

December 2009

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Repository Citation

Cullen Ann Drescher, *The BAPCPA, the Gag Rule, and the First Amendment: A Proposal for Alignment Through Interpretive and Analytical Change*, 18 Wm. & Mary Bill Rts. J. 503 (2009), <https://scholarship.law.wm.edu/wmborj/vol18/iss2/7>

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THE BAPCPA, THE GAG RULE, AND THE FIRST AMENDMENT: A PROPOSAL FOR ALIGNMENT THROUGH INTERPRETIVE AND ANALYTICAL CHANGE

Cullen Ann Drescher*

On October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act¹ (the “BAPCPA” or the “Act”) took effect as the product of nearly a decade of congressional debate about proposed amendments to the Bankruptcy Code, and “represents one of the most comprehensive overhauls of the Bankruptcy Code in more than twenty-five years.”² The stated purpose of the BAPCPA was to “improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.”³ Although the declared intent behind the BAPCPA is hardly objectionable as a legislative goal, the substance of the Act has come under intense scrutiny even before its passage into law.⁴

One of the BAPCPA’s most controversial provisions is embodied in section 526(a)(4) of the Act (the “Gag Rule”).⁵ That provision explicitly prohibits attorneys from advising debtors who are contemplating bankruptcy to take on additional debt, even when providing such counsel would be both prudent and perfectly legal.⁶ A

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¹ 11 U.S.C. §§ 526–528 (2006).

² Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 485 (2005).

³ H.R. Rep. No. 109-31, at 1 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

⁴ *See* Jensen, *supra* note 2, at 485 (“[T]he enactment of BAPCPA in 2005 brought to a close a tumultuous legislative reform initiative that—over the course of a decade—became a poster child illustrating some of the most creative examples of legislative legerdemain.”).

⁵ Section 526(a)(4) provides 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 or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor . . . under this title.” 11 U.S.C. § 526(a)(4) (2006).

⁶ *See id.*; Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 578–79 (2005) (explaining liability on attorneys may be imposed although “there may be instances where it is advisable for a client to obtain a mortgage, to refinance an existing mortgage to obtain a lower interest rate, or to buy a new car on time”); Debra H. Devan, *Attorneys’ Ethical Obligation Clash with Recent Amendments to Bankruptcy Code*, MD. B.J., May–June 2007, at 4, 8 (“Many times taking on more debt is the most financially prudent option for a prospective bankruptcy debtor.”).

violator of this provision may be obligated to return “any fees or charges” paid to him or her by the debtor-client along with any “actual damages” and “reasonable attorneys’ fees.”⁷

In passing section 526(a)(4), Congress sought to accomplish two related objectives.⁸ First, Congress sought to prevent debt relief agencies from advising clients about how to discharge additional debt, thereby diluting the amount that creditors would otherwise receive in a bankruptcy payout.⁹ Second, Congress intended to preclude a putative debtor’s “gaming” of the means test.¹⁰ The means test was also introduced as part of BAPCPA as a tool by which to determine whether a debtor qualifies for bankruptcy protection under Chapter 7.¹¹ The latter concern reflects the possibility a debtor may worsen the appearance of his or her financial situation by incurring additional debt, thereby increasing the likelihood that protection under Chapter 7 will be available.¹²

Part I of this Note explores the constitutionality of section 526(a)(4) of the BAPCPA under the First Amendment, including a discussion of recent cases in which courts have struggled to determine whether section 526(a)(4) is a permissible restriction on attorney speech. Part I also suggests that the appropriate method by which to analyze the constitutionality of section 526(a)(4) is through the intermediate scrutiny that the Supreme Court employed in *Conant v. Walters*.¹³ The result of that analysis is a narrow form of the Gag Rule that was also endorsed by Judge Colloton in *Milavetz, Gallop & Milavetz, P.A. v. United States*¹⁴ and the Fifth Circuit in *Hersh v. United States ex rel. Mukasey*.¹⁵

⁷ 11 U.S.C. § 526(c)(2)(A) (2006).

⁸ *Bankruptcy Reform Act of 1998: Hearing on H.R. 3150 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 105th Cong. 7, 9 (1998) (statement of Rep. Bill McCollum); *id.* at 13 (statement of Rep. James P. Moran).

⁹ *Id.* at 7, 13.

¹⁰ *Id.* at 9. The term “gaming” has been used throughout case law to describe a debtor’s abuse of the means test. *See, e.g., Zelotes v. Adams*, 363 B.R. 660, 664 (Bankr. D. Conn. 2007).

¹¹ BAPCPA amended the Bankruptcy Code by adding the means test, which is embodied in § 707(b)(2). The test measures a debtor’s ability to repay debts in the sixty months following a filing for bankruptcy protection. If the debtor’s “current monthly income” less allowable expenses would permit the debtor to pay either (1) the greater of 25% of non-priority unsecured debt or \$6,000; or (2) \$10,000, then the debtor’s petition is presumed to be an abuse of Chapter 7. 11 U.S.C. § 707(b)(2) (2006). The mechanics and implications of the means test are discussed more fully in Part II and the conclusion of this Note.

¹² Chapter 7 of the Bankruptcy Code provides for liquidation proceedings in which debtors give up all of their property in exchange for relief, in the form of a discharge, from their debts. In reorganization proceedings under Chapters 11, 12, and 13, however, debtors usually make payments to creditors from future income pursuant to a court-approved plan. *See* 11 U.S.C. §§ 727–1321 (2006).

¹³ 309 F.3d 629 (2002), *cert. denied*, 540 U.S. 946 (2003).

¹⁴ 355 B.R. 758 (Bankr. D. Minn. 2006).

¹⁵ 553 F.3d 743 (5th Cir. 2008).

Part II of this Note suggests an analytical framework to be used in determining what speech should be subject to the Gag Rule's narrow form, and what speech should be fully protected by the First Amendment. The proposed analysis involves two steps, asking first whether the challenged speech caused the debtor to pass the means test where he would have otherwise failed. The proposed analysis then considers the pre-BAPCPA standard for determining "substantial abuse" that arose with the enactment of the Federal Judgeship Act of 1984.¹⁶ As the ensuing discussion explains, this two-pronged analytical tool gives effect to the intent of Congress in enacting the BAPCPA while vindicating the original intent of the Bankruptcy Code and the protective spirit of the First Amendment.

I. THE CONSTITUTIONALITY OF SECTION 526(A)(4) UNDER THE FIRST AMENDMENT

On September 9, 2008, Connecticut District Court Judge Droney held that section 526(a)(4) of the BAPCPA violates the First Amendment of the United States Constitution.¹⁷ In *Connecticut Bar Ass'n v. United States*, the plaintiffs argued that the provision was facially unconstitutional if construed to apply to attorneys.¹⁸ Judge Droney found that section to be "unconstitutional as applied to attorneys and their clients," and enjoined the government from enforcing section 526(a)(4) against the plaintiffs.¹⁹

Though sweeping and forceful, Judge Droney's opinion reflects an emerging concurrence in current BAPCPA jurisprudence. Several courts have held that section 526(a)(4) offends the First Amendment because it is a content-based regulation that illegally suppresses a bankruptcy attorney's right to express his or her professional views.²⁰ In reaching the same conclusion, Judge Droney addressed three questions that have emerged as especially problematic for courts grappling with the constitutional uncertainty surrounding section 526(a)(4).²¹ His answers thereto reflect the current majority position, and the undeniable judicial consensus that the BAPCPA is in need of legislative reform.

A. Are Attorneys "Debt Relief Agencies" Within the Meaning of BAPCPA?

As a threshold matter, Judge Droney addressed the question of whether the plaintiff attorneys in *Connecticut Bar* fit within the BAPCPA's definition of "debt

¹⁶ 28 U.S.C. §§ 157–159 (2006).

¹⁷ *Conn. Bar Ass'n v. United States*, 394 B.R. 274, 284 (Bankr. D. Conn. 2008).

¹⁸ *Id.* at 277.

¹⁹ *Id.*

²⁰ *See, e.g.,* *Milavetz, Gallop & Milavetz, P.A. v. United States*, 355 B.R. 758, 764–66 (Bankr. D. Minn. 2006); *Zelotes v. Martini*, 352 B.R. 17, 22 (Bankr. D. Conn. 2006); *Olsen v. Gonzales*, 350 B.R. 906, 915 (Bankr. D. Or. 2006); *Hersh v. United States*, 347 B.R. 19, 25 (Bankr. N.D. Tex. 2006), *aff'd in part, rev'd in part, Hersh*, 553 F.3d at 743.

²¹ *Conn. Bar Ass'n*, 394 B.R. at 279–82.

relief agency.”²² Once an attorney and or her law firm is considered a “debt relief agency,” BAPCPA’s restrictions govern the relationship between that entity and its debtor-clients.²³ Like most courts and commentators facing this question, Judge Droney answered in the affirmative.²⁴ However, because the BAPCPA’s definition of “debt relief agency” makes no direct reference to either “attorney” or “lawyer,” plaintiffs in other cases have made compelling arguments for a contrary interpretation.²⁵

For example, in *In re Attorneys at Law and Debt Relief Agencies*, the U.S. Bankruptcy Court for the Southern District of Georgia was persuaded that attorneys fall outside the BAPCPA’s definition of debt relief agencies.²⁶ In that case, the court relied on the “plain language” principle of statutory interpretation to arrive at its conclusion.²⁷

The § 101(12A) definition of “debt relief agency,” while extremely broad does not include the word “attorney” or “lawyer.” It does include “bankruptcy petition preparer,” but that term is defined in § 110 and expressly *excludes* attorneys and their staffs. “Attorney” is separately defined in § 101(4), which makes no reference to debt relief agencies or to subsection (12A). Clearly as a matter of plain language, “attorney” and “debt relief agency” are not synonymous nor do they in common understanding include each other.²⁸

Given these definitions, the *Attorneys at Law* court held that the term “debt relief agency” was included in the BAPCPA to regulate “entities who interface with debtors

²² *Id.* at 280. BAPCPA defines 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.” 11 U.S.C. § 101(A12) (2006). The Code defines “bankruptcy assistance” as “any goods or services . . . provided to an assisted person with the . . . purpose of providing information, advice, counsel, document preparation, . . . or . . . legal representation” regarding a bankruptcy proceeding. *Id.* at § 101(4A).

