

**Milavetz, Gallop & Milavetz, P.A. v. United States,**  
541 F.3d 785 (8<sup>th</sup> Cir. 2008)  
*cert. granted* 2009 U.S. LEXIS 4255 (U.S., June 8, 2009)

Edited for classroom use. Questions and comments appear in side bar text boxes

Appeal from the United States District Court for the District of Minnesota. James M. Rosenbaum, U.S. District Judge. Milavetz, Gallop & Milavetz P.A. v. United States, 355 B.R. 758 (D. Minn., 2006).

**The attorneys and law firm were self represented by** Alan Scott Milavetz, Chad Schulze, Milavetz & Gallop, Edina, MN; and by Joseph A. Rymanowski, Jr., St. Paul, MN. The two Doe plaintiffs were also represented by Alan Scott Milavetz, Chad Schulze, Milavetz & Gallop, Edina, MN; Thomas F. Miller, Wayzata, MN.

Consider that this case was brought by a small (10 attorney) general practice firm near Minneapolis and will now be before the United States Supreme Court. Why do you suppose the attorneys in this firm believed that this issue was significant enough to devote the substantial resources necessary to pursue this case so far?

The United States was represented by Marcia Kay Sowles, Senior Counsel, U.S. Department of Justice, Civil Division, Washington, DC; Roylene A. Champeaux, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, District of Minnesota, Minneapolis, MN; Mark R. Freeman, Mark B. Stern, U.S. Department of Justice, Civil Division, Appellate Staff, Washington, DC.

An amicus brief was filed for the Commercial Law League of America on Behalf of Appellee by DeWitt Brown, William H. Schorling of Buchanan & Ingersoll, Philadelphia, PA.

The Commercial Law League of America is a national organization of attorneys, judges and other experts in credit and finance matters. See <http://www.clla.org>, who especially represents the interests of creditors' attorneys. Another statute that applies to attorneys is the Fair Debt Collection Practices Act. Originally the Act exempted attorneys from its scope. In 1986, Congress amended the Act, eliminating the attorney exemption. The US Supreme Court thereafter held that the Act created no implied exceptions for attorneys. *Heintz v. Jenkins*, 115 S. Ct. 1489, 1492 (1995).

**The Case was heard by Circuit Judges Kermit Bye, Lavenski Smith, & Steven Colloton**

Judge Bye is from Fargo ND, was appointed by Clinton in 2000; President G.W. Bush appointed Judge Smith (Little Rock, AK) in 2002 and Judge Colloton (Des Moines, IA) in 2003.

## OPINION

Smith, Circuit Judge.

Milavetz, Gallop & Milavetz, P.A., a law firm that practices bankruptcy law, the firm's president, a bankruptcy attorney within the firm, and two clients<sup>1</sup> who sought bankruptcy advice from the firm brought suit against the United States seeking a declaratory judgment that certain provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)—11 U.S.C. §§ 526(a)(4) and 528(a)(4) and (b)(2)—did not apply to attorneys and law firms and are unconstitutional as applied to attorneys. The district court granted summary judgment to the plaintiffs and issued an order declaring that: (1) attorneys in the District of Minnesota were excluded from the definition of a "debt relief agency" as defined by BAPCPA; and (2) the challenged provisions were unconstitutional as applied to attorneys in the District of Minnesota. We affirm in part and reverse in part.

### *I. Background*

On April 20, 2005, BAPCPA was signed into law, amending and adding multiple sections of the Bankruptcy Code ("the Code"). ... One BAPCPA amendment added a new term, "debt relief agency," which is defined in § 101(12A) of the Code. 11 U.S.C. § 101(12A). The amended Code restricts some actions of debt relief agencies, while requiring them to do others. *See* 11 U.S.C. § 526 ("Restrictions on debt relief agencies"); 11 U.S.C. § 528 ("Requirements for debt relief agencies"). For example, § 526(a)(4) bars a debt relief

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<sup>1</sup> The client-plaintiffs sought prebankruptcy advice regarding the incurrence of additional debt prior to filing bankruptcy. The Bankruptcy Code precludes a debt relief agency from advising an assisted person from incurring additional debt in contemplation of bankruptcy. 11 U.S.C. § 526(a)(4). Thus, these client-plaintiffs are appearing on behalf of themselves and all others similarly situated who desire to exercise their First Amendment rights with attorneys regarding bankruptcy information.

