



Business Law Committee

BAPCPA Constitutional Issues: A Survey of the New Bankruptcy Code After Year One

Ilan A. Nieuchoicz*



Immediately after the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”),¹ legal scholars and attorneys began dissecting the new law and discovered several potential constitutional issues the judiciary will likely need to address.² A year has passed since BAPCPA’s enactment³ and during this time the judiciary has had occasion to address some of the constitutional issues created by the new law.⁴ This article provides a survey of the courts’ positions on these constitutional issues and concludes with a brief outline of other potential legal challenges the courts may be asked to address.

The principle constitutional issues presented to the courts thus far have involved First Amendment challenges to 11 U.S.C. §§ 526, 527, and 528,⁵ the contention being that these provisions interfere with attorney-client speech by imposing restrictions on protected speech and compelling other forms of speech.⁶ While courts addressing these First Amendment challenges have implemented similar analytical processes, differences in statutory interpretations have led to disparate results. This article will review the courts’ analyses and explore their various conclusions relating to the constitutional issues presented by BAPCPA.

Is an Attorney a “Debt Relief Agency”?

A threshold question that the courts have been called upon to address prior to determining the constitutionality

of provisions 11 U.S.C §§ 526, 527, and 528 is whether an attorney falls within the definition of a “debt relief agency.”⁷ Each of these statutory provisions restrict or compel the speech of a “debt relief agency.”⁸ Consequently, the constitutionality of these provisions will depend largely on what individuals and entities are encompassed within the phrase “debt relief agency.”⁹

The analysis must begin with a review of several interlinked definitional provisions. Section 101(12A) defines a “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 under section 110...”¹⁰ The definition continues in Subsections A thru E to exclude certain persons and entities.¹¹ Attorneys are not specifically mentioned within these exclusions.¹² The terms “bankruptcy assistance” and “assisted person” are separately defined in § 101.¹³

The applicability of § 101(12A) would seem to turn upon who is being assisted.¹⁴ 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.”¹⁵ Section 101(4) defines “attorney” as “attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law.”¹⁶ Section 101(4) “makes no reference to debt relief agencies.”¹⁷ Similarly, the statutory definition of a “debt

Continued on page 10

¹ Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005).

² See *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66, 67-8 (Bankr. M.D. Ga. 2006), citing HON. WILLIAM HOUSTON BROWN AND LAWRENCE R. AHERN, III, 2005 BANKRUPTCY REFORM LEGISLATION WITH ANALYSIS, 58 (Thomson/West 2005); Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 576 (2005); Coastal Bankruptcy Law Institute Seminar Materials (September 23, 2005) at Tab 4, pg. 2; Hon. Keith M. Lundin, *Ten Principles of BAPCPA: Not What was Advertised*, 24 AM. BANKR. INST. J. 1, 69 (Sept. 2005); Samuel Gerdano, *25 Changes to Personal Bankruptcy Law*, at ¶ 19, <http://www.abiworld.net/bankbill/changes.html>.

³ Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005) (BAPCPA was enacted on April 20, 2005 and became generally effective on October 17, 2005. A few provisions became effective upon enactment.)

⁴ See *Geisenberger v. Gonzales*, 346 B.R. 678 (Bankr. E.D. Pa. 2006); *In the Matter of McCartney*, 336 B.R. 588 (Bankr. M.D. Ga. 2006); *Hersh v. United States*, 347 B.R. 19 (Bankr. N.D. Tex. 2006); *Olsen v. Gonzales*, No. 05-6365-HO, 2006 WL 2345503 (Bankr. D. Or. Aug. 11, 2006).

⁵ *Supra* at note 3.

⁶ 11 U.S.C. § 526(c) (creating civil liability for violation of one of the enumerated duties imposed upon a “debt relief agency”).

⁷ See 11 U.S.C. §§ 101(12A), 526, 527, 528; see also *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 66, 67; *Hersh v. United States*, 347 B.R. at 22-3; *Olsen v. Gonzales*, No. 05-6365-HO, 2006 WL 2345503.

⁸ See 11 U.S.C. §§ 101(12A), 526, 527, 528.