²³ Devan, *supra* note 6, at 6.

²⁴ *Conn. Bar Ass’n*, 394 B.R. at 280–81; *Zelotes*, 352 B.R. at 19 n.1; *see also Milavetz*, 355 B.R. at 767; Chemerinsky, *supra* note 6, at 576 (indicating any lawyer giving bankruptcy assistance to “assisted person” is deemed a “debt relief agency”); Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 288–89 (2005) (finding that all debtors’ lawyers are classified as “debt relief agencies” under the new Bankruptcy Code).

²⁵ *See, e.g., Milavetz*, 355 B.R. at 767–68 (“According to plaintiffs, the omission of any reference to attorneys . . . while including a term which excludes attorneys [*e.g.*, ‘bankruptcy petition preparer’], shows Congress must have intended to exclude attorneys from the ‘debt relief agency’ definition.”).

²⁶ 332 B.R. 66, 69 (Bankr. S.D. Ga. 2005).

²⁷ *Id.* (“When construing a statute, the ordinary meaning should be read into terms unless a special statutory definition controls.” (citing *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982))).

²⁸ *Attorneys at Law*, 332 B.R. at 69.

in shadowy, gray areas not already covered by bankruptcy petition preparer regulations . . . but it did not intend to regulate attorneys.”²⁹ The court did acknowledge, however, that another reading of the statute may lead to a different conclusion.³⁰

Indeed, after *Attorneys at Law*, several courts did adopt an alternative reading of the BAPCPA’s definitions after attempting to discern the statute’s “plain meaning.” For example, the District Court for the Northern District of Texas in *Hersh v. United States* held that “the term ‘debt relief agency’ includes bankruptcy attorneys.”³¹ The court reasoned that because “‘providing legal advice’ is part of the definition of bankruptcy assistance” and only attorneys are authorized to do so, attorneys squarely “fit within the definition of ‘persons providing bankruptcy assistance.’”³²

In looking beyond the BAPCPA’s definitions, the *Hersh* court discovered two additional factors supporting its conclusion that the statute applies to attorneys. First, the court pointed out that after defining the term “debt relief agency,” drafters of the Act continued to list five exceptions.³³ For the *Hersh* court, the fact that Congress declined to list attorneys as an excepted group evinced an implied congressional intent to regulate attorneys through the BAPCPA.³⁴ Second, the *Hersh* court explained that “legislative history clearly indicates that Congress had attorneys in mind with this statute; the House Report on the BAPCPA mentions ‘attorney’ 164 times.”³⁵

²⁹ *Id.* at 70. In addressing the most egregious of those “gray areas,” the Court stated:

[I]t is well-known that non-lawyers often attempt to provide “legal representation,” often to poorer, less educated, and more vulnerable citizens. To do so constitutes unauthorized practice of law and may include misdemeanor penalties under state law. . . . [T]he inclusion of the term “legal representation” in the definition of “bankruptcy assistance” was Congress’s effort to empower the Bankruptcy Courts presiding over a case with authority to protect consumers . . . who may have been harmed by a debt relief agency that may have engaged in the unauthorized practice of law, and whose existing remedies for any damage is more theoretical than real.

Id. at 69. See also Chemerinsky, *supra* note 6, at 582–83 (discussing matters of state regulation under the Tenth Amendment and BAPCPA).

³⁰ *Attorneys at Law*, 332 B.R. at 69 (“The inclusion of ‘legal representation’ in the scope of what a debt relief agency does certainly suggests a contrary result to that which I reach.”).

³¹ 347 B.R. 19, 22 (Bankr. N.D. Tex. 2006).

³² *Id.* at 23.

³³ *Id.*

³⁴ *Id.* (“[I]f Congress had wanted attorneys excluded from the term ‘debt relief agency’ (and, as a result, the requirements of BAPCPA at issue here) it surely would have taken this opportunity to exclude them from what otherwise they are so plainly within.”).

³⁵ *Id.* (citing H.R. REP. NO. 109-31, as reprinted in 2005 U.S.C.C.A.N. 88). The House Report lends additional supporting evidence of legislative intent to subject attorneys to BAPCPA: “The bill’s consumer protections include provisions strengthening professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases.” H.R. REP. NO. 109-31, at 17, as reprinted in 2005 U.S.C.C.A.N. 88. In addition, legislative documents reflect that Senator Feingold proposed Amendment No. 93 to Congress during

After *Hersh*, most courts accept the notion that attorneys are included in the BAPCPA's definition of "debt relief agency."³⁶ In *Connecticut Bar*, Judge Droney agreed.³⁷ However, as his opinion makes clear, the application of the statute to attorneys does not in itself confer standing on attorneys who wish to challenge the BAPCPA's provisions.³⁸

B. Do Attorneys Have Standing to Challenge Provisions of the BAPCPA Under the "Case or Controversy" Requirement?

In *Connecticut Bar*, Judge Droney held that the plaintiff attorneys had standing to sue to challenge section 526(a)(4).³⁹ There, the government asserted that four of the plaintiffs could not show that they suffered injury in fact as a result of the challenged provision because they were not attorneys who represented debtors in their practices of law.⁴⁰ Therefore, the government argued, the matter had not risen to the level of a "case or controversy" within the meaning of the Constitution.⁴¹

The crux of the defendants' argument was that "the new statute was meant to address bankruptcy [as] part of the Bankruptcy Code"; thus, "bankruptcy assistance"

BAPCPA discussions, which would have expressly excluded lawyers from the definition of "debt relief agency." See 151 CONG. REC. S2316 (daily ed. Mar. 9, 2005) (statement of Sen. Feingold). The Senate did not address Senator Feingold's proposal on that date. *Id.* at 2342.

³⁶ See *Zelotes v. Martini*, 352 B.R. 17, 19 n.1 (Bankr. D. Conn. 2006); *Olsen v. Gonzales*, 350 B.R. 906, 912 (Bankr. D. Or. 2006).

³⁷ *Conn. Bar Ass'n v. United States*, 394 B.R. 274, 280–81 (Bankr. D. Conn. 2008).

³⁸ *Id.* at 279 (discussing standing in detail despite later finding that attorneys were included in BAPCPA's definition of "debt relief agency").

³⁹ *Id.* The U.S. Constitution restricts federal courts to adjudicating "cases and controversies." U.S. CONST. art. III, § 2. The Supreme Court articulated the parameters of this requirement, setting forth a three part test for whether standing exists in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To qualify as a party with standing to litigate, a person must show (1) "an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical"; (2) there must "be a causal connection between the injury and the conduct complained of"; and (3) it must be "likely . . . that the plaintiff's injury can be redressed by a favorable decision." *Id.*

⁴⁰ Plaintiffs Brown and Welsh represented only creditors, Plaintiff Sklarz stated only that the practice of his firm included bankruptcy, and Plaintiff Roisman alleged that he focused primarily on family law and sometimes discussed bankruptcy with his clients. *Conn. Bar Ass'n*, 394 B.R. at 279.

⁴¹ See *Arizonians for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (explaining that standing is part of Constitution's case or controversy requirement, and that a party must show invasion of a legally protected interest that is concrete and particularized, and harm that is actual or imminent). Another case was brought after a consumer bankruptcy attorney filed a motion asking the court to determine his status under section 101(12A) of the Code. See *In re McCartney*, 336 B.R. 588, 589–92 (Bankr. M.D. Ga. 2006) ("Movant asks the Court to determine that attorneys who practice before this Court are not debt relief agencies The Court can only conclude that Movant has failed to satisfy the case or controversy requirement.").

under the BAPCPA “must mean advice given to debtors filing for bankruptcy.”⁴² The court disagreed, finding “nothing in the text of the statute limit[ing] its application to attorneys representing debtors contemplating filing for bankruptcy.”⁴³ According to Judge Droney, “The statute’s definition of ‘assisted person’ requires that the debts of an assisted person be consumer debts, but it does not require that the ‘bankruptcy assistance’ provided be with respect to that person’s debts.”⁴⁴ Under that analysis, section 526(a)(4) causes injury in fact to all attorneys who provide assistance to consumers with regard to their debts, whether or not a bankruptcy proceeding is involved.

A similar standing argument appeared in *Zelotes v. Martini*, where the defendant argued that the plaintiff had not suffered the required injury in fact “as no entity ha[d] taken action to enforce BAPCPA against [the plaintiff].”⁴⁵ Citing several cases discussing the uniqueness of standing doctrine in the context of the First Amendment,⁴⁶ the court concluded that *Zelotes* was eligible to challenge the BAPCPA provision despite the lack of threatened sanction because section 526(a)(4) posed a danger of self-censorship.⁴⁷ The resulting injury, held the court, was a chilling of the attorney’s professional speech that the First Amendment could not permit.⁴⁸

The reasoning employed in *Connecticut Bar* and *Zelotes* is consistent with the United States District Court’s decision in *New York Bar Ass’n v. Reno*, where the court found that the New York Bar Association had standing to challenge a similar

⁴² *Conn. Bar Ass’n*, 394 B.R. at 281 n.4.

⁴³ *Id.* at 281.

⁴⁴ *Id.*

⁴⁵ 352 B.R. 17, 20 (Bankr. D. Conn. 2006). *Zelotes*, an attorney, brought an action challenging the constitutionality of section 526(a)(4) against *Martini* in her official capacity as United States Trustee. *Id.* at 19.

⁴⁶ *See, e.g., Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 392 (1988) (holding, in the context of a First Amendment claim, that the plaintiffs had standing “as the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution”); *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (“A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement . . . [b]ut . . . does not have to await the consummation of threatened injury to obtain preventive relief.”); *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (stating that “constitutional violations may arise from the deterrent, or ‘chilling,’ effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights”).

⁴⁷ *Zelotes*, 352 B.R. at 21 (citing *Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006) (“[I]t is well settled that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”)). *But see Geisenberger v. Gonzales*, 346 B.R. 678, 682 (Bankr. E.D. Pa. 2006) (finding that the plaintiff lacked standing to challenge section 526(a)(4) because the plaintiff failed to allege that “the federal government or the Commonwealth of Pennsylvania has threatened to enforce the [provision] against him” or that he “sustained or is in imminent danger of suffering an economic loss from the enactment of the BAPCPA provisions” at issue).