agency from advising a client "to incur more debt in contemplation" of a bankruptcy filing, 11 U.S.C. § 526(a)(4), while §§ 528(a)(4) and (b)(2) require debt relief agencies to include a disclosure in their bankruptcy-related advertisements directed to the general public declaring: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code[,]'or a substantially similar statement." 11 U.S.C. § 528(a)(4), (b)(2). The plaintiffs sought alternative remedies. First, plaintiffs requested a declaratory judgment that attorneys did not fall within the definition of "debt relief agency." If the court determined that attorneys fell within the definition of debt relief agency, they challenged the constitutionality of §§ 526(a)(4) and 528(a)(4) and (b)(2), as applied to attorneys.

## II. Discussion

### A. Debt Relief Agencies

As you read these provisions of the Act, try to decide for yourself whether you think Attorneys are meant to be included.

Initially, we address whether attorneys fall within the Code's definition of debt relief agencies. If they do not, we will have no need to

address the constitutionality of §§ 526(a)(4) and 528(a)(4) and (b)(2), which only apply to debt relief agencies. ...

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.

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

Further, the Code defines the term "bankruptcy assistance" to mean: 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.

*Id.* at § 101(4A) (emphasis added).

Additionally, the Code defines the term "assisted person" as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$164,250." *Id.* at § 101(3).

The plaintiffs argue that attorneys are not "debt relief agencies" because the definition of debt relief agencies makes no direct reference to attorneys, even though "attorney" is a defined term in the Code,<sup>2</sup> but does include

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<sup>2</sup> "The term 'attorney' means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law." 11 U.S.C. § 101(4). This definition makes no reference to "debt relief agencies" or to subsection (12A).

the term "bankruptcy petition preparer" which, by definition, excludes debtor's attorneys and their staff.<sup>3</sup>

. . . [The court then engages in substantial statutory construction]

The plain reading of the definition of debt relief agency, and the defined terms that make up that definition, leads us to conclude that attorneys who provide "bankruptcy assistance" to "assisted persons" are unambiguously included in the definition of "debt relief agencies." *See Olsen*, 350 B.R. at 912 ("[I]t is the plain language of the Act that leads to the conclusion that attorneys are to be included in the definition of 'debt relief agency,'" and "[t]hus, further use of the tools of statutory construction is not necessary"). The statutory language sweeps broadly and clearly covers the legal services provided by attorneys to debtors in bankruptcy unless excluded by another provision.

Congress specifically listed five exclusions from the definition of "debt relief agency," and if it meant to exclude attorneys from that definition it could have explicitly done so. *Id.*; 11 U.S.C. §101(12A).

Moreover, if attorneys were not included in the definition of debt relief agencies, Congress would have had no reason to include § 526(d)(2), which expressly provides that nothing in §§ 526, 527, or 528 (the sections covering debt relief agencies) "shall be deemed to limit or curtail the authority or ability 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." 11 U.S.C. § 526(d)(2)(A) and (B). The legislative history provides further indication that attorneys are included in the definition. *See H.R. Rep. No. 109-31, 109th Cong. 1st Sess.*

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<sup>3</sup> "[B]ankruptcy petition preparer' means a person, *other than an attorney for the debtor or an employee of such attorney* under the direct supervision of such attorney, who prepares for compensation a document for filing [by the debtor in connection with his bankruptcy case]." 11 U.S.C. § 110(a)(1) (emphasis added); *see also id.* at § 110(a)(2) (defining "document for filing" as used in § 110(a)(1)).

at 4 (April 8, 2005) ("The bill's consumer protections include provisions strengthening professionalism standards *for attorneys* and others who assist consumer debtors with their bankruptcy cases") (emphasis added).<sup>4</sup>

Why did Congress include this provision? What if Congress took the next step and did include legislative provisions that disqualified certain attorneys from practicing before the Bankruptcy courts? Would such a law be constitutional?

Because attorneys were not specifically excluded from the definition of debt relief agencies, we hold that attorneys that provide "bankruptcy assistance" to "assisted persons" are "debt relief agencies" as that term is defined by the Code. Interpreting the definition of "debt relief agency" to exclude bankruptcy attorneys would be contrary to Congress's intent.

