

Chap 7..13

Bankruptcy Blotter



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THE PRUDENT PRACTITIONER

After Milavetz, You Are a Debt Relief Agency¹

By Rosemary E. Williams

BAPCPA created a new title for attorneys who represent debtors who are natural persons having primarily consumer debts and who have non-exempt property with an aggregate value of \$164,250 or less:² “debt relief agency.” By statute, a debt relief agency is a person or entity who provides “any bankruptcy assistance” to an “assisted person” in return for payment of money or other valuable consideration, or who is a bankruptcy petition preparer.³ Therefore, an attorney who represents a debtor with non-exempt property valued in excess of \$164,250 is still just that: an attorney.

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From the Editor

Dear Chap 7..13 Subscribers,

We have been very busy updating the software with the March 15th update (effective date of changes; update will be in advance of this date) to means test data and the pending (as of the date of writing) release of version 9.5 which will contain updates to federal and California exemptions’ updates as well as debt ceiling limits effective April 1st.

Version 9.5 will also contain research references and links from within the software to Westlaw. These links come with an offer of some free time on Westlaw. We encourage you to take advantage of this to see some of what Westlaw has to offer.

Cordially,

Your Chap 7..13 Project Team

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Officers, directors, employees, or agents of a debt relief agency or of a bankruptcy petition preparer are not in themselves debt relief agencies, nor is a nonprofit organization exempt from federal taxation⁴ under the Internal Revenue Code.⁵ A creditor of an “assisted person,” to the extent that the creditor is helping an assisted person to restructure a debt owed by the assisted person to the creditor is, notwithstanding the function, still not a debt relief agency,⁶ nor is a depository institution⁷ or any federal or state credit union,⁸ or any affiliate or subsidiary of either.⁹ The author of this column, her publisher, any distributor or seller of these works or any other work entitled to copyright protection,¹⁰ are not debt relief agencies — but could become one “when acting in such capacity.”¹¹

Besides creating the term “debt relief agency,” BAPCPA hosts a list of potential liabilities, requirements and restrictions, including prohibited legal advice and disclosures. One provision in particular has generated constitutional challenges: BAPCPA directs that a DRA may not “advise” an assisted person (aka a consumer debtor) or prospective assisted person to incur more debt in contemplation of filing a bankruptcy case.¹² On review of the constitutionality of this provision, the Supreme Court held that this means that advice is forbidden only when the advice is given “because the debtor is filing for bankruptcy, rather than for a valid purpose” such as reducing debt load by refinancing,¹³ and is thus within constitutional limits and is not impermissibly vague.

The Supreme Court’s 2010 decision affirming that attorneys representing consumer debtors were DRAs, and that the Code’s provision prohibiting advice to debtors to incur more debt except when given for a “valid purpose” includes a clarifying direction: the provision prohibits a DRA from “advising a debtor to manipulate the protections of the bankruptcy system by ‘loading up’ on debt with the expectation of obtaining its discharge, conduct that is abusive per se.”¹⁴ Are there any attorneys who tell consumer debtors to max their credit cards with a trip to Hawaii to relax before filing bankruptcy? Have there ever been?

Prior to the Supreme Court’s decision, several attorneys, law firms and one bar association mounted constitutional challenges to this provision. The least helpful decision, but one which came close to that of the Supreme Court, was that of the Court of Appeals for the Fifth Circuit,¹⁵ which held, in reversing a district court’s finding that the provision was unconstitutional, that, “to avoid potential constitutional questions,” the provision “had to be interpreted” to prohibit attorneys from advising clients to incur debt in contemplation of bankruptcy “only when doing so would be an abuse or improper manipulation of bankruptcy system.” Unlike the Supreme Court, the Court of Appeals did not provide guidelines or suggestions as to what might constitute an “abuse” of the bankruptcy system. This failing left the opinion scarcely worth the filing fee, other than to create a sort of conflict in opinion with the Court of Appeals for the Eighth Circuit which ultimately permitted Supreme Court review. For example, the Fifth Circuit did not address whether a DRA could be found in violation of the provision if the debtor’s case was dismissed as an “abuse” of the bankruptcy system for any of the many available reasons.