⁹ See 11 U.S.C. § 101(12A).

¹⁰ *Id.*

¹¹ 11 U.S.C. § 101(12A).

The term “debt relief agency” means any person who provides any

bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include--(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer; (B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986; (C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor; (D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or (E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

¹² *Id.*

¹³ 11 U.S.C. §§ 101(3), (4A).

The term “bankruptcy assistance” means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors’ meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

¹⁴ 11 U.S.C. § 101(12A).

¹⁵ *Id.*

¹⁶ 11 U.S.C. § 101(3).

¹⁷ *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 66, 67; see also 11 U.S.C. § 101(4);

relief agency” makes no specific reference to attorneys; still, the term “debt relief agency” could be construed to encompass attorneys.¹⁸ To determine whether an attorney is a “debt relief agency,” courts have analyzed the statutory provisions by their plain meaning.¹⁹ Nonetheless, these jurisdictions have arrived at different conclusions.²⁰

Attorneys Are Not Debt Relief Agencies

Relying upon the rules of statutory interpretation, which require a statute be read giving unambiguous words their plain meaning, the United States Bankruptcy Court for the Southern District of Georgia determined that “attorneys” are not “debt relief agencies.”²¹ The court, concerned about attorneys’ preoccupation with evaluating the potential new risks and liabilities imposed upon them by BAPCPA, set out to proactively clarify the definition of a “debt relief agency” by ruling on its own motion under the authority of §§ 526(c) and 105 of the Bankruptcy Code.²² The court acknowledged that although the statutory definition of a “debt relief agency” seemed broad enough to include bankruptcy preparers and attorneys, additional language was used within the definition to expressly include a “bankruptcy preparer.” The court determined that if Congress intended attorneys to be “debt relief agencies,” Congress would have added clear and unequivocal language to that effect.²³ Based on the forgoing determinations, the court concluded that “attorneys . . . admitted to the Bar of [the Bankruptcy] Court . . . are not covered by the provisions . . . regulating debt relief agencies, including without limitation §§ 101(12A), (4A), 526, 527, 528, and are excused from compliance with any of those requirements or provisions”²⁴

Some Attorneys Are Debt Relief Agencies

The Bankruptcy Courts for the Northern District of Texas and the District of Oregon reached the opposite conclusion and have held that certain attorneys are indeed debt relief agencies.²⁵ The courts based their conclusions

on the plain meaning and legislative history of BAPCPA.²⁶

A “debt relief agency” is “any person who provides any bankruptcy assistance to an assisted person”²⁷ “[B]ankruptcy assistance” includes “legal representation.”²⁸ Relying on the principle that only attorneys are authorized to provide legal advice, the courts construed §§ 101(12A) and 101(4A) to support the conclusion that attorneys are debt relief agencies.²⁹

The Bankruptcy Court for the Northern District of Texas found additional support for its holding in the five exceptions in the definition “debt relief agency” definition of § 101(12A).³⁰ The court explained that “if Congress had wanted attorneys excluded from the term ‘debt relief agency’ . . . it surely would have taken the opportunity to exclude them from what otherwise they are so plainly within.”³¹ Both courts referenced legislative history as added support for their conclusion attorneys are debt relief agencies.³²

The courts, however, found that not *all* attorneys are necessarily debt relief agencies.³³ BAPCPA expressly states that those who aid an “assisted person” are considered a “debt relief agency.”³⁴ An “assisted person” is defined by BAPCPA as “any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000.”³⁵ Accordingly, only attorneys representing individuals who are “assisted persons” pursuant to § 101(3) are debt relief agencies.³⁶ These courts, having found that attorneys fall within the classification of “debt relief agencies,” were then able to consider the constitutionality of the BAPCPA provisions which govern these entities.³⁷

Does an Attorney Have Standing to Bring a First Amendment Claim?

A court must first consider the jurisdictional question of standing before reaching the merits of a case. The courts appear to be split on the issue of whether an attorney has standing to challenge BAPCPA on First Amendment grounds. While some courts have strictly adhered to the “case

Continued on page 22

¹⁸ See 11 U.S.C. § 101(12A), *supra* at n. 9.

