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COMMENT

Milavetz v. United States: So Bankruptcy Attorneys are Debt Relief Agencies, Right?

The Supreme Court in *Milavetz v. United States*[1] considered the question of whether bankruptcy attorneys are included in the definition of a debt relief agency,[2] a classification that is subject to certain restrictions under the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA or the BAPCPA). This question arose almost immediately after Congress passed the BAPCPA in 2005[3] despite Congress broadly defining the term as "any person who provides bankruptcy assistance to an assisted person . . . ."[4] Aware of this unsettled question, and concerned with whether their bankruptcy

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1 Milavetz, Gallop & Milavetz, P.A. v. United States, 176 L. Ed. 2d 79 (2010).

2 11 U.S.C. § 101 (12A) (2006) (defining 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 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.").

3 *See* In re Attys. at Law, 332 B.R. 66 (Bankr. S.D. Ga. 2005) (issuing opinion on Oct. 17, 2005, the effective date of the bulk of the BAPCPA provisions, sua sponte holding that attorneys in the Bankruptcy Court for the Southern District of Georgia were not bound by the requirements of a debt relief agency), *appeal dismissed*, 353 B.R. 318 (S.D. Ga. 2006).

4 § 101 (12A).

attorneys would be subject to the requirements of a debt relief agency, Milavetz Gallop & Milavetz, instituted an action in the United States District Court for the District of Minnesota in 2006.[5]

Their case centered around two main arguments. First, they asserted that attorneys were not expressly included within the statutory definition and should therefore not be held subject to the requirements of a debt relief agency.[6] In the alternative, if the definition covered attorneys, they claimed the doctrine of constitutional avoidance counseled against including attorneys within the definition because two specific requirements of a debt relief agency would impinge on an attorney's constitutional rights.[7] They argued the restriction on advising a client from "incur[ring] more debt in contemplation" of filing for bankruptcy is either unconstitutionally vague[8] or that it violated the First Amendment.[9] They also claimed the advertising disclosure requirements of a debt relief agency violated an attorney's First Amendment right. [10] Were the doctrine of constitutional avoidance not to apply, Milavetz argued these provisions nevertheless were unconstitutional and should be inapplicable to bankruptcy attorneys.[11]

The district court agreed with Milavetz's alternative argument, citing the doctrine of constitutional avoidance as reason for holding the debt relief agency requirements inapplicable to bankruptcy attorneys.[12] The government appealed and a divided United States Court of Appeals, Eighth Circuit reversed on the principal issue,

5 Milavetz, Gallop & Milavetz, P.A. v. United States, 355 B.R. 758 (D. Minn. 2006).
6 *Id.* at 767.
7 *Id.* at 768.
8 *Id.* at 765.
9 *Id.* at 763.
10 *Id.* at 766.
11 *Id.* at 762.
12 *Id.* at 769.

holding the definition covered attorneys.[13] However, the Eighth Circuit affirmed the district court's decision holding that a restriction on an attorney's ability to advise a client to incur additional debt in contemplation of a bankruptcy filing was unconstitutional.[14] Each side appealed and the Supreme Court granted both writs for certiorari.[15] In a near unanimous decision, the Court held in favor of the government, saying attorneys who provide qualifying services are debt relief agencies and that none of the specified provisions violated an attorney's constitutional rights.[16]

I. BACKGROUND

A. RELEVANT PRECEDENT CONCERNING STATUTORY INTERPRETATION

As stated by the Supreme Court most recently in *Barnhardt v. Sigmon Coal Co.*, statutory interpretation begins with a look at the plain meaning of the statute, and only where the text is ambiguous would the analysis look to extrinsic material such as legislative history.[17] At times, the plain meaning of a statute may raise questions as to whether the statute is constitutional. In these instances, the doctrine of constitutional avoidance might apply. The doctrine states that if two or more interpretations of the statute are fairly possible, but one would present serious constitutional problems, the Court will construe the statute in accordance with the interpretation that avoids

