Can Congress Prohibit an Attorney from Advising a Client to Incur Debt in Contemplation of Bankruptcy?

CASE AT A GLANCE

In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act, which was designed to prevent certain abuses in the bankruptcy system and to heighten the requirements for those filing for Chapter 7 bankruptcies in which nearly all debts are discharged. However, the law also imposed some restrictions and regulations on the speech of "debt relief agencies." The first question in the case is whether this phrase includes attorneys. The remaining questions ask whether these restrictions on attorney speech violate the First Amendment.

Milavetz, Gallop & Milavetz v. United States **and**
United States v. Milavetz, Gallop & Milavetz
Docket Nos. 08-1119 and 08-1125

Argument Date: December 1, 2009
From: The Eighth Circuit

by David L. Hudson Jr.
Vanderbilt Law School

ISSUES

Does the phrase "debt relief agencies" that appears in a section of the current bankruptcy law include attorneys?

Does a provision prohibiting attorneys from advising clients to "incur more debt" violate the First Amendment?

Do advertising disclosure requirements on debt relief agencies (including attorneys) violate the First Amendment?

FACTS

In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) in response to certain abuses in the bankruptcy system. However, the act also included provisions that would restrict the speech of attorneys if they are determined to be "debt relief agencies."

One provision—11 U.S.C. § 526(a)(4) provides: "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." Two other provisions provide in pertinent part that debt relief agencies must include the following disclaimer in their advertisements: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."

Attorneys Robert Milavetz and Barbara Nevins of the firm Milavetz, Gallop & Milavetz and two clients challenged these three provisions on statutory interpretation and First Amendment grounds. They sued in federal court, seeking a declaratory judgment that the provisions are unconstitutional. First, they argued that the phrase "debt relief agency" should not be construed to include attorneys. Second, they argued that the "incur more debt" provision and the disclaimer requirements violate the First Amendment.

In December 2006, a federal district court ruled in favor of the Milavetz plaintiffs. The court ruled that the phrase "debt relief agency" does not include attorneys. First, the court determined that the meaning of the statute was ambiguous. It then applied the doctrine of constitutional avoidance, whereby a court interprets a statute in a way to avoid constitutional problems. The district court also determined that the "incur more debt" provision violated the First Amendment and did not satisfy the strict scrutiny standard of review, the highest level of review that requires the government to show that a regulation advances a compelling government interest in a very narrowly tailored way. The district court also invalidated the disclosure requirements as failing the intermediate scrutiny standard of review, which requires the government to show that a regulation advances a substantial governmental interest and is narrowly drawn.

The government appealed to the U.S. Court of Appeals for the Eighth Circuit, which affirmed in part and reversed in part. *Milavetz v. United States,* 541 F.3d 785 (2008). The Eighth Circuit determined that attorneys fall under "debt relief agencies." The appeals court also upheld the disclaimer requirements. However, it determined that forbidding attorneys from advising their clients to "incur more debt" in contemplation of bankruptcy violated the First Amendment. The court pointed out that there are circumstances in which attorneys can lawfully advise clients to obtain more debt before filing bankruptcy. For example, the court noted, some individuals may need to purchase a car or refinance a mortgage before filing for bankruptcy.
Both the government and the Milavetz plaintiffs appealed to the U.S.

Supreme Court, which granted both petitions in June 2009 and then consolidated the two cases.

CASE ANALYSIS

The Statutory Issue

The threshold issue poses a question of statutory interpretation—whether the phrase "debt relief agency" as used in the statute includes attorneys. The parties devote a substantial portion of their briefs to this question.

The government argues that a plain reading of the statute controls. The statute defines "debt relief agency" as "*any person* who provides *any bankruptcy assistance* to an *assisted person* in return for the payment of money." According to the government, attorneys qualify as "any persons" and "bankruptcy assistance" includes "legal representation." Therefore, a "plain reading" of the statute demonstrates that Congress meant the phrase "debt relief agency" to include attorneys.

Additionally, the government contends, the law's legislative history confirms that one of the congressional purposes in passing the act was to curb attorneys. "After extensive hearings, Congress determined that misleading and abusive practices by bankruptcy professionals, including attorneys, had become a substantial cause of unnecessary bankruptcy petitions and had sometimes jeopardized debtors' ability to obtain a discharge of their debts," the government writes.