¹⁹ *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 67; *Hersh*, 347 B.R. at 22-3; *Olsen*, No. 05-6365-HO, 2006 WL 2345503.

²⁰ Compare *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 67 (attorneys are not debt relief agencies), with *Hersh*, 347 B.R. at 22-3 (bankruptcy attorneys are debt relief agencies), and *Olsen*, No. 05-6365-HO, 2006 WL 2345503 (legislative history provides a strong indication attorneys are debt relief agencies).

²¹ *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 68; 11 U.S.C. § 101(12A) (The statute fails to expressly reference attorneys).

²² *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 68, n. 1 (“Section 526(c)(5) authorizes the Court on its own motion to enjoin violations of the debt relief agency provisions or impose civil penalties on the violator. If the Court has that broad jurisdiction to both initiate a disciplinary action and punish a violation, it must of necessity have jurisdiction on its own motion to conclude that certain types of persons or certain types of activity are not covered at all, since the first step in enforcing the provision is to determine whom is encompassed within its grasp.”) (emphasis added); see also 11 U.S.C. §§ 526(c), 105.

²³ *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 70-1 (“[T]he 2005 Act is silent as to whether it is intended to pre-empt or curtail other state interests in regulating and disciplining attorneys’ conduct. Attorneys’ admission and discipline stating that an expansive interpretation of Federal law to usurp state regulation of the practice of law via ambiguous provisions of [BAPCPA] . . . could

possibly violate the Tenth Amendment to the Constitution”).

²⁴ *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 71.

²⁵ *Supra* at n. 13.

²⁶ *Hersh v. United States*, 347 B.R. at 22-3; *Olsen v. Gonzales*, No. 05-6365-HO, 2006 WL 2345503 at 2.

²⁷ 11 U.S.C. § 101(12A).

²⁸ 11 U.S.C. § 101(4A).

²⁹ *Hersh*, 347 B.R. at 22-3; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 2; 11 U.S.C. §§ 101(12A), 101(4A).

³⁰ *Hersh*, 347 B.R. at 23; 11 U.S.C. § 101(12A).

³¹ *Hersh*, 347 B.R. at 23.

³² *Hersh*, 347 B.R. at 23 (“[L]egislative history clearly indicates that Congress had attorneys in mind with this statute; the House Report on BAPCPA mentions ‘attorney’ 164 times.”) (citing H.R. Rep. 109-31, reprinted in 2005 U.S.C.C.A.N. 88); *Olsen v. Gonzales*, No. 05-6365-HO, 2006 WL 2345503 at 3 (Senator Feingold proposed an amendment to BAPCPA to exclude attorneys from the definition of debt relief agencies; however, the Senate did not address Senator Feingold’s proposal, citing 151 CONG. REC. S2306-02, 2316-17 (2005)).

³³ *Hersh*, 347 B.R. at 23; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 3.

³⁴ 11 U.S.C. § 101(12A).

³⁵ 11 U.S.C. § 101(3).

³⁶ 11 U.S.C. §§ 101(3), 101(12A).

³⁷ See *Hersh*, 347 B.R. at 23; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 3.

and controversy” requirement necessary for standing, others have taken a more liberal interpretation of the requirement in light of the First Amendment issues presented.³⁸

No Standing...Skirting the Issue of Constitutionality

Article III of the United States Constitution limits the jurisdiction of the courts to those matters that meet the “case and controversy” requirement.³⁹ To satisfy this prerequisite the “litigant must have suffered an actual injury that can be redressed by a favorable judicial decision.”⁴⁰ The United States Bankruptcy Courts for the Eastern District of Pennsylvania⁴¹ and Middle District of Georgia⁴² have strictly adhered to the “case and controversy” requirement and have dismissed cases involving constitutional challenges to BAPCPA. Dismissal was appropriate because the courts found that the attorneys bringing suit had not suffered actual injuries and that no entity had taken action against them to enforce the provisions of BAPCPA.⁴³ As a consequence of the dismissals, the constitutional validity of the challenged BAPCPA provisions have not been addressed and remains an unresolved issue in these states.