13 Milavetz, Gallop & Milavetz, P.A. v. United States, 541 F.3d 785, 797 (8th Cir. 2008).
14 *Id.* at 794.
15 United States v. Milavetz, Gallop & Milavetz, P.A., 129 S. Ct. 2766 (2009) (granting writ for the government); Milavetz, Gallop & Milavetz, P.A. v. United States, 129 S. Ct. 2769 (2009) (granting writ for Milavetz).
16 Milavetz, Gallop & Milavetz, P.A. v. United States, 176 L. Ed. 2d 79, 97 (2010).
17 534 U.S. 438, 450 (2002).

these constitutional problems.[18] A majority of lower courts addressing this issue have interpreted the definition of debt relief agencies to plainly include bankruptcy attorneys.[19]

B. RELEVANT PRECEDENT APPLICABLE TO DETERMINING THE SCOPE AND VALIDITY OF RESTRICTIONS ON ADVICE GIVEN BY A DEBT RELIEF AGENCY

Under the BAPCPA a debt relief agency is prohibited from "advis[ing] an assisted person or prospective assisted person to incur more debt in contemplation of" filing for bankruptcy.[20] At the center of the issue is the interpretation of the phrase "in contemplation of." The provision would present First Amendment concerns if the phrase was read broadly to prohibit *any* advice an attorney were to provide to a client contemplating bankruptcy. However, if construed narrowly, the provision would only proscribe certain types of advice, and would present an issue of vagueness that might render it unconstitutional. A majority of the lower courts have held this provision to be unconstitutional as applied to attorneys, construing the provision broadly to prohibit a debt relief agency from advising an assisted

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[18] *See, e.g.,* United States v. Sec. Indus. Bank, 459 U.S. 70, 78 (1982) (*quoting* Lorillard v. Pons, 434 U.S. 575, 577 (1978)); *See also* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (U.S. 1988)("This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804), and has for so long been applied by this Court that it is beyond debate.").

[19] *See* Hersh v. United States, 553 F.3d 743, 752 (5th Cir. 2008); Connecticut Bar Ass'n v. United States, 394 B.R. 274, 280 (D. Conn. 2008); *In re Irons*, 379 B.R. 680, 685 (Bankr. S.D. Tex. 2007); Olsen v. Gonzales, 350 B.R. 906, 912 (D. Or. 2006).

[20] 11 U.S.C. § 526(a)(4) (2006).

person from incurring *any* type of debt when contemplating a bankruptcy filing.[21]

C. RELEVANT PRECEDENT APPLICABLE TO DETERMINING WHETHER THE DISCLOSURE REQUIREMENTS ARE CONSTITUTIONAL

The disclosure requirements at issue in *Milavetz* require a debt relief agency to advertise "'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.' or a substantially similar statement."[22] While the Supreme Court has examined the constitutionality of commercial speech disclosure requirements in the past, courts have not uniformly applied one

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[21] *See Connecticut Bar Ass'n*, 394 B.R. at 282 (interpreting the phrase broadly to "prohibit[] attorneys from advising their clients to incur any kind of debt prior to filing for bankruptcy, including debts that are legal and desirable in certain instances."); Zelotes v. Martini, 352 B.R. 17, 25 (D. Conn. 2006) (holding the restriction on advice unconstitutionally overbroad because it "prohibit[s] lawyers from advising clients to take lawful, prudent actions. . . ."; *Olsen*, 350 B.R. at 916 (holding the restriction on advice included both lawful and abusive actions and was therefore in violation of the First Amendment); *But see Hersh*, 553 F.3d at 756 (holding § 526(a)(4) to be construed narrowly to prohibit only advice to abuse the bankruptcy system).

