruptcy across the country in rallying against the newly enacted [BAPCPA].") As of April 2006, at least three constitutional challenges to the debt relief agency provisions had been launched by consumer bankruptcy attorneys nationwide. *See generally In re* McCartney, 336 B.R. 588 (Bankr. M.D. Ga. 2006) (dismissing action which sought to determine that bankruptcy attorneys were not debt relief agencies); Complaint, Milavetz Gallop and Milavetz v. U.S., No. 05-CV-2626 (D. Minn. Nov. 14, 2005) (launching action for a declaratory judgment against "debt relief agency" provisions); Complaint, Geisenberger v. Gonzales, No. 05-CV-5460 (E.D. Penn. Oct. 14, 2005) ("Plaintiff . . . demand declaratory judgment that . . . [debt relief agency provisions] of the [BAPCPA] are unconstitutional . . . .").

attorneys by section 528 of the Code, and an analysis of section 528's constitutionality under the First Amendment's compelled commercial speech doctrine.

I. ATTORNEYS ARE "DEBT RELIEF AGENCIES" UNDER THE CODE

A. Section 101(12A)—What is a "Debt Relief Agency"?

One of BAPCPA's most striking additions to the Bankruptcy Code is section 101(12A), which creates a new category of bankruptcy service provider called a "debt relief agency."[3] Banks and credit card issuers lobbied for the amendment to crack down on "so-called bankruptcy mills, where large volumes of cases are handled and where [bankruptcy] lawyers allegedly don't see their clients until a court hearing."[4]

Section 101(12A) defines the term "debt relief agency" as:

> [A]ny person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include—
>
> (A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;
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> (B) a nonprofit organization that is exempt from taxation under . . . [26 U.S.C. § 501(c)(3)];
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> (C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

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[3] *See* Geoff Giles, *The New Bankruptcy Law: Bad News for Debtors, Worse News For Lawyers*, NEV. L., Sept. 2005, at 8 ("perhaps the most striking provision of . . . . [BAPCPA is the creation of] 'Debt Relief Agencies'"); *see also* Peter Alexander, *"Herstory" Repeats: The Bankruptcy Code Harms Women and Children*, 13 AM. BANKR. INST. L. REV. 571, 576 (2005) (indicating creation of debt relief agency is among hidden changes of BAPCPA); LOS ANGELES BANKRUPTCY FORUM, CURRENT DEVELOPMENTS IN ETHICS AND PROFESSIONAL RESPONSIBILITY: HOW DOES BAPCPA AFFECT YOU AS COUNSEL? 1 (2005) [hereinafter LA FORUM] ("BAPCPA establishes a new category of bankruptcy service providers called "Debt Relief Agencies" . . . .").

[4] Marcia Coyle, *Debtor's Attorneys See Red in Bankruptcy Bill; They See Malpractice Premium and Overhead Hikes; Judges' Workload Would Increase*, 179 N.J.L.J. 1126, Mar. 21, 2005, at 12; *see also* Alexander, *supra* note 3, at 582 (quoting Congressman Nadler for proposition that BAPCPA represents Congress putting bank, credit card company interests ahead of concern of middle class and expertise of practitioners); *see also* Jean Braucher, *Rash and Ride-Through Redux: The Term for Holding on to Cars, Homes and Other Collateral under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 457 (2005) (noting "[C]redit industry apparently paid for the initial drafting of the bankruptcy package finally passed in 2005. . . .").

> (D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act [12 U.S.C. § 1813] or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act [12 U.S.C. § 1752]), or any affiliate or subsidiary of such depository institution or credit union; or
> (E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17 when acting in such capacity.[5]

Because an "assisted person" is defined in the Code as one who owes primarily consumer debts, section 101(12A) will mainly apply to persons who assist consumer debtors.[6]

Most commentators believe that the plain meaning of section 101(12A) classifies attorneys for consumer debtors ("consumer bankruptcy attorneys") as "debt relief agencies."[7] As support, they focus on the "bankruptcy assistance" language within "debt relief agency," which is defined in section 101(4)(a) of the Code as "any goods or services . . . provided to an assisted person with the . . . purpose of providing information, advice, counsel, document preparation, [] filing, . . . [or] *legal representation* with respect to a . . ." bankruptcy proceeding.[8] The

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[5] 11 U.S.C. § 101(12A) (2006). *See* Karen Gross & Susan Block-Lieb, *Empty Mandate or Opportunity for Innovation? Pre-Petition Credit Counseling and Post-Petition Financial Management Education*, 13 AM. BANKR. INST. L. REV. 549, 562 n.64 (2005) (summarizing definition of "debt relief agency" under 11 U.S.C. § 101(12A)); Henry Hildebrand, III & Keith Lundin, *Selected Changes Affecting Consumer Bankruptcy Practice in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 59 CONSUMER FIN. L.Q. REP. 370, 371 (2005) (summarizing section 101(12A) changes along with others, noting restrictions of sections 526–28).

[6] *See* 11 U.S.C. § 101(3) (2006) ("The term 'assisted person' means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000."); *see also* Janet Flaccus, *Lawyers, You Are Now A Debt Relief Agency Under the New Bankruptcy Law*, 2005 ARK. L. NOTES 27 (2005) (noting broad definition of "assisted person"); Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 576–77 (2005) (referencing definition of "assisted person").

[7] *See* LA FORUM, *supra* note 3, at 2 ("Most commentaries and legal authorities have concluded that attorneys for consumer debtors and petition preparers fall within the scope of the definition of 'debt relief agencies.'"); *see also* Coyle, *supra* note 4, at 12 ("[BAPCPA] would require attorneys to include in their advertising and official communications a statement that 'We are a debt relief agency'"); Zitka, *supra* note 2, at 10 ('provisions of BAPCPA fail to distinguish between attorneys and non-attorneys providing bankruptcy services . . . . [Requiring attorneys to] advertise themselves as 'debt relief agencies.'"). The plain meaning is derived from the statutory text, unless the "text suggests an absurd result or a scrivener's error." WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 375 (2000). *See* Karen M. Gebbia-Pinetti, *Interpreting the Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAP. L. REV. 173, 277 (2000) ("[The plain meaning] rule presumes that the plain text accurately conveys Congress' intent and prohibits examination of other sources if the language is plain."); Jon May, *Statutory Construction: Not For the Timid*, CHAMPION MAGAZINE, Feb. 2006, at 29 ("[The plain meaning rule requires] the court proceed to examine the 'language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'").

[8] 11 U.S.C. § 101(4)(a) (2006) (emphasis added).

specific inclusion of legal representation within the definition of bankruptcy assistance conspicuously renders consumer bankruptcy attorneys "debt relief agencies" for the purposes of section 101(12A).[9] To make matters worse, the effect of section 101(12A) is not limited to individual consumer bankruptcy attorneys. Because "person" is defined as an individual, partnership, or corporation in the Code, most commentators also believe that consumer bankruptcy law firms are "debt relief agencies" under section 101(12A).[10]

B. Why Non-Consumer Bankruptcy Attorneys Should Be Concerned About Section 101(12A) of the Code

Although section 101(12A) of the Code generally applies to consumer bankruptcy attorneys and law firms, its breadth allows it to reach beyond bankruptcy to affect non-consumer bankruptcy attorneys and law firms.[11]

Section 101(12A) defines a "debt relief agency" as any person who provides bankruptcy assistance to an assisted person.[12] An "assisted person" is defined in the Code as any person whose debts are primarily consumer debts and whose non-exempt property is worth less than $150,000.[13] The Code broadly defines "bankruptcy assistance" to include advice, counsel, and legal representation with respect to any bankruptcy case, even if the client is not filing for bankruptcy.[14]

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[9] *See* Slaughter, *supra* note 2, at 10 ("Under the plain language of the amendments . . . [attorneys] have just become a 'debt relief agency' . . . ."); *see also* Chemerinsky, *supra* note 6, at 576 (indicating any lawyer giving bankruptcy assistance to "assisted person" is deemed "debt relief agency"); Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 288–89 (2005) (finding all debtors' lawyers are classified as "debt relief agencies" under new Bankruptcy Code).

[10] *See* 11 U.S.C. § 101(41) ("The term 'person' includes individual, partnership, and corporation, but does not include governmental unit . . . ."); *id.* § 101(12A) ("[a debt relief agency is] any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration."); *see also* Vance & Cooper, *supra* note 9, at 293 (defining debt relief agency as a "person, who provides 'bankruptcy assistance' to an 'assisted person' for money or other consideration.").

[11] *See* Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191, 206 (2005) ("These [BAPCPA] provisions . . . will apply to many attorneys who rarely, or never, represent consumer bankruptcy debtors."); *see also* Slaughter, *supra* note 2, at 10 ("the most disturbing aspect of . . . the BAPCPA is that many lawyers who do not practice bankruptcy law may not be aware of these new provisions and could very well find themselves being deemed debt relief agencies without ever knowing what a 'debt relief agency' is."); Giles, *supra* note 3, at 8 ("the law is so broadly written that a divorce lawyer, who may not even know where the bankruptcy courthouse is located, may come within [BAPCPA's] . . . purview by counseling bankruptcy to a couple that is awash in debt.").

[12] *See* 11 U.S.C. § 101(12A) (2006) (defining "debt relief agency").

[13] *See* 11 U.S.C. § 101(3) (defining "assisted person"); *see also* Sommer, *supra* note 11, at 206 (pointing to confusion surrounding Bankruptcy Code definition of 'assisted person'); Chemerinsky, *supra* note 6, at 576–77 (providing further definition of "assisted person").