Attorneys Have Standing to Challenge BAPCPA

Other courts have found attorneys have standing to bring First Amendment claims even where actual injuries are absent.⁴⁴ In *Hersh v. U.S.*, an attorney filed suit against the Attorney General of the United States and the State of Texas challenging the constitutionality of § 526(a)(4) of the Bankruptcy Code on the basis the statute restricts attorney-client speech by prohibiting an attorney from providing certain forms of counseling to the client.⁴⁵ The defendant filed a motion to dismiss for lack of standing on the basis that no action had been taken against the attorney to enforce the provision.⁴⁶ The Bankruptcy Court for the Northern District of Texas found that mere allegations an attorney’s speech was simultaneously stifled and compelled by the provisions of BAPCPA were sufficient to provide standing on questions concerning First Amendment speech.⁴⁷ Similarly, the *Olsen v. Gonzales* opinion issued by the United States Bankruptcy Court for the District of Oregon held that allegations of a chilling effect against speech provide a sufficient base for standing on First Amendment issues.⁴⁸

Are Sections 526, 527, and 528 of BAPCPA Constitutional Under the First Amendment?

The Bankruptcy Courts for the Northern District of Texas and the District of Oregon are among the few courts that have addressed the First Amendment issues surrounding §§ 526, 527, and 528.⁴⁹ Having found the attorney plaintiffs had standing and were debt relief agencies the courts could then consider the constitutionality of the BAPCPA provisions.

Section 526 Unconstitutionally Restricts Speech

The First Amendment to the Constitution of the United States states, in part, “Congress shall make no law ... abridging the freedom of speech...”⁵¹ The courts addressed the constitutionality of two Subsections within Section 526, specifically §§ 526(a)(1) and 526(a)(4).⁵²

The question presented to the Bankruptcy Court for the District of Oregon was whether § 526(a)(1) unconstitutionally chilled speech by subjecting attorneys to sanctions for failing to perform services which later became ill-advised or unethical.⁵³ Section 526(a)(1) provides:

(a) A debt relief agency shall not - (1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under [the Bankruptcy Code].⁵⁴

The Oregon Bankruptcy Court found the plaintiff attorney’s challenge was subject to failure if the statute could be construed in such a manner that would not infringe upon the Constitution.⁵⁵ The court determined that § 526(a)(1) was in line with the purposes of BAPCPA, “limiting unethical conduct and increasing responsibility and integrity.”⁵⁶ The court also recognized that attorneys could “couch their promises in conditional language [instead of] abstain[ing] from speech.”⁵⁷ The court held § 526(a)(1) was not unconstitutional, and dismissed the claim.⁵⁸

Section 526(a)(4) has also been challenged as a violation of the First Amendment on the basis it prevents attorneys from properly advising their clients.⁵⁹ Section 526(a)(4) provides:

(a) A debt relief agency shall not - (4) advise an

Continued on page 23

³⁸ Compare *Geisenberger*, 346 B.R. 678 (case dismissed for lack of standing), and *In the Matter of McCartney*, 336 B.R. 588 (same), with *Hersh*, 347 B.R. at 23-5 (allegations of chilled-speech satisfies standing requirement), and *Olsen*, No. 05-6365-HO, 2006 WL 2345503.

³⁹ U.S. Const. Art. III, § 2.

⁴⁰ *Iron Arrow Honor Soc’y v. Heckler*, 464 U.S. 67, 70 (1983).

⁴¹ *Geisenberger*, 346 B.R. at 678 (Attorney failed to establish injury and court dismissed case for lack of standing.)

⁴² *In the Matter of McCartney*, 336 B.R. at 588 (Attorney for Chapter 7 debtors moved the court for a determination that attorneys practicing before the bankruptcy court were not “debt relief agencies” under BAPCPA. Motion was dismissed for lack of a “case and controversy” the court could rule over.)

⁴³ See generally *Geisenberger*, 346 at B.R. 678; *In re McCartney*, 336 B.R. at 588.