[22] 11 U.S.C. § 528(a)(4) (2006) ("(a) A debt relief agency shall – (4) clearly and conspicuously use the following statement in any [advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public (whether in general media, seminars or specific mailings, telephonic or electronic messages, or otherwise)]: '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. (b)(2)(B) ("(b)(2) 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 any consumer debt shall—(B) include the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.").

standard to all disclosure requirements.[23] Generally if it is a restriction on misleading advertisements it's subject to the *Zauderer* standard and must be "reasonably related to the State's interest in preventing deception of consumers."[24] Restrictions on non-misleading commercial speech are subjected to the higher standard announced by the Court in *Central Hudson*.[25] Regarding the disclosure requirements relevant in *Milavetz*, the lower courts have not been unanimous in their conclusions as to what standard to apply[26] or in their conclusions as to the disclosure requirement's constitutionality.[27]

II. ANALYSIS

Justice Sotomayor, writing for the Court determined the case by finding the statutory text clearly covered bankruptcy attorneys as debt relief agencies and that the doctrine of constitutional avoidance was not a factor because the requirements of debt relief agencies did not raise any constitutional problems when applied to attorneys.[28]

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[23] *See* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir. 2009) (applying *Zauderer* to a disclosure requirement); *United States v. Wenger*, 427 F.3d 840 (10th Cir. 2005) (applying both *Zauderer* and *Central Hudson* in combination to a disclosure requirement); *Borgner v. Brooks*, 284 F.3d 1204 (11th Cir. 2002) (applying *Central Hudson* to a disclosure requirement).

[24] *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985).

[25] Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

[26] *See* Olsen v. Gonzales, 350 B.R. at 920 (applying *Central Hudson*, although the court stated *Zauderer* might be more applicable); *Connecticut Bar Ass'n*, 394 B.R. at 290 (applying *Zauderer*).

[27] *See* Olsen v. Gonzales, 350 B.R. at 920 (holding the disclosure requirements constitutional); *Connecticut Bar Ass'n*, 394 B.R. at 290 (holding the disclosure requirements constitutional as applied to attorneys representing consumer debtors but unconstitutional as applied to attorneys representing non-consumer debtors).

[28] *Milavetz*, 176 L. Ed. 2d at 97.

First, Justice Sotomayor examined whether the statutory text plainly included attorneys as debt relief agencies.[29] Important to the Court was the fact that the definition of "bankruptcy assistance" "includes several services commonly performed by attorneys[,]" and some services that "may be provided only by attorneys."[30] The Court also found instructive the fact that Congress provided exclusions to the definition of debt relief agencies, but showed no indication of the intent, expressed or implied, to exclude attorneys.[31]

The Court then considered Milavetz's arguments, but dismissed their reading of the statute as implausible and stated Congress did not "impermissibly trench" on the State's traditional role in regulating attorneys.[32] Milavetz argued that where an "officer, director, employee or agent of a person who provides bankruptcy assistance" was excluded from being a debt relief agency, a "partner" was not.[33] Milavetz was concerned with the possibility of binding an entire law firm to the requirements of a debt relief agency where only one partner is engaged in bankruptcy assistance.[34] The Court agreed with this reading of the statute and stated this "is consistent with the joint responsibilities that typically flow from the partnership structure."[35] The Court refused to apply the doctrine of constitutional avoidance because a reading of the definition to exclude attorneys was not "fairly possible."[36]

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29 *Id.* at 86.

30 *Id.* at 87 (referring to "services sold or otherwise provided to an assisted person with the express or implied purpose of providing . . . *advice*, *counsel*, *document preparation* . . . 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." 11 U.S.C. § 101(4A)(2006) (emphasis added)).

31 *Id.*

32 *Id.* at 88.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.* at 88-89.

Next, the Court considered the scope and validity of the restrictions on providing advice.[37] The government advocated for a narrow reading of the phrase "in contemplation of" that would only prohibit a debt relief agency from advising a client to abuse the bankruptcy system.[38] Milavetz argued for a broader reading that would bar an attorney from advising a client contemplating bankruptcy to incur more debt that would be in the client's best interest, such as refinancing a mortgage to acquire a lower interest rate or to purchase a reliable car to improve their ability to repay.[39] They argued this broad reading was violative of an attorney's First Amendment right to free speech and also in the alternative, Milavetz argued the narrow reading that the government advanced would be unconstitutionally vague.[40] The Court consulted a previous interpretation of the phrase "in contemplation of" adopted by the Court,[41] and looked at the broader context of the provision within the statute.[42] This led the Court to construe the phrase narrowly to prohibit only advice a debt relief agency provides to its client where the "impelling reason for the advice is the anticipation of bankruptcy."[43]

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37 *Id.* at 89.