[14] *See* 11 U.S.C. § 101(4A) (defining the term "bankruptcy assistance" as "any goods or services sold . . . provided to an assisted person with the . . . 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

Therefore, non-consumer bankruptcy attorneys who represent clients in matters with ancillary bankruptcy concerns may be considered "debt relief agencies."[15] For instance, "a family law attorney who advises his client of the effect of a bankruptcy filed by his client's ex-spouse" would be considered a debt relief agency.[16]

The broad definition of "bankruptcy assistance" and "assisted person" may classify a non-consumer bankruptcy firm as a "debt relief agency" even though its client is not filing for bankruptcy, or even contemplating filing. For example, a law firm may be considered a "debt relief agency" simply by advising a sole proprietorship, owing primarily consumer debts, of the effect of its supplier's bankruptcy.[17] This possibility could make it "difficult for a large firm which occasionally provides such services to keep track of whether it is a debt relief agency at any particular point in time."[18]

C. Should Courts Treat Attorneys as "Debt Relief Agencies?"

Since the enactment of BAPCPA, consumer bankruptcy attorneys have sought to clarify the definition of "debt relief agencies" in section 101(12A) through court action. As of the writing of this note, the issue had only been brought before two bankruptcy courts.[19] The two cases, one in the Southern District of Georgia and the other in the Middle District of Georgia, have reached disparate decisions regarding section 101(12A).[20]

1. The Arguments in *In re Attorneys at Law and Debt Relief Agencies*

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another or providing legal representation with respect to a case . . . under this title."); *see also* Sommer, *supra* note 11, at 206 (reiterating confusion of Bankruptcy Code definitions, including definition of "bankruptcy assistance"); Chemerinsky, *supra* note 6, at 576–77 (indicating bankruptcy assistance may arise in non-bankruptcy cases).

[15] *See* Sommer, *supra* note 11, at 207 (indicating attorneys who represent "individual landlords or other mom and pop business[es] . . . or nondebtor spouses who are creditors in title 11 case, including Chapter 11 cases" are "debt relief agencies."); *see also* Chemerinsky, *supra* note 6, at 576–77 (stating lawyer who provides advice to landlord pursuant to the bankruptcy case of tenant can be considered debt relief agency); Vance & Cooper, *supra* note 9, at 288 (discussing regulation of consumer debtors' attorneys as debt relief agencies).

[16] LA FORUM, *supra* note 3, at 3.

[17] *See* 11 U.S.C. § 101(8) ("The term 'consumer debt' means debt incurred by an individual primarily for a personal, family, or household purpose.").

[18] Sommer, *supra* note 11, at 207.

[19] Last searched April 18, 2006.

[20] *In re* McCartney, 336 B.R. 588, 589, 592 (Bankr. M.D. Ga. 2006) (dismissing action which sought to determine that bankruptcy attorneys were not debt relief agencies); *In re* Attorneys at Law and Debt Relief Agencies, 332 B.R. 66, 68–70 (Bankr. S.D. Ga. 2005) (holding debtor attorneys are not "debt relief agencies").

On October 17, 2005, raising the issue on its own, the United States Bankruptcy Court for the Southern District of Georgia ("Southern District") held that attorneys were not "debt relief agencies" within the meaning of section 101(12A).[21]

The court began its legal analysis by tackling the broad definition of "debt relief agency" in section 101(12A). The court examined section 101(12A) and noted that it does not include the word "attorney" or "lawyer," but includes the term "bankruptcy petition preparers" which expressly excludes attorneys and their staff.[22] Based on this observation, the court concluded that because "the definition of 'debt relief agency' omits express reference to attorneys and includes a term which excludes attorneys . . . ," Congress must not have intended attorneys to be classified as "debt relief agencies."[23] The court then dismissed the "legal representation" language in the Code's definition of "bankruptcy assistance" as merely intending to protect consumers harmed by debt relief agencies engaged in the unauthorized practice of law, and explained that it was not meant to classify attorneys as "debt relief agencies."[24]

Next, the court considered whether it seemed absurd to classify attorneys as "debt relief agencies" when section 527(b) of the Code required debt relief agencies "to inform assisted persons that they have the right to hire an attorney or to represent themselves . . . ."[25] Puzzled by section 527(b), the court questioned

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[21] *Attorneys at Law and Debt Relief Agencies,* 332 B.R. at 68–70; *see also Attorneys Are Not BAPCPA "Debt Relief Agencies*," *supra* note 1 ("Georgia bankruptcy court has ruled that attorneys who are members of the Bar of that court . . . are not 'debt relief agencies'").

[22] *See Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 69 ("The . . . definition of 'debt relief agency,' while extremely broad does not include the word 'attorney' or 'lawyer' . . . . It does include 'bankruptcy petition preparer,' but that term is defined in section 110 and expressly excludes attorneys and their staffs."). A bankruptcy petition preparer is "a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation a document for filing . . . ." 11 U.S.C. § 110(a)(1) (2006).

[23] *Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 69.

[24] *See id.* ("[It] was Congress' effort to empower the Bankruptcy Courts presiding over a case with authority to protect consumers who . . . may have been harmed by a debt relief agency that may have engaged in the unauthorized practice of law . . . .").

[25] *Id*. The bankruptcy court referred to the following portion of section 527(b) of the Bankruptcy Code:

> A debt relief agency providing bankruptcy assistance to an assisted person shall provide each assisted person at the same time as the notices required under subsection (a)(1) the following statement, to the extent applicable, or one substantially similar. The statement shall be clear and conspicuous and shall be in a single document separate from other documents or notices provided to the assisted person:
>
> "IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.
>
> "If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION

whether Congress really intended attorneys to tell assisted people that they had the right to hire an attorney.[26] The court believed that such an interpretation would be absurd, and therefore held that Congress did not intend to classify attorneys as "debt relief agencies."[27]

The court concluded its analysis by examining the legislative history surrounding section 101(12A). The court began by noting that "[a]ttorneys' . . . discipline historically [had been] a matter of state law" and that the new Code gave the federal courts expansive disciplinary powers over debt relief agencies, which raised Tenth Amendment issues.[28] The court then reasoned that if Congress had intended attorneys to be classified as "debt relief agencies," the Tenth Amendment issues would not have gone unnoticed and undebated by the States or Congress.[29] Yet the court was unable to find Congressional debate in BAPCPA's legislative history regarding the Tenth Amendment, indicating that Congress must not have intended for attorneys to be classified as "debt relief agencies."[30]

2. The Arguments in *In re McCartney*

On January 12, 2006, the United States Bankruptcy Court for the Middle District of Georgia refused to address the issue of whether attorneys were "debt relief agencies," asserting that the case did not provide a live "case or

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PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the contract before you hire anyone."

11 U.S.C. § 527(b) (2006); *see also* Geoff Giles, *The New Bankruptcy Law: Bad News for Debtors, Worse News for Lawyers*, 13 NEV. L. 8, 9 (2005) (advising when section 527(b) "comes into play"); Sommer, *supra* note 11, at 208–10 (discussing debt relief agencies and section 527).

[26] *See Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 70 ("It is hard to imagine that the language which, again, conspicuously omits the word 'attorney' really requires an attorney to tell an assisted person that he/she has the right to hire an attorney . . . ."); *see also* David C. Farmer, *Bankruptcy Reform: Like a BAPCPA Out of Hell?*, 10 HI B. J. 6, 10 (2006) (discussing section 527(b)); Thomas J. Yerbich, *The Coming Exodus of Consumer Counsel*, AM. BANKR. INST. J., July-Aug. 2003, at 10, 51 (explaining why section 527(b) is "troublesome").

[27] *See Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 70 ("I hold that Congress intended to establish regulation of entities who interface with debtors in shadowy, gray areas . . . , but it did not intend to regulate attorneys. . . . [This fits with] [t]he interpretation of a statute that is logical or sensible . . . over interpretation that is illogical or absurd."); *see also* Roger Cox, *2005: The Year in Review: Bankruptcy Law*, 69 TEX. B. J. 23 (2006) (reiterating court's ruling that lawyers are not debt relief agencies).

[28] *Attorneys at Law and Debt Relief Agencies,* 332 B.R at 70–71. The 10th Amendment of the Constitution reserves powers not delegated to the federal government to the states or people. U.S. CONST. amend. X. The 10th Amendment, therefore, gives the state powers over matters that have been historically a matter of state law. *See id.*; *see also* Chemerinsky, *supra* note 6, at 582–83 (discussing Tenth Amendment and BAPCPA).

[29] *See Attorneys at Law and Debt Relief Agencies,* 332 B.R. at 71 ("I cannot conceive that as long as this bill has been pending any such intent could have gone unnoticed and undebated by the states."); *cf.* Chemerinsky, *supra* note 6, at 582–83.

[30] *See Attorneys at Law and Debt Relief Agencies,* 332 B.R. at 71 (revealing examination of legislative history); *see also* Cox, *supra* note 27, at 23 (stating court's holding that lawyers are not debt relief agencies).

controversy."[31] Although the bankruptcy court for the Middle District of Georgia refused to reach a definitive decision, the arguments employed by the United States Trustee ("Trustee") and the consumer bankruptcy attorney highlight the difficulty of determining whether consumer bankruptcy attorneys are "debt relief agencies" under section 101(12A).[32]

The Trustee's main argument for classifying attorneys as "debt relief agencies" was that the plain and ordinary meaning of section 101(12A) encompassed attorneys.[33] As support, the Trustee cited to the language of section 101(12A), which defines a "debt relief agency" as any person who provides any *bankruptcy assistance* to an assisted person.[34] The Trustee then referred to the "legal representation" language in the Code's definition of "bankruptcy assistance" to conclude that the definition of "debt relief agencies" encompassed attorneys.[35]

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[31] *See In re* McCartney, 336 B.R. 588, 592 (Bankr. M.D. Ga. 2006) ("Movant has not shown that he is in danger of sustaining any immediately impending harm or injury."); *see also* U.S. CONST. art. III, § 2, cl. 1. Section 2, clause 1 states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . . to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another state;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.; Arizonians for Official English v. Arizona, 520 U.S. 43, 64 (1997) (explaining standing is part of Constitution's case and controversy requirement, and party must show invasion of legally protected interest that is concrete and particularized, and actual or imminent). The case was brought after a consumer bankruptcy attorney filed a motion asking the court to determine his status under section 101(12A) of the Code. *See McCartney* 336 B.R. at 590 ("Movant asks the Court to determine that attorneys who practice before this Court are not 'debt relief agencies' . . . .").