⁴⁴ See *Hersh*, 347 B.R. at 19; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 2-4.

⁴⁵ See *Hersh*, 347 B.R. at 22.

⁴⁶ *Id.*

⁴⁷ *Id.* at 22 n. 3.

⁴⁸ *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 3-5 (distinguishing the standing standard for First Amendment issues from the traditional case and controversy requirement of Article III).

⁴⁹ *Hersh*, 347 B.R. at 23-5, *Olsen*, No. 05-6365-HO, 2006 WL 2345503, at 6-7; 11 U.S.C. §§ 526, 527, 528.

⁵¹ U.S. Const. amend. I

⁵² *Hersh*, 347 B.R. at 23-5; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 6-7.

⁵³ *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 7.

⁵⁴ 11 U.S.C. § 526(a)(1).

⁵⁵ *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 7.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 7; 11 U.S.C. § 526(a)(1).

⁵⁹ *Hersh*, 347 B.R. at 23-5; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 6-7; 11 U.S.C. § 526(a)(4).

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.⁶⁰

Prior to conducting its analysis of the statute, the court had to determine which legal standard to apply. “Traditionally, courts subject content-based restrictions on speech to strict scrutiny.”⁶¹ However, the “Government propose[d] that § 526(a)(4) [was] an ethical regulation . . . subject to a lesser standard outlined in *Gentile v. State Bar of Nevada*.”⁶²

In *Gentile*, the United States Supreme Court held regulation of speech is constitutional if: (1) the regulation serves a legitimate state interest and (2) the limitations imposed are “narrow and necessary.”⁶³ Strict scrutiny “requires the regulation of speech to be (1) narrowly tailored to promote (2) a compelling government interest.”⁶⁴ Both *Hersh* and *Olsen* used the lower standard of the *Gentile* constitutional balancing test and found § 526(a)(4) over-inclusive and facially unconstitutional.⁶⁵ Consequently, a strict scrutiny analysis was unnecessary.⁶⁶

Although Congress’ purpose in enacting BAPCPA was to “remedy abuse of the bankruptcy system,”⁶⁷ provision “526(a)(4) prevents lawyers from advising clients to take actions that are lawful . . . under BAPCPA.”⁶⁸ The courts point out that incurring “additional debt in contemplation of bankruptcy does not necessarily constitute abuse,” because acquiring more debt may at times be the most “prudent” option for an individual contemplating bankruptcy.⁷⁰ Accordingly, § 526(a)(4) prevents attorneys from offering their clients the most appropriate counseling.⁷¹ The courts that have considered the constitutionality of § 526(a)(4) have found it unconstitutional because it fails to meet the “narrow and necessary” standard set out by *Gentile*.⁷²

Section 527 Does Not Unconstitutionally Compel Speech

Section 527 of BAPCPA requires a “debt relief agency” to

provide “assisted persons” with written notice and disclosure of specific information concerning bankruptcy.⁷⁴ First Amendment rights “include[] both the right to speak freely and the right to refrain from speaking at all.”⁷⁵ Attorneys have claimed that the compelled speech imposed upon them as debt relief agencies under § 527 is unconstitutional.⁷⁶ The courts that have considered this constitutional issue have acknowledged “section 527 advances a sufficiently compelling government interest and does not unduly burden either the attorney-client relationship or the ability of a client to seek bankruptcy.”⁷⁷ The government has a valid concern in guaranteeing that a client is informed of specific information relevant to the bankruptcy process prior to filing a petition for bankruptcy.⁷⁸

In *Hersh*, the plaintiff attorney argued that the disclosures required by § 527 provide false or misleading information; however, the court dismissed this argument. The Bankruptcy Court for the Northern District of Texas explained that § 527 is flexible, allowing attorneys to modify the required disclosures so long as the content remains “substantially similar.”⁷⁹ “Given [the government’s] significant interest [and the statute’s inherent flexibility, courts have held that] the compelled speech of section 527 is a reasonable burden” and have dismissed claims of unconstitutionality.⁸⁰

Section 528 Does Not Unconstitutionally Compel Speech

Section 528 requires attorneys to make certain disclosures in advertisements such as, “We are a debt relief agency,” or “We help people file for bankruptcy relief under the Bankruptcy Code.”⁸¹ In *Olsen*, the attorney plaintiff brought a constitutional challenge to § 528 claiming the statute unconstitutionally compels untrue, ill-advised and misleading speech.⁸² Plaintiff argued that not all attorneys help people file for bankruptcy relief.⁸³ The plaintiff contended that although he “advise[d] clients to file bankruptcy” and counseled clients on issues of dischargability, he had not represented clients in bankruptcy matters nor had he filed petitions for bankruptcy relief.