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.* at 91.

42 *Id.* at 92.

43 *Id.* The Court previously examined the meaning of the phrase "in contemplation of" in Conrad v. Pender, 289 U.S. 472 (1933). There the Court took the position that to determine if an action was "in contemplation of the filing of a petition" the "controlling question" was "whether the thought of bankruptcy was the impelling cause of the transaction." *Id.* at 477. Justice Sotomayor adopted this same interpretation and added that advice given by a debt relief agency "to incur more debt because of bankruptcy" would "generally consist of advice to 'load up' on debt with the expectation of obtaining its discharge – *i.e.*, conduct that is abusive *per se*." *Milavetz*, 176 L. Ed. 2d at 91. The Court then mentioned two contextual reasons that provided support for this conclusion. *Id.* at 92. First, because the BAPCPA's system for determining whether a debtor would be able to repay was

The Court analyzed the reading the government advanced and stated it would not be unconstitutionally vague because the concept of abuse was a well-defined standard within the Bankruptcy Code.[44] The interpretation the Court adopted was not unconstitutionally vague because the Court saw the scope of the provision "adequately defined, both on its own terms and by reference to the Code's other provisions. . . ."[45]

The disclosure requirements were similarly found to be constitutional as applied to attorneys.[46] Critical to this was the Court's finding that *Zauderer* was to apply because the regulation was aimed at inherently misleading commercial speech, and the particular regulations were similar to those in *Zauderer*.[47] In applying *Zauderer* the Court said the disclosure requirements were reasonably related to the government's interest in preventing consumer deception.[48] The Court stated the term "debt relief agency" was not confusing because the disclosure requirements forced bankruptcy attorneys in their advertising to inform the public of their services, which included helping people file for bankruptcy relief, and therefore "provide[d] additional assurance that consumers [would] not misunderstand the term."[49]

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highly subject to abuse, the Court saw this restriction on advice as a preventative measure taken against the potential abuse. *Id.* Second, the Court stated that the provisions adjacent to the restrictions on advice all evinced a concern for protecting against acts that would harm creditors and debtors. *Id.* Were the phrase to be interpreted narrowly, this would protect creditors and debtors from advice to abuse the bankruptcy system, but if it were read broadly it would bar advice that "would likely benefit both debtors and creditors" and therefore conflict with the context's purpose. *Id.*

44 *Id.* at 93-94.

45 *Id.* at 94.

46 *Id.* at 97.

47 *Id.* at 95.

48 *Id.* at 97.

49 *Id.* at 96.

Justice Scalia, while concurring in the judgment, warned "much can be lost" by the Court recognizing legislative history within an opinion that found the statutory text is clear and unambiguous.[50] He disagreed with the decision to include footnote three within the majority opinion in which Sotomayor explained that the legislative history provided support for the majority's reasoning.[51] His main concern is that attorneys will now mechanically use legislative history to buttress an argument notwithstanding the "case where the statutory text is unambiguously in their favor . . . ."[52]

In his concurrence, Justice Thomas emphasized "the posture of Milavetz's challenge" of the disclosure requirements "inhibit[ed] [the Court's] review of its First Amendment claim."[53] Milavetz did not provide any examples of their advertisements for the Court to consider,[54] and therefore the Court's analysis resembled a facial challenge, which presents a high standard for the challenger to overcome.[55] Because there was at least one "'conceivabl[e]' manner in which [the disclosure requirements could] be enforced consistent with the First Amendment[,]" they were held to be constitutional as applied to Milavetz.[56]

III. EVALUATION

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[50] *Id.* at 97-98 (Scalia, J., concurring).

[51] *Id.* Although Sotomayor stated within footnote three, "reliance on legislative history is unnecessary in light of the statute's unambiguous language. . . ." Id. at 87 n.3 (majority opinion).

[52] *Id.* at 98(Scalia, J., concurring).

[53] *Id.* at 100 (Thomas, J., concurring).

[54] *Id.* at 79 (majority opinion).