#### B. *Constitutionality of § 526(a)(4)*

Having concluded that attorneys providing bankruptcy assistance to assisted persons are debt relief agencies under the Code, we now must determine whether the challenged provisions placing restrictions and requirements on debt relief agencies are unconstitutionally overbroad as applied to these types of attorneys.<sup>5</sup> One of the sections challenged by the plaintiffs in this case is § 526(a)(4), which states:

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<sup>4</sup> Additionally, while we recognize that the Supreme Court has stated that "failed legislative proposals are a particularly dangerous ground on which to rest [a statutory interpretation]," *Lockhart v. United States*, 546 U.S. 142 (2005) (internal quotation marks and brackets omitted), we note that on March 9, 2005, Senator Feingold proposed amendment No. 93 to Congress which would have excluded attorneys from the definition of debt relief agencies, *see* 151 Cong. Rec. S2306–02, 2316 (daily ed. Mar. 9, 2005) (statement by Sen. Feingold) ("This amendment would exclude lawyers from the provisions dealing with 'debt relief agencies' . . ."), but the Senate did not address the proposal.

<sup>5</sup> Even though a more narrowly drawn version of § 526(a)(4) would likely be valid as applied to the plaintiffs in this case, our analysis applies to all attorneys falling within the definition of debt relief agencies, not merely the plaintiff-attorneys. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798–99 (1984) (explaining that the overbreadth doctrine allows a party to challenge a broadly written statute "even though a more narrowly drawn statute would be valid as applied to the party in the case," as "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression") (internal quotations and citation omitted).

(a) A debt relief agency shall not—

...

(4) advise an 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.

11 U.S.C. § 526(a)(4).

Plaintiffs assert that the prohibition against advising an assisted person or prospective assisted person to incur more debt in contemplation of bankruptcy violates the First Amendment. The parties disagree as to the level of scrutiny we apply to the constitutional analysis of this limitation on speech. Plaintiffs claim that we should review the constitutionality of § 526(a)(4) under the strict scrutiny standard as the restriction on attorney advice is content-based. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"). Under strict scrutiny review, the government has the burden to prove that the constraints on speech are supported by a compelling governmental interest and are narrowly tailored, such that the statutory effect does not prohibit any more speech than is necessary to serve the governmental interest. *Republican Party of Minnesota v. White*, 536 U.S. 765, 774–75 (2002).

In contrast, the government argues that § 526(a)(4)'s restrictions are a type of ethical regulation, invoking the more lenient standard outlined in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). Under the *Gentile* standard, we would balance the First Amendment rights of the attorneys against the government's legitimate interest in regulating the activity in question—the prohibition of advising assisted persons to incur more debt in contemplation of bankruptcy—and then determine whether the regulations

impose "only narrow and necessary limitations on lawyers' speech." *Id.* at 1075.

Note that *Gentile* was a Nevada criminal defense attorney who had been disciplined by the Supreme Court for making prejudicial pretrial publicity statements, in violation of the state court's rule of professional conduct limiting attorney pre-trial publicity. The court reversed the discipline, but in a 5-4 split, with no clear agreement regarding the rationale. Model Rule 3.6 provides the current ABA version of this rule. Do you think it makes a difference that the rule being challenged in *Gentile* was a state court's rule of professional conduct rather than federal legislation? What other constitutional considerations would impact the court's decision in *Gentile*?

According to the government, § 526(a)(4) should be interpreted as merely preventing an attorney from advising an assisted person (or prospective assisted person) to take on more debt in contemplation of bankruptcy when the incurrance of such debt is done with the intent to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy discharge. However, the plain language of the statute does not permit this narrow interpretation. Rather, § 526(a)(4) broadly prohibits a debt relief agency from advising an assisted person (or prospective assisted person) to incur *any* additional debt when the assisted person is contemplating bankruptcy. The statute's blanket prohibition applies even if the additional debt would not be discharged during the bankruptcy proceedings. 11 U.S.C. § 526(a)(4).

Are there no other legal avenues to dissuade attorneys from counseling their clients to abuse bankruptcy laws? Consider Model Rules 3.1 and 3.3. What about Rule 11 of the Federal Rules of Civil Procedure? Are there other standards as well?