Continued on page 24

⁶⁰ 11 U.S.C. § 526(a)(4).

⁶¹ *Hersh*, 347 B.R. at 24 (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030); see also *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 6-7.

⁶² *Id.*

⁶³ *Hersh*, 347 B.R. at 24, quoting *Gentile v. State Bar of Nev.*, 501 U.S. at 1075 (1991).

⁶⁴ *Hersh*, 347 B.R. at 23, 24; citing *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000).

⁶⁵ *Hersh*, 347 B.R. at 24; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 7 (finding section 526(a)(4) also to be under-inclusive because non-profits, which are excluded from the definition of a “debt relief agency,” can still get advice that would attribute to the abuse Congress intended to address with the statute).

⁶⁶ *Hersh*, 347 B.R. at 24, citing *Gentile*, 501 U.S. at 1030 (implementing a test to determine whether regulation of attorney statements to the press violated the First Amendment).

⁶⁷ *Hersh*, 347 B.R. at 24; see also 151 CONG. REC. H2063-01, 2066 (2005).

⁶⁸ *Id.*

⁷⁰ *Hersh*, 347 B.R. at 24 (justified reasons for acquiring additional debt prior to bankruptcy may include “(1) refinancing at a lower rate to reduce payments and forestall or prevent entering into bankruptcy, or (2) taking on secured debt such as loan on an automobile that would survive bankruptcy and also enable the debtor to

continue to get to work and make payments.”).

⁷¹ *Id.* at 24; see also 11 U.S.C. § 526(a)(4).

⁷² *Hersh*, 347 B.R. at 24, citing *Gentile*, 501 U.S. at 1030; see also 11 U.S.C. § 526(a)(4).

⁷⁴ 11 U.S.C. § 527.

⁷⁵ *Wooley v. Maryland*, 430 U.S. 705 (1977).

⁷⁶ See *Hersh*, 347 B.R. at 25-7; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 7-9.

⁷⁷ *Hersh*, 347 B.R. at 27; see also *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 7-9.

⁷⁸ *Hersh*, 347 B.R. at 27, quoting H.R. Rep. 109-31, reprinted in 2005 U.S.C.C.A.N. 88, 91 (“The amount of debt discharged by bankruptcy in a given year can be tens of billions of dollars.... As among consumer creditors, attorneys, and their debtor clients, the consumer debtor is often at an informational disadvantage. Thus, the government interest is significant.”)

⁷⁹ 11 U.S.C. § 527(b).

⁸⁰ *Hersh*, 347 B.R. at 27; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 8.

⁸¹ 11 U.S.C. § 528(b)(2)(B).

⁸² *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 9-11.

⁸³ *Hersh*, 347 B.R. at 27 n. 12; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 9-11.

Including the clauses mandated by § 528 would cause him to make untrue statements to his clients.⁸⁴

The Bankruptcy Court for the District of Oregon analyzed § 528 using the *Central Hudson* four-prong intermediate scrutiny commercial speech test and found that § 528 did *not* violate the Constitution.⁸⁶ The court found that each element of the test was met, acknowledging that the speech compelled was neither unlawful nor misleading,⁸⁷ that the government had a substantial interest in compelling the speech, and that the statute was narrowly drawn to advance the interest.⁸⁸ Like § 527, § 528 allows a “debt relief agency” to modify the language so long as it remains “substantially similar.”⁸⁹ The statute is flexible allowing an attorney to modify the language as well as include supplemental material to fulfill the disclosure requirement while avoiding untrue statements and misrepresentations.⁹⁰

Other Potential Constitutional Issues

Scholars have identified the following additional constitutional issues the courts may be called upon to consider:⁹¹

- Do the penalties prescribed by BAPCPA for violations

⁸⁴ *Hersh*, 347 B.R. at 27; 11 U.S.C. § 528(b)(2)(B).