The Milavetz petitioners counter that the plain reading of the law does not control when the statutory language is ambiguous or the plain reading would lead to absurd results. These petitioners argue that if Congress had intended to include attorneys within the phrase "debt relief agencies" it would have included the term "attorney" somewhere in the section. "'Attorney' is a defined term under the Code, and, as a general matter, whenever Congress intends specifically to include 'attorney' within the scope of a particular section it does so expressly," the petitioners explain. They point out that Congress mentions "attorneys" in several other places in the law, clarifying that those other provisions do apply to attorneys. However, in the "debt relief agency" section, Congress did not include the term *attorneys.*

The Milavetz petitioners also argue that reading the phrase "debt relief agency" to include attorneys "would lead to the anomalous result of requiring some bankruptcy attorneys to plainly misrepresent their services to the public." For instance, many bankruptcy attorneys only represent creditors, not debtors.

The "Incur More Debt" Provision

If the Court does find attorneys are covered by the law, then the Milavetz petitioners contend that the Court should uphold the Eighth Circuit's finding that the "incur more debt" provision violates the First Amendment. They say the "incur more debt" provision both prohibits attorneys from giving truthful advice to clients and interferes with the client's right to receive information.

The petitioners argue that a lawyer's advice to clients concerning lawful conduct regarding bankruptcy is "noncommercial speech" and is therefore covered by the Supreme Court's overbreadth doctrine. This doctrine provides that regulations which sweep too broadly and prohibit too much protected speech are invalidated. According to the Milavetz petitioners, the "incur more debt" provision in the Bankruptcy Abuse Act is unconstitutionally overbroad as applied to attorneys because it applies to many instances of protected speech. The petitioners claim that the provision even prohibits beneficial advice such as recommending a client refinance an existing mortgage, obtain a lower interest rate, buy a reliable automobile, or even seek medical care. Petitioners assert that the law infringes on perfectly sound lawyerly advice, as "there is nothing inherently unlawful about a client borrowing money to purchase reliable transportation."

On a more macro level, if the Court were to uphold such a stark restriction on lawyers' speech to clients, it "would inevitably erode the essential underpinnings of our representational system of advocacy and the basic concepts of justice that it supports," states the petitioners.

The government counters that to the contrary, the "incur more debt" provision should be interpreted as applying only to instances in which the attorney and client intend to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy discharge. "As the text, structure, and purposes of Section 526(a)(4) demonstrate, Congress forbade only advice to incur new debt for the purpose of abusing the bankruptcy system or defrauding creditors," the government writes, even though the Eighth Circuit below bluntly stated that "the plain language of the statute does not permit this narrow interpretation."

The government argues that the Supreme Court should adopt reasoning similar to that employed by dissenting Eighth Circuit Judge Stephen Colloton, who accepted the government's narrowing construction by focusing on the statute's "in contemplation of bankruptcy" phrase—a term of art that "denotes an action taken with intent to abuse the protections of bankruptcy laws."

Furthermore, the Supreme Court has emphasized that an overbreadth analysis must take into account that for purposes of the doctrine, any overbreadth has to be real and substantial—much more than a few hypothetical situations. In this case, the government argues, "Section 526(a)(4) may validly be applied to a significant category of unethical attorney advice."

The government also argues that under traditional First Amendment review, the "incur more debt" provision should not be subject to full-fledged strict scrutiny. Instead, the law should be evaluated under the lower level of review that was used to review the constitutionality of ethical regulations of lawyers in *Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991). Under the *Gentile* standard, a court balances the First Amendment rights of the attorneys against the government's legitimate interest in regulating the activity in question and then determines whether the restrictions impose "only narrow and necessary limitations on lawyers' speech."

The Milavetz petitioners counter that even under application of the *Gentile* standard, the regulation fails because it is not narrowly tailored.

The Disclosure Requirements

The two other challenged provisions provide that attorneys, as debt relief agencies, must include certain disclosures in their advertising. The parties argue over whether such compelled commercial speech is

subject to intermediate scrutiny or rational basis review. The petitioners argue for intermediate scrutiny, which would require the government to demonstrate that it had a substantial interest for the regulation, that the regulation directly advances the interest and is narrowly drawn. The government argues for rational basis review, which would only require the government to show that it had a legitimate interest for its regulation that is rational and not arbitrary.