[55] *Id.* at 101 (Thomas, J., concurring). ("When forced to determine the constitutionality of a statute based solely on such conjecture, we will uphold the law if there is any 'conceivabl[e]' manner in which it can be enforced consistent with the First Amendment.") (citation omitted).

[56] *Id.* at 101 (*quoting* Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 456 (2008)).

The Court's opinion in *Milavetz* is properly grounded in precedent and logically comes to the conclusion that attorneys who provide qualifying services are debt relief agencies for purposes of the BAPCPA. Although the Court attempts to clarify the scope of advice a debt relief agency is permitted to provide to a client,[57] a great deal of questions remain as to how one is to determine whether the impelling reason for providing the advice was the anticipation of bankruptcy. Additionally, the holding does not foreclose further as-applied challenges of the disclosure requirements, which could mean some practitioners will not be required to include them in their advertising.

The Court properly restricted its statutory interpretation to the specific language at issue and its broader context in determining the scope of both the debt relief agency definition and the scope of restricted advice. Recent jurisprudence on statutory interpretation has demonstrated that unless the text is ambiguous, the statutory text is the single source the Court is to look at when interpreting the text.[58] Justice Scalia, as here, has continually acted as a watchdog to ensure legislative history is not a factor in that analysis unless the text is truly ambiguous.[59] The Court correctly looked at the broad definition of debt relief agency and the exceptions to the definition, which

[57] *Id.* at 92-93.

[58] Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002).

[59] *See* Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J concurring)("It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind."); *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring in the judgment)("Committee reports, floor speeches, and even colloquies between Congressmen are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.")(citation omitted).

specifically lists six but does not mention attorneys, and concluded the context in which the provision is located indicates attorneys are debt relief agencies for purposes of the BAPCPA. Concerning the scope of prohibitions on client advice, the Court also constrained its analysis to the specific provision and its immediate context.[60] The Court appropriately recognized that the restriction on advice was located amongst three subparts that all evince a concern for practices that "threaten to harm debtors or creditors."[61] It would be strange for Congress to prohibit lawful, prudent advice, which would in most cases benefit the debtor, creditor and the court system. This is especially true where the provision is placed amongst other restrictions that serve to protect against actions detrimental to the debtor and creditor. Supreme Court precedent states that to determine the meaning of the words in a statute the Court is to look at "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[62] In this case, the United States provided compelling contextual reasons for a narrow reading where Milavetz provided little to support its legal conclusion that the term barred all advice. Therefore the Court accurately determined the provision's context counseled for a narrow reading of the restriction.

The Court's conclusion that the restrictions on advice are not unconstitutionally vague, however, is questionable, and this will most likely be revealed in future cases. Strangely, the Court's brief analysis of the vagueness issue defends a characterization of the provision that the Court did not adopt.[63] The Government proffered,[64] and Milavetz argued against,[65] a reading of the restrictions on advice to bar only

60 *Milavetz*, 176 L. Ed. 2d at 91-92.
61 *Id.* at 92.
62 Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).
63 *Milavetz*, 176 L. Ed. 2d at 94-94.
64 *Id.* at 89.
65 *Id.*

advice that would abuse the bankruptcy system.[66] This is not the narrow construction the Court adopted.[67] The Court instead construed the phrase to bar only advice "principally motivated by the prospect of bankruptcy . . . ."[68]

The Court presumably assumed that a standard based on abuse was more vague than a standard based on finding whether the principal motivation of an attorney's advice was the anticipation of bankruptcy, and therefore if able to refute the vagueness of the abuse standard, would not need to defend the standard the court *actually* adopted. This assumption, though, is incorrect. A statute is unconstitutionally vague where it "fails to provide a person of ordinary intelligence fair notice of what is prohibited."[69] The concept of abuse, as the Court points out, is no stranger to the Bankruptcy Code and is used in a number of other contexts to guide a court in determining whether the Code has been violated.[70] How though is a court to determine the principal motivation of an attorney's advice where there are countless rationales for the advice? Once the principal motivation is identified, how are we to determine what the Court means by "anticipation of bankruptcy?" The Court in footnote six implies the answer is found somewhere between an "awareness of the possibility of bankruptcy" and the prospect of filing for bankruptcy with the expectation of its discharge.[71] This lacuna leaves practitioners without a guide to determine what types of advice are prohibited and discredits the Court's conclusion that the restriction is not unconstitutionally vague.