⁸⁶ *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 9, citing *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980) (laying out the *Central Hudson* intermediate scrutiny four-prong test).

⁸⁷ *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 10; see also 11 U.S.C. § 528(b)(2)(B) (allowing for a “substantially similar statement” in lieu of the express language quoted in the statute).

⁸⁸ *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 10, citing 151 CONG. REC. H2063-01, 2066 (2005) (“[L]egislative history indicates that section 528 is intended to ‘[p]revent deceptive and fraudulent advertising practices by debt relief agencies....’”).

⁸⁹ See 11 U.S.C. §§ 527(b), 528(b)(2)(B).

⁹⁰ *Hersh*, 347 B.R. at 27 n. 12; *Olsen*, No. 05-6365-HO, 2006 WL 2345503, at 9-11.

⁹¹ See Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse*

of §§ 526, 527, and 528 violate the Tenth Amendment or Separation of Powers?⁹²

- Does the means test of § 707(b) violate the principles of Equal Protection?⁹³
- Does the compelled disclosure of tax returns imposed by § 521 violate privacy rights?⁹⁴
- Does the imposition of time limits on the courts pursuant to §§ 1112(b) and 521(a)(2) violate the principles of Separation of Powers and Due Process?⁹⁵

Summary

This article has outlined some of the First Amendment constitutional issues related to BAPCPA. To date, only a handful of courts have considered the constitutional implications of the new bankruptcy code. The few courts that have addressed these issues have employed deferring analytical approaches and interpretations, which have resulted in varying conclusions of law. This lack of uniformity has left the legal community pondering the scope and ramification of BAPCPA. At this point, it is impossible to predict how other courts will interpret these and other constitutional issues stemming from BAPCPA.

Prevention and Consumer Protection Act of 2005, 79 AM. BANKR. L.J. 571 (2005).

⁹² *Id.* at 580-82.

⁹³ *Id.* at 590-96.

⁹⁴ *Id.* at 596-99.

⁹⁵ *Id.* at 599-602.

**Ilan A. Nieuchoicz is a legal intern to the U.S. Bankruptcy Court for the Middle District of Florida in Orlando. The views expressed in this article are solely his own and do not reflect any position, policy or opinion of the Court. Nieuchoicz is a J.D. Candidate, magna cum laude, December 2006, Florida State University College of Law. He has been a member of the OCBA since June 2006. The author would like to thank Mr. Kurt F. Stone for his helpful suggestions.*

THE 100 CLUB!

Congratulations to the members of the Orange County Bar Association 100 Club

Fishback, Dominick, Bennett, Stepter, Ardaman, Ahlers & Bonus, LLP • Halim & Pratt, LLC

Billings, Morgan, Boatwright & Hernandez, LLC • Sublette, Sanders & Sanders, P.A.

Graham, Builder, Jones, Pratt & Marks, LLP • Marcus, McMahon & Myers, PL

Murrah, Doyle and Wigle, P.A. • N. Diane Holmes, P.A. • Wendy L. Aikin, P.A.

Legal Aid Society of the OCBA • Roetzel & Andress, LPA • The Brennan Law Firm

Quintairos, Prieto, Wood & Boyer, P.A. • Tangel-Rodriguez & Associates

King, Blackwell, Downs & Zehnder, P.A. • Law Office of Jeffrey Feulner, P.A.

Lewis & Crichton, Attorneys at Law • The Carlyle Appellate Law Firm

Stovash, Case & Tingley, P.A.

Is your firm part of the 100 Club? Any firm with two or more attorneys and 100% membership in the OCBA can be a member of the 100 Club. If you think your firm is eligible, e-mail a typed list of your attorneys to Susan Laviolette at susanl@ocbanet.org and she'll let you know!