Fortunately, another circuit court was more willing to say what it meant. The Court of Appeals for the Eighth Circuit¹⁶ held that the provision was “unconstitutionally overbroad as applied to attorneys who provide bankruptcy assistance to assisted persons.” The Court noted that the provision would prevent a debtor’s advisor from suggesting refinancing of a mortgage, the purchase of an alternate vehicle where the existing one was too costly, or any other measure which could reduce the debtor’s expenses so as to free more funds for payment of the debtor’s obligations and living costs, or give any related advice which was legal but for BAPCPA. The objections pointed out by the Eighth Circuit have therefore been met by the Supreme Court, but its ruling of unconstitutionality has been reversed.

In another approach to the same conclusion, the District Court for Oregon¹⁷ took up the provision and held that it “had a chilling effect” on attorneys’

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protected advice to clients, and was over-inclusive because it prevented attorneys from assisting debtors in legitimate pre-bankruptcy planning. The District Court also found that the provision unconstitutionally violated attorneys' free speech rights, agreeing in that conclusion with the District Court for Connecticut, which held the provision unconstitutional as a First Amendment violation.¹⁸ These rulings too have been overturned by the Supreme Court, which found that, under a "narrower reading," the Court thought the language referred to a specific type of misconduct designed to manipulate the protections of the bankruptcy system, and concluded that the section only prohibits a DRA from giving advice as to the "manipulation" of the bankruptcy system, and thus passed constitutional muster.

Throughout its decision, the Supreme Court made repeated references to a 1933 decision holding that, in the context of a reexamination of fees paid to an attorney for legal services provided immediately before an involuntary petition was filed, the "nature of the legal services" rendered could be considered in determining whether the "thought of bankruptcy was the impelling cause of payment." The debtor had paid attorneys to negotiate with creditors for a time extension and, if necessary, for the operation of the business under the creditors' supervision. The Supreme Court held that did not establish, as matter of law, that the payment was not "in contemplation of bankruptcy" within the statute authorizing a re-examination of transaction.¹⁹ Thus precedent existed, within constitutional boundaries, for prohibiting advice to debtors by attorneys about methods of abusing bankruptcy relief.

Specifically, the Supreme Court quoted from its 1933 decision:

Recognizing "'the temptation of a failing debtor to deal too liberally with his property in enabling counsel to protect him,' we read 'in contemplation of ... filing' in that context to require that the portended bankruptcy have 'induce[d]' the transfer at issue, understanding inducement to engender suspicion of abuse. In so construing the statute, we identified the "controlling question" as "whether the thought of bankruptcy was the impelling cause of the transaction."

and concluded that, given the substantial similarities between [1933's § 96(d) and today's §526(a)(4)], we think the controlling question under the latter provision is likewise whether the impelling reason for "advis[ing] an assisted person ... to incur more debt" was the prospect of filing for bankruptcy.²⁰

Other parts of this industry-driven provision have been found troublesome, but on closer examination, fall into the "much ado about nothing" category. For example, a debt relief agency must, no later than five days after "the first date on which such agency provides any bankruptcy assistance services" to a consumer debtor, but before the petition is filed, sign a written contract with the consumer debtor that "explains clearly and conspicuously:

- (1) the services the agency will provide;
- (2) the fees or charges for the services; and
- (3) the terms of payment."²¹

The DRA is to provide the assisted person with a copy of the "fully executed and completed contract," although a date for this is not specified.²² This provision directs that representation is to be undertaken under a contract with the client. Any professional sensible of keeping time-consuming arguments (and liability premiums) to a minimum already does that.²³