⁴⁸ *Zelotes*, 352 B.R. at 21–22.

restriction on professional speech.⁴⁹ In that case, the Association challenged a statute that “made it a crime to dispose of assets in order to become eligible for Medicaid benefits if the disposition of assets ‘resulted in the imposition of a period of ineligibility.’”⁵⁰ Because the Attorney General stated that the Justice Department was not likely to enforce that statute, the government argued that the Association was not in danger of suffering an injury,⁵¹ and the plaintiffs’ motion for injunctive relief was therefore not ripe for adjudication.⁵²

In discussing the question of whether the plaintiffs’ claim was ripe, the court was careful to explain that, where the First Amendment is implicated, customary standards are “relaxed.”⁵³ The court held that the plaintiffs suffered injury “[e]ven in the absence of hardship from imminent prosecution or threat of prosecution,” because of the chilling effect of the questioned law.⁵⁴ According to the court:

The irreparable harm that exists here is the potential for self-censorship among [the bar association’s] members. [Those] members have an ethical obligation as attorneys to respect and uphold the law. In fact, Plaintiff’s affidavits state that [the statute in

⁴⁹ 999 F. Supp. 710, 713 (N.D.N.Y. 1998). In 2006, the *Olsen* court discussed the district court’s decision in *Reno* as it might apply to an analysis of section 526(a)(4). *Olsen v. Gonzales*, 350 B.R. 906, 914 (Bankr. D. Or. 2006). Although the *Olsen* court disagreed with the reasoning in *Reno* and arrived at a contrary conclusion, the *Olsen* court did acknowledge that the plaintiffs in *Olsen* could have made “a similar challenge” regarding standing as the one that proved successful for the plaintiffs in *Reno*. See *Olsen*, 350 B.R. at 914.

⁵⁰ *Reno*, 999 F. Supp. at 712–13 (stating that section 4734 of the Balanced Budget Act of 1997 “was incorporated into section 217 of the Health Insurance Portability and Accountability Act of 1996”).

⁵¹ The Department of Justice stated that the government would “neither defend the constitutionality of 42 U.S.C. section 1320a-7b(a)(6) nor enforce its criminal provisions.” Attorney General Janet Reno had “notified the United States House of Representatives and the United States Senate that the Department of Justice would not enforce the aforementioned criminal provisions” prior to the litigation in *New York Bar Ass’n*. *Id.* at 713.

⁵² *Id.* (“Not surprisingly, [the Government] now argues that a preliminary injunction is no longer needed.”).

⁵³ *Id.* at 715. The court explained that “the question of ripeness and injunctive relief converge” in the shared requirement that injury or hardship will result if judicial consideration is withheld

when relief against the enforcement of a criminal statute is sought, a plaintiff generally must show either actual prosecution under the statute or that a sufficiently real and immediate threat of prosecution exists. . . .

The customary ripeness analysis is, however, relaxed somewhat in circumstances involving a facial challenge implicating the First Amendment.

Id. (citing *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995); *Martin Tractor Co. v. Fed. Election Comm’n*, 627 F.2d 375, 380 (D.C. Cir. 1980)).

⁵⁴ *Id.*

question] actually has resulted in [association] members refraining from providing certain counsel and assistance to clients.⁵⁵

For the *Reno* court, injunctive relief was necessary to preclude the threatened injury—a chilling effect on the attorneys’ professional speech.⁵⁶

Because injury in fact is a prerequisite to an attorney’s ability to achieve standing to facially challenge section 526(a)(4) of the BAPCPA, the *Reno* analysis should apply to confer standing in every circumstance.⁵⁷ Because section 526(a)(4) is like the statute challenged in *Reno* in that it creates the potential for self-censorship among attorneys, it injures those attorneys by chilling their professional speech.⁵⁸ This particular type of injury is ripe, even if it is neither imminent nor irreparable.⁵⁹ Because the injury asserted by the plaintiffs in *Connecticut Bar* and *Zelotes* elevated those matters to “cases and controversies” within the meaning of *Reno* and established standing doctrine, the courts in those cases were correct in finding the plaintiffs eligible to challenge the constitutionality of section 526(a)(4).⁶⁰

C. What Standard Should Be Used In Evaluating the Constitutionality of Section 526(a)(4) Under the First Amendment?

In cases where an attorney challenges the constitutionality of section 526(a)(4), disputes arise between the parties as to whether the court should apply strict scrutiny or a more lenient standard of First Amendment analysis. In *Connecticut Bar*, the plaintiff argued that strict scrutiny should be applied because the restriction in question was content-based, and the speech to which it applied should be accorded strong constitutional protection.⁶¹ The government argued for a less exacting standard,

⁵⁵ *Id.* at 716.

⁵⁶ *Id.*

⁵⁷ A “facial challenge” to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 n.11 (1988). “The Supreme Court has indicated a general preference for as applied challenges, noting that [f]acial invalidation ‘is manifestly, strong medicine’ that ‘has been employed by the Court sparingly and only as a last resort.’” *Zelotes v. Martini*, 352 B.R. 17, 21 n.3 (Bankr. D. Conn. 2006) (quoting *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998)).

⁵⁸ *Zelotes*, 352 B.R. at 21 (“[P]laintiff alleges that his speech is chilled by [section 526(a)(4)], . . . and this alleged suppression since the enactment of the BAPCPA is sufficient to establish standing.”).

⁵⁹ *Reno*, 999 F. Supp. at 716.

⁶⁰ Where the BAPCPA is concerned, challenging attorneys may have an even stronger argument regarding their standing to sue than did the plaintiff attorneys in *Reno*, as no enforcement body has ever threatened to take action against attorneys in violation of its provisions. *See, e.g., Olsen v. Gonzales*, 350 B.R. 906, 913 (Bankr. D. Or. 2006) (“[T]here has been no threatened enforcement of the BAPCPA against [the] plaintiffs.”).

⁶¹ *Conn. Bar Ass’n v. United States*, 394 B.R. 274, 281 (Bankr. D. Conn. 2008). In *United States v. Playboy Entertainment Group, Inc.*, the Supreme Court explained that strict scrutiny

urging the court to employ the balancing test from *Gentile v. State Bar of Nevada*.⁶² The *Gentile* standard is traditionally applied to determine whether a state-enacted rule of ethics violates the First Amendment.⁶³

At least one court has reached a conclusion as to which standard most appropriately applies to section 526(a)(4).⁶⁴ In *Hersh*, the court held that strict scrutiny should be used to evaluate that section, and that the provision failed under that test.⁶⁵ The *Hersh* court agreed that the government's goal of preventing abuse of the bankruptcy system was compelling, but that the statute was not sufficiently narrow to serve that interest to the satisfaction of the First Amendment.⁶⁶ Moreover, the court emphasized that "[n]either 11 U.S.C. § 526(a)(4) nor any other part of the section purports to be an ethical standard."⁶⁷ Concluding that the *Gentile* standard does not apply to that section, but recognizing that "[t]he balancing test in *Gentile* and the strict scrutiny test appear to share the requirement that any restrictions on speech be narrow," the *Hersh* court advised that "the provision fails strict scrutiny for the same reasons it fails the more lenient test."⁶⁸

Acknowledging that both strict scrutiny and the *Gentile* test require restrictions be narrow limitations on speech, other courts have avoided an express articulation

requires the regulation of speech to be (1) narrowly tailored to promote (2) a compelling government interest. 529 U.S. 803, 813 (2000). *See also* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 741 (1996) (explaining that strict scrutiny allows the "government [to] directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech").

⁶² 501 U.S. 1030 (1991). The *Gentile* test asks whether there is a "constitutionally permissible balance" between "the First Amendment rights of attorneys" and the government's "legitimate interest in regulating the activity in question," and requires that (1) the ethical restrictions serve the state's legitimate interest in regulating the activity in question, and (2) the restrictions imposed only narrow and necessary limitations on speech. *Id.* at 1075.

⁶³ In *Gentile*, the Court considered a Nevada Supreme court rule "prohibiting a lawyer from making extrajudicial statements to press that he knows or reasonably should know would have 'substantial likelihood of materially prejudicing' adjudicative proceeding[s]." *Id.* at 1033–34. The *Gentile* standard was later applied in *Canatella v. Stovitz*, 365 F. Supp. 2d 1064 (N.D. Cal. 2005) to examine state bar statutes and professional rules designed to regulate attorney speech in California.

⁶⁴ *Hersh v. United States*, 347 B.R. 19, 23–24 (Bankr. N.D. Tex. 2006), *aff'd in part, rev'd in part*, 553 F.3d 743 (5th Cir. 2008).

⁶⁵ *Id.*

⁶⁶ *Id.* at 25. The court found that the section "is overinclusive in at least two respects: (1) it prevents lawyers from advising clients to take lawful actions; and (2) it extends beyond abuse to prevent advice to take prudent actions." *Id.*

⁶⁷ *Id.* at 24 n. 8; *see also* *Milavetz, Gallop & Milavetz, P.A. v. United States*, 355 B.R. 758, 764 (Bankr. D. Minn. 2006) ("While the section is certainly a rule, nothing in § 526 alludes to ethics. The section is titled 'Restrictions on debt relief Agencies,' and plainly prohibits certain acts. The advice the section forecloses may be potentially advantageous to creditors, but this does not make it equivalent to ethics either in logic or in law.").

⁶⁸ *Id.* at 24 & n.8.

of which standard is to be applied in examining the constitutionality of section 526(a)(4). For example, in *Zelotes*, the court found that “[i]t is not necessary to determine whether . . . § 526(a)(4) is an ethical regulation, and thus subject to the *Gentile* standard, or whether it is a content-based regulation of attorney speech subject to strict scrutiny.”⁶⁹ Because the *Zelotes* court held that section 526(a)(4) violates the First Amendment under either test, the court analyzed the statute “under the more lenient *Gentile* standard.”⁷⁰

D. The Highest Courts to Consider the Constitutionality of Section 526(a)(4) and the Resulting Circuit Split

After several lower courts held that the Gag Rule violates the constitutionally-granted right to free speech, the Eighth Circuit was charged to decide the issue in *Milavetz, Gallop & Milavetz, P.A. v. United States*.⁷¹ On March 11, 2008, that court held that the Gag Rule is “unconstitutionally overbroad as applied to . . . attorneys” under either strict scrutiny or the lower *Gentile* standard.⁷² The court identified the Gag Rule’s inherent constitutional defect:

[T]his 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. . . . Therefore, we hold that [the Gag Rule] is substantially overbroad, and unconstitutional as applied to attorneys who provide bankruptcy assistance to assisted persons, as those terms are defined in the Code.⁷³

Because of its interference with an attorney’s duty to speak forthrightly with his clients, the *Milavetz* court found that section 526(a)(4) causes injury to debtors who

⁶⁹ *Zelotes v. Adams*, 363 B.R. 660, 666 (Bankr. D. Conn. 2007).

