

Attorneys: Update Your Advertisements!

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The bankruptcy laws extensively changed following the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which became fully effective on October 17, 2005. As a result, confusion and uncertainty arose in the legal community with respect to bankruptcy as a whole, and the case law interpreting these changes continues to evolve.

With the enactment of the BAPCPA, the Bankruptcy Code 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." 11 U.S.C. § 101(12A). The BAPCPA also places certain restrictions on debt relief agencies. *See*, 11 U.S.C. § 526(a)(4). For instance, section 526(a)(4) of the Bankruptcy Code provides in pertinent part that "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." 11 U.S.C. § 526(a)(4). The BAPCPA also requires debt relief agencies to include in their advertisements certain disclosures. *See*, 11 U.S.C. § 528(b)(2). For example, section 528(b)(2)(B) of the Bankruptcy Code provides in pertinent part 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.'" 11 U.S.C. § 528(b)(2)(B).

The Supreme Court of the United States had an opportunity to review these BAPCPA provisions in the recent case, Milavetz, Gallop & Milavetz, P.A. v. U.S., 2010 WL 757616 (U.S. 2010). The Court in Milavetz interpreted section 101(12A) of the Bankruptcy Code and held that an attorney who provides bankruptcy assistance to an assisted person is a debt relief agency under the BAPCPA. Therefore, because the BAPCPA places certain restrictions and requirements on debt relief agencies, it is important for each attorney and law firm to evaluate their own practice to determine whether they are in fact operating as a debt relief agency, so as to ensure compliance with the newly enacted provisions of the BAPCPA.

In order to determine whether an attorney or law firm is operating as a debt relief agency, it is necessary to evaluate whether that attorney or law firm is providing "bankruptcy assistance" to an "assisted person," as these terms are defined in the Bankruptcy Code. The Bankruptcy Code defines "bankruptcy assistance" as encompassing several services performed generally by bankruptcy attorneys including "providing information, advice, counsel, document preparation, or filing...or providing legal representation with respect to a case or proceeding under this title." 11 U.S.C. § 101(4A). 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." 11 U.S.C. § 101(3). Therefore, in accordance with the holding in Milavetz, if an attorney or law firm is providing bankruptcy assistance to an assisted person, then that attorney or law firm is likely deemed to be a debt relief agency under the BAPCPA and must comply with the restrictions and requirements established by the BAPCPA for debt relief agencies.

The Court in Milavetz also interpreted section 526(a)(4) of the Bankruptcy Code and held that section 526(a)(4) was intended to prohibit a debt relief agency from advising an assisted person to "load up" on debt pre-bankruptcy with the expectation of that debt being discharged later in a bankruptcy case.

Finally, the Court in Milavetz reviewed section 528 of the Bankruptcy Code and upheld the constitutionality of the requirements set forth therein, which are intended to prevent misleading advertisements by debt relief agencies. As a result, if you are a debt relief agency, in that you are providing bankruptcy assistance to an assisted person as defined in the Bankruptcy Code, you must include in your advertisements directed to the general public the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or language substantially similar. 11 U.S.C. § 528(b)(2)(B).

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**, Law Clerk. The primary areas of practice of **Iurillo & Associates, P.A.** are Commercial and Bankruptcy Litigation and Debtors' and Creditors' Rights.