

DEBATE 2: INTRODUCTION

SHOULD ATTORNEYS BE SUBJECT TO THE PROVISIONS OF THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 REGULATING DEBT RELIEF AGENCIES?:

A SUMMARY OF THE ORDER BY THE U.S. BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, THE APPELLANT BRIEF BY THE U.S. TRUSTEE FOR REGION 21, AND THE INTERVENING BRIEF BY APPELLEES*

INTRODUCTION

Last year, Congress passed sweeping changes to the U.S. Bankruptcy Code (“Bankruptcy Code”) in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).¹ Among these changes are new and significant restrictions on the activities of debt relief agencies.² These changes have created controversy over whether attorneys are included in the definition of “debt relief agency”³ and therefore regulated by 11 U.S.C. §§ 526, 527, and 528. Each section is briefly explained below.

Section 526, in relevant part, prohibits debt relief agencies from (1) misrepresenting to assisted persons the services to be provided to them or the risks attendant upon becoming a debtor, (2) advising an assisted person to make untrue or misleading statements in bankruptcy filings, and (3) advising an assisted person to incur more debt in contemplation of filing bankruptcy or for the purpose of paying for bankruptcy services.⁴

Section 527 requires that debt relief agencies provide assisted persons with certain information, notices, and disclosures, including (1) notice of the right to

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¹ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

² *Id.* §§ 526 – 528.

³ *See id.* § 101(12A).

⁴ *Id.* § 526.

proceed pro se, hire an attorney, or hire a bankruptcy petition preparer; (2) information on how to complete bankruptcy schedules, value assets, and determine what property is exempt; and (3) notice of the debtors' obligation to provide truthful and accurate information and the potential consequences of failing to do so.⁵

Section 528 requires that debt relief agencies provide assisted persons a written contract "clearly and conspicuously" explaining the nature of services they will render, the amount of the fees or charges for such services, and the terms of payment.⁶ In addition, § 528 requires that debt relief agencies disclose in their advertising that they are debt relief agencies, that the assistance they provide may involve bankruptcy relief, and that they are in the business of helping people file for relief under the Bankruptcy Code.⁷

On October 17, 2005, the date the amendments to these sections went into effect, the U.S. Bankruptcy Court for the Southern District of Georgia ("the Court") issued an Order ("the Order") finding the BAPCPA provisions regulating debt relief agencies do not apply to attorneys.⁸ In response to the Order, the U.S. Trustee for Region 21 ("the Appellant") filed an appeal with the district court.⁹ In response to the appeal, Barbara B. Braziel, R. Wade Gastin, and Frank Perch, an attorney with Hunter, Maclean, Exley, & Dunn, P.C. ("the Appellees"), intervened.¹⁰ The following three sections summarize the court's Order, Appellant's brief, and Appellees' brief.

I. ORDER BY THE U.S. BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

The Order, issued sua sponte, holds the BAPCPA provisions regulating debt relief agencies do not apply to attorneys.¹¹ The court noted, if attorneys are indeed included in the definition of debt relief agencies, a whole "new

⁵ *Id.* § 527.

⁶ *Id.* § 528(a).

⁷ *Id.* a§ 528.

⁸ *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. 66, 70 (Bankr. S.D. Ga. 2005) [hereinafter Order].

⁹ See Brief of U.S. Trustee as Appellant, *In re Attorneys at Law & Debt Relief Agencies*, No. 4:05-cv-00206-WTM (S.D. Ga. Nov. 18, 2005) [hereinafter Appellant Brief].

¹⁰ See Brief of Intervenors – Appellees, Barbara B. Braziel, R. Wade Gastin and Hunter, Maclean, Exley & Dunn, P.C., *In re Attorneys at Law & Debt Relief Agencies*, No. 4:05-cv-00206-WTM (S.D. Ga. Nov. Jan. 5, 2006) [hereinafter Appellee Brief].