⁷⁰ *Id.*

⁷¹ 541 F.3d 785 (8th Cir. 2008).

⁷² *Id.* at 793. “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.” *Id.* at 792. Under the more lenient *Gentile* standard, which is traditionally applied in the context of First Amendment challenges to ethical restrictions on attorney speech, the rights of attorneys are first balanced against the “government’s legitimate interest in regulating the activity in question”; next, the court “determine[s] whether the regulations impose[d] ‘only narrow and necessary limitations on lawyers’ speech.” *Id.* at 793 (quoting *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991)).

⁷³ *Id.* at 793–94 (footnotes omitted).

require the assistance of counsel.⁷⁴ And because “it is well settled that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,”⁷⁵ the Gag Rule also causes permanent damage to attorneys under the *Milavetz* reading of the rule.

In dissent to the majority’s opinion in *Milavetz*, Judge Colloton reminded the court that “[w]hen presented with a constitutional challenge to an Act of Congress, we have not only the power, but the duty, to adopt a narrowing construction that will avoid constitutional difficulties whenever possible.”⁷⁶ According to Colloton, the phrase “in contemplation of filing for bankruptcy” should be construed to connote “actions taken with the intent to abuse the protections of the bankruptcy system.”⁷⁷

In support of his conclusion, Colloton insightfully recognized that the phrase “in contemplation of filing” is a term of art in the bankruptcy context.⁷⁸ Indeed, the term is often used in discussion of preferential payments and fraudulent transfers.⁷⁹ Under the Bankruptcy Code, such transactions are unlawful because they are made within the ninety day “zone of insolvency” in which a debtor is *in contemplation* of filing for bankruptcy and under a duty to preserve his assets for the benefit of the estate.⁸⁰ Thus, in bankruptcy, the phrase “in contemplation of filing” is used to modify the actions of nefarious debtors who abuse the protections of the bankruptcy system to the detriment of his estate’s ultimate beneficiaries.⁸¹

If the Gag Rule is read to prohibit attorneys from advising debtors to incur only detrimental additional debt (debt that would be harmful to the estate), then the rule simply reinforces the ethical principle that attorneys cannot advise their clients to take unlawful actions.⁸² Because the debtor’s assumption of detrimental debt on the eve of bankruptcy would be unlawful under the Bankruptcy Code, a debtor’s attorney

⁷⁴ *Id.* at 793.

⁷⁵ *Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006).

⁷⁶ *Milavetz*, 541 F.3d at 798 (citing *Boos v. Barry*, 485 U.S. 312, 330–31 (1988)). Judge Colloton also noted that “[i]t is therefore incumbent upon us to read the statute to eliminate those [constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress.” *Id.* (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994)).

⁷⁷ *See id.* at 799.

⁷⁸ *Id.*

⁷⁹ *See, e.g., In re Damron Cost. Co., Inc.*, 218 B.R. 371 (Bankr. W.D. Ky. 1997) (applying a Kentucky statute defining a preferential transfer as on that is made “in contemplation of insolvency,” and “with the design to prefer one or more creditors to the exclusion . . . of others”).

⁸⁰ 11 U.S.C. § 547 (2006); *see also In re Amcast Indus. Corp.*, 365 B.R. 91 (Bankr. S.D. Ohio 2007) (discussing unlawful transfers made within the preference period).

⁸¹ *Milavetz*, 541 F.3d at 799 (citing *In re Pearce*, 21 Vt. 611, 616 (1843) (concluding that an act was done “in contemplation of bankruptcy” if it was done with “inten[t] to defeat the general distribution of effects, which takes place under a proceeding in bankruptcy”).

⁸² For example, an attorney’s duty of confidentiality, which totally covers the client’s admission of guilt, does not extend to a client’s plans to engage in future unlawful conduct. *See Nix v. Whiteside*, 475 U.S. 157 (1986).

is already ethically prohibited from advising his client to take such improper steps.⁸³ Interpreted this way, the Gag Rule not only allows attorneys to advise their clients to incur additional debt that is beneficial, but avoids imposing limitations on an attorney's right to speak freely that do not exist in the canons of ethics to which they are already bound.

Judge Colloton also pointed out that the Gag Rule's system of sanctions leads naturally to a narrowing interpretation such as the one he suggests:

An attorney who violates [the Gag Rule] can be sanctioned in just three situations: if a debtor sues the attorney for the available remedies—remittal of fees, actual damages, and reasonable attorneys 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. The remedies for violation thus emphasize actual damages.⁸⁴

Based on the foregoing, Judge Colloton explained that “legal and appropriate advice that would be protected by the First Amendment, yet prohibited by a broad reading of [the Gag Rule], should cause no damage at all.”⁸⁵ He continued:

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, then a debtor following that advice would suffer no damages. 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.⁸⁶

In contrast, a debtor is likely to have a remedy against an attorney if he is advised to file an abusive petition and his case is dismissed under the means test.⁸⁷ Damages would also be imposed “where an attorney general or a court has reason to seek or impose sanctions against an abusive debt relief agency.”⁸⁸ In sum, under Congress's statutory scheme, damages can only arise where an attorney has caused a client to incur damaging debt. Beneficial debt is not contemplated by the statute, and should be kept outside the scope of the Gag Rule's application.⁸⁹

⁸³ *See id.*

⁸⁴ *Milavetz*, 541 F.3d at 800 (internal citation omitted).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *See id.*

Nine months after the Eighth Circuit spoke, the Fifth Circuit became the second federal appellate bench to consider the Gag Rule's constitutionality. In reviewing the district court decision in *Hersh v. United States*, the Fifth Circuit offered a whole-hearted endorsement of Judge Colloton's view, upholding the doctrine of constitutional avoidance and a limiting interpretation of section 526(a)(4).⁹⁰ According to the court, the statute should be construed

to prevent only a debt relief agency's advice to a debtor to incur debt in contemplation of bankruptcy when doing so would be an abuse of the bankruptcy system. In so interpreting the statute, we avoid the constitutionality questions raised by Hersh (and those relied on by the *Milavetz* majority), and conclude that the statute only affects unprotected speech.⁹¹

The *Hersh* court shared Judge Colloton's concern that section 526(a)(4), as written, creates a blanket prohibition on attorneys advising clients to take on additional debt, even when doing so would be entirely warranted by a debtor's financial circumstances.⁹²

To compel the court's ultimate conclusion, Hersh provided five distinct examples of when her clients should properly be advised to incur new debt before filing for bankruptcy.⁹³ The court noted that "[t]he government generally takes the position that in nonabusive situations of [the kind outlined by Hersh], section 526(a)(4) does not preclude advice to incur the debt."⁹⁴ As the government's concession before the Fifth Circuit indicates, section 526(a)(4) should not be taken literally. The court agreed in finding that, should it be understood according to its words, the statute "would raise serious constitutional problems because . . . it would restrict some speech that is protected by the First Amendment."⁹⁵ Accordingly, the court construed section 526(a)(4) to prevent a debt relief agency from advising a debtor to incur debt in contemplation of bankruptcy when doing so would be an abuse of the bankruptcy system.⁹⁶ Under the First Amendment, then, the statute only touches unprotected speech.⁹⁷

⁹⁰ See *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743 (5th Cir. 2008). The court also held that attorneys who provide "bankruptcy assistance" to an "assisted person" qualify as "debt relief agencies" when they receive payment of money or other valuable consideration for such services. *Id.* at 752.

⁹¹ *Id.* at 756.

⁹² *Id.* at 754.

⁹³ *Id.* at 754 n. 10.

⁹⁴ *Id.*

⁹⁵ *Id.* at 754.

⁹⁶ *Id.*

⁹⁷ *Id.* at 761. For a thorough and useful summary of the Fifth Circuit's opinion, see Hon. Nancy C. Dreher, *Fifth Circuit Rules That Consumer Debtors' Attorneys are "Debt Relief*

E. The Correct Constitutionality Analysis—Conant v. Walters Meets Judge Colloton and the Fifth Circuit

Constitutional challenges to professional speech arising outside the attorney-client relationship provide helpful guidance to analysis of the Gag Rule. In *Conant v. Walters*, the Ninth Circuit addressed a statutory restriction on speech that was much like the Gag Rule, but applied in a medical context.⁹⁸ In that case, a group of patients and physicians brought a First Amendment challenge to the enforcement of a government policy threatening to punish physicians for conversing with their patients about the medical uses of marijuana.⁹⁹

The dispute “focused on the government’s policy of investigating doctors or initiating proceedings against doctors . . . because they ‘recommended’ the use of marijuana” to their ill patients.¹⁰⁰ In the district court, the government argued that such recommendations led to illegal use.¹⁰¹ However, that court found that there are many legitimate uses of marijuana in the medical context.¹⁰² “For example, the doctor could seek to place the patient in a federally approved, experimental marijuana therapy program. Alternatively, the patient upon receiving the recommendation could petition the government to change the law.”¹⁰³

On appeal, the Ninth Circuit found that the government policy did “strike at the core” First Amendment interests of doctors and patients.¹⁰⁴ The court explained that “[a]n integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients.”¹⁰⁵ Further, the court recognized that the need for doctor-patient communication has been endorsed in the courts through the development and continued application of the common law doctor-patient privilege.¹⁰⁶

The court in *Conant* also rejected the government’s argument that being a member of a regulated profession results in a surrender of First Amendment rights.¹⁰⁷ Citing *Florida Bar v. Went For It, Inc.*,¹⁰⁸ the court stated a contrary opinion: “professional speech may be entitled to ‘the strongest protection our Constitution has to offer.’”¹⁰⁹

Agencies” and That DRA Provisions of BAPCPA Having to do with Advice to Clients and Disclosure are Constitutional, 2 BANKR. SERV. CURRENT AWARENESS ALERT 8 (Feb. 2009).