Thus, regardless of whether the government's interest in prohibiting the speech was legitimate (*Gentile* standard) or compelling (strict scrutiny standard), § 526(a)(4) is unconstitutionally overbroad as applied to attorneys falling within the definition of debt relief agencies because it is not

narrowly tailored, nor narrowly and necessarily limited, to restrict only that speech that the government has an interest in restricting. Instead, § 526(a)(4) prohibits attorneys classified as debt relief agencies from advising any assisted person to incur any additional debt in contemplation of bankruptcy; this prohibition would include advice constituting prudent pre-bankruptcy planning that is not an attempt to circumvent, abuse, or undermine the bankruptcy laws. Section 526(a)(4), as written, prevents attorneys from fulfilling their duty to clients to give them appropriate and beneficial advice not otherwise prohibited by the Bankruptcy Code or other applicable law.

There are certain situations where it would likely be in the assisted person's, and even the creditors', best interest for the assisted person to incur additional debt in contemplation of bankruptcy. However, under § 526(a)(4)'s plain language an attorney is prohibited from providing this beneficial advice—even if the advice could help the assisted person avoid filing for bankruptcy altogether. For instance, it may be in the assisted person's best interest to refinance a home mortgage in contemplation of bankruptcy to lower the mortgage payments. This could free up additional funds to pay off other debts and avoid the need for filing bankruptcy all together. *Hersh*, 347 B.R. at 24. Moreover, it may be in the client's best interest to incur additional debt to purchase a reliable automobile before filing for bankruptcy, so that the debtor will have dependable transportation to travel to and from work, which will likely be necessary to maintain the debtor's payments in bankruptcy. *Id.* Incurring these types of additional secured debt, which would often survive or could be reaffirmed by the debtor, may be in the debtor's best interest without harming the creditors.

<p>If an attorney did not provide this advice, would the attorney have violated Rules 1.1 and 1.4 of the Rules of Professional Conduct? Would the attorney be liable for malpractice?</p>
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Factual scenarios other than these few hypothetical situations no doubt exist and may further illustrate why incurring additional debt in contemplation of bankruptcy may not be abusive or harmful to creditors. Nonetheless, § 526(a)(4), as written, does not allow attorneys falling within the definition of debt relief agencies to advise assisted persons (or prospective assisted persons)—i.e. clients (or prospective clients) meeting the definition of assisted person—to incur such debt. Thus, § 526(a)(4) is not narrowly tailored nor narrowly and necessarily limited to prevent only that speech which the government has an interest in restricting.

Therefore, we hold that § 526(a)(4) is substantially overbroad, and unconstitutional as applied to attorneys who provide bankruptcy assistance to assisted persons, as those terms are defined in the Code.

[An additional issue, regarding the constitutionality of the BPA's requirements that attorneys include certain disclosures in their advertising was upheld as constitutional.]

### III. *Conclusion*

In sum, attorneys who provide bankruptcy assistance to assisted persons are debt relief agencies under the Bankruptcy Code, and § 526(a)(4) is unconstitutional as applied to these attorneys, but §§ 528(a)(4) and (b)(2) are constitutional. Accordingly, we affirm in part and reverse in part.

COLLTON, Circuit Judge, concurring in part and dissenting in part.

.... I disagree ... with the court's holding that 11 U.S.C. § 526(a)(4) is unconstitutionally overbroad in violation of the First Amendment, and I would therefore reverse the district court's decision declaring this statutory provision unconstitutional.

Milavetz, Gallop, & Milavetz, P.A., mounts a facial attack on §526(a)(4), arguing that the section’s potential application to attorneys in hypothetical situations requires that the statute be declared impermissibly overbroad and unconstitutional. This case involves a facial challenge in the First Amendment context, “under which a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 n.6 (2008). This “overbreadth doctrine,” however, is “strong medicine that is used sparingly and only as a last resort.” *New York State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988) (internal quotations omitted). It should be applied only when there is “a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.” *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). The Supreme Court recently emphasized that it has “vigorously enforced the requirement that a statute’s overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.” *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008).<sup>6</sup>

To resolve the constitutional challenge brought by Milavetz, we must first construe the disputed statute. When presented with a constitutional challenge to an Act of Congress, we have not only the power, but the duty, to adopt a narrowing

