

U.S. SUPREME COURT UPHOLDS LIMITATION ON LEGAL ADVICE ATTORNEY CAN GIVE CLIENT CONTEMPLATING BANKRUPTCY



By: Brian D. Sullivan

In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”) amended the bankruptcy code to prescribe certain activities of bankruptcy professionals termed “debt relief agencies.” One of the prohibitions of the statute was to forbid professionals from advising a person contemplating bankruptcy to incur more debt. The U.S. Supreme Court has recently held that this provision applies to attorneys and limits the advice attorneys can give when counseling clients considering bankruptcy. *Milavetz Gallop & Milavetz, PA v. United States*, 559 U.S. ____ (2010).

BAPCPA was enacted to improve the conduct of bankruptcy professionals. Some of the measures apply to a broad class of bankruptcy professionals termed “debt relief agencies.” Debt relief agencies include “any person who provides any bankruptcy assistance to an assisted person in return for payment or who is a bankruptcy petition preparer.” The Supreme Court held that attorneys providing advice to clients considering bankruptcy proceedings are in fact “debt relief agencies under the Act. The BAPCPA further provides that debt relief agencies shall not “advise an assisted person * * * to incur more debt in contemplation of such person filing a case under this title.”

In *Milavetz*, a bankruptcy law firm filed an action for declaratory relief seeking a determination that attorneys did not constitute debt relief agencies as the term is used in BAPCPA. In the alternative, the bankruptcy attorneys argued that the prohibition against giving advice to a client regarding incurring more debt was unconstitutional. The Supreme Court, in analyzing the plain text of the statute, concluded that attorneys providing legal services to clients considering bankruptcy qualified as debt relief agencies and thus were subject to the prohibitions of the statute. In so holding, the Court rejected arguments raised by the attorneys that the federal statute impermissibly regulated the practice of law.

Moreover, the Court rejected the attorneys’ assertion that their constitutional rights to free speech were impermissibly infringed upon by imposing restrictions upon advice lawyers can give to clients. The Court found that the government had a substantial interest in restricting abusive conduct in bankruptcy proceedings. Thus, the Court concluded that the limitation on advice given to clients in “contemplation of bankruptcy” was reasonable and narrowly focused.

In support of its position, the Court recognized that the various penalties that could be imposed against a lawyer corroborated its interpretation of the narrow application of the statute. Specifically, the Court noted that the attorney found to violate the prohibitions regarding advising a client to incur additional debt prior to bankruptcy could be liable for the remittal of fees, actual damages, reasonable attorney fees and costs and that state attorneys general could seek actual damages and, where appropriate, a civil penalty. Although the Court did not specifically address the scope of damages for which an attorney acting in violation of BAPCPA could be liable, it warned that a client who incurs more debt in contemplation of bankruptcy runs the risk of defeating the effort to obtain bankruptcy relief. In such a case, the actual damages flowing from the attorneys’ advice for which he may be liable could be significant.

Attorneys counseling clients contemplating bankruptcy must be wary of the restriction imposed on the scope of their advice under the BAPCPA. Additionally, these attorneys must be mindful that, if they are found to have violated the provisions of the statute, they may be subject to liability to their client for actual damages and attorney fees. If you would like a full copy of the Supreme Court’s recent decision or have questions related to the application of the Court’s holding, please contact one of our professional liability practice group members.

Cleveland

Brian D. Sullivan
bsullivan@reminger.com
101 W. Prospect Ave.,
1400 Midland Bldg.
Cleveland, OH 44115
Phone: 216-430-2190
Fax: 216-687-1841

Cleveland

George S. Coakley
gsullivan@reminger.com
101 W. Prospect Ave.,
1400 Midland Bldg.
Cleveland, OH 44115
Phone: 216-430-2160
Fax: 216-687-1841

Columbus

Gregory D. Brunton
gbrunton@reminger.com
65 East State Street, 4th Floor
Capitol Square
Columbus, OH 43215
Phone: 614-232-2632
Fax: 614-232-2410

Cincinnati

Joseph W. Borchelt
jborchelt@reminger.com
525 Vine Street,
Suite 1700
Cincinnati, OH 45202
Phone: 513-455-4014
Fax: 513-721-2553

Akron

D. Cheryl Atwell
catwell@reminger.com
200 Courtyard Square
80 South Summit Street
Akron, OH 44308
Phone: 330-434-6002
Fax: 330-375-9075

Sandusky

Donald J. Moracz
dmoracz@reminger.com
237 W. Washington Row,
Second Floor
Sandusky, OH 44870
Phone: 419-609-4220
Fax: 419-626-4805

Toledo

Laurie J. Avery
lavery@reminger.com
One SeaGate,
Suite 1600
Toledo, OH 43604
Phone: 419-254-1311
Fax: 419-243-7830

Lexington, KY

Shea Conley
sconley@reminger.com
269 West main Street,
Suite 700
Lexington, KY 40507
Phone: 859-233-1311
Fax: 859-233-1312

Louisville, KY

Donald L. Miller, II
dmiller@reminger.com
One Riverfront Plaza
401 W. Main Street, Ste. 710
Louisville, KY 40202
Phone: 502-584-1310
Fax: 502-589-5436