¹¹ Order, *supra* note 8, at 70.

layer of regulation will be superimposed on the bar of this Court.”¹² This new layer of regulation could lead to attorney preoccupation with the evaluation of new risks and liabilities “as they strive to represent their clients, comply with existing state regulation of their practice, learn the new substantive and procedural mandates of this new law, and adhere to the separate professional standards applicable to members of the Bar of this Court.”¹³ As such, these additional regulations will levy too heavy a burden on the bar if imposed needlessly or “merely out of an abundance of caution.”¹⁴

In analyzing the provisions at issue, the court looked first to the text itself.¹⁵ Although “attorneys” or “lawyers” are not expressly included in the definition of debt relief agencies, the court recognized the definition is broad enough on its face to include attorneys.¹⁶ Further analysis, however, warranted a different finding based on three definitional points. First, the definition of “bankruptcy petition preparer” expressly excludes attorneys and their staff.¹⁷ Second, the word “attorney” is separately defined and does not include the term “debt relief agency” in its definition.¹⁸ Finally, in a plain language analysis, “attorney” and “debt relief agency” are not synonymous.¹⁹

In addition to the definitions provided in the statute, the court further examined the inclusion of the words “providing legal representation” in the definition of “bankruptcy assistance.”²⁰ Although this inclusion suggests attorneys are to be characterized as debt relief agencies, the court concluded the opposite, noting non-lawyers sometimes attempt to provide unauthorized legal representation.²¹ Therefore, the inclusion of providing “bankruptcy assistance” in the scope of the definition of “debt relief agency” reflects Congress’ attempt to empower bankruptcy courts to protect vulnerable consumers who may be harmed by unauthorized legal representation provided by debt relief agencies.²²

¹² *Id.* at 68.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 68-69.

¹⁶ *Id.* at 68.

¹⁷ *Id.*; 11 U.S.C.S. § 110(a)(1) (2005).

¹⁸ Order, *supra* note 8, at 68; 11 U.S.C.S. § 101(4) (2005).

¹⁹ Order, *supra* note 8, at 68.

²⁰ *Id.* at 68; 11 U.S.C.S. § 101(4)(A) (2005).

²¹ Order, *supra* note 8, at 68.

²² *Id.* at 68.

After analyzing the text of BAPCPA itself, the Court applied a logical interpretation. The court stated 11 U.S.C. § 527(b) would lead to absurd consequences if attorneys indeed fall under the definition of debt relief agencies.²³ Section 527(b) requires that debt relief agencies inform assisted persons of their right to hire an attorney or represent themselves.²⁴ Interpreted logically, this section suggests attorneys are not included as debt relief agencies because to hold otherwise would require, among other things, that attorneys tell their clients they have a right to hire an attorney.²⁵ The court found it more likely that this section is an attempt to further protect consumers who are being assisted by non-attorneys.²⁶

Finally, the court stated interpreting the statute to encompass attorneys within the regulation of debt relief agencies would allow federal law to usurp state regulation of the practice of law, which was not the intent of Congress.²⁷ Section 526(d)(2) “makes clear that there is no effort to curtail the states’ role in enforcing ‘qualifications for the practice of law.’”²⁸ BAPCPA is otherwise silent on whether it preempts state law on this issue.²⁹ Because the practice of law has historically been governed by the states and preemption by federal law would require “a breathtakingly expansive interpretation” of BAPCPA, the court concluded Congress would not have intended such a result without expressly stating so.³⁰ In other words, if Congress meant to “ensnare attorneys in the thicket of [§§] 526, 527, and 528, it would have used the term ‘attorney’ and not ‘debt relief agency.’”³¹ For the foregoing reasons, the Court held attorneys are not covered by the provisions of BAPCPA regulating debt relief agencies and are excluded from compliance with those requirements.³²

II. BRIEF OF THE U.S. TRUSTEE AS APPELLANT

The U.S. Trustee for Region 21 appealed the Order, claiming the Order undermines the enforcement of the Bankruptcy Code, thereby undermining

²³ *Id.* at 68-69.

²⁴ 11 U.S.C.S. § 527(b) (2005).

²⁵ Order, *supra* note 8, at 68.

²⁶ *Id.* at 68-69.

²⁷ *Id.*

²⁸ *Id.* (quoting 11 U.S.C.S. § 526(d)(2) (2005)).

²⁹ See Order, *supra* note 8, at 69.

³⁰ *Id.* at 68.