The disclosures mandated for a DRA are likewise a lot of sound and fury signifying not much, although they do constitute another invitation to prepare a booklet, completing with the firm's name and contact information, for delivery to prospective debtors containing the notices and some incidental advertising. A DRA must provide an assisted person with a written notice containing (1) a "brief" description of Chapters 7, 11, 12, and 13, and the "general purpose, benefits and costs of proceeding under each of these chapters; (2) the types of services available from credit counseling agencies; (3) a statement that a person who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury in connection with a bankruptcy case "shall be subject to fine, imprisonment, or both; and a warning that (4) all information supplied by a debtor in connection with a case "is subject to examination by the Attorney General.²⁴ Other than threats adopted by a Congress that obviously preferred a stick to a carrot, nothing there that prudent attorneys have not been doing for years. Some of this is duplicated by the Clerk's notice to be delivered to the debtor prior to the petition date. (Is this a tacit admission that the Clerk's notice, divorced as it is from any context or explanation that might make it helpful, now completely redundant?) The only real hazard here is flooding the debtor with so much paper, much of it redundant or useless, that she or he gives up on understanding any of it. Not surprisingly, the requirement that attorneys provide assisted persons with notice of this information has passed constitutional review.²⁵

Practice Tip: If no local form is available, a prudent practitioner could obtain a copy of the Clerk's notice²⁶ and include its language as part of the mandated notices a DRA must provide.

Other DRA provisions mandate inclusion of certain language in advertising, including a statement that the attorney or law firm is a "debt relief agency." All to the good, really. This has passed constitutional muster on the ground that the disclosure requirements are "reasonably related to the government's interest in protecting consumer debtors from deceptive advertising."²⁷ Again, an advertising help. Being a "debt relief agency" sounds more comforting to a frightened debtor than bankruptcy court, especially given all the negative press about BAPCPA's closing the doors to bankruptcy relief. It also gives the DRA more latitude in fashioning relief to match the assisted person's needs without preconceived notions by the client about what's necessary.

The DRA must give a "clear and conspicuous notice advising" the consumer debtor, no later than three business days after the "first date on which a DRA first offers to provide bankruptcy assistance services:"

- (1) all information that the consumer debtor provides for the bankruptcy case must be "complete, accurate and truthful;"
- (2) all assets and liabilities are required to be completely and accurately disclosed in the documents filed to commence the case (presumably this includes the Schedules and Statement of Financial Affairs, although these are not required to "commence" the case and are already sworn);
- (3) the replacement value of each asset must be stated in those documents where requested "after reasonable inquiry" to establish the value;
- (4) current monthly income and other amounts stated by the debtor as mandated by the abuse/means test of 11 U.S.C.A. § 707(b)(2), and, in a Chapter 13 case, disposable income,²⁸ must be stated "after reasonable inquiry" even though the debtor must produce payment advices and tax returns; and
- (5) a warning that any information the consumer provides during the case may be audited, and failure to provide the information "may result in dismissal" of the bankruptcy case "or other sanction, including a criminal sanction."²⁹

Copies of these notices must be maintained by the DRA for two years after the date on which the notices are given to the AP.³⁰ This notice is all stick and no carrot, so the attorney might want to give the debtor the phone number

and address of her or his congressional representatives.

Practice Tip: The Fair and Accurate Credit Transactions Act of 2003,³¹ or FACTA, applies to lawyers as well as credit reporting agencies.³² The law covers "consumer reports," which include credit reports, credit scores, reports businesses or individuals receive with information relating to employment background, check writing history, insurance claims, residential or tenant history, or medical history.³³ The law requires disposal practices that are reasonable and appropriate to prevent unauthorized access, preferably shredding or burning documents. While BAPCPA's retention requirements, together with any applicable rules issued by a state bar, should suffice to define what is "reasonable and appropriate" under FACTA, once the requirements to retain these type of documents lapse, the attorney must have a process and procedure in effect to destroy the designated documents by shredding or burning.

In a lengthy opinion by a Bankruptcy Court in Maryland on the issue of what is and is not a "debt relief agency" *outside* the attorney context,³⁴ the Court considered whether a corporation that, in return for payment, provided "bankruptcy assistance" in the form of telephonic or in-person consultation on different ways to deal with debt and, in particular, on the "bankruptcy option," was a "debt relief agency" described in the Bankruptcy Code. The corporation solicited via the internet, and provided a workbook to consumers to assess the viability of a bankruptcy filing. The Court held that the entity's consumer debtor clients met the statutory definition of an "assisted person," and that the entity was a DRA within the meaning of Bankruptcy Code provisions that regulated conduct of such agencies. The Court found that a client became an "assisted person" on the transfer of compensation, not at the moment of first contact or communication.