[32] *See McCartney*, 336 B.R. at 592 ("The Court can only conclude that Movant has failed to satisfy the case or controversy requirement."). The U.S. Trustee is "a component of the Department of Justice that seeks to promote the efficiency and protect the integrity of the federal bankruptcy system." About the United States Trustee Program & Bankruptcy, http://www.usdoj.gov/ust/eo/ust_org/about_ustp.htm (last visited Feb. 26, 2006). One of the U.S. Trustee's specific responsibilities is "to take legal action to enforce the requirements of the Bankruptcy Code . . . ." *Id.*; *see also* 11 U.S.C. § 307 (2006) ("The United States Trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title."); *In re* Gideon, 158 B.R. 528, 530 (Bankr. S.D. Fla. 1993) (stating United States Trustee may act as litigant or administrative arm of bankruptcy courts).

[33] Answer at 4, *In re* McCartney, 336 B.R. 588 (Bankr. M.D. Ga. Jan. 12, 2006) (No. 05-58001-RFH) ("[T]he plain and ordinary meaning of the statutory language used to define 'debt relief agency' encompasses attorneys . . . ."); *see also* Slaughter, *supra* note 2, at 10 (positing plain meaning of language in Code allows debt relief agencies to include attorneys); LA FORUM, *supra* note 3, at 2 (acknowledging many commentaries conclude that attorneys fall within definition of "debt relief agencies" in Code).

[34] Answer at 4, *In re* McCartney, 336 B.R. 588 (No. 05-58001-RFH); *see also* 11 U.S.C. § 101(12A) (2006) (stating the term "debt relief agency" is any person who provides bankruptcy assistance to an assisted person); *cf.* Slaughter, *supra* note 2, at 10 ("Many commentators feel the debt relief agency provisions were simply poorly drafted and not intended to include attorneys.").

[35] Answer at 4, *In re* McCartney, 336 B.R. 588 (No. 05-58001-RFH) ("There is no doubt that bankruptcy attorneys are persons that provide legal representation with respect to bankruptcy cases."); *see also* 11

The Trustee's alternative argument was that the legislative history of BAPCPA indicated Congress' intent that attorneys be classified as "debt relief agencies."[36] Specifically, the Trustee argued that Congress' failure to adopt United States Senator Feingold's (D-WI) amendment to prevent attorneys from being classified as "debt relief agencies" was proof that Congress intended attorneys to be classified as "debt relief agencies."[37]

In opposition to the Trustee's main argument, the bankruptcy attorney cited to the Code's separate definition of "attorney" in section 101(4) as evidence that Congress did not intend attorneys to be classified as "debt relief agencies."[38] The consumer bankruptcy attorney also referred to the discussion in *In re Attorneys at Law and Debt Relief Agencies*, which states that application of the debt relief agency requirements to attorneys would lead to an absurd result.[39]

The bankruptcy attorney then rebutted the Trustee's legislative history argument by citing to the Supreme Court's holding in *Lockhart v. United States* that failed amendments should not be considered in statutory interpretation.[40] Given *Lockhart*'s holding, the consumer bankruptcy attorney argued, the "[l]egislative history was not clear as to whether an attorney was to be included as a debt relief agency."[41]

3. Interpreting the Arguments and Concluding that Attorneys Are "Debt Relief Agencies"

U.S.C. § 101 (4A). *But see* LA FORUM, *supra* note 3, at 2–3 (pointing to Honorable Lamar W. Davis, Jr.'s proposition that the term "legal representation" in definition of "bankruptcy assistance" refers to non-lawyers' unauthorized practice of law).

[36] Answer at 5, *In re* McCartney, 336 B.R. 588 (No. 05-58001-RFH) ("The legislative history of the BAPCPA eliminates any doubt that Congress intended the term 'debt relief agency' to encompass attorneys and lawful legal representation.").

[37] *Id*. at 6. ("Because Congress did not adopt Senator Feingold's amendment, it is clear from the legislative history of the BAPCPA . . . that Congress intended for the provisions governing debt relief agencies to apply to attorneys."). On March 9, 2005, Senator Feingold proposed amendment No. 93 to Congress which would have excluded lawyers from the definition of debt relief agencies. *See* 151 CONG. REC. S2306–02, 2316–17 (2005). The amendment was part of a group of amendments Senator Feingold proposed in response to the American Bar Association's concerns. *See id*. Instead of passing the amendment, the Senate decided not to address Senator Feingold's proposal. *See id*.

[38] Brief at 7, *In* re McCartney, 336 B.R. 588 (Bankr. M.D. Ga. Jan. 12, 2006) (No. 05-58001-RFH) ("Congress added the new category 'debt relief agency' but neglected to include in the definition the term 'attorney' . . . . [but] include[d] . . . 'bankruptcy petition preparer' . . . . [which] exclude[s attorneys] from [its] definition . . . . "); *see also In re* Attorneys at Law & Debt Relief Agencies, 332 B.R. 66, 67 (Bankr. S.D. Ga. 2005) ("Although attorneys are not expressly included in the definition, the language defining debt relief agencies is broad enough on its face to include attorneys . . . .").

[39] Brief at 8, *In re* McCartney, 336 B.R. 588 (No. 05-58001-RFH); *see also In re* Attorneys at Law and Debt Relief Agencies, 332 B.R. 66, 70 (Bankr. S.D. Ga. 2005) ("All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose." (citing United States v. Katz, 271 U.S. 354, 357 (1926))).

[40] Brief at 11, *In re* McCartney, 336 B.R. 588 (No. 05-58001-RFH) (positing reliance on Senator Feingold's failed amendment as interpretative authority would be incorrect); *see* Lockhart v. U.S., 126 S.Ct. 699, 702 (2005) ("Failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'").

[41] Brief at 11, *In* re McCartney, 336 B.R. 588 (No. 05-58001-RFH).

The arguments employed in the bankruptcy courts of the Southern District and the Middle District of Georgia represent the strongest opposing views regarding whether attorneys constitute "debt relief agencies." A detailed analysis of the arguments used in both courts lends support to the view that attorneys are in fact "debt relief agencies."

First, contrary to the argument used by the Southern District and the bankruptcy attorney, section 101(12A)'s failure to include attorneys within the definition of "debt relief agency" is not dispositive. Under the canon of negative implications, "if Congress enumerates specific exceptions . . . , other exceptions will not be recognized in the absence of explicit legislative direction."[42] Because section 101(12A) specifically excludes certain categories from the definition of "debt relief agency," [43] but fails to exclude attorneys, the canon of negative implications would actually require attorneys to be classified as "debt relief agencies."[44]

Second, the Southern District and the bankruptcy attorney's reliance on the absurd-result canon of statutory interpretation to conclude that attorneys were not subject to section 101(12A) is questionable. The absurd-result canon allows courts to read statutes in a way that avoids results the court believes to be absurd.[45] However, the absurd-result canon is highly subjective since the "level of unreasonableness that courts are willing to accept varies greatly."[46] This indicates that reliance on the absurd-result canon is insufficient on its own to conclude that attorneys are not "debt relief agencies."

Third, the Southern District's use of legislative history to conclude that attorneys were not "debt relief agencies" was irrelevant. Typically, courts are not supposed to consider legislative history if they can resolve ambiguities in statutes through other means such as plain meaning.[47] In this case, using the plain meaning

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[42] May, *supra* note 7, at 31. The canon of negative implications, *Expressio Uniun est Exclusio Alterisu*, provides that "the inclusion [expression] of one thing suggests the exclusion of all others." ESKRIDGE, *supra* note 7, at 255.

[43] Under section 101(12A), "an officer, director, employee, or agent of a person" of a debt relief agency, "a nonprofit organization," "a creditor of such assisted person," "a depository institution," and "an author, publisher, distributor, or seller of works subject to copyright protection" are excluded from the classification of "debt relief agency." 11 U.S.C. § 101(12A) (2006).

[44] *See* 11 U.S.C. § 101(12A) (2006) ("any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110 [is a debt relief agency] . . . ."); *see also* Sommer, *supra* note 11, at 207 (noting debt-relief agency "clearly includes attorneys who represent individual landlords or other mom and pop businesses that owe primarily consumer debts, as well as those who represent consumer creditors, or non-debtor spouses who are creditors in title 11 cases. . . .").

[45] *See* ESKRIDGE, *supra* note 7, at 260 ("Assuming that the legislature does not intend irrational or incoherent directives, courts will read—or even rewrite—statutes to avoid *absurd results*."); *see also* May, *supra* note 7, at 31 (agreeing that courts are not bound to apply clear statutory language in a manner to would lead to absurd results).

[46] May, *supra* note 7, at 31.

[47] *See* Lamie v. United States Tr., 540 U.S. 526, 534 (2004) (finding that if a statute's meaning is plain courts only have power to enforce it according to its terms); Garcia v. United States, 469 U.S. 70, 75 (1984)

of section 101(12A) would lead to the conclusion that attorneys are "debt relief agencies" without the need to refer to legislative history.[48]

Finally, turning to Senator Feingold's amendment, courts are generally reluctant to use failed congressional amendments as statutory interpretative tools.[49] Since the Senate rejected Senator Feingold's amendment, the presumption would render the amendment immaterial in determining whether attorneys are "debt relief agencies."

So what is the best interpretation of section 101(12A)? "Several scholarly surveys of the Court's approach to the Code in particular have identified textualism or 'plain meaning' as its primary (but not exclusive) analytical technique."[50] The plain meaning would require an interpretation of "debt relief agency" with "definitions of key terms but without regard to legislative history or bankruptcy policy."[51] As previously discussed, this would mean that attorneys are "debt relief agencies."

