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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ERIC W. OLSEN,
KEVIN D. SWARTZ,
JASON C. MCBRIDE,

CIV. NO. 05-6365-HO

Plaintiffs,

v.

ALBERTO GONZALES, in his official capacity as United States Attorney General, and **ILENE LASHINSKY**, in her official capacity as United States Trustee for Region 18,

Defendants.

**REPLY MEMORANDUM IN
SUPPORT OF MOTION TO
DISMISS PURSUANT TO FED.
R. CIV. P. 12(b)(6)**

Introduction

Plaintiffs' Response to Defendants' Motion to Dismiss does not effectively rebut any of the arguments made by defendants in support of the constitutionality of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). It fails to undermine our view of the BAPCPA's legislative history and does not refute the following arguments: § 526(a)(4) is an ethical rule which satisfies the First Amendment balancing test that applies to such rules; § 526(a)(1) does not make attorneys liable for services that become unnecessary or unethical and does not chill speech; § 527 is constitutional because statutes can compel licensed professionals to divulge facts in the interest of full disclosure; § 528 is constitutional because it requires only factually accurate disclosures in advertisements; and, §§ 526-28 are not unconstitutionally vague because the Supreme Court has defined the term "exemption" and the Bankruptcy Code adequately explains how to value property and apply exemptions. Thus, the Court should grant defendants' motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted.

Argument

A. Plaintiffs' Response Distorts the BAPCPA's Legislative History.

Plaintiffs make three erroneous assertions about the legislative history of the BAPCPA in the introduction to their response. Plaintiffs' Response at 1. These assertions merit rebuttals because the BAPCPA's legislative history informs its interpretation. See Exxon Mobil Corp. v. Allapattah Services, Inc., 125 S. Ct. 2611, 2625 (2005) (referring to legislative history as one of the Supreme Court's interpretive tools); Memorandum in Support of Defendants' Motion to Dismiss at 10-11, 17-18.

First, plaintiffs suggest that the Court should ignore legislative history generated by Congress when it considered "prior drafts of the bill." Plaintiffs' Response at 1. This is nonsense: Congress considered its work on "prior drafts" to be earlier steps in a single process of passing a bankruptcy reform bill, rather than discrete legislative actions. See H.R. Rep. No. 109-31, 109th Cong., 1st Sess. at 4, reprinted in 2005 U.S.C.C.A.N. at 91-93 (House Judiciary Committee report on bill that became the BACPA discussing earlier efforts to pass reform bill and relying on information from previous congressional hearings). Second, plaintiffs imply that no relevant legislative history exists because the BAPCPA resulted from a Senate Bill and the Senate did not hold any hearings. Plaintiffs' Response at 1. No more than this needs to be said: Legislative history comprises more than hearing transcripts from the chamber of Congress that drafted a bill.¹ Kenna v. U.S. Dist. Court for C.D. Cal., 435 F.3d 1011, 1015 (9th Cir. 2006) (referring to floor statements and committee reports as

¹ In this case, there is a potent piece of legislative history, namely, a committee report from the House Judiciary Committee discussing the Senate bill that became the BAPCPA and recommending that the House of Representatives pass it without amendment. 2005 U.S.C.C.A.N. at 88; see Garcia v. United States, 469 U.S. 70, 76 (1984) (explaining that committee reports are the best sources of legislative history).

relevant sources of legislative history and suggesting that the Senate’s intention is not the only one that matters). Finally, plaintiffs claim that Congress did not consult bankruptcy judges or experts in the field in the course of considering the BAPCPA. This assertion is wrong. Congress heard testimony from, among others, the Honorable Randall Newsome, United States Bankruptcy Judge for the Northern District of California, Bankruptcy Reform Act of 1998: Part I, Hearing on H.R. 3150 before House Judiciary Comm., 105th Cong., 2d Sess. 25 (1998), Professor Elizabeth Warren of Harvard Law School, 2005 U.S.C.C.A.N. at 91 n. 8, and Professor Todd Zywicki of the George Mason University School of Law, id. at n. 9.

B. Section 526(a)(4) Is Constitutional.

1. The Court should review § 526(a)(4) pursuant to the balancing test discussed in Gentile.

Our opening memorandum explained that plaintiffs’ first claim, that § 526(a)(4) (which prohibits lawyers from counseling assisted person to incur debt “in contemplation” of filing for bankruptcy) is unconstitutional, fails because the provision satisfies the balancing test that applies to ethical restrictions of lawyers that limit their speech. See Gentile v. State Bar of Nevada, 501 U.S. 1030, 1073 (1991). Plaintiffs disagree that the balancing test applies, arguing that Gentile and other balancing-test cases are factually distinguishable and that speech made in the professional capacity must be protected by the strict scrutiny test to preserve the independence of the judiciary.² Plaintiffs’ Response at 2-4. Plaintiffs’ arguments miss the mark. The two Supreme Court balancing-test cases discussed by plaintiffs (Gentile and Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 448 (1978)) are