The Court found the agency misrepresented the services that it would provide to prospective clients who approached it for assistance, as well as the benefits that clients could obtain by pursuing the "bankruptcy option" through the agency. Specifically, the Court found that the agency engaged in a classic bait-and-switch scam whereby the agency led prospective clients to believe that, in exchange for payment of the agency's \$1,495 fee, a bankruptcy petition would be filed for the client by one of the agency's attorneys, only to disclose, after the clients had paid the fee and completed the bankruptcy workbook, that the workbook had been forwarded to outside counsel, who required payment of an additional fee in order to commence a bankruptcy case on client's

behalf. The Court further found that the letter with which through which the DRA solicited financially distressed debtors by offering to provide them with relief from their debts did not qualify as a “written contract,” of a kind which the agency was statutorily required to execute with and deliver to those debtors who became clients of the agency and elected the “bankruptcy option” as a means of dealing with their debts.

In conclusion, the Court ruled that the DRA defendant violated those provisions of the Bankruptcy Code regulating its conduct, failing to clearly and conspicuously make the requisite disclosures to financially distressed consumers, and by failing to include, in its advertisements on the internet a clear and conspicuous statement to effect that it helped people “file for bankruptcy relief.” Almost as an aside, the Court further ruled that the Code provisions regulating DRAs did not prohibit a substantial amount of protected speech and did not violate First Amendment rights of non-attorney debt relief agencies.

So what does a prudent DRA do?

- 1) Up your liability coverage a bit. Be sure your policy includes coverage for “sanctions.”
- 2) Use the term DRA in advertising. It’s a freebie. Instead of saying the word “bankruptcy,” which some consumers are still afraid of given the advertising of the supporters of BAPCPA, be a “debt relief agency” and notice the warm, fuzzy result.
- 3) Don’t worry. Fed R Bankr Pro 9011 has been around for a long time without any perceptible danger to the debtors’ bar.
- 4) Remember that virtue does not reside in who you represent. Think of bankers who think that sitting in the same building as a vault somehow gives them understanding of money.

NOTES

1. Original Title “After Milavetz, U R A DRA.”
2. The client matching that description is also depersonalized into an “assisted person.” See 11 U.S.C.A. § 101(3).
3. 11 U.S.C.A. § 101(12A). This includes debtor’s attorneys. Milavetz, Gallop & Milavetz, P.A. v. U.S., — S.Ct. —, 2010 WL 757616 (U.S.,2010).
4. See 26 U.S.C.A. § 501(c)(3) for the concept.
5. 11 U.S.C.A. § 101(12A)(A) and (B).
6. 11 U.S.C.A. § 101(12A)(C).
7. As defined in 12 U.S.C.A. § 1813 (§ 3 of the Federal Deposit Insurance Act).
8. Defined in 12 U.S.C.A. § 1752 (Federal Credit Union Act).
9. 11 U.S.C.A. § 101(12A)(D).
10. 17 U.S.C.A. §§ 102 et seq.