Accordingly, attorneys who hoped that they would not be classified as "debt relief agencies" under section 101(12A) of the Code are in for a rude awakening. At the very least, the two arguments within the Georgia courts only add fuel to the controversy created by section 101(12A).

II. DOES SECTION 526(a) VIOLATE CONSUMER BANKRUPTCY ATTORNEYS' RIGHT TO PRIVATE SPEECH?

A. Section 526(a)—Its Effects on Consumer Bankruptcy Attorneys

1. What Does Section 526(a) of the Code Say?

Section 526(a) of the Code prohibits debt relief agencies from making untrue or misleading statements, advising clients to make untrue or misleading statements, misrepresenting the services the debt relief agency will provide, or advising "an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a [bankruptcy] case . . . or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or

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("only the most extraordinary contrary intentions from [legislative history] would justify a limitation on the 'plain meaning' of the statutory language."); *see also* May, *supra* note 7, at 30 ("Courts are not supposed to consider legislative history if they can resolve ambiguities in statutes through other means.").

[48] *See supra* Part I.A (revealing plain meaning of section 101(12A) would classify attorneys as debt relief agencies).

[49] *See* ESKRIDGE, *supra* note 7, at 378.

[50] John Hennigan, *Rousey and The New Retirement Funds Exemption*, 13 AM BANKR. INST. L. REV. 777, 786 (2005). *See, e.g.*, Lee Dembart & Bruce A. Markell, *Alive at 25? A Short Review of the Supreme Court's Bankruptcy Jurisprudence 1979-2004*, 78 AM. BANKR. L.J. 373, 386, 390–91 (2004) (concluding "plain meaning" was Court's dominant method to interpret the Code); Walter A. Effross, *Grammarians at the Gate: The Rehnquist Court's Evolving "Plain Meaning" Approach to Bankruptcy Jurisprudence*, 23 SETON HALL L. REV. 1636, 1638–39 (1993) (revealing Court increasing use of plain meaning approach to statutory interpretation).

[51] Hennigan, *supra* note 50, at 786.

representing a debtor in a [bankruptcy] case . . . ."[52] Although most of the prohibited practices were already considered improper before the enactment of BAPCPA, advising a debtor or prospective debtor to incur more debt may be proper under certain circumstances.[53] For instance, it may be proper to advise "clients regarding all of their options involving future financial plans, including . . . co-signing a child's educational loan . . . [or] obtaining emergency medical and dental assistance."[54]

Failure to comply with section 526(a) may result in damages for reasonable attorney fees and costs, injunctive relief, and any appropriate civil penalty the court deems appropriate.[55] If the debt relief agency intentionally or negligently fails to comply with section 526(a), the state may bring an action against the debt relief agency to enjoin the violation and to recover attorney fees, actual damages, and its attorney fees and costs.[56] The bankruptcy court, the debtor, or the U.S. Trustee can also seek civil penalties and injunctive relief against the debt relief agency for intentional violations of section 526(a) or "clear and consistent pattern[s] or practice[s] of violating" section 526(a).[57]

2. Consumer Bankruptcy Attorneys will have Problems with Section 526(a)

A consumer debtor client comes to your office and states that he is thinking of filing for bankruptcy. The client has a 30-year non-adjustable mortgage at 25 percent compounded semi-annually. He asks whether he should refinance. What do you say? According to section 526(a), nothing!

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[52] 11 U.S.C. § 526(a)(4) (2006).

[53] *See* Sommer, *supra* note 11, at 208 ("most of [the prohibited acts] . . . are improper under current law . . . .").

[54] Complaint at 5, Milavetz Gallop and Milavetz v. U.S., No. 05-CV-2626.

[55] *See* 11 U.S.C. § 526(c) (laying out potential penalties against debt relief agencies for violation of section 526).

[56] *See id.*; *see also In re* McCartney, 336 B.R. 588, 589 (Bankr. M.D. Ga. 2006) (stating State can bring action against alleged debt relief agency for alleged violation of section 526); 8 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE 738–741 (2d ed. 2005-2006) (indicating state law enforcement may seek enjoinment or actual damages for violation of section 526).

[57] 11 U.S.C. § 526(c)(5) (2006) states:

> [I]f the court, on its own motion or on the motion of the United State 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 . . . enjoin the violation . . . [or] impose an appropriate civil penalty . . . .

Id. For an example of section 526(c)'s application to debt relief agencies, see *In re Barcelo*, No. 03-22074 (ESS), 2005 WL 3007104, at *1 (Bankr. E.D.N.Y. 2005), where We the People Forms and Service Centers, USA, Inc.—a debt relief agency—was permanently enjoined from engaging in certain practices such as advising when and where to file for bankruptcy or deciding which debts are secured or unsecured. *See id.*at *1. Trustee brought adversary proceedings pursuant to BAPCPA amendments sections 526–28. *Id.* at *1; *see also* Vance & Cooper, *supra* note 9, at 297 (discussing We The People press release and publication).

Section 526(a)(4) of the Code strictly prohibits debt relief agencies from advising prospective debtors to incur more debt if the debtor contemplates filing for bankruptcy.[58] This could mean that a consumer bankruptcy attorney would be prohibited from helping a debtor to avoid filing for bankruptcy.[59] For example, a consumer bankruptcy attorney cannot advise a debtor to avoid bankruptcy by borrowing money or accepting undocumented gifts of money from a family member or friend.[60]

More problematically, under section 526(a)(4), a debt relief agency may not advise a debtor to pay "an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor" in a bankruptcy case.[61] This means that if a debtor were to ask a consumer bankruptcy attorney whether he had to pay for the attorney's services in the bankruptcy proceeding, the attorney could not answer affirmatively.[62] Will section 526(a)(4) inhibit consumer bankruptcy attorneys from representing debtors? Only time will tell.

B. What Is an Attorney's First Amendment Right to Private Speech?

Under the First Amendment right to private speech, the Supreme Court has recognized two categories of laws that may suppress private speech: content-based laws and content-neutral laws.[63] Content-based laws "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed."[64] It is well

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[58] *See* 11 U.S.C. § 526(a)(4) (2006). Section 526(a)(4) states that a debt relief agency shall not:

> [A]dvise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

Id.

[59] *See* Letter from Robert D. Evans, Director, Governmental Affairs Office American Bar Association, to The Honorable Arlene Spector, Chairman, Committee on the Judiciary (Feb. 8, 2005) (on file with author) [hereinafter "ABA letter"] ("[T]he bill [is] worded so broadly that the attorney could be subject to liability merely for making an unsuccessful attempt to help the client restructure the debt or avoid bankruptcy."); Chemerinsky, *supra* note 6, at 579 (explaining liability on attorneys may be imposed although "there may be instances where it is advisable for a client to obtain a mortgage, to refinance any existing mortgage to obtain a lower interest rate, or to buy a new car on time.").

[60] *See* LA FORUM, *supra* note 3, at 5 (describing practical interpretations of section 526 as possibly restrictive); *see also* Vance & Cooper, *supra* note 9, at 309–12 (interpreting statutory language of section 526 in four different ways regarding authorized advice to assisted persons).

[61] 11 U.S.C. § 526(a)(4) (2006); *see also supra* note 58 and accompanying text.

[62] *See* LA FORUM, *supra* note 3, at 5 (listing implications of section 526); *see also* Vance & Cooper, *supra* note 9, at 306–08 (breaking down prohibitive provisions of section 526).

[63] *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 641–43 (1994) (deciphering between regulations attacking specific content and regulation that are content-neutral).

[64] *Id.* at 643; *see also* Hill v. Colorado, 530 U.S. 703, 723 (2000) ("Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation.").

settled that content-based laws are subject to strict scrutiny.[65] To overcome strict scrutiny, the government must demonstrate a compelling interest and a law that is narrowly tailored to further that interest without imposing unnecessary restraints on speech.[66] Laws that are both under-inclusive and over-inclusive are clearly not narrowly tailored.[67] Ordinarily, content-based laws are presumptively unconstitutional under the First Amendment.[68]

In contrast, content-neutral laws "confer benefits or impose burdens on speech without reference to the ideas or views expressed."[69] Content-neutral laws are subject to an intermediate level of scrutiny.[70] Intermediate scrutiny allows the government to regulate speech if the law "was designed to serve a substantial government interest and . . . reasonable alternative avenues of communication remained available."[71]

The First Amendment prohibits the government from constraining the message of a private individual. Generally, laws that do not advance a legitimate regulatory

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[65] *See Turner*, 512 U.S. at 642 ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content . . . . [And] laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny."); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 574 (2001) (applying strict scrutiny to content-based regulation).

[66] *See* U.S. v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest."); *see also* Denver Area Educ. Telecoms. Consort., Inc. v. FCC, 518 U.S. 727, 741 (1996) (revealing strict scrutiny allows "government [to] directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech.").

[67] *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 793 (1978) (explaining that challenged statute failed strict scrutiny because it was both over-inclusive and under-inclusive); *see also* Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663, 676 (2004) ("[N]arrow tailoring test can invalidate not only over-inclusive statutes but also those that are under-inclusive."); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422 (1996) ("[L]aw is not narrowly tailored if it restricts a significant amount of speech that doesn't implicate the government interest.").

[68] *See Playboy*, 529 U.S. at 812 ("Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles."); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 126 (1991) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.") (citation omitted); *see also* John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1104 (2005) (finding that "content-based speech regulations are highly disfavored and are presumptively unconstitutional.").

[69] *Turner*, 512 U.S. at 642.

[70] *See Turner*, 512 U.S. at 642 ("regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . ."); Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (holding content-neutral legislation must promote substantial government interest); *see also* Chemerinsky, *supra* note 6, at 580 (stating content-neutral regulations are evaluated under intermediate scrutiny).