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<sup>6</sup> The district court purported to consider only an “as-applied” challenge to § 526(a)(4), rather than an overbreadth challenge, and ultimately declared the section “unconstitutional as applied to attorneys.” *Milavetz, Gallop & Milavetz, P.A. v. United States*, 355 B.R. 758, 766 n.4, 769 (D. Minn. 2006). The majority correctly recognizes that the district court’s approach is really an overbreadth analysis, and considers the statute under that framework. *See ante*, at 9 & n.7, 11, 13 & n.10. The “as applied” method of analysis, by contrast, considers the statute’s application to a “particular claimant” based on “harm caused to the litigating party.” *Turchick v. United States*, 561 F.2d 719, 721 n.3 (8th Cir. 1977). “The ‘as applied’ method vindicates a claimant whose conduct is within the First Amendment but invalidates the challenged statute *only to the extent of the impermissible application.*” *Id.* (emphasis added). The district court and the majority have declared § 526(a)(4) unconstitutional in *all* of its applications to *all* attorneys, and the supporting reasoning is thus consistent with “facial overbreadth analysis.” *Id.* (punctuation omitted).

construction that will avoid constitutional difficulties whenever possible. *Boos v. Barry*, 485 U.S. 312, 330-31 (1988). . . ., in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), the Court emphasized that “it is incumbent upon” a federal court to read a statute to eliminate constitutional doubts, “so long as such a reading is not plainly contrary to the intent of Congress.” *Id.* at 78.

The challenged provision in this case provides in 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). Milavetz argues that according to this provision, a debt relief agency may not advise a client to incur *any* debt for *any* purpose when the client is contemplating the filing of a petition for bankruptcy. As such, Milavetz contends that an attorney could be sanctioned for “fulfilling his duty to his client to give legal and appropriate advice not otherwise prohibited by the Bankruptcy Code.” (Brief of Appellee 30). Even under Milavetz’s broad construction of the statute, a facial challenge resting on a “few hypothetical situations,” *ante*, at 12, is unlikely to justify invalidating a statute in *all* of its applications, because “the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.” *Vincent*, 466 U.S. at 800.

It is unnecessary to resolve whether § 526(a)(4) is impermissibly overbroad when given its broadest reading, however, because the government suggests an acceptable narrowing construction of the statute that would avoid most constitutional difficulties. The government contends that “in contemplation of” filing for bankruptcy is a term of art that denotes an action taken with the intent to abuse the protections of bankruptcy laws. Under this view, the statute should be construed to prohibit only advice that a client engage in conduct for the purpose of manipulating the bankruptcy system.

The text, structure, and legislative history of § 526(a)(4) provide adequate support for a narrowing construction. Particularly given the latitude of federal courts to narrow a text to avoid constitutional difficulties, *see Boos*, 485 U.S. at 330-31, the words “in contemplation of . . . filing a case” need not create impermissible overbreadth. Rather, we may recognize that the phrase “in contemplation of” has been construed in the bankruptcy context to mean actions taken with the intent to abuse the protections of the bankruptcy system. Black’s Law Dictionary reflects this understanding, defining “contemplation of bankruptcy” as “the thought of declaring bankruptcy because of the inability to continue current financial operations, *often coupled with action designed to thwart the distribution of assets in a bankruptcy proceeding.*” *Black’s Law Dictionary* 336 (8th ed. 2004) (emphasis added). American and English authorities construing the bankruptcy laws also support the proposition that the words “in contemplation of” may be understood to require an intent to abuse the bankruptcy laws. *In re Pearce*, 19 F. Cas. 50, 53 (D. Vt. 1843) (No. 10873) (concluding that an act was done “in contemplation of bankruptcy” if it was done “in anticipation of breaking or failing in his business, of committing an act of bankruptcy, or of being declared bankrupt at his own instance, on the ground of inability to pay his debts, *and intending to defeat the general distribution of effects, which takes place under a proceeding in bankruptcy.*”) (emphasis added); *Morgan v. Brundrett*, 5 Barn. & Ad. 289, 296, 110 Eng. Rep. 798, 801 (K.B. 1833) (Parke, J.) (interpreting “in contemplation of bankruptcy” to mean that “the payment or delivery must be with intent to defeat the general distribution of effects which takes place under a commission of bankruptcy.”); *Fidgeon v. Sharpe*, 5 Taunt. 539, 545-46, 128 Eng. Rep. 800, 802-03 (C.P. 1814) (Gibbs, C.J.) (An act made in contemplation of bankruptcy “must be intended in fraud of the bankrupt laws.”); *cf.* *Buckingham v. McLean*, 54 U.S. 151, 167 (1851) (“To give to these words, contemplation of bankruptcy, a broad scope, and somewhat loose meaning, would not be in furtherance of the general purpose with which they were introduced.”); *id.* at 169 (relying on English bankruptcy decisions as

instructive authority on meaning of the former Bankrupt Act). Our duty to construe the statute to avoid constitutional difficulties counsels that we should look to these authorities for a plausible alternative to the broad construction urged by Milavetz.