11. 11 U.S.C.A. § 101(12A)(D).
12. 11 U.S.C.A. § 526(a).
13. Milavetz, Gallop & Milavetz, P.A. v. U.S., — S.Ct. —, 2010 WL 757616 (U.S.,2010).
14. Milavetz, Gallop & Milavetz, P.A. v. U.S., — S.Ct. —, 2010 WL 757616, *8 (U.S.,2010).
15. Hersh v. U.S. ex rel. Mukasey, 553 F.3d 743 (C.A.5 (Tex.),2008).
16. Milavetz, Gallop & Milavetz, P.A. v. U.S., 541 F.3d 785 (C.A.8 (Minn.),2008).
17. Olsen v. Gonzales, 368 B.R. 886 (D.Or.,2007).
18. Connecticut Bar Ass’n v. United States, 394 B.R. 274 (D.Conn.2008).
19. Conrad, Rubin & Lesser v. Pender, 289 U.S. 472, 478, 53 S.Ct. 703 (U.S. 1933).
20. Milavetz, Gallop & Milavetz, P.A. v. U.S., — S.Ct. —, 2010 WL 757616, *9 (U.S.,2010). [citations that were in Pender are omitted here.] If this sounds very much like the Fifth Circuit’s vaguery, keep in mind that it leads to a specific holding and example of what is prohibited.
21. 11 U.S.C.A. § 528(a)(1).
22. 11 U.S.C.A. § 528(a)(2).
23. Every attorney representing a debtor must file a disclosure of compensation which includes this information, although not in complete sentences. Compare Form B203. And see Official Form B19 for an additional requirement for non-attorney petition preparers.
24. 11 U.S.C.A. § 342(b)(1). The Clerk is required to give the same or similar notice prior to the filing of the petition. What really happens is that these notices are given out by counsel for the debtor. The author’s suggestion that this be printed on city limit signs (“Welcome to Detroit. You may file bankruptcy ...”) has not received universal approbation.
25. Connecticut Bar Ass’n v. U.S., 394 B.R. 274 (D.Conn.,2008).
26. See Form B201A.
27. Milavetz, Gallop & Milavetz, P.A. v. U.S., 541 F.3d 785 (C.A.8 (Minn.),2008), affirmed in part, reversed in part by Milavetz, Gallop & Milavetz, P.A. v. U.S., — S.Ct. —, 2010 WL 757616 (U.S. Mar 08, 2010) (holding that debtors’ attorneys ae DRAs subject to the provisions of Code § 526).
28. 11 U.S.C.A. § 707(b)(2) is the determining standard for this.
29. 11 U.S.C.A. § 527(a)(2). This is obviously intended to scare the debtor into not filing for bankruptcy at all.
30. 11 U.S.C.A. § 527(d). A better retention option may be whatever the length of the professional liability statute is if longer, but in no event use a smaller time interval than that directed in the Bankruptcy Code.
31. 15 U.S.C.A. §§1681-1681y. See <http://www.ftc.gov/os/2004/11/041119factaapph.pdf> (last visited 02/24/10) for the Notice to Users of Consumer Reports, and <http://www.ftc.gov/os/2004/11/041119factaappg.pdf> (last visited 02/24/10) for some interesting, and suggestive, reading.
32. See 15 U.S.C.A. §§ 1681 et seq.
33. 15 U.S.C.A. § 1681(d)(1).
34. In re Spence, 411 B.R. 230 (Bankr.D.Md.,2009).

Changing Exemptions Amounts

Some exemptions statutes, e.g., the federal regimen, specify that exemptions will be changed periodically by a state agency. The federal system, California, Minnesota, South Carolina, Indiana, Ohio and Alaska are all changing in 2010. Is your state listed? If not, let us know if your state exemptions change periodically at west.chap7dotdot13@thomsonreuters.com.

We monitor changing exemptions amounts in all the states, e.g., Arizona has proposed changes moving through their legislature this year, but sometimes we miss them ... let us know if changes are coming to your state.

Do you use any exemptions which you had to manually add to the software? Let us know, so we can make Chap 7..13 better for everyone.

Our Most Recent Release

Version 9.3, released in February, 2010, contains revised chapter 13 plans for Massachusetts, Puerto Rico and the Southern District of Florida, eight new or revised local forms, and the addition of customer-requested modified forms B201B. Also included are revised exemptions for California and Wisconsin, resolution of a CM/ECF issue regarding filing with an a/k/a, and resolution of a printing issue.

As mentioned in From the Editor on the first page ... version 9.4 will be out in time for March 15th updates to means test data, and version 9.5 will be out in advance of April 1st federal and California exemptions' updates as well as debt ceiling increases.

If you know of any forms that you would like to have added to the program, or if there are any forms that are currently in the program that you think should be modified to make your life and the lives of our other customers easier, please send your suggestions to us at west.chap7dotdot13@thomsonreuters.com. We'll be glad to help if we can.

Chap 7..13 Tips

How Do I Copy Information to the Spouse Tab from the Debtor Tab?