⁹⁸ 309 F.3d 629 (9th Cir. 2002).

⁹⁹ *Id.* at 632.

¹⁰⁰ *Id.* at 634.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* (internal citation omitted).

¹⁰⁴ *Id.* at 636.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 637.

¹⁰⁸ 515 U.S. 618, 634 (1995).

¹⁰⁹ *Conant*, 309 F.3d at 637.

According to the court in *Conant*, “[T]o survive First Amendment scrutiny, the government’s policy must have the requisite ‘narrow specificity.’”¹¹⁰ However, the court concluded that the government’s policy failed this standard as it left “doctors and patients ‘no security for free discussion,’” and that “physicians have been forced to suppress speech that would not rise to the level of that which the government constitutionally may prohibit.”¹¹¹ The court in *Conant* did not suggest that the government should cease its efforts to end abuse of marijuana through regulations on the medical profession. Rather, the court held that “[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try.”¹¹²

At this analytical juncture, the reasoning in *Conant v. Walters* reaches near perfect alignment with Judge Colloton’s views as adopted in *Hersh v. United States*. The Gag Rule is the first strategy the government thought to try in precluding abuses of the bankruptcy system through gaming of the means test, as indicated by the fact that the two provisions were enacted simultaneously.¹¹³ Its restriction on speech, therefore, should be broadly and literally interpreted only as a last resort. An equally effective and less restrictive approach is to construe the statute with the “narrow specificity” demanded by *Conant*, urged by Judge Colloton, and adopted wholesale by the Fifth Circuit in *Hersh*.¹¹⁴ For the Gag Rule, this means that the words “in contemplation of bankruptcy” should be taken to mean “with the intent to abuse the protections of the bankruptcy system.”¹¹⁵

Although the limiting interpretation does avoid the Gag Rule’s problems under the First Amendment, other difficulties will arise in applying the new, narrow-form variation of the statute. At the first instance, courts will struggle with the task of identifying the types of speech that are properly subject to the new and narrow rule. Part II of this Note seeks to provide a coherent approach to meeting that challenge. The analytical framework presented is consistent with the intent of Congress in enacting the BAPCPA as well as the Federal Judgeship Act, and faithful to the broader mission of the Bankruptcy Code as historically interpreted by federal courts.

II. TO WHAT SPEECH SHOULD THE GAG RULE APPLY IN ITS NEW AND NARROW FORM?

This section posits that to identify speech to which the narrow-form Gag Rule applies, courts should engage in a two-step inquiry into the effect of the speech itself. First, a court should determine whether or not the speech at issue causes a

¹¹⁰ *Id.* at 639.

¹¹¹ *Id.* (internal citation omitted).

¹¹² *Id.* at 637 (citing *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002)).

¹¹³ *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743, 761 (5th Cir. 2008).

¹¹⁴ *See Hersh*, 553 F.3d at 757; *Conant*, 309 F.3d at 639.

¹¹⁵ *Hersh*, 553 F.3d at 753.

consumer debtor to pass the means test where he or she would otherwise fail. In other words, this initial step asks whether, but for the challenged speech, the means test would prohibit the debtor from obtaining relief under Chapter 7. If the question yields an affirmative result, a presumption of Gag Rule applicability should arise.

Next, a court should proceed to the second step of the analysis which searches for rebuttal by resurrecting the Chapter 7 eligibility standard employed after 1984 and prior to 2005. The second prong of the proposed framework asks whether the speech in question causes the debtor to commit a “substantial abuse” under the Federal Judgeship Act of 1984 as judicially interpreted by bankruptcy courts. If the answer is yes, then the speech should be regulated by the narrow-form Gag Rule. If the answer is no, then the presumption of applicability is properly rebutted and a court should refrain from applying the Gag Rule to the speech in question.

A. Step One: Advice to Incur Debt that Leads to Means Test Failure—A Presumption of Applicability

Bankruptcy Code section 707(b) embodies the BAPCPA’s rigid “means test,” which sets forth an income-based standard for a consumer’s admission to Chapter 7.¹¹⁶ Because the test only affords debtors in the “worst” financial conditions the opportunity for discharge through liquidation, some debtors have incentive to incur additional debt to ensure eligibility for Chapter 7 relief.

1. Purposes and Precepts of the Means Test

By nearly all accounts, the BAPCPA has wrought an unprecedented transformation of the Bankruptcy Code as it pertains to individual debtors.¹¹⁷ As Brubaker notes, “[t]he Bankruptcy Act of 1898 established for the first time a permanent federal bankruptcy system in which individual debtors could freely and voluntarily avail themselves of a liberal bankruptcy discharge of indebtedness.”¹¹⁸ Through a surrender of nonexempt assets and without creditor consent, consumers were empowered to financially rehabilitate without imposition by lenders.¹¹⁹ This system “remained a seemingly indelible fixture of federal bankruptcy law until the advent of BAPCPA, which restricts both individual debtors’ access to such a ‘liquidation’ discharge (through chapter 7) and the scope of the relief afforded by such a chapter 7 discharge.”¹²⁰

¹¹⁶ See 11 U.S.C. § 707(b) (2006) (providing that a petition may be dismissed if the individual debtor fails to satisfy the means test standards).

¹¹⁷ See, e.g., *In re Baker*, 390 B.R. 524 (Bankr. D. Del. 2008); *In re Duke*, 345 B.R. 806 (Bankr. W.D. Ky. 2006); Ralph Brubaker, *Consumer Credit and Bankruptcy: Assessing a New Paradigm*, 2007 U. ILL. L. REV. 1, 1.

¹¹⁸ Brubaker, *supra* note 117, at 1 (citing Charles Jordan Tabb, *A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998*, 15 EMORY BANKR. DEV. J. 343 (1999)).

¹¹⁹ *Id.*

¹²⁰ *Id.*

Congress's unambiguous intent in enacting the BAPCPA was to discourage consumers from pursuing liquidation under Chapter 7.¹²¹ The BAPCPA clearly prefers that consumers seek to discharge their debts, if at all, by filing under Chapter 13.¹²² "A Chapter 13 discharge is normally granted only upon completion of the debtor's Chapter 13 repayment plan, usually at least three years after her petition has been filed."¹²³ In most cases, a plan will not be confirmed unless it provides for the full repayment of all secured creditors from the debtor's future earnings in the form of periodic installments.¹²⁴ Thus, unlike the Chapter 7 debtor, who is free to use his post-petition income in regaining a financial foothold, an individual proceeding through Chapter 13 remains encumbered by his debts for the duration of his plan.¹²⁵

Because most consumer debtors cannot satisfy their debts through liquidation, creditors benefit when they are guaranteed repayment through future income streams.¹²⁶ It is unsurprising, then, that the unsecured creditors' lobby was particularly active during the period in which the BAPCPA underwent congressional consideration.¹²⁷ Political pressures notwithstanding, Congress justified the BAPCPA's provisions by pointing to "substantial abuse" of Chapter 7, asserting that the integrity of the Bankruptcy Code depended on a legislative end to such behavior.¹²⁸ Pursuant to that objective, Congress vested the BAPCPA with a rigid "means test," which has proven

¹²¹ The National Consumer Law Center takes a more sinister view of the BAPCPA: From its Orwellian title (the Act is clearly *not* a 'Consumer Protection Act') to the last of its 512 pages, the 2005 Act presents numerous challenges to attorneys who represent consumer debtors. How such terrible legislation could be passed by Congress is a story of money, political mean-spiritedness, and intellectual dishonesty.

HENRY SOMMER, CONSUMER BANKRUPTCY LAW AND PRACTICE 4 (8th ed. 2006).

¹²² *Kibbe v. Sumski*, 361 B.R. 302, 312–14 (B.A.P. 1st Cir. 2007); *In re Briscoe*, 374 B.R. 1, 17–18 (Bankr. D.D.C. 2007) (noting "Congress' expressed preference for the maximal repayment of debt" to creditors).

¹²³ JEFF FERRIELL & EDWARD J. JANGER, UNDERSTANDING BANKRUPTCY § 13.05, at 513 (2d ed. 2007).

¹²⁴ Chapter 13 plans usually provide for the repayment of a specified percentage of unsecured debts. However, secured and "super-priority" interests, such as domestic support obligations and administrative claims, are paid out first. *See In re Warner*, 115 B.R. 233 (Bankr. C.D. Cal. 1989) (discussing priority scheme required for plan confirmation under Chapter 13).

¹²⁵ FERRIELL & JANGER, *supra* note 123, § 13.05, at 513–14.

¹²⁶ Most filings under Chapter 7 are "no asset" liquidations in which the debtor's only assets are those that are exempted by the Bankruptcy Code and therefore not subject to liquidation. The practical result of this reality is that most debtors filing under Chapter 7 receive a discharge of indebtedness for "free," as the creditors receive no payout from the bankruptcy estate. *See id.* § 17.01, at 603.

¹²⁷ *See, e.g., Barry Rehfeld, Top Creditor Lobbyist Tassej Goes for Broke*, AM. BANKER, May 17, 2001, at 1 (explaining how a lobbyist-produced report became the framework for the BAPCPA).

¹²⁸ *In re Lindstrom*, 381 B.R. 303, 308 (Bankr. D. Colo. 2007).

to be the most complicated barrier to the commencement of a Chapter 7 case since the Act became enforced as federal law.¹²⁹

2. The Mechanics of the Means Test Explained

Virtually any individual qualifies for voluntary liquidation under Chapter 7 of the Bankruptcy Code.¹³⁰ This broad eligibility rule must nevertheless be read in conjunction with the *de facto* limitation placed on consumer debtors by section 707(b).¹³¹ That provision requires a court to determine whether a debtor has sufficient disposable income to make meaningful payments to creditors under a Chapter 13 plan.¹³² If such ability exists, the debtor's petition will be dismissed as "abusive" of Chapter 7, and the case will be dismissed or converted to a proceeding under Chapter 13.¹³³

a. A Mathematical Formula for Identifying Abusive Petitions

With the BAPCPA came a sweeping change to the analysis formerly employed by courts in identifying abuse in consumer bankruptcy filings.¹³⁴ In place of the subjective evaluation described in former section 707(b), the BAPCPA imposed a cold calculation—a mathematical "means test" by which consumer worthiness for Chapter 7 is numerically ascertained.¹³⁵

Prior to the BAPCPA's enactment, courts would typically consider the totality of the circumstances in any given case to ensure the absence of "substantial abuse" in a Chapter 7 petition.¹³⁶ For example, in *Green v. Staples*, the Fourth Circuit reversed

¹²⁹ *In re Singletary*, 354 B.R. 455, 458 n.3 (Bankr. S.D. Tex. 2006) ("BAPCPA was intended to address what Congress perceived to be certain abuses of the bankruptcy process. Among the abuses identified by Congress was the easy access to chapter 7 liquidation proceedings by consumer debtors, who if required to file under chapter 13, could afford to pay some dividend to their unsecured creditors.").