[71] City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 434 (2002) (reiterating content-neutral laws only need to leave open ample alternatives of communication); s*ee* City of Renton v. Playtime Theaters, 475 U.S. 41, 50 (1986) (reviewing regulation to determine whether it leaves open alternative methods of communication); Clark v. Comty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (summarizing content-neutral laws are valid so long as they leave open reasonable alternative avenues of communication and are for substantial government interest).

goal, but rather suppress information through coercion rather than persuasion, cannot stand.[72]

In *Legal Services Corporation v. Velasquez*,[73] the Supreme Court directly addressed an attorney's First Amendment right to private speech.[74] In *Legal Services Corporation*, Congress created the Legal Services Corporation ("LSC") to provide "funds to eligible local grantee organizations to provide legal assistance in non-criminal proceedings or matters to persons financially unable to afford legal assistance."[75] However, the legislation prohibited attorneys from using the funds to initiate actions that would amend or challenge existing welfare laws.[76] The attorneys employed by the LSC brought suit against the condition, claiming that it violated the attorneys' right to private speech guaranteed under the First Amendment.[77] The lower court found the condition to be content-based and applied strict scrutiny to invalidate the regulation.[78]

In the majority opinion delivered by Justice Kennedy, the Court affirmed the lower court's holding and held that the condition violated the First Amendment right of LSC attorneys to private speech by inhibiting the attorneys' ability to advise their

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[72] *See Turner,* 512 U.S. at 641; *Simon & Schuster*, 502 U.S. 105, 115 (1991) (asserting invalidity of law regulating viewpoint).

[73] 531 U.S. 533 (2001).

[74] *See id.* at 541–49 (addressing attorney's First Amendment claim). *See also* Arthur N. Eisenberg, *The Brooklyn Museum Controversy and The Issue of Government-Funded Expression*, 66 BROOK. L. REV. 275, 282 (2000) (stating issue in *Velasquez* was whether legislation violated First Amendment); *cf.* Chemerinsky, *supra* note 6, at 580 (asserting First Amendment is violated when lawyers' representation of clients is impaired).

[75] *Legal Serv. Corp.*, 531 U.S. at 538; *see also* Eisenberg, *supra* note 74 at 304 (discussing statute at issue in *Velasquez*); Otis King & Jonathan A. Weiss, *We are Mad as Hell and We Don Not Intend to Get Over It: Where Were the Troops?*, 22 PACE L. REV. 269, 275 (2002) (addressing legislation challenged in *Velasquez*).

[76] *See Legal Serv. Corp.*, 531 U.S. at 536 ("[T]he restriction . . . prohibits legal representation funded by recipients of LSC moneys if the representation involves an effort to amend or otherwise challenge existing welfare law."); *see also* Eisenberg, *supra* note 74, at 304–05 (recapping restrictions placed on recipients of funds from Legal Services Corporation); King & Weiss, *supra* note 75, at 275 (reiterating prohibitions on fund recipients).

[77] *Legal Serv. Corp.*, 531 U.S. at 536 ("This suit requires us to decide whether one of the conditions imposed by Congress on the use of LSC funds violates the First Amendment rights of LSC grantees and their clients.").

[78] *Id.* at 537 ("[T]he Second Circuit approved an injunction against enforcement of the provision as impermissible viewpoint-based discrimination in violation of the First Amendment . . . . [W]e affirm the judgment of the Court of Appeals."); *see also* Velazquez v. Legal Serv. Corp., 164 F.3d 757, 772 (2d Cir. 1999), *aff'd*, *Legal Serv. Corp.*, 531 U.S. 533 (2001):

> We believe that the suit-for-benefits exception is viewpoint discrimination subject to strict First Amendment scrutiny. Defendants offer no arguments why the provision can service such scrutiny and we perceive none. We therefore conclude that the suit-for-benefits exception . . . unconstitutionally restricts freedom of speech, insofar as it restricts a grantee, seeking relief for a welfare applicant, from challenging existing law.

Id.

clients.[79] Kennedy's opinion explained that "[r]estricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distort[ed] the legal system by altering the traditional role of the attorneys . . . ."[80] The Court feared "the public would come to question the adequacy and fairness of professional representations when the attorney, either consciously to comply with the statute or unconsciously to continue the representation despite the statute, avoided all references to questions of statutory validity and constitutional authority."[81] Hence, the Court is hesitant to permit efforts by the government to silence attorneys.[82]

C. Applying the First Amendment Right to Private Speech to Section 526(a)(4)

At the outset, a court must first determine if section 526(a)(4) is content-based.[83] Section 526(a)(4) suppresses a consumer bankruptcy attorney's right to express views and opinions regarding whether a debtor may incur more debt in contemplation of filing for bankruptcy. It "focuses only on the content of the speech and the direct impact that speech has on its listeners . . . [which is] the essence of content-based regulation."[84]

As a content-based law, section 526(a)(4) is subject to strict scrutiny. Strict scrutiny requires the government to show (1) a compelling interest and (2) a narrowly tailored regulation that would further that interest.[85]

First, the government has a compelling interest in curtailing bankruptcy abuse and fraud by debtors within the bankruptcy system.[86] The legislative history indicates that Congress passed BAPCPA to address findings of "debtor misconduct and abuse" and "misconduct by attorneys and other professionals" within the

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[79] *See Legal Serv. Corp*, 531 U.S. at 537 ("the Second Circuit approved an injunction against enforcement of the provision as impermissible viewpoint-based discrimination in violation of the First Amendment . . . . [W]e affirm the judgment of the Court of Appeals.").

[80] *Id*. at 544.

[81] *Id.* at 546.

[82] *See id.* at 548 (stating the Constitution does not permit the government to insulate its own interpretation of the Constitution from judicial attack by restricting attorneys' speech); *see also* Chemerinsky, *supra* note 6, at 579 (noting the Court "has been very protective of the First Amendment rights of attorneys to advise . . . their clients.").

[83] *See* Fee, *supra* note 68, at 1112 ("[A] court's first inquiry is usually whether the regulation is content-based."); Ashley C. Phillips, *A Matter of Arithmetic: Using Supply and Demand to Determine the Constitutionality of Adult Entertainment Zoning Ordinances*, 51 EMORY L.J. 319, 321 (2002) ("[A] court must find, as a preliminary matter, that the ordinance at issue is content-neutral rather than content-based."); Jeffrey S. Strauss, *Dangerous Thoughts? Academic Freedom, Free Speech, and Censorship Revisited in Post-September 11th America*, 15 WASH. U.J.L. & POL'Y 343, 347 (2004) ("A court's first step in analyzing the legitimacy of speech regulation is to determine whether the restriction is 'content-based.'").

[84] U.S. v. Playboy Entm't Group, Inc., 529 U.S. 803, 811–812 (2000).

[85] *See supra* note 66 and accompanying text.

[86] *See* Coyle, *supra* note 4, at 12 ("[T]he attorney provisions are needed to reduce fraud and abuse within the bankruptcy system."); *see also* Richard Collin Mangrum, *Tithing, Bankruptcy and the Conflict Between Religious Freedom and Creditor's Interests*, 32 CREIGHTON L. REV. 815, 821 n.41 (1999) (discussing cases where court held protection of creditors served compelling interest).

bankruptcy system.[87] Cases such as *Norwest Bank Nebraska N.A. v. Tveten*,[88] where the debtor improperly converted non-exempt assets to exempt assets under his attorney's advice to avoid creditors, justify Congress' findings.[89] Therefore, section 526(a)(4) survives the first prong.

The second prong, however, is problematic. Is section 526(a)(4) narrowly tailored? The most striking feature of section 526(a)(4) is that it only applies to debt relief agencies. Excluded from the definition of "debt relief agency" are "an officer, director, employee, or agent" of a debt relief agency; "a nonprofit organization . . .; a creditor of such assisted person . . .; a depository institution . . ; [and] an author, publisher, distributor, or seller of works subject to copyright protection."[90] These exclusions allow a nonprofit organization to advise a debtor to cheat creditors by incurring more debt before filing for bankruptcy. Thus, assuming *arguendo* that advising a debtor who contemplates filing for bankruptcy to incur more debt constitutes bankruptcy abuse, section 526(a)(4) is simply under-inclusive and is not narrowly tailored to address the government's goal of curbing bankruptcy abuse and misconduct.[91]

Section 526(a)(4) is also over-inclusive since it not only prohibits an attorney from advising debtors to incur more debt to cheat creditors, but it simultaneously prohibits an attorney from doing the same to protect creditors.[92] For example, assume that a debtor who is contemplating bankruptcy has only enough assets to pay off either his mortgage or his credit card debt in liquidation, but a mortgage refinance would allow the debtor to pay the monthly payments to both creditors. A consumer bankruptcy attorney would normally advise the debtor to refinance the mortgage. However, an attorney following section 526(a)(4) would remain silent and allow the debtor to file for bankruptcy prematurely at the creditors' expense. Because the consumer bankruptcy attorney is prevented from advising his client to incur debt for the purpose of protecting creditors, section 526(a)(4) is over-inclusive. Thus, section 526(a)(4) does not satisfy the second prong of strict scrutiny analysis because it is both under-inclusive and over-inclusive.[93]

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[87] H.R. Rep. No. 109-31, part 1, at 5 (stating abuse of bankruptcy system by debtor is widespread and hurts both consumers and creditors).

[88] 848 F.2d 871 (8th Cir. 1988).

[89] *See id.* at 876.

[90] 11 U.S.C. § 101(12A) (2006) (exempting certain groups from debt relief agency status).

[91] *See* 11 U.S.C. § 526(a)(4) (2006) (stating debt relief agency shall not advise party to incur more debt in contemplation of filing bankruptcy). Apparently, "[t]he speech in question was not thought by Congress to be so harmful that all channels were subject to restriction." *Playboy*, 529 U.S. at 812. Unfortunately, unlike the rational basis standard, strict scrutiny does not provide Congress with the right to address one problem at a time. *See generally* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955) (holding rational basis allows government to deal with problem one step at a time).

