MILAVETZ, GALLOP & MILAVETZ, P.A. v. UNITED STATES: THE SUPREME COURT RULES THAT LAWYERS ARE SUBJECT TO DEBT RELIEF AGENCY PROVISIONS

On March 8, 2010, the U.S. Supreme Court issued a 9-0 opinion in Milavetz, Gallop & Milavetz, P.A. v. United States. At issue in Milavetz were several of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). The Court made three important rulings in the case: first, that attorneys are included in the definition of "debt relief agency" (DRA) in §101(12A) of the Code; second, that §526(a)(4), which prohibits a DRA from advising a client to incur more debt "in contemplation of" bankruptcy, prohibits only advice to incur more debt when the "impelling reason" for the advice is anticipation of bankruptcy; and third, that §528, which imposes advertising disclosure requirements on DRAs, is reasonably related to the government's interest in preventing consumer deception and is therefore valid.

In ruling that attorneys are DRAs under the Code, the Court relied on a plain reading of the statute. Because a DRA is a person who provides "bankruptcy assistance" to certain individuals, and "bankruptcy assistance" includes some tasks, such as the provision of "legal representation with respect to" a bankruptcy case, that can only be performed by attorneys, the Court found no intent to exclude attorneys from the definition. In support of its holding, the Court noted several explicit exclusions from the DRA definition. Under §526(a)(4) of the Code, a DRA cannot advise a client to "incur more debt in contemplation of" filing a bankruptcy case. The petitioner had argued, and the Eighth Circuit agreed, that this provision was unconstitutionally overbroad because it prohibited advice that could be beneficial to both the debtor and his creditors, such as advice to refinance a mortgage at a lower interest rate in order to avoid bankruptcy altogether. The Supreme Court disagreed, holding that the only advice prohibited by the statute is advice to incur more debt "because the debtor is filing for bankruptcy." Adopting a narrow reading of the statute, the Court stated that the advice prohibited by §526(a)(4) would usually consist of advice that is "abusive per se," such as advice to "load up" on debt prior to bankruptcy with the expectation of discharging that debt. On the other hand, as the Court added in a footnote, advice to refinance a mortgage at a lower rate or purchase a reliable car before filing would be permissible because "the promise of enhanced financial prospects" is the impelling cause of the advice. Conceding that a broad reading of the statute would seriously undermine the attorney/client relationship, the court stressed that §526(a)(4) does not restrain a lawyer's ability to talk candidly with a client about the incurrence of debt in contemplation of filing a bankruptcy case. Under §528, DRAs, and therefore attorneys who qualify as DRAs, must identify themselves as such in their advertisements and disclose that they help people file for bankruptcy. The court saw this as a restriction on commercial speech, and thus found that an attorney's First Amendment interest in not providing the required information is minimal. Finding that §528's requirements are reasonably related

to the government’s interest in preventing consumer deception, the court upheld the requirements.