¹³⁰ FERRIELL & JANGER, *supra* note 123, § 17.02, at 604–05.

¹³¹ Hon. Thomas Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 221 (2007).

¹³² *Id.*

¹³³ 11 U.S.C. §§ 348(a), 1307(a) (2006).

¹³⁴ Bruce M. Price & Terry Dalton, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (and Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135, 136–37 (2007).

¹³⁵ *In re Davis*, 348 B.R. 449, 452–53 (Bankr. E.D. Mich. 2006).

¹³⁶ Before the BAPCPA's effective date, the Bankruptcy Code provided, in relevant part: After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under

the district court's decision to grant the dismissal of a Chapter 7 petition after finding that the court should apply a totality of the circumstances test to determine a debtor's potential "substantial abuse."¹³⁷ The court was careful to explain that the debtor's surplus income did not alone justify the dismissal, but that other factors such as the debtor's health, his pre-petition conduct in borrowing funds, and his apparent lack of good faith in filing supported the conclusion that the petition was abusively filed.¹³⁸ Under the pre-BAPCPA regime, therefore, judges were free to use broad discretion in affording or denying Chapter 7 relief, and rendered that decision based on facts never appearing on a debtor's balance sheet.

The means test in the BAPCPA allows for no such subjective discretion, as it confines courts to consider a debtor's surplus income as the primary factor in determining whether a Chapter 7 petition is abusive.¹³⁹ As currently drafted, the means test is like a double-edged sword, threatening two separate injuries to consumers who fail to meet its rigid requirements. First, the means tests requires a comparison between the median income in the debtor's state and the debtor's annual earnings.¹⁴⁰ If the debtor's income is greater than the state median, abuse is presumed as a matter of law.¹⁴¹ In order to rebut this presumption, a debtor must show that his net monthly income,¹⁴²

this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

11 U.S.C. § 707(b) (2000).

¹³⁷ Green v. Staples, 934 F.2d 568, 572–73 (4th Cir. 1991).

¹³⁸ *Id.*

¹³⁹ H.R. REP. NO. 109-31, pt. I, at 6 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 92; see also *In re Ellringer*, 370 B.R. 905, 910 (Bankr. D. Minn. 2007) (citing 151 CONG. REC. S2470 (daily ed. March 10, 2005) (statement of Sen. Nelson) ("First and foremost, the bill will curb abuse of the bankruptcy system by implementing a means test to ensure that those who can afford to repay some portion of their unsecured debts are required to do so.")); Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 699 (2005) ("Congress has replaced judicial discretion on ability to pay in chapter 7 abuse cases with a detailed formula. . . . [U]ntil Congress revises it, the means test displaces judicial tests of ability to pay.").

¹⁴⁰ 11 U.S.C. § 707(b)(2)(A)(i) (2006) provides:

In considering . . . whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by [applicable exemptions] and multiplied by 60 is not less than the lesser of (i) 25 percent of the debtor's nonpriority unsecured claims in the case, or \$6,575, whichever is greater; or (II) \$10,950 (internal reference omitted).

¹⁴¹ *Id.*

¹⁴² Net monthly income is gross monthly income (from all sources) less certain allowable expenses that are taken in principal part from federal IRS standards applicable to income taxation calculations. See *id.* § (b)(2)(A)(i)–(ii).

when multiplied by sixty,¹⁴³ is less than \$10,000 and less than the greater of 1) \$6,000 or 2) 25% of the unsecured debt he owes.¹⁴⁴

To illustrate, let us review an example one commentator has discussed.¹⁴⁵ Suppose Debtor A nets \$40 per month in income. “Multiplying by sixty produces \$2,400. This is less than \$10,000 and less than \$6,000,” so, according to the means test, Debtor A is not a bankruptcy abuser.¹⁴⁶ However, if Debtor B’s net income is \$110 per month, the product is \$6,600. “This is less than \$10,000 but more than \$6,000. [Debtor B] must now show that unsecured claims against [him] exceed \$26,400” in order to pass the BAPCPA’s means test.¹⁴⁷ Finally, consider Debtor C, whose net income is \$167.77 per month. Since multiplication by sixty yields a result that exceeds \$10,000, Debtor C fails the means test and is subject to the presumption that he is an abuser of Chapter 7.¹⁴⁸ For Debtors B and C, then, the BAPCPA potentially forecloses an opportunity that would have been available under the old “totality of the circumstances” test: the chance to demonstrate at the outset that non-financial factors justify his application to Chapter 7.

True, an inquiry into the “totality of the circumstances” did not disappear completely from the abuse analysis as amended by the BAPCPA. Proponents of the means test will quickly point out that it appears unambiguously in section 707(b)(2)(D)(3).¹⁴⁹ However, a close reading of the new statute reveals that the court may only consider the totality of the circumstances where a debtor’s income is below the state median.¹⁵⁰

¹⁴³ The significance of the number sixty is in its relation to the duration of a typical Chapter 13 plan. However, the use of this number is often criticized for its failure to recognize that the Bankruptcy Code does not mandate five-year plans for all consumers. Only above-median income debtors are required to maintain five-year plans, while below-median debtors can write three-year plans. See David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 267–68 (2007) (citing *In re McPherson*, 350 B.R. 38, 45–46 (Bankr. W.D.Va. 2006)); see also Chelsey W. Tulis, *Get Real: Reframing the Debate over How to Calculate Projected Disposable Income in § 1325(b)*, 83 AM. BANKR. L.J. 345, 353–61 (2009) (suggesting that the means test provides above-median income debtors an advantage over below-median debtors).

¹⁴⁴ 11 U.S.C. § 707(b)(2)(B)(iv) (2006) provides that satisfaction of the means test insulates the debtor from the presumption of abuse arising under § 707(b)(2)(A)(i).

¹⁴⁵ This example appears in Carlson, *supra* note 143, at 266–68.

¹⁴⁶ *Id.* at 266.

¹⁴⁷ *Id.* at 267.

¹⁴⁸ *Id.* at 268.

¹⁴⁹ That section provides:

In considering . . . whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption [of abuse] does not arise or is rebutted, the court shall consider (A) whether the debtor filed the petition in bad faith; or (B) the totality of the circumstances . . . of the debtor’s financial situation.

11 U.S.C. § 707(b)(2)(D)(3).

¹⁵⁰ See Charles J. Tabb & Jillian K. McClelland, *Living With the Means Test*, 31 S. ILL. U. L.J. 463, 467 (2007).

Such debtors are protected from an initial presumption of abuse, but still may fail the means test if the “totality of the circumstances” so require.¹⁵¹ Said another way, the totality of the circumstances test, when employed according to the BAPCPA, operates only to establish that a petition is abusive.¹⁵² It does not work to save a debtor from dismissal, as it would have under the pre-BAPCPA regime.¹⁵³

The BAPCPA’s vision of the “totality of the circumstances” is entirely consistent with its omission of an important phrase which appeared in the pre-BAPCPA section 707(b). Prior to 2005, that section included an affirmative command that “[t]here shall be a presumption in favor of granting the relief requested by the debtor.”¹⁵⁴ Though its absence is often overlooked, the amended section 707(b) is conspicuously lacking in any such suggestion.¹⁵⁵ Indeed, the first edge of the means test cuts sharply against the debtor, and intends to sever him from the possibility of obtaining discharge of indebtedness through liquidation proceedings.

b. The Means Test Causes Uncertainty in Chapter 13

The means test’s blade makes a second cut when a debtor, who has been denied access to Chapter 7, files for relief under Chapter 13. In this context, the cause of injury is a drafting imprecision—the result is financial bleeding that continues unabated over the plan’s repayment term. This danger was recognized early by Judge Nelms in *In re Hardacre*, when he noticed a stark discrepancy between the BAPCPA’s treatment of income standards in Chapters 7 and 13.¹⁵⁶ Under the Act, a debtor’s “current monthly income” shall be used to determine Chapter 7 eligibility, while his “projected disposable income” must be used in evaluating his ability to make payments under a Chapter 13 plan.¹⁵⁷ Consequently, after the BAPCPA amendments, the Bankruptcy Code directs that “projected disposable income” is the operative figure to be employed in a court’s determination of the amount a debtor must pay in each installment to satisfy his repayment obligations over the life of the plan.¹⁵⁸

Although the BAPCPA defines the term “current monthly income” as the average of monies received or earned over the six months prior to the bankruptcy filing,

¹⁵¹ *See id.*

¹⁵² *See id.*

¹⁵³ *See id.*

¹⁵⁴ 11 U.S.C. § 707(b) (1988).

¹⁵⁵ *See In re Henebury*, 361 B.R. 595, 601 (Bankr. S.D. Fla. 2007) (“[P]re-BAPCPA § 707(b)’s ‘presumption in favor of granting the relief requested by the debtor’ has been removed, and been replaced with post-BAPCPA § 707(b)(2)’s presumption of abuse against debtors who, as determined by the means test, have sufficient monthly disposable income to repay a portion of their unsecured debts”); *accord, In re Vogeler*, 393 B.R. 240 (Bankr. D. Kan. 2008).

¹⁵⁶ 338 B.R. 718, 721 (Bankr. N.D. Tex. 2006).

¹⁵⁷ 11 U.S.C. §§ 707(b)(2)(A)(i), 1325(b)(1)(B) (2006).

¹⁵⁸ 11 U.S.C. § 1325(b) (2006).

the statute fails to provide a single, precise definition of “projected disposable income.”¹⁵⁹ Accepting that the terms are not interchangeable, Judge Nelms concluded in *Hardacre* that “projected disposable income” must be a forward looking figure, “based upon the debtor’s anticipated income during the term of the plan.”¹⁶⁰ According to this reasoning, a debtor in Chapter 13 will not be evaluated as he was when he filed for Chapter 7, as his demonstrated “current monthly income” is meaningless in developing a plan of repayment.¹⁶¹ Thus, according to Judge Nelms and those who share his understanding of the Act, a debtor’s fate in Chapter 13 depends not on the quality of his financial records, but instead on the accuracy of his crystal ball.