[92] *See* 11 U.S.C. § 526(a)(4) (2006) (prohibiting a debt relief agency from advising a client to incur more debt in contemplation of filing for bankruptcy); *see also* Chemerinsky, *supra* note 6, at 579 (suggesting that there may be times when encouraging a debtor to refinance debt would benefit all creditors).

[93] It should be noted that as the Court feared in *Legal Services Corporation*, "[t]he courts and the public [will] . . . question the adequacy and fairness of professional representation [ ] . . . ," when consumer

Accordingly, section 526(a)(4) violates consumer bankruptcy attorneys' right to private speech because it does not survive strict scrutiny, and courts should find it unconstitutional.

III. DOES SECTION 528 OF THE BANKRUPTCY CODE VIOLATE THE FIRST AMENDMENT'S COMPELLED COMMERCIAL SPEECH DOCTRINE?

A. Section 528—The Required Advertising Disclosures

Section 528(a)(4) of the Code requires debt relief agencies to "clearly and conspicuously use the following statement in . . . [general public] advertisement[s]:[94] 'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.' or a substantially similar statement."[95] General public advertisement is identified in section 528(b) as:

> (1)(A) descriptions of bankruptcy assistance in connection with a chapter 13 plan whether or not chapter 13 is specifically mentioned in such advertisement; and
> (B) statements such as "federally supervised repayment plan" or "Federal debt restructuring help" or other similar statements that could lead a reasonable consumer to believe that debt counseling was being offered when in fact the services were directed to providing bankruptcy assistance with a chapter 13 plan or other form of bankruptcy relief under this title.
> (2) . . . [And statements] with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt . . . .[96]

Nothing in section 528 prohibits consumer bankruptcy attorneys from advertising themselves as both attorneys and debt relief agencies.[97]

Like section 526 of the Code, any violation of section 528 may result in damages for reasonable attorney fees and costs, injunctive relief, and any civil

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bankruptcy attorneys are compelled by sanctions not to properly advise their clients because of section 526(a)(4). Legal Serv. Corp. v. Velasquez, 531 U.S. 533, 546 (2001); *cf.* 11 U.S.C. § 526(a)(4) (restricting ability of debt relief agencies to advise their clients).

[94] Section 528(a)(3) refers to general public advertisement as "general media, seminars or specific mailing, telephonic or electronic messages, or otherwise." 11 U.S.C. § 528(a)(3) (2006).

[95] *Id.* § 528(a)(4).

[96] 11 U.S.C. § 528(b) (2006). *See generally In re* Attorneys at Law and Debt Relief Agencies, 332 B.R. 66, 67 (Bankr. S.D. Ga. 2005) (discussing advertising obligations of debt relief agencies under section 528 of Bankruptcy Code); Vance & Cooper, *supra* note 9, at 301–03 (describing requirements of section 528(b)).

[97] One interpretation of section 528 compels consumer bankruptcy attorneys to identify themselves as "debt relief agencies" on their "business card, web site, stationary, . . . business listing in the yellow pages, State Bar Directory, [and] Martindale Hubbell listing." LA FORUM, *supra* note 3, at 9; *see also* Sommer, *supra* note 11, at 210–11 (describing advertising requirements in section 528).

penalty the court deems appropriate.[98] If a consumer bankruptcy attorney fails to comply with section 528, it may be possible for a debtor "who received competent and effective representation to walk away from any liability to the attorney."[99]

B. What Is the Compelled Commercial Speech Doctrine?

The compelled commercial speech doctrine derives from the Court's recognition of the First Amendment right to commercial speech and the First Amendment right to refrain from speaking at all. As a hybrid, it is still not clear how much First Amendment protection from compelled commercial speech the Court deems appropriate.[100] For that reason, to understand the compelled commercial speech doctrine, one must examine the Court's holdings regarding commercial speech and compelled speech.

1. The Commercial Speech Doctrine and its Application to Attorneys

The Court defines commercial speech as any expression that "propose[s] a commercial transaction" with the public.[101] Common sense can usually distinguish speech proposing a commercial transaction from other varieties of speech.[102]

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[98] *See* 11 U.S.C. § 526(c) (2006) (qualifying penalties resulting from violation of section 528); *see also* Chemerinsky, *supra* note 6, at 582 (listing reasonable attorneys' fees and costs and court imposed injunctions or civil penalties, among others, as penalties for violating section 528 of Bankruptcy Code); Vance & Cooper, *supra* note 9, at 303–04 (discussing debtor's affirmative remedies under section 526(c) for violations of advertising requirements).

[99] LA FORUM, *supra* note 3, at 11 (indicating debtor may bring suit to recover attorney fees although debtor received competent legal services); *see* Chemerinsky, *supra* note 6, at 582 (noting debt relief agency's liability to assisted person for "any fees or charges paid by such person to the agency, plus actual damages and reasonable attorneys' fees and costs, for any intentional or negligent failure to comply with 526, 527 and 528"); Vance & Cooper, *supra* note 9, at 303–304 (suggesting section 526(c)(1) of Bankruptcy Code "allows a debtor who received competent and effective representation to walk away from any liability to the attorney because the attorney's ad failed to include the required disclosures").

[100] *See* Christine Esperanza, Note, *Fruits, Nuts, Cigarettes, and the Right to Remain Silent*, 31 HASTINGS CONST. L.Q. 163, 182 (2004) (finding uncertainties in compelled commercial speech jurisprudence); Nicole B. Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929, 932 (1998) (noting Court's inconsistent grant of First Amendment protection to commercial speech over past forty years); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 3 (2000) ("Lacking firm jurisprudential foundations, commercial speech doctrine has veered wildly between divergent and inconsistent approaches.").

[101] Bd. of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 473–74 (1989) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)) (characterizing expressions which "'propose a commercial transaction'" as "test for identifying commercial speech."); *see* Nike, Inc. v. Kasky, 539 U.S. 654, 677 (2003) (Breyer, J., dissenting) (citing United States v. United Foods, Inc., 533 U.S. 405, 409 (2001)) (characterizing commercial speech as expression that "propose[s] the presentation or sale of a product or other commercial transaction."); *United Foods, Inc.*, 533 U.S. at 409 (defining commercial speech as "speech that does no more than propose a commercial transaction.").

[102] Jacqueline K. Hall, Comment, *United States v. Schiff: Commercial Speech Regulation or Free Speech Infringement?*, 36 SETON HALL L. REV. 551, 558 (2006) (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S.

In *Bates v. State Bar of Arizona*,[103] the Court announced that advertising by lawyers was a form of commercial speech entitled to protection by the First Amendment.[104] In *Bates*, two attorneys were disciplined for advertising their legal service in a local newspaper in violation of the Arizona Bar's blanket rule prohibiting attorney advertising.[105] The Court had to address whether the operation of the rule violated the First Amendment. In a plurality opinion, the Court held that blanket prohibitions on attorney advertisements violated the First Amendment right to commercial speech.[106] The Court reasoned that an attorney's right to "commercial speech served individual and societal interest in assuring informed and reliable decision-making."[107]

The Court later clarified the *Bates* doctrine in *In re R.M.J.*[108] There the Court announced that the *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*[109] formulation of a four-prong commercial speech test would apply to professional service advertising cases.[110]

The first prong of the *Central Hudson* test requires the court to determine whether the expression is protected by the First Amendment right to commercial speech.[111] This requires the expression at issue to propose a commercial transaction that is not unlawful or misleading.[112]

Next, the second prong requires a court to ask whether the government has a substantial interest.[113] Examples of substantial government interests include "conserving energy, maintaining standards of licensed professionals, preventing solicitation that involves fraud, . . ., and preserving the reputation of the legal profession."[114]

447, 455–56 (1978)); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–63 (1980) (explaining commercial speech proposes commercial transaction).

[103] 433 U.S. 350 (1977), *reh'g denied,* 434 U.S. 881 (1977).

[104] *Id.* at 383 ("In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we of course, do not hold that advertising by attorneys may not be regulated in any way.").

[105] *See id.* at 353–57.

[106] *See id.* at 384.

[107] *Id.* at 364.

[108] 455 U.S. 191 (1982).

[109] 447 U.S. 557 (1980).

[110] *See In re R.M.J.*, 455 U.S. at 203–04 n.15 ("[T]he Central Hudson formulation must be applied to advertising for professional services . . . .").

[111] *See Central Hudson*, 447 U.S. at 566 ("At the outset, we must determine whether the expression is protected by the First Amendment.").

[112] *See id.*; *see also* Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 184 (1998) (noting requirements for first prong of *Central Hudson* test); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388–89 (1973) (revealing expression at issue must not be illegal).

[113] *See Cent. Hudson*, 447 U.S. at 566 ("Next, we ask whether the asserted governmental interest is substantial."). *See, e.g.,* John Donnelly & Sons v. Campbell, 639 F.2d 6, 12 (5th Cir. 1980) (designating preservation of the "beauties of the landscape" as a strong governmental interest); Anabell's Ice Cream Corp. v. Town of Glocester, 925 F. Supp. 920, 928 (D.R.I. 1996) ("It is well-established that a municipality has 'a substantial interest in protecting its citizens from unwelcome noise.'").

[114] Chemerinsky, *supra* note 6, at 576.

If both inquiries are positive, then the third and fourth prongs of *Central Hudson* require the court to "determine whether the regulation directly advances the governmental interest asserted" and whether the regulation is narrowly drawn.[115] In *Board of Trustees of State University of New York v. Fox*,[116] the Court stressed that a narrowly drawn regulation does not have to be the least restrictive means, but rather be "something short of a least-restrictive-means standard."[117]

Together, the above precedents have firmly established that an attorney's right to advertise is protected as commercial speech and that regulation of attorney advertising is subject to the *Central Hudson* test, or what is otherwise known as intermediate scrutiny.