Compelled disclaimers are subject to intermediate scrutiny under the Supreme Court's decision in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n,* 444 U.S. 507 (1980), and the government cannot pass such a standard, the Milavetz petitioners argue. They assert that intermediate scrutiny is the proper standard when the government attempts to regulate and compel the speech of attorneys who are engaging in truthful, nondeceptive advertising.

The government responds that a different case, *Zauderer v. Ohio Disciplinary Comm'n,* 471 U.S. 626 (1985) provides the appropriate standard. In that decision the Supreme Court held that "warnings or disclaimers might be appropriately required … in order to dissipate the possibility of consumer confusion or deception." The government argues that disclosure or disclaimer requirements in the commercial context are constitutional as long as they are reasonably related to the state's interest in preventing deception of consumers.

But even under rational basis review, the Milavetz petitioners contend, the compelled disclaimers are unduly burdensome and irrational because they do not even make sense if applied to bankruptcy attorneys who only represent creditors.

SIGNIFICANCE

The threshold statutory issue in this case affords the Court an opportunity to explain the contours and limitations on the doctrine of constitutional avoidance and to explain its approach to statutory interpretation. The decision could have an impact on the recent suit filed by the American Bar Association against the Federal Trade Commission over whether statutory provisions requiring businesses to do more to stop identity theft applies to attorneys. (Although the district court recently granted summary judgment in favor of the ABA, the FTC is considering whether to appeal.)

Meanwhile, the decision will have major ramifications for attorneys who represent debtors and creditors. Attorneys could be chilled from engaging in all sorts of speech if the "incur more debt" provision is upheld. The American Bar Association asserts in its amicus brief in support of the Milavetz petitioners that the case also has great importance for state judicial systems that traditionally are responsible for regulating the legal profession. Moreover, the ABA asserts, an adverse ruling in this case would "undermine the attorney-client privilege by creating new exceptions to that privilege."

The case affords the Court the opportunity to clarify when restrictions on attorney speech are subject to strict scrutiny or perhaps a lower level of review, such as the *Gentile* standard. The case also affords the Court another opportunity to provide more guidance on the overbreadth doctrine in First Amendment cases—a subject that has attracted the keen eyes and differing views of several justices in recent years.

The Court may take this opportunity to clear up another area of immense confusion in the lower courts—what legal standard should be applied to compelled disclaimers in the commercial speech context. In *Borgner v. Florida Board of Dentistry,* 537 U.S. 1080 (2002), the Court denied review in a dental advertising case, but Justices Thomas and Ginsburg dissented from the denial of certiorari. In his dissent, Justice Thomas reasoned that the Court should take the case because it "presents an excellent opportunity to clarify some oft-recurring issues in the First Amendment treatment of commercial speech and to provide lower courts with guidance on the subject of state-mandated disclaimers."

Now, the Court has just such a case before it and can clarify the proper legal standard to apply with respect to compelled commercial speech that takes the form of disclosure or disclaimer requirements: should it be intermediate scrutiny, rational basis, or some other standard?

David L. Hudson Jr. teaches classes as an adjunct at Vanderbilt Law School, Nashville School of Law, and Middle Tennessee State University. He is the author or coauthor of 25 books, including *The Rehnquist Court: Understanding Its Impact and Legacy* (Praeger, 2006) and *The Handy Supreme Court Answer Book* (Visible Ink Press, 2008). He can be reached at dhudson@freedomforum.org or 615.727.1342.

PREVIEW of United States Supreme Court Cases, pages 126–128.
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ATTORNEYS FOR THE PARTIES

For Petitioners Milavetz, Gallop & Milavetz, P.A., et al. (G. Eric Brunstad Jr., 860.524.3999)

For Respondent United States (Elena Kagan, Solicitor General, 202.514.2217)

AMICUS BRIEFS

In Support of Petitioners Milavetz, Gallop & Milavetz, P.A., et al.

American Bar Association (Carolyn B. Lamm, 312.988.5000)

Commercial Law League of America (William H. Schorling, 215.665.8700)

In Support of Respondent United States

Public Good, The Center for Science in the Public Internet, the Environmental Law Foundation and the Center for Environmental Health (Seth E. Mermin, 510.548.4064)