Elimination of repetitive data entry is a main asset of Chap 7..13. One of the features you might have missed

is the Copy Debtor Info button on the Spouse tab in the Case Information window. If your debtor and spouse live together, you can click on the Copy Debtor Info button to copy the address on the Debtor tab over to the Spouse tab. This small step will save you a minute or two of data-entry time.

How Do I Generate Separate Documents (Schedules C or Statements of Intention) for Both Debtor and Spouse?

When representing a married couple, some courts require two separate versions of the same form (one for the wife and one for the husband). Chap 7..13 allows you to do this. With the program open, go to Utilities > District List and select your district. You will be on the Local Information tab. In the left hand column, you will see an entry called Exemption Schedule. If you wish to generate two Schedules C, check Separate husband/wife schedules. Underneath that, you will see an entry called Statement of Intentions. If you wish to generate two separate Statements of Intentions, check Separate Husband/wife pages. When entering the assets, it is important to designate each asset as belonging to the husband or the wife so that it will appear on the correct form.

Need more forms to do this? Please contact us at west.chap7dotdot13@thomsonreuters.com and give us your feedback.

How Do I Amend a Summary of Schedules?

Chap 7..13 will only calculate the Amended Summary of Schedules to reflect claims that have been check-marked as amended under the appropriate claim windows. You may want to have the Amended Summary reflect the new current total. For example, instead of showing the original Schedule B total as \$25,000 on the original Summary of Schedules and the having the Amended Summary show just the value of the additional item worth \$3,000, you may want to see a Schedule B total of \$28,000 on the Amended Summary.

The steps below should allow you to amend the Summary of Schedules properly:

- I. Move the Summary of Schedules and all of the schedules that have been changed to the Amended tab on the Print Reports window.
 - a. Select the documents you would like to move and click on the Move button on the right side of the Print Reports/Electronic Filing window.

- b. Review the screen to see that the correct documents are selected, then click on the Next button.
- c. Select the Amended Documents radio button and click on Finish. The documents you selected will then appear on the Amended tab.
2. Close out of the Print Reports/Electronic Filing window.
3. Double-click on Summary in the Case Explorer window.
4. Click on the Amended Summary of Schedules Tab.
5. Check the box next to the words Edit Amended Summary.
6. Make all necessary changes, both to the amounts entered as well as the number of pages.
7. “Un-check” the box next to Edit Amended Summary.
8. You can make additional changes onto the actual final form through clicking on Print>Print Preview>Edit. THESE CHANGES WILL BE LOST IF YOU MAKE ANY ADDITIONAL CHANGES ON THE TAB AND PRINT THE FORM AGAIN.
9. Click on the Save button on the top right side of the screen and save the document to the Print Reports window.
10. Close out of the Summary of Schedules window and open the Print Reports/Electronic Filing window.
11. Move the document you named to the Amended tab.
12. Delete the original Summary of Schedules from the Amended tab, to ensure that you don’t file duplicate Summaries.

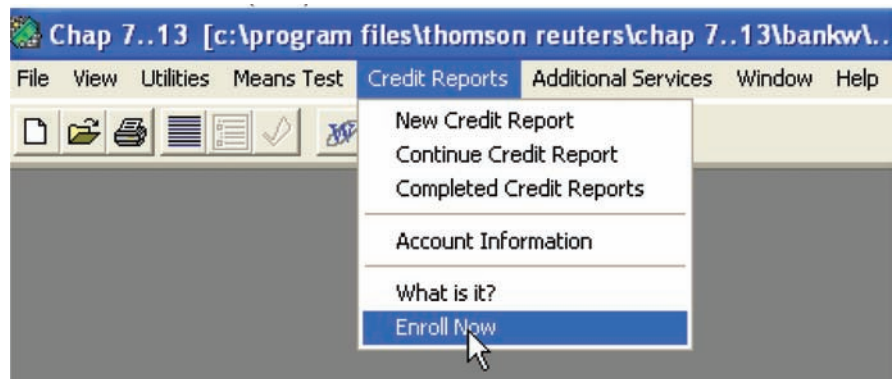
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