The structure of § 526(a)(4) also supports a narrowing construction. The prohibitions of this statute can be enforced only through the civil remedies provided in § 526(c). An attorney who violates § 526(a)(4) can be sanctioned in just three situations: if a debtor sues the attorney for the available remedies – remittal of fees, actual damages, and reasonable attorney’s fees and costs; if a state attorney general sues for a resident’s actual damages; or if a court finds that the attorney intentionally violated § 526(a)(4), and chooses to “impose an appropriate civil penalty.” 11 U.S.C. § 526(c). The remedies for a violation thus emphasize actual damages.

If an attorney is found liable under this Act, would he or she also be subject to discipline for the same conduct?
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But legal and appropriate advice that would be protected by the First Amendment, yet prohibited by a broad reading of § 526(a)(4), should cause no damage at all. If an attorney advises a debtor to refinance his home to lower mortgage payments, or to purchase a reliable car to enable him to pay off his debts, *see ante*, at 11-12, then a debtor following that advice would suffer no damage. There is no reason to believe that a client could recover the remittal of attorney’s fees or that a court would find a civil penalty “appropriate” as a remedy for legal advice that *benefits* both the debtor *and* his creditors. Rather, a debtor is likely to have a remedy against an attorney only in the case of an abusive bankruptcy petition, where the debtor may suffer damages if the petition is dismissed as abusive, *see* 11 U.S.C. § 707(b)(1), and where an attorney general or a court has reason to seek or impose sanctions against an abusive debt relief agency. The remedial focus of § 526 thus bolsters the proposition that §

526(a)(4) was aimed only at advice given by a debt relief agency that is designed to abuse the bankruptcy process.

The incorporation of an abusive purpose requirement into §526(a)(4) is also consonant with the evident purpose of the statute. The government argues, and Milavetz acknowledges, that a principal goal of Congress in passing the statute was to “preclude debtors from taking on more debt knowing that it will later be discharged during bankruptcy.” (Brief of Appellee 34). A narrowing construction of § 526(a)(4) is in accord with expressions of desire in the legislative history to address “misconduct by attorneys and other professionals,” and “abusive practices by consumer debtors who, for example, knowingly load up with credit card purchases or recklessly obtain cash advances and then file for bankruptcy relief.” H.R. Rep. No. 109-31, pt.1, at 5, 15 (2005) (internal quotation omitted), *as reprinted in* 2005 U.S.C.C.A.N. 88, 92, 101. Milavetz itself argues that a broad construction of § 526(a)(4) “goes beyond” this congressional purpose, and is “absurd,” because it would prevent an attorney from advising a client to take actions that might avoid the need for filing bankruptcy altogether. (Brief of Appellee 34). Given our duty to construe an Act of Congress in a manner that eliminates constitutional doubts, there is no need to adopt a construction that one party says is absurd, that the other party says was unintended by Congress, and that sweeps in salutary legal activity that would be a strange target for a statute entitled the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

If the problem is client behavior (i.e., debtors incurring additional debt in bad faith just before filing for bankruptcy), why is regulating attorney advice the solution? Consider a similar attempt to deter individuals from “spending down” their assets in order to qualify for Medicaid. Congress first made it a crime for a person to transfer assets to qualify for Medicaid. There was such protest over the “Granny Goes to Jail” law that Congress repealed the law and, instead, passed legislation making it a crime to “advise, for a fee, a person to transfer assets” (even though it was at that point entirely legal for the person to do so in order to qualify for Medicaid). 42 U.S.C.A. § 1320a-7b(a)(6)(1997). The New York District Court enjoined the “Granny’s Lawyer Goes to Jail” law as an unconstitutional infringement on attorney free speech rights. *New York State Bar Ass’n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998).

For these reasons, I would reverse the district court’s decision declaring unconstitutional the provision codified at 11 U.S.C. § 526(a)(4).

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