³¹ *Id.*

³² *Id.*

Appellant's ability to assist with such enforcement.³³ The Appellant maintains the court should vacate the Order for lack of jurisdiction and need not address the merits of the Order.³⁴ If the court deems it appropriate to consider the merits of the Order, however, the Appellant requests in the alternative that the court reverse the Order based on erroneous statutory construction.³⁵

The Appellant claims the bankruptcy court lacked jurisdiction under Article III of the U.S. Constitution because the court was not presented with a "case or controversy."³⁶ Because bankruptcy courts exercise judicial functions as a unit of the district court,³⁷ they are bound by the jurisdictional limitations of Article III, including existence of a "case or controversy."³⁸ Because of the timing of the issuance of the Order—the same day the relevant provisions of BAPCPA took effect—Appellant argues not only that the bankruptcy court had no case or controversy before it to which the Order related, but also no party with standing to seek judicial relief from the court existed.³⁹ Therefore, the court lacked jurisdiction to issue such an order.⁴⁰

Alternatively, Appellant claims the court lacked jurisdiction under 28 U.S.C. § 157.⁴¹ Section 157 of Title 28 provides "[e]ach district court may provide that any or all *cases* under title 11 and any and all *proceedings* under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."⁴² Because the Order did not adjudicate an issue in a pending bankruptcy "case" or "proceeding," Appellant argues the court lacked jurisdiction to enter the Order.⁴³

In addition, Appellant argues the court lacked statutory power to enter the Order under 28 U.S.C. § 151.⁴⁴ Section 151 clarifies a bankruptcy court is a "unit of the district court" and derives its power from the district court.⁴⁵

³³ Appellant Brief, *supra* note 9, at 1.

³⁴ *Id.* at 2.

³⁵ *Id.*

³⁶ *Id.* at 2; U.S. CONST. art. III, § 2, cl. 1.

³⁷ 28 U.S.C. § 151 (2000).

³⁸ Appellant Brief, *supra* note 9, at 6 (citing *Aetna Life Ins. Co. v. Hayworth*, 300 U.S. 227, 239–40 (1937)).

³⁹ Appellant Brief, *supra* note 9, at 6.

⁴⁰ *Id.*

⁴¹ 28 U.S.C. § 157; Appellant Brief, *supra* note 9, at 9.

⁴² 28 U.S.C. § 157 (emphasis added).

⁴³ Appellant Brief, *supra* note 9, at 9.

⁴⁴ 28 U.S.C. § 151; Appellant Brief, *supra* note 9, at 9.

⁴⁵ 28 U.S.C. § 151.

Moreover, a bankruptcy court has authority “with respect to any action, suit, or proceeding . . . except as otherwise provided by law or by rule or order of the district court.”⁴⁶ Based on these statutory provisions, Appellant claims the bankruptcy court exceeded its authority by interpreting the statutory provisions at issue outside of any action, suit, or proceeding.⁴⁷

Appellant alternatively claims the court should reverse the Order as an erroneous construction of the statutory provisions regarding debt relief agencies.⁴⁸ This argument rests on four bases. First, Appellant relies on the plain and ordinary language of the statute.⁴⁹ Bankruptcy Code § 101(12A) defines a “debt relief agency” as “any person who provides any bankruptcy assistance to an assisted person. . . or who is a bankruptcy petition preparer under section 110. . . .”⁵⁰ Section 101(4A) defines “bankruptcy assistance” to include “providing legal representation with respect to a case or proceeding under the [Bankruptcy Code].”⁵¹ Appellant notes attorneys certainly provide legal representation with respect to bankruptcy cases.⁵² Moreover, § 101(12A) lists several exclusions from the definition of debt relief agency, and attorneys are absent from the list.⁵³ Therefore, Appellant claims the plain and ordinary language of the statute should be interpreted to include attorneys within the definition of debt relief agencies.⁵⁴

Second, Appellant argues at least two other provisions of BAPCPA indicate Congressional intent to include attorneys as debt relief agencies.⁵⁵ Section 526(d)(2) provides no language in §§ 526, 527, or 528 shall be deemed to limit the authority of a state to “determine and enforce qualifications for the practice of law under the laws of that State,” or “of a Federal Court to determine and enforce the qualifications for the practice of law before that court.”⁵⁶ Appellant maintains these provisions would be meaningless if the provisions regarding debt relief agencies did not apply to attorneys.⁵⁷ Also, § 527(b) requires debt relief agencies provide assisted persons with a written

⁴⁶ *Id.*

⁴⁷ Appellant Brief, *supra* note 9, at 9.

⁴⁸ *Id.* at 10–19.

⁴⁹ *Id.* at 13–15.

⁵⁰ 11 U.S.C.S. § 101(12A) (2005) (emphasis added).

⁵¹ *Id.* § 101(4A).

⁵² Appellant Brief, *supra* note 9, at 15.

⁵³ *See* 11 U.S.C.S. § 101(12A)(A)–(D).