2. Compelled Speech Doctrine

The compelled speech doctrine derives from the First Amendment right to refrain from speaking at all.[118] This protection against compelled speech has been recognized to apply to corporations as well as to individuals.[119]

The true compelled private speech doctrine recognizes one of the two categories of compelled speech that the Court has held to be unconstitutional.[120] True compelled private speech exists when "an individual . . . [is] obligated personally to express a message he disagrees with, imposed by the government."[121]

In the context of true compelled private speech, the Court has stated that the difference between compelled speech and compelled silence has no "constitutional significance."[122] As a result, the Court's precedents have applied the same exacting First Amendment scrutiny to both true compelled private speech and private

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[115] *Central Hudson*, 447 U.S. at 566.

[116] 492 U.S. 469 (1989).

[117] *Id.* at 477.

[118] Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[119] *See* Pacific Gas and Electric Co. v. Pub. Utils. Comm'n of California, 457 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say"); First Nat'l Bank of Boston v. Bellotti 435 U.S. 735, 777 (1978) (stating that corporations and individuals should be treated equally for purposes of protection of speech).

[120] *See* Johanns v. Livestock Mktg. Ass'n, 125 S.Ct. 2055, 2060 (2005) (recognizing two types of compelled speech). The other form of compelled speech the Court has recognized is compelled subsidy speech, which involves situations where "an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity." *Id*.

[121] *Id.; see* Rumsfeld v. Forum for Academic and Institutional Rights, 126 S.Ct. 1297, 1309 (2005) (distinguishing present case from prior cases where "the compelled-speech violation . . . resulted from the fact that complaining speaker's own message was affected by the speech it was forced to accommodate."); *see also* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995) ("this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact that the speaker would rather avoid, ...").

[122] Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 797–98 (1988) (explaining that there is no constitutional difference between compelled speech and compelled silence); *see* Miami Herald Publishing Company v. Tornillo, 418 U.S. 241, 256 (1974) (holding that statute which compels publishers to publish material is operating in same way as a statute that forbids a publisher from publishing material).

speech.[123] Specifically, statutes that compel the utterance of a particular message are subject to strict scrutiny, which requires the government to demonstrate a compelling governmental interest and a narrowly tailored statute.[124]

3. What Standard Applies to Compelled Commercial Speech?

Although the Court has settled which standards are applicable to commercial speech and true compelled speech, the Court has failed to clarify the contours of the compelled commercial speech doctrine, leaving the applicable standard up for debate.[125]

For some time, courts believed that *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio* had announced the appropriate standard applicable to compelled commercial speech.[126] In *Zauderer*, the Supreme Court addressed the validity of a state statute that compelled the disclosure of possible litigation costs in attorney advertisements.[127] The Court recognized that disclosure requirements implicated the attorney's First Amendment right, but refused to hold the requirement unconstitutional. Instead, the Court applied the rational basis test and held that an "advertiser's rights [were] adequately protected as long as disclosure requirements [were] reasonably related to the [s]tate's interest in preventing deception of consumers."[128] The Court explained that this standard would not inhibit the government's ability to regulate deceptive advertising since it would allow the government to pass legislation to address problems one piece at a time.[129]

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[123] *See Riley*, 487 U.S. at 797–98 (applying strict scrutiny after discussion of compelled private speech cases); *see also Rumsfeld*, 126 S.Ct. at 1308 (stating that compelled statements of fact and compelled statements of opinion are subject to First Amendment scrutiny).

[124] *See supra* note 66 and accompanying text (describing strict scrutiny).

[125] *See* Esperanza, *supra* note 100, at 180; *see also* Jaret N. Gronczewski, *Issues in the Third Circuit: "Got Milk?" . . . Not Today: The Third Circuit Defends First Amendment Rights for Small Dairy Farmers*, 50 VILL. L. REV. 1237, 1258 (2005) ("The Supreme Court has not settled on what should be the proper standard for compelled commercial speech cases and the circuits are split on the issue."); Kathryn Murphy, Note, *Can the Budweiser Frogs be Forced to Sing a New Tune?: Compelled Commercial Counter-Speech and the First Amendment*, 84 VA. L. REV. 1195, 1222 (1998) ("the Supreme Court has never squarely addressed the constitutionality of compelled commercial speech.").

[126] *See* Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 650 (1985); *see also* Casarez, *supra* note 100, at 972 ("In *Tillman v. Miller*, a recent case involving attorney advertising, the Eleventh Circuit . . . . said it would review the disclosure requirement pursuant to the less stringent standards announced in *Zauderer* . . . ."); David L. Hudson Jr., *Advertising and the First Amendment: What's on the Horizon*, FIRST AMENDMENT CENTER, http://www.firstamendmentcenter.org/speech/advertising/horizon.aspx?topic=advertising (last visited April 7, 2006) (discussing *Zauderer* standard in compelled commercial speech cases and split among lower courts after *Zauderer*). *See generally* BellSouth Adver. & Publ'g Corp. v. Tenn. Regulatory Auth., 79 S.W.3d 506 (2002) (applying *Zauderer's* rational basis to compelled commercial speech challenge).

[127] *See Zauderer*, 471 U.S. at 650.

[128] *Id.* at 651 (revealing rationale basis allows law to be passed as long as it is reasonably related to legitimate government interest).

[129] *Id.* at 651 n.14.

A few years later, the Court seemed to withdraw from the *Zauderer* standard for compelled commercial speech in *Riley v. National Federation of the Blind*.[130] In *Riley*, the state imposed regulations that required professional fundraisers to disclose to potential donors the amount of charitable contributions that were actually turned over to charity.[131] The state argued that the regulations related only to commercial speech and asked the Court to apply a more deferential standard.[132] In an apparent withdrawal from *Zauderer*, the Court applied the true compelled speech standard of strict scrutiny and invalidated the regulation.[133] The Court justified its approach by holding that the speech was noncommercial since it was "inextricably intertwined with otherwise fully protected [private] speech;" namely, the regulation would inhibit "the informative and perhaps persuasive" elements of solicitation.[134]

In dissent, Chief Justice Rehnquist argued that a more deferential standard should have been applied to the disclosure requirements. He found that the disclosures were "directly analogous to mandatory disclosure requirements that exist in other contexts, such as securities transactions."[135] To Justice Rehnquist, the fact that the statute required disclosure of true facts in the course of what is at least in part a

> 'commercial' transaction . . . [did] not necessarily create such a burden on core protected speech as to require that strict scrutiny be applied. Indeed, it seems . . . where the solicitation involves dissemination of a message . . . the disclosure required by the statute . . . will have little . . . effect on the message itself . . . .[136]

In effect, Justice Rehnquist's dissent criticized the Court's use of the inextricably intertwined test as an elaborate ruse to avoid the *Zauderer* rule of deference.

Zauderer and *Riley* therefore apply two extreme and disparate standards to compelled commercial speech (rational basis and strict scrutiny) without expressly

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[130] 487 U.S. 781 (1988) (holding strict scrutiny applied to compelled commercial disclosure). *See* Gordon & Breach Sci. Publishers., S.A. v. Am. Inst. of Physics, 859 F. Supp. 1521, 1539 (S.D.N.Y. 1994) (discussing *Riley's* hybrid speech with respect to charitable fundraising and Court's test for fully protected expression).

[131] *See Riley*, 487 U.S. at 795.

[132] *See id*.

[133] *See id.* at 796 (applying strict scrutiny to invalidate the state law); *see also* Cal-Amond, Inc. v. U.S. Dept. of Agriculture, 14 F.3d 429, 436 (9th Cir. 1993) ("*Riley* addressed a First Amendment challenge to . . . fundraiser disclos[ures] . . . . [and] found the regulation unconstitutional under strict scrutiny."); N.W. Enterprises, Inc. v. City of Houston, 27 F. Supp. 2d 754, 914 (S.D. Tex. 1998) ("In *Riley* . . . [t]he Court held that the statute should be subject to strict First Amendment scrutiny because it impermissibly compelled the fundraisers to engage in speech.").

[134] *Riley*, 487 U.S. at 796.

[135] *Id*. at 811 (Rehnquist, J., dissenting).

[136] *Id*.

overruling each other; this leaves the standard for compelled commercial speech cases unresolved.[137]

Perhaps the best standard to apply to compelled commercial speech is the standard between rational basis and strict scrutiny—intermediate scrutiny, the *Central Hudson* standard for commercial speech cases. The Court uses the same standard for both true compelled private speech cases and private speech cases. Since there is uniform treatment of all private speech, a uniform standard should also apply to all forms of commercial speech. In addition, since the constitutional difference between compelled speech and compelled silence is insignificant, only one standard should apply to all forms of commercial speech.[138]

Application of intermediate scrutiny to compelled commercial speech would also satisfy the Court's concerns in *Zauderer* and *Riley* by preserving protections for speech without unnecessarily restricting the government's ability to prevent deceptive advertising. First, as to *Zauderer*, the use of intermediate scrutiny does not inhibit the government's ability to limit deceptive advertising since intermediate scrutiny does not require the government's regulation to be narrowly tailored. Instead, intermediate scrutiny merely requires the regulation to be narrowly drawn, and there is plenty of discretion in determining what is narrowly drawn since the Court has described the standard only as something short of being narrowly tailored. Thus, intermediate scrutiny would the government latitude to pass compelled commercial speech laws even though they may be under-inclusive.

Second, as for *Riley*, the use of intermediate scrutiny adequately protects an individual's right against compelled commercial speech. This protection derives from the standard's substantial justification requirement, which forces the government to demonstrate a substantial interest for the compelled commercial speech regulation.

The added benefit of intermediate scrutiny is that the Court could abandon the *Riley* inextricably intertwined test, which classifies all speech as noncommercial speech that has "informative and perhaps persuasive" elements. The problem with the intertwined test is that all advertisements theoretically are inextricably

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[137] *See, e.g.*, Bd. of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 474 (1989) (discussing compelled commercial speech); Ass'n of Nat. Advertisers, Inc. v. Lungren, 809 F. Supp. 747, 752 (N.D. Cal. 1992) (endorsing that *Riley* involved compelled commercial speech); BellSouth Adver. & Publ'g Corp. v. Tenn. Regulatory Auth., 79 S.W.3d 506, 519–20 (Tenn. 2002) (discussing compelled commercial speech doctrine and applying *Zauderer*'s rational basis to compelled commercial speech challenge). *See generally supra* note 118 and accompanying text.