At the present time, the *Hardacre* opinion cannot fairly be cast as the prevailing majority view. As one observer notes: “[F]or every case holding one way, one will find an equally opposing case with the same facts.”¹⁶² Apart from causing courts such division, the BAPCPA’s imprecision can inflict serious wounds on a bankrupt consumer. Because he is largely unable to predict, at the outset of his case, whether plan payments will be calculated based on his “current monthly income”¹⁶³ or according to speculative assessments presented to the court,¹⁶⁴ an individual risks his future fiscal viability in filing for Chapter 13. In the event that his “projected disposable income” does not reflect his long-term ability to pay, the means test will bind him to a plan that he simply cannot afford to carry out.

For the trepidatious consumer, legislative history sheds more darkness than light on the intended meaning of “projected disposable income.” Congressional testimony reveals that the term was included in the BAPCPA to allow courts to consider anticipated changes in a debtor’s financial circumstances during the life of a Chapter 13 plan.¹⁶⁵ Very well, but how, then, does the BAPCPA account for *unanticipated* changes in a debtor’s financial viability? After all, unexpected economic changes are often the very events that precipitate the filing of consumer bankruptcies.¹⁶⁶ This was

¹⁵⁹ See *id.*; *Hardacre*, 338 B.R. at 722 (“[T]he phrase ‘projected disposable income’ is subject to conflicting interpretations.”).

¹⁶⁰ *Hardacre*, 338 B.R. at 722.

¹⁶¹ See *id.*

¹⁶² Jennifer Emens-Butler, *Bankruptcy Reform, Part II: Chicken Little Still Looking Skyward* . . . , 33 VT. B.J. 28, Spring 2007, at 29.

¹⁶³ See, e.g., *In re Brady*, 361 B.R. 765 (Bankr. D.N.J. 2007) (holding that a debtor’s actual budgeted surplus income would not be considered because the “current monthly income” of the means test controlled).

¹⁶⁴ See, e.g., *In re Kibbe*, 342 B.R. 411 (Bankr. D.N.H.) (holding that actual income would be used as projected under plan and not according to means test where debtor’s income increased shortly after filing), *aff’d sub nom.*, *Kibbe v. Sumski*, 361 B.R. 302 (B.A.P. 1st Cir. 2007).

¹⁶⁵ *In re Briscoe*, 374 B.R. 1, 12 & n.8, 17 (Bankr. D.D.C. 2007) (discussing congressional intent, including one of BAPCPA’s co-sponsors, Iowa Senator Charles “Chuck” Grassley’s, understanding of the statute’s purpose).

¹⁶⁶ See, e.g., *In re Vansickel*, 309 B.R. 189, 211 (Bankr. E.D. Va. 2004) (considering whether the bankruptcy was filed because of a “sudden illness, calamity, disability, or

the question presented to the court in *In re Hanks*,¹⁶⁷ and the court's response cuts against the second edge of the means test's double-sided blade.

In *Hanks*, the debtors, who were husband and wife, suffered a “substantial reduction in income . . . both before and after the date of filing.”¹⁶⁸ The decline was occasioned when Mr. Hanks lost his job as a computer programmer and, consequently, his salary of over \$64,000 per year.¹⁶⁹ Unable to find similarly lucrative work, Mr. Hanks took a position as a movie reviewer, yielding an annual income of less than \$23,000.¹⁷⁰ Anticipating inability to satisfy debts coming due, the Hankses filed for bankruptcy protection soon after Mr. Hanks became unemployed.¹⁷¹ Because the Hankses' current monthly income was calculated based on a six-month earning history, the Hankses did not qualify for Chapter 7 relief.¹⁷² According to that standard, their income was sufficiently high as to allow them to enter a plan of repayment.¹⁷³

Upon filing under Chapter 13, the Hankses learned that their plan repayments were to be calculated using the “projected disposable income” standard appearing in the BAPCPA.¹⁷⁴ Noting that this term was undefined, the court in *Hanks* reasoned that it could only refer to the amount produced when the debtor's current monthly income was multiplied by the plan commitment period.¹⁷⁵ Thus, the court concluded that the Hankses were obliged to pay \$666.78 per month—a figure well beyond their realistic means—to fund their Chapter 13 plan.¹⁷⁶ Upon the Hankses' objection, the court answered that the BAPCPA compelled the result:

Whether justified or not, the result of Congress' efforts was “a law that is sometimes self-executing, inflexible, and unforgiving.” It is not at all clear that Congress did not actually intend to keep people out of bankruptcy altogether if possible Ultimately,

unemployment” as a factor in determining a debtor's ability make regular payments under his Chapter 13 plan).

¹⁶⁷ *In re Hanks*, 362 B.R. 494 (Bankr. N.D. Utah 2007).

¹⁶⁸ *Id.* at 496.

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

¹⁷¹ *Id.*

¹⁷² *See id.* at 496–97.

¹⁷³ *See id.* at 496.

¹⁷⁴ *See id.* at 499.

¹⁷⁵ Interestingly, after *Hanks*, courts in Utah shifted to Judge Nelms's view that “projected disposable income” was a purely forward looking figure. Under this interpretation, however, the result in *Hanks* would have been the same. Because Mr. Hanks expected to find similar employment during the plan commitment period, his “projected monthly income” would still have been artificially and unsustainably high. Courts do not permit unemployed debtors who are seeking re-employment to project their income at an “unemployment level.” *See In re Liverman* 383 B.R. 604 (Bankr. D. N.J. 2008); *In re Purdy*, 373 B.R. 142 (Bankr. N.D. Fla. 2007).

¹⁷⁶ *Hanks*, 362 B.R. at 496, 500–02.

it is not within this Court's power nor is it this Court's role to change Congress' intentional policy choices or to save it from its inadvertent drafting errors.¹⁷⁷

What became of the Hankses remains unknown, but it is clear that the court left the couple trapped between two equally dismal fates. In the first possible scenario, the Hankses would succeed in making their monthly payments by borrowing from "predatory" lenders at high interest rates or through increased use of credit cards to pay for other living expenses.¹⁷⁸ Discharge would ensue from Chapter 13, but more debt would remain to perpetuate the Hankses' financial disability.

In an alternative scenario, the Hankses would default on their Chapter 13 plan. The bankruptcy court would revoke its promise of discharge, and the couple would again face their creditors—but without the protection of the Bankruptcy Code.¹⁷⁹ In either possible outcome, the Hankses are left exposed, wounded by the means test, and without the possibility for financial rehabilitation. Creditors emerge victorious in either possible case, and the double-edged means test is proven powerful in preventing consumer access to successful discharge in Chapter 7.

3. Why a Rebuttable Presumption Properly Arises When Attorney Speech Causes a Debtor to Fail the Means Test

With an understanding of the means test's harsh effects, it is easy to empathize with the attorney who wishes for his clients to avoid a potential failure. However, Congress and the BAPCPA expressly prohibit attorneys from giving their debtor-clients advice to incur more debt for the mere sake of passing the means test's rigors.¹⁸⁰ As

¹⁷⁷ *Id.* at 500–02 (internal citations omitted).

¹⁷⁸ In general, a "predatory" loan is one in which the borrower receives no reasonable anticipated financial benefit as a result of the loan. Specifically, the Federal Reserve defines predatory lending as that which includes one or more of the following attributes: (1) "[m]aking unaffordable loans based on the assets of the borrower rather than on the borrower's ability to repay [the] obligation," (2) "[i]nducing a borrower to refinance a loan repeatedly in order to charge high . . . fees each time the loan is refinanced," or (3) "[e]ngaging in fraud or deception to conceal the true nature of the loan obligation . . . from an unsuspecting or unsophisticated borrower." OFFICE OF THE COMPTROLLER OF THE CURRENCY, SUPERVISION AND REGULATION LETTER 01-4, EXPANDED GUIDANCE FOR SUBPRIME LENDING PROGRAMS 10–11 (2001), available at <http://www.federalreserve.gov/boarddocs/srletters/2001/sr0104a1.pdf>; Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1, 12–13 (2009).

¹⁷⁹ Material default in terms of a confirmed Chapter 13 plan can be cause for relief from automatic stay and can be cause for dismissal of Chapter 13 case. When the automatic stay is lifted, secured creditors may proceed in foreclosure against collateral according to state law embodied in its adopted version of UCC Article 9. See *In re Brown*, 70 B.R. 10, 12 (Bankr. S.D. Ohio 1986).

¹⁸⁰ Indeed, this was the original intent of Congress in enacting the Gag Rule. See *supra* notes 8–11 and accompanying text.

a first step to distinguishing good advice to incur more debt from that which is abusive, a court must regard with suspicion any advice that causes a debtor to pass the means test when he would otherwise be unable to do so.

To illustrate, suppose Attorney advised Debtor, whose income was above the state median, to take an unsecured loan to finance medical expenses prior to filing a bankruptcy petition. The purpose of taking a loan rather than attempting to pay out of pocket was allegedly to have enough cash on hand to make required monthly payments on other borrowed funds. Debtor's net monthly income was \$110, resulting in a product of \$6,600.¹⁸¹ Under the means test, Debtor is a presumed abuser and may only rebut that presumption by showing that the unsecured claims against him exceed \$26,400.¹⁸² If the loan from Bank causes Debtor to so demonstrate, the attorney's advice to incur the additional unsecured amount should be presumptively subject to the narrow-form Gag Rule under the proposed analysis.

Two considerations support the correctness of this result. First, the BAPCPA's original Gag Rule sought to implicate only attorney speech that bore a causal relationship to a debtor's passage of the means test.¹⁸³ Extending the rule to advice that does not cause a debtor to cross the line from failure into passage does nothing to further the BAPCPA's aims. Second, the narrow-form Gag Rule does not intend to apply to all speech that causes a debtor to pass the means test, only that which is uttered "with the intent to abuse the protections of the bankruptcy system."¹⁸⁴ It is thus appropriate that the causation of a debtor to pass the means test establishes only a presumption that the narrow-form Gag Rule should apply. For the purposes of the proposed analysis, the causation of a means test failure evokes a suspicion—rather than a determination—that the speech at issue may be constitutionally restrained.