⁵⁴ Appellant Brief, *supra* note 9, at 15.

⁵⁵ *Id.*

⁵⁶ 11 U.S.C.S. § 526(d)(2).

⁵⁷ Appellant Brief, *supra* note 9, at 16.

notice containing certain disclosures, such as providing “a written contract specifying what the attorney or bankruptcy petition preparer will do for you and how much it will cost.”⁵⁸ Appellant notes it makes little sense for anyone other than the assisted person’s attorney to disclose such laws to the assisted person.⁵⁹

Third, Appellant relies on the legislative history of BAPCPA to reinforce the claim that Congress intended the term “debt relief agency” to encompass attorneys.⁶⁰ Specifically, while BAPCPA was under consideration by the Senate, Senator Feingold offered an amendment to exclude attorneys from the definition of debt relief agency because “[r]equiring lawyers to call themselves ‘debt relief agencies’ will do more to confuse the public than protect it.”⁶¹ Because Congress did not adopt Senator Feingold’s amendment, Appellant claims Congress intended the debt relief agency provisions to apply to attorneys.⁶²

Finally, Appellant addresses the court’s characterization of the burden treating attorneys at debt relief agencies would impose.⁶³ Appellant notes this would not be the first time attorneys were subject to additional federal regulation.⁶⁴ For example, both the Fair Debt Collection Practices Act and Sarbanes-Oxley add layers of federal regulation to attorneys practicing in the applicable areas.⁶⁵ For the foregoing reasons, Appellant requests the court vacate the Order for lack of jurisdiction or reverse the Order for erroneous statutory construction.⁶⁶

III. BRIEF OF INTERVENORS AS APPELLEES

The Appellees in this matter are attorneys admitted to practice before the bankruptcy court. Because of their direct and pecuniary interest in this case, Appellees filed a motion to intervene claiming the bankruptcy court had both

⁵⁸ 11 U.S.C.S. § 527(b).

⁵⁹ Appellant Brief, *supra* note 9, at 16.

⁶⁰ *Id.* at 16–18.

⁶¹ 151 CONG. REC. S2306 (daily ed. Mar. 9, 2005) (statement of Sen. Feingold).

⁶² Appellant Brief, *supra* note 9, at 18.

⁶³ *Id.* at 18–19.

⁶⁴ *Id.* at 18.

⁶⁵ *Id.* at 18–19; *see generally* Fair Debt Collection Practices Act of 1977, 15 U.S.C. §§ 1601-1692; Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7245.

⁶⁶ Appellant Brief, *supra* note 9, at 20.

inherent power and statutory authority to enter the Order.⁶⁷ Moreover, Appellees claim virtually all the provisions regulating debt relief agencies “duplicate, modify, or directly conflict with the duties and obligations imposed on attorneys under the codes of professional conduct adopted by most state and federal courts, or by state law.”⁶⁸ Appellees request the bankruptcy court’s decision be affirmed.⁶⁹

Appellees claim the court had the inherent authority, statutory authority, and a constitutional mandate to enter the Order for three reasons.⁷⁰ First, the Order clarifies the practice of law under BAPCPA.⁷¹ In light of the confusion of legal scholars regarding the provisions at issue, Appellees argue the court had the authority to put the members of its bar on notice the provisions relating to debt relief agencies do not affect the practice of law.⁷²

Second, Appellees maintain the court has the authority to regulate the practice of law by the members of its bar.⁷³ Moreover, this power may be exercised by general order or sua sponte.⁷⁴ Appellees point to Bankruptcy Rule 9029, which allows the court to regulate the practice of law through general order.⁷⁵ Moreover, BAPCPA § 526(b)(5) allows “the court, on its own motion” to punish acts in violation of § 526(b)(5), including acts that show the person ‘engaged in a clear and consistent pattern or practice of violating this section.’⁷⁶ If this section applies to attorneys, Appellees argue, it allows the bankruptcy court to regulate practice outside a case or controversy, and therefore allows the court to issue orders sua sponte.⁷⁷

Finally, Appellees assert attorneys practicing before the bankruptcy court are entitled to the benefit of the Order as a matter of due process.⁷⁸ In other words, attorneys practicing before the bankruptcy court “have an absolute constitutional right to know—in advance of an attempt to sanction them—to

⁶⁷ Appellee Brief, *supra* note 10, at 2.

⁶⁸ *Id.*

⁶⁹ *Id.* at 3.