[138] *See Riley*, 487 U.S. at 796 ("in the context of protected speech, the difference [between compelled speech and compelled silence] is without constitutional significance . . . ."); Parate v. Isibor, 868 F.2d 821, 828 (1989) ("the difference between compelled speech and compelled silence 'is without constitutional significance . . . ."); *see also* Esperanza, *supra* note 100, at 167 (noting that the Court has long rejected the notion that compelled speech deserves less Constitutional protection that other kinds of speech). At least one court has applied intermediate scrutiny to a compelled commercial speech case. *See* Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 74 (2d Cir. 1996) (finding government interest of "consumer curiosity" was insufficient to support the regulation under *Central Hudson*).

intertwined with informative and persuasive information, and thus would be considered noncommercial speech. However, such a conclusion is contrary to common sense and would render compelled speech laws, such as well established securities laws that require disclosures in a security's prospectus, subject to strict scrutiny and therefore constitutionally questionable.

Therefore, courts should apply the *Central Hudson* test of intermediate scrutiny to compelled commercial speech cases.

C. Applying Intermediate Scrutiny to the Advertising Disclosures Mandated by Section 528 of the Code

To assess the constitutionality of 528(a)(4) and 528(b) of the Code ("section 528"), one must first determine what standard to apply to section 528 under the First Amendment. As described above, the First Amendment has two pervading standards: strict scrutiny and intermediate scrutiny. The bright line identifying each standard is whether the speech in question is commercial or private.

In keeping with the Court's definition of "commercial," advertisements propose a commercial transaction to the public and therefore are a form of commercial speech under the First Amendment.[139] Arguably then, because section 528 compels commercial speech, the *Central Hudson* test of intermediate scrutiny should apply.[140]

All that remains is to apply the four prong *Central Hudson* test of intermediate scrutiny to section 528. First, "[f]or commercial speech to come within the provision [of the First Amendment], it . . . must concern lawful activity and [can] not be misleading."[141] Prior to section 528 of the Code, consumer bankruptcy attorneys advertised themselves truthfully as bankruptcy attorneys. Such advertising was not illegal, false, deceptive, or misleading. With the enactment of section 528, consumer bankruptcy attorneys are compelled to advertise themselves as "debt relief agencies" that "help people file for bankruptcy relief under the Code" which is still not illegal or misleading.[142] Thus, the first prong of *Central Hudson* is satisfied.

Next, the second prong of *Central Hudson* requires the government to demonstrate a substantial interest in compelling consumer bankruptcy attorneys to

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[139] Commercial speech is any expression that "propose[s] a commercial transaction" with the public. *Fox*, 492 U.S. at 473–74.

[140] Should rational basis apply, section 528 would be deemed constitutional since it is reasonably related to the prevention of deceptive advertisements. Mainly, section 528 only requires the utterance of a truthful disclosure not an untruthful one. 11 U.S.C. § 528 (2006). Should strict scrutiny apply, section 528 would be deemed unconstitutional since it is over-inclusive and thus not narrowly tailored. Namely, non-bankruptcy attorneys whose clients do not even file for bankruptcy would be required to identify themselves as "debt relief agencies" that help people file for bankruptcy.

[141] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[142] *See supra* Part I.C.3 (concluding attorneys are in fact debt relief agencies).

identify themselves as "debt relief agencies" in advertisements. The congressional legislative history indicates that section 528 is intended to "[p]revent deceptive and fraudulent advertising practices by debt relief agencies . . . ."[143] Therefore, the government's substantial interest is in the promotion of accurate advertising that would not deceive or defraud consumer debtors. Since the Court has identified preventing fraud as a substantial interest, the second prong is satisfied.

The third prong requires section 528 to directly advance the government's asserted interest of accurate advertising that would not deceive or defraud consumers. It has been argued that compelling consumer bankruptcy attorneys to advertise themselves as "debt relief agencies" fails to promote accurate advertising because the public would be unable to differentiate between an attorney and non-attorney debt relief agency.[144] However, the argument fails because section 528 does not prohibit consumer bankruptcy attorneys from identifying themselves as both bankruptcy attorneys and "debt relief agencies" in advertisements. Thus, the forced inclusion of "debt relief agencies" in advertisements gives consumers more accurate information to better determine what type of debt relief agency they may require.[145]

Conceivably, the only successful challenge to the third prong would be from non-consumer bankruptcy attorneys who are forced untruthfully to advertise that they "help people file for bankruptcy relief under the Code."[146] As described in Part II of this note, section 101(12A) of the Code is so broad that a non-consumer bankruptcy attorney may be considered a "debt relief agency" and thus subject to section 528.[147] If the non-consumer bankruptcy attorney did not practice bankruptcy law, the compelled disclosure that the attorney "helped people file for bankruptcy relief" would be untrue and misleading. Under this scenario, section 528 fails to advance the government's interest of accurate advertising and violates the third prong of *Central Hudson*.[148]

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[143] 151 CONG. REC. H2063-01, 2066 (2005).

[144] *See* ABA letter, *supra* note 59 ("Requiring both attorneys and non-attorney bankruptcy petition preparers to advertise themselves as 'debt relief agencies' would obscure these important distinctions while creating substantial confusion among the public."); *see also In re* McCartney, 336 B.R. 588, 590 (Bankr. M.D. Ga. 2006) (recognizing issue regarding whether legislature intended for "debt relief agency" to include attorney); *In re* Attorneys at Law & Debt Relief Agencies, 332 B.R. 66, 69 (Bankr. S.D. Ga. 2005) (noting attorneys are not synonymous with "debt relief agency" within meaning of Code).

[145] For example, a typical debtor may not require all the services a consumer bankruptcy attorney can provide. The debtor may merely require the filing of paperwork, which a non-attorney debt relief agency should be proficient in accomplishing.

[146] Section 528 of the Bankruptcy Code requires debt relief agencies to "clearly and conspicuously use the following statement in . . . [general public] advertisement[s]: 'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.' or a substantially similar statement." 11 U.S.C. § 528(a)(4) (2006).

[147] LA FORUM, *supra* note 3, at 3.

[148] The third prong of *Central Hudson* requires the government's law to directly advance the government's asserted interest. *See* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

Any argument by non-consumer bankruptcy attorneys must, however, take into account the fact that section 528 allows a statement of a "substantially similar" meaning to be advertised in place of "We help people file for bankruptcy relief under the Code." For instance, a family lawyer might be able to indicate in his advertisement that "family law may involve bankruptcy" instead of identifying that he helps people file for bankruptcy relief.

So what does "substantially similar" mean? The most direct definition is from Webster's Dictionary which defines "substantial" as "being largely but not wholly that which is specified" and "similar" as "having characteristics in common."[149] Thus the ordinary meaning of "substantially similar" requires any statement to share largely the same characteristic as "We help people file for bankruptcy relief under the Code."[150] This interpretation renders the aforementioned family lawyer's modified statement not substantially similar since it does not indicate that the family lawyer helps people file for bankruptcy. In reality, these determinations are so subjective as to require a case by case determination.

Finally, the fourth prong of *Central Hudson* requires section 528 to be narrowly drawn.[151] "Narrowly drawn" requires the government to use a means that is short of the least-restrictive-means standard. Under section 528, consumer bankruptcy attorneys are required only to insert a two-line admonition into certain advertisements. Although there may be better ways to prevent deceptive advertising,[152] section 528 has successfully applied to most consumer bankruptcy attorneys while failing to apply to most non-consumer bankruptcy attorneys. These conclusions imply that section 528 is narrowly drawn to protect consumer debtors from deceptive advertising. Thus, the fourth prong is satisfied.

Accordingly, because section 528 passes the *Central Hudson* test, it should be deemed constitutional as applied to consumer bankruptcy attorneys under the First Amendment. Potentially, the only successful challenges to section 528 will come from non-consumer bankruptcy attorneys who are compelled to falsely advertise themselves as "helping people file for bankruptcy relief under the Code."

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[149] WEBSTER DICTIONARY (10th ed. 1997).

[150] "[T]he Supreme Court has increasingly relied on dictionaries in discerning ordinary meaning." ESKRIDGE, *supra* note 7, at 252. The ordinary meaning requires a court to "follow the ordinary usage of the term, unless Congress gives them a specified or technical meaning." *Id*. at 375. The ordinary term may be determined by following dictionary definitions. *See id*.; *see also* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 280 (focusing on dictionary definitions to define "ordinary" meaning).

[151] *See Central Hudson*, 447 U.S. at 566 ("[The fourth inquiry is] whether [the law] . . . is . . . more extensive than is necessary to serve that interest."); *see also* Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002) (applying *Central Hudson* test for determining whether commercial speech regulation is constitutionally permissible); Lisa M. Fealk-Stickler, *Regulating the Regulators: The Impact of FDA Regulations on Corporations' First Amendment Rights*, 39 J. MARSHALL L. REV. 95, 105 (describing *Central Hudson* test).

[152] For example, the government could require the U.S. Trustee to review each consumer bankruptcy attorney's advertisement prior to publication.

CONCLUSION

This note has laid out the main challenges to sections 101, 526, and 528 of the Code and outlined a few hurdles consumer bankruptcy attorneys will face while challenging the constitutionality of the provisions. Hopefully, this discussion will provide the courts and consumer bankruptcy attorneys with some guidance as they interpret and challenge the new Code.

For now, the current challenges to the debt relief agency provisions of the Code represent the beginning of a constitutional struggle between consumer bankruptcy attorneys and the federal government. While the struggle remains unresolved, many consumer bankruptcy attorneys will ponder removing themselves from the consumer bankruptcy practice to avoid the debt relief agency provisions of the Code, potentially leaving debtors less informed about the bankruptcy process and more vulnerable to fraud.

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