

## **Are Debtors' Attorneys "Debt Relief Agencies"?**

By Camille Iurillo and J' Aimee Crockett

Are debtors' attorneys debt relief agencies? This was the threshold question before the U.S. Supreme Court recently in Milavetz, Gallop & Milavetz, P.A. v. United States, 2010 WL 757616 (U.S. 2010). And according to its March 8, 2010 unanimous opinion, the answer is "yes."

Shortly following the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Milavetz, a law firm, filed a preenforcement suit in the United States District Court for the District of Minnesota seeking declaratory relief concerning BAPCPA's new debt relief agency regulations. Specifically, Milavetz sought declaration that attorneys, as a class, were excluded from the definition of "debt relief agenc[ies]" as it appears in 11 U.S.C. § 101(12A). Section 101(12A), broadly defines "debt relief agency" as "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."

Milavetz recognized that if attorneys were considered debt relief agencies, they were subject to further regulation under sections 526 and 528 of the Bankruptcy Code. Section 526(a)(4) provides, in pertinent part, "a debt relief agency shall not advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title." Section 528 requires all debt relief agencies to include in their advertisements certain disclosures. For example, section 528(b)(2)(B) requires that "an advertisement, directed to the general public, indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay consumer debt shall include the following statement: 'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.'"

By 2009, Milavetz was still at odds with BAPCPA after receiving conflicting decisions between the District Court for the District of Minnesota and the Eighth Circuit Court of Appeals. The District Court found "debt relief agency" as defined in section 101(12A) did not include attorneys. As such, it held that sections 526 and 528 were unconstitutional as applied. The Eighth Circuit Court of Appeals, however, disagreed in part. Notably, it rejected the District Court's conclusion that attorneys were not debt relief agencies and it reversed the District Court's finding that section 528 was unconstitutional. Yet, a majority of the Eighth Circuit panel agreed with the District Court that section 526 was invalid. In light of the conflict, the Supreme Court granted certiorari to resolve whether attorneys are indeed debt relief agencies, to answer questions regarding section 526's scope, and to determine the constitutionality of section 528's disclosure requirements.

Before the Supreme Court, Milavetz first argued that attorneys are not "debt relief agencies" as defined in section 101(12A). Going straight to the point, the Court found this position wholly unpersuasive. It noted, by definition under section 101(4A), "bankruptcy assistance" encompasses several services performed generally by attorneys including "providing information, advice, counsel, document preparation, or filing . . . or providing legal representation with respect to a case or proceeding." Moreover, section 101(3) defines an "assisted person" as "any person whose debts consist primarily of consumer debts and the value

of whose nonexempt property is less than \$150,000." Thus, if an attorney or law firm provides bankruptcy assistance to an assisted person, then that attorney or law firm is a debt relief agency. The Court further found that Milavetz's interpretation of section 101(12A), which would exclude *only* attorneys providing bankruptcy assistance, was a constructional implausibility.

Upon finding that "attorneys who provide bankruptcy assistance to consumer debtors" are clearly debt relief agencies, the Court turned to Milavetz's constitutional claims. Milavetz's challenged two BAPCPA provisions that it claimed violated the First Amendment rights of attorneys. In particular, section 526(a)(4), which prohibits advising persons to incur more debt in contemplation of filing bankruptcy, and section 528 which requires certain disclosures in advertisements.

True to form, the Court upheld these provisions. It found the Eighth Circuit Court of Appeals erroneously concluded that section 526(a)(4) prohibited a debt relief agency from advising a person to incur *any* additional debt in contemplation of bankruptcy. Instead, the Court clarified that section 526(a)(4) only prohibits debt relief agencies from advising debtors to "load up" on debt with the expectation of obtaining a discharge in bankruptcy. Accordingly, the Court disagreed that section 526(a)(4)'s narrow rule prohibiting attorneys from advising clients to commit abusive pre-filing conduct could chill attorney speech or hinder the attorney-client relationship. Summarily, the Court declined to find that Milavetz's First Amendment rights were implicated by BAPCPA's prohibition on advising debtors to commit fraud.

Lastly, the Court affirmed the validity of section 528's disclosure requirements as applied to Milavetz. Here, the Court agreed with the Eighth Circuit Court of Appeals—because the challenged provision imposed a disclosure requirement, rather than an affirmative limitation on speech, rational basis review was appropriate. Milavetz countered that the term "debt relief agency" was confusing and misleading, therefore, its mandated inclusion in attorney advertisements was not "reasonably related" to the Government's interest in preventing consumer deception. The Court disagreed, citing the potential for debtors to be misled by advertisements promising debt relief without any reference to filing for bankruptcy, which presents additional economic costs. In sum, the Court found Milavetz's objection to the disclosure requirement in section 528 "little more than a preference on Milavetz's part for referring to itself as something other than a "debt relief agency." The Court concluded that Milavetz's labeling preference raised slight constitutional concern.

There are two lessons in *Milavetz*—the first of which should go without saying—never advise a debtor to incur additional debt with the expectation of obtaining a discharge in bankruptcy. Second, if you or your firm assist debtors who fall within the definition of an "assisted person" you are a debt relief agency under BAPCPA.

**Iurillo & Associates, P.A.**, located in downtown St. Petersburg, is comprised of **Camille J. Iurillo**, Shareholder, **Gina M. Pellegrino**, Associate, **Sabrina C. Beavens**, Associate, and **J'Aimee Crockett**, Associate awaiting bar results. The primary areas of practice of **Iurillo & Associates, P.A.** are Commercial and Bankruptcy Litigation and Debtors' and Creditors' Rights.