⁷⁰ *Id.* at 9–15.

⁷¹ *Id.* at 9.

⁷² *Id.* at 10.

⁷³ *Id.* at 11.

⁷⁴ *Id.* at 13.

⁷⁵ FED. R. BANKR. P. 9029.

⁷⁶ Appellee Brief, *supra* note 10, at 13 (quoting 11 U.S.C.S. § 526(b)(5) (2005)).

⁷⁷ Appellee Brief, *supra* note 10, at 13–14.

⁷⁸ *Id.* at 14.

what standards they must adhere.”⁷⁹ Therefore, due process mandated the court inform the attorneys at bar they are not required to comply with the debt relief agency provisions of BAPCPA.⁸⁰

In addition to affirming the court’s inherent and statutory right to enter the Order, Appellees also maintain the court correctly determined the term “debt relief agency” does not include attorneys, premising their claim on the plain language of the statute, the legislative history, and Congressional intent.⁸¹

Appellees first look to the plain language of the statute.⁸² Focusing on the term “agency,” Appellees rely on a general-language dictionary to conclude that “none of the definitions of ‘agency’ reasonably would be understood by a consumer to suggest a lawyer or law firm.”⁸³ Moreover, Appellees use examples of other agencies, such as real estate agencies, of which lawyers are not included in the widely understood definition.⁸⁴ Finally, Appellees point to cases in which attorneys were prevented from using names that would confuse or mislead consumers,⁸⁵ and argue similar problems would arise if attorneys were included under the definition of debt relief agencies.⁸⁶ Therefore, to avoid such an absurd result, the language of the statute should be read to exclude attorneys from the definition of debt relief agencies.⁸⁷

Appellees also support the court’s finding that the inclusion of “providing legal representation” in the definition of “bankruptcy assistance” does not require a different construction of “debt relief agency.”⁸⁸ The fact that the definition of “debt relief agency” includes some things attorneys can do does not mandate that attorneys be read into the definition.⁸⁹

Next, Appellees analyze the legislative history discussed in Appellant’s brief.⁹⁰ Appellees note, contrary to Appellant’s argument that Senator Feingold’s amendment to exclude attorneys from the definition of debt relief

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 15–24.

⁸² *Id.* at 15–18.

⁸³ *Id.* at 16 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002)).

⁸⁴ Appellee Brief, *supra* note 10, at 17.

⁸⁵ See *Medina County Bar Ass’n v. Baker*, 809 N.E.2d 659, 660 (Ohio 2004); *Rodgers v. Comm’n for Lawyer Discipline*, 151 S.W.3d 602, 613 (Tex. App. 2004).

⁸⁶ Appellee Brief, *supra* note 10, at 17–18.

⁸⁷ *Id.* at 18.

⁸⁸ *Id.* at 18–21.

⁸⁹ *Id.*

⁹⁰ *Id.* at 21.

agencies was voted down, Senator Feingold's amendment was actually withdrawn by Senator Feingold and was never put to a vote by the Senate or any committee.⁹¹ Appellees assert it is just as likely Senator Feingold withdrew his amendment because it was redundant rather than because Congress intended to keep attorneys within the definition of "debt relief agencies."⁹²

Finally, Appellees support the court's assertion that inclusion of attorneys in the definition of "debt relief agencies" usurps states' authority to regulate the practice of law and even directly conflicts with a number of state-promulgated rules.⁹³ For example, Georgia Rule of Professional Conduct 7.1(a) provides a lawyer's communication to the public may not be "false, fraudulent, deceptive or misleading."⁹⁴ Because the term "debt relief agency" would mislead consumers, Appellees claim, lawyers cannot comply with both the Georgia rule and the provisions of BAPCPA.⁹⁵ Furthermore, Appellees distinguish Appellant's analogies to the Fair Debt Collection Practices Act and Sarbanes-Oxley as irrelevant to the provisions at issue.⁹⁶ For the foregoing reasons, Appellees request the Order be affirmed.⁹⁷

⁹¹ See 151 CONG. REC. S2462-02 (daily ed. Mar. 10, 2005).

⁹² Appellee Brief, *supra* note 10, at 21.

⁹³ *Id.* at 21–24.

⁹⁴ GA. RULES OF PROF'L CONDUCT R. 7.1(a).

⁹⁵ Appellee Brief, *supra* note 10, at 21.

⁹⁶ *Id.* at 23–24.

⁹⁷ *Id.* at 24.