The Court correctly determined the *Zauderer* standard was applicable to the disclosure requirements and properly applied that

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66 *Id.*
67 *Id.* at 94.
68 *Id.*
69 United States v. Williams, 128 S. Ct. 1830, 1845 (2008).
70 *Milavetz*, 176 L. Ed. 2d at 93-94.
71 *Id.* at 94 n.6.

standard in holding them to be constitutional. The rational basis test under *Zauderer* is virtually always detrimental to the challenger's case, and consequently, it's no surprise the Court held the disclosure requirements were reasonably related to the government interest in preventing consumer deception, and therefore constitutional. The Court applied *Zauderer* because the commercial speech at issue was inherently misleading,[72] however the Court has never determined exactly what makes speech inherently misleading. In *Zauderer* the Court determined that an advertisement is inherently misleading where it announces "that if there is no recovery, no legal fees are owed[,]" but doesn't distinguish between legal fees and costs, therefore prompting a layperson to mistakenly assume they would owe the attorney nothing if there was no recovery.[73] In *Milavetz*, the Court states the inherently misleading commercial speech was "a pattern of advertisements that [held] out the promise of debt relief without alerting consumers to its potential cost"[74] or that bankruptcy was the means to accomplish the debt relief.[75]

The advertisements in *Zauderer* implicitly addressed a consumer's question as to how much the services would cost, leading consumers to believe the services were essentially free of charge. However, the advertisements in *Milavetz* merely refrained from answering that question. It's arguable that the commercial speech at issue in *Zauderer* is more inherently misleading than the speech in *Milavetz*, but this only shows that the Court's threshold for proving inherently misleading speech is at least as low as the advertisements at issue in *Milavetz*. This is consistent with the court's position that deceptive commercial speech is to be afforded less constitutional

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72 *Id.* at 96.

73 *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 652 (1985).

74 *Milavetz*, 176 L. Ed. 2d at 96.

75 *Id.* at 100 (Thomas, J., concurring).

protection,[76] and serves as a warning to advertisers. The ruling informs advertisers the government has a strong mandate when it takes aim at regulating commercial speech that has the ability to deceive consumers as to the costs associated with the goods or services advertised.

Bankruptcy practitioners looking to avoid placing the disclosure requirements in their advertising are not left entirely without a remedy. The Court makes clear,[77] and Justice Thomas elaborates on the point that because Milavetz failed to present examples of its advertisements, the as-applied challenge to the disclosure requirement resembled more of a facial challenge.[78] Therefore, if a challenger is able to present examples of their advertisements and demonstrate they are in no way deceptive, they would have a good chance at establishing the disclosure requirements, as applied, violated their First Amendment right under *Zauderer*, and would be inapplicable to them.[79]

CONCLUSION

The Court was able to unanimously agree in the judgment in *Milavetz*, but this does not mean attorneys will not continue to fight the requirements of a debt relief agency or that all questions were answered. This comment attempts to highlight the unanswered questions regarding the restrictions on advice that will hopefully be fleshed out in both scholarly works and in the case law. Regarding the disclosure requirements, there is a palpable chance that bankruptcy

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76 *Zauderer*, 471 U.S. at 652.

77 *Id.* at 100 (Thomas, J., concurring).

78 *Id.* at 94 (majority opinion).

79 The government would not have an interest in protecting from the deception of the challenger's consumers under *Zauderer*, and therefore the regulation could not be reasonably related to the government interest in protecting from consumer deception.

attorneys looking to avoid the disclosure requirements will be able to present a case that would render the disclosure requirements inapplicable to them. If Congress did indeed wish to include attorneys within the definition of a debt relief agency, they surely did not want attorneys to avoid placing the disclosure requirements in their advertising. Hopefully the Court laid out both its statutory interpretation doctrine and First Amendment commercial speech standards clearly enough for Congress to avoid these issues in future legislation.

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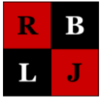
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