B. Step Two: Rebuttal Evidence Found Through Application of the Federal Judgeship Act's "Substantial Abuse" Criteria

As was described in Part II.A.2, the hallmark of the pre-BAPCPA bankruptcy abuse regime was judicial discretion. Prior to 1984, access to Chapter 7 was "virtually unfettered."¹⁸⁵ "Courts could only dismiss cases for cause, requiring egregious acts on the part of the debtor."¹⁸⁶ In effect, "consumer debtors could easily discharge all of their debts under Chapter 7 without regard to their financial situation" as long as they were honest and forthcoming with the court.¹⁸⁷ Creditors disliked this environment,

¹⁸¹ See *supra* Part II.A.2 for a discussion of the relevant mechanics of the means test.

¹⁸² See *supra* Part II.A.2.

¹⁸³ See, e.g., *Zelotes v. Adams*, 363 B.R. 660, 665 (Bankr. D. Conn. 2007).

¹⁸⁴ *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743, 756 (5th Cir. 2008) (quoting *Milavetz v. United States*, 541 F.3d 785, 798–99 (8th Cir. 2008)).

¹⁸⁵ Lauren E. Tribble, Note, *Judicial Discretion and the Bankruptcy Abuse Prevention Act*, 57 DUKE L.J. 789, 795 (2007).

¹⁸⁶ Adam D. Herring, *Fixing the Broken Machine: Means Testing and Secured Debt Payments Under BAPCPA*, NORTON J. BANKR. L. & PRAC., Feb. 2006, at 103.

¹⁸⁷ *Id.*

and sought to change it through the legislative process.¹⁸⁸ In response, Congress enacted the Federal Judgeship Act (FJA) in 1984.¹⁸⁹

Under the FJA, judges could dismiss cases only if they presented “substantial abuse” of the Bankruptcy Code.¹⁹⁰ The task of the courts was then to define “substantial abuse,” as Congress had not seen it fit to do so.¹⁹¹ In most circuits, the primary determining factor for finding substantial abuse was the debtor’s ability to repay its creditors.¹⁹² The debtor’s ability to repay was assessed by deducting reasonable monthly expenses from anticipated monthly income.¹⁹³ Although the debtor’s ability to repay was a factor in determining what constituted substantial abuse, bankruptcy judges retained considerable discretion to consider other factors.¹⁹⁴

At this stage in the proposed analysis, judges should retain similar discretion in determining whether speech that has caused a debtor to fail the means test was uttered ““with the intent to abuse the protections of the bankruptcy system.””¹⁹⁵ By allowing judges to observe the factors employed in the “substantial abuse” inquiry under the FJA, the proposed analysis affords debtors and their attorneys a modicum of judicial consideration for the realities with which a financially overburdened consumer must contend.

Return for a moment to our illustrative Debtor, who took an unsecured loan from Bank prior to filing for bankruptcy on the advice of his attorney. In evaluating whether

¹⁸⁸ See *id.*; Tribble, *supra* note 185, at 795.

¹⁸⁹ See 28 U.S.C. § 157 (2006).

¹⁹⁰ Tribble, *supra* note 185, at 796.

¹⁹¹ The 1984 Amendment included no definitional guidance as to how the notion of “substantial abuse” was to be understood.

¹⁹² Tribble, *supra* note 185, at 797.

¹⁹³ In *Kornfield v. Schwartz*, 164 F.3d 778, 781 (2d Cir. 1999), the Second Circuit reiterated that “the debtor’s personal circumstances are relevant to . . . ability to pay.” However, in no case did a debtor’s ability to pay, standing alone, mandate dismissal. *Id.*

¹⁹⁴ Under the “substantial abuse” analysis, judges were free to consider varying other factors, including:

- (1) “[w]hether the bankruptcy petition was filed because of sudden illness, calamity, disability, or unemployment; (2) [w]hether the debtor incurred cash advances and made consumer purchases far in excess of his ability to repay; (3) [w]hether the debtor’s proposed family budget [was] excessive or unreasonable; (4) [w]hether the debtor’s schedules and statement of current income and expenses reasonably and accurately reflect[ed] the true financial condition; and (5) [w]hether the petition was filed in good faith.

Green v. Staples, 934 F.2d 568, 572 (4th Cir. 1991) (internal citations omitted). See also *Price v. United States Trustee*, 353 F.3d 1135, 1139–40 (9th Cir. 2004) (considering the five factors in *Green* as well as “[w]hether the debtor has engaged in eve-of-bankruptcy purchases”); *In re Snow*, 185 B.R. 397, 402 (Bankr. D. Mass. 1995) (noting that *Green* and similar cases “may be collectively summarized as requiring an analysis of the facts and circumstances of the individual case”).

¹⁹⁵ *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743, 756 (5th Cir. 2008) (quoting *Milavetz v. United States*, 541 F.3d 785, 798–99) (8th Cir. 2008)).

this additional debt was made “with the intent to abuse the protections of the bankruptcy system” such that the narrow-form Gag Rule would apply to Attorney’s advice, a bankruptcy judge would employ the proposed analysis to look beyond the Debtor’s financial reports to account for a variety of surrounding and circumstantial factors.¹⁹⁶

The court in *In re Renner*¹⁹⁷ addressed a situation similar to that of our hypothetical Debtor. The court’s determination that the granting of relief under Chapter 7 to the debtors would not constitute “substantial abuse” of the bankruptcy system was based in part upon its finding that the debtors’ financial situation “appear[ed] to be the result not of irresponsible consumer spending but of unfortunate health problems.”¹⁹⁸ The court explained that the debtors’ affidavit indicated that one of the debtors suffered from increasingly aggravated multiple sclerosis, and that her uninsured medical expenses could be anticipated to increase.¹⁹⁹ In addition, the other debtor had suffered a heart attack, which resulted in a reduction in his employability.²⁰⁰ Although their financial condition, at the time of filing, may have supported a successful Chapter 13 plan, the court exercised its discretion to find that the filing was not abusive given the medical needs of both debtors.²⁰¹

Similarly, in our hypothetical, a bankruptcy judge using the proposed analysis would transpose the multi-factor “substantial abuse” evaluation onto the attorney speech at issue. In so doing, he or she would look beyond the fact that the additional unsecured debt had caused Debtor to fail the means test. The judge may discover that the unsecured loan was advised not “with an intent to abuse the protections of the bankruptcy system,” but rather in the interest of Debtor’s financial and physical health.²⁰² In such a case, the court’s finding would successfully rebut the presumption of applicability resulting from step one and thereby protect the attorney’s speech from application of the Gag Rule in its new and narrow form.

Under the FJA’s “substantial abuse” standard, “[p]ersonal circumstances could also weigh in favor of dismissal of a [debtor’s] Chapter 7 petition.”²⁰³ For instance, in *First USA v. Lamanna*, the First Circuit held that despite his very low income, the debtor could not file for relief as a liquidating consumer.²⁰⁴ Because Lamanna was living with his parents at the time he filed for bankruptcy, his expenses were low enough to suggest an increased ability to pay.²⁰⁵ Similarly, a court employing the proposed analysis to our hypothetical might reasonably conclude that Debtor’s unsecured

¹⁹⁶ See *supra* note 184 & accompanying text.

¹⁹⁷ 70 B.R. 27 (Bankr. D.N.D. 1987).

¹⁹⁸ *Id.* at 29.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 28.

²⁰¹ *Id.* at 29.

²⁰² See *supra* note 184 & accompanying text (explaining that judges may find non-abuse by looking to other factors).

²⁰³ Tribble, *supra* note 185, at 797.

²⁰⁴ 153 F.3d 1, 5 (1st Cir. 1998).

²⁰⁵ *Id.*

medical loan was unnecessary in light of his substantial insurance coverage or disability benefit entitlements. Should that position prevail, the second step of the proposed analysis would buttress the presumption from the first, resulting in a finding that the narrow-form Gag Rule should apply to Attorney's advice to Debtor regarding the additional borrowed sum.

CONCLUSION

This Note first suggests that courts should apply a narrow form of Bankruptcy Code section 526(a)(4). The narrow form is achieved when courts interpret the phrase "in contemplation of bankruptcy" to mean "with the intent to abuse the protections of the bankruptcy system."²⁰⁶ In effect, this interpretation subjects only speech that is unprotected by the First Amendment to restriction under the Gag Rule.

Next, this Note proposes a two-pronged analysis designed to assist courts in identifying the speech to which the narrowed Gag Rule should properly apply. By targeting restrictable speech with precision, the suggested framework vindicates Judge Colloton's reasoning and that of the courts in *Conant v. Walters* and *Hersh v. United States*. Importantly, the proposed framework limits the Gag Rule's application to speech that Congress regarded as dangerous to the bankruptcy system and intended to prohibit in passing the BAPCPA.

In considering the results of the means test at the outset, the first prong of the proposed framework serves the intent of Congress in enacting the BAPCPA by establishing a rebuttable presumption based upon the notion of causation. Speech leading to a passage of the means test that would otherwise not exist is presumed to be subject to the narrowed Gag Rule and restriction that withstands scrutiny under the First Amendment.

Further, in attending to the circumstances of each particular debtor, the second prong of the proposed analysis gives effect to the original tenets of the Bankruptcy Code and ameliorates some of the BAPCPA's harsh and disfavored effects. By allowing courts to consider factors beyond a debtor's ability to repay, the proposed analysis returns a modicum of judicial discretion to bankruptcy courts and softens the edges of the rigid means test for debtors who need it most.

Appropriate interpretation and application of the Gag Rule demands a strong judicial commitment to the freedom of debtors and their attorneys to openly communicate. Through a reasoned and cogent analytical process, the suggested framework aligns the realities of the bankruptcy system with the precepts of the First Amendment. While preserving speech given life and protection by the Constitution, the framework advances the spirit of American bankruptcy law by affording straightforward advice to deserving debtors along with the chance for a financial "fresh start."²⁰⁷

²⁰⁶ See *supra* note 178 & accompanying text.

²⁰⁷ The oft-cited "fresh start" principle of the Bankruptcy Code was early recognized by the Supreme Court in *Burlingham v. Crouse*, 228 U.S. 459, 473 (1913).