² Even if the Court were to find that strict scrutiny should be applied, § 526(a)(4) should be upheld. Memorandum in Support of Defendant’s Motion to Dismiss at 16 n. 7.

factually distinguishable at one level, but the point is irrelevant: The balancing test's application is not limited to the specific facts of Gentile and Ohralik. Plaintiffs' argument that Cantella v. Stovitz, 263 F. Supp. 2d 1064, 1076 (N.D. Cal. 2005), is distinguishable, on the other hand, is wrong because the case is not meaningfully distinguishable. As for the independence of the judiciary, it is not threatened by the application of the balancing test to ethical restrictions' on attorney speech because this approach does not jeopardize the judiciary's ability to interpret the law.

Plaintiffs' first argument is that the case law does not support our argument in favor of the balancing test. They insist that Gentile does not justify the application of the balancing test because it involved a public statement that was likely to prejudice the administration of justice whereas § 526(a)(4) governs private and ethical advice. Plaintiffs' Response at 3. They add that Ohralik does not justify the application of a balancing test to § 526(a)(4) because it involved commercial speech. Id. Finally, they contend that Cantella does not support the application of a balancing test to this provision because that case applied a balancing test to a provision "with a mechanism to limit enforcement to advice that is illegal or unjust." Id.

With their different factual settings, Gentile and Ohralik demonstrate that the balancing test applies to restrictions on attorney speech in a variety of contexts, not that the balancing test is limited to public statements and commercial speech. Neither case states that the balancing test on ethical restrictions is limited to public statements, commercial speech, or any other set of specific facts. To the contrary, the Court noted in Gentile that leniency has traditionally permeated its review of ethical restrictions affecting attorney speech. 501 U.S. at 1073 (explaining that the balancing test spans from attorney speech in the courtroom in pending cases to attorney speech in advertisements). The reason that the Court has applied the balancing test in different circumstances is that the factual

differences do not undermine the principle underlying the Court's leniency: The government's interest "in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the court," Ohralik, 436 U.S. 447, 460 (1978); see also Gentile, 501 U.S. at 1072-1075, and this proposition holds true across different factual contexts. What is more, lower courts have interpreted the Court's jurisprudence to mean that the balancing test applies to ethical restrictions on attorney speech in contexts other than those present in the Supreme Courts' cases. United States v. Scarfo, 263 F.3d 80, 92-93 (3d Cir. 2001) (deciding that Gentile provides the standard for reviewing restrictions on attorney speech "in general"); Cantella, 263 F. Supp. 2d at 1076 (upholding, under Gentile, an ethical rule that limits the advice that lawyers can give to their clients).

Contrary to plaintiffs' argument, Cantella supports the argument that the Court should review § 526(a)(4) under the balancing test discussed in Gentile. In Cantella, the court applied a balancing test to uphold an ethical regulation, § 6068(c) of the California Business and Professions Code, which provides that attorneys can advise clients to take only those actions that appear to the attorney to be "legal or just." 263 F.Supp. 2d at 1076. Plaintiffs' argument with regard to Cantella is not clear. At one point, they appear to argue that § 6068(c) differs from § 526(a)(4) because it applies to *advice* that is illegal or unjust. See Plaintiffs' response at 3 ("Likewise, the Cantella case involved a restriction with a mechanism to limit enforcement to advice that is illegal or unjust.") If this is plaintiffs' argument, it is ill-founded. Section 6068(c), in fact, applies to advice counseling *activities* that are illegal or unjust, Cal. Bus. & Prof. Code § 6068(c); it is not limited to advice that itself is otherwise illegal or unjust. Section 526(a)(4), thus, is not different from § 6068(c) on this count: Both limit advice based on the nature of the conduct that is the subject of the advice.

Alternatively, plaintiffs might be arguing that the regulation at issue in Cantella is an ethical rule because it applies to advice to undertake illegal or unjust conduct, but that § 526(a)(4) is not an ethical rule because it is not limited to advice to “fraudulent[ly]” or “abusive[ly]” incur debt. See Plaintiff’s Response at 3. To be clear, this is not an argument that the balancing test cannot apply to ethical restrictions on lawyers’ advice to clients (placing this argument is in tension with plaintiffs’ second argument that attorney speech made in a “professional capacity” should be protected under the strict scrutiny standard), rather, it is an argument that the balancing test cannot be applied to § 526(a)(4) because it is not an ethical rule. But § 526(a)(4) is an ethical rule. The argument to the contrary ignores the meaning of the phrase “in contemplation.” In light of Congress’ intention “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,” 2005 U.S.C.A.N. 88, 89, the best interpretation of the “in contemplation” language is that it makes attorneys liable for advising a debtor to take on debt because he or she intends to file for bankruptcy, as such advice is aimed at allowing the debtor to take unfair advantage of discharge (by running up debt primarily because it will not need to be repaid) or “game” the means test (by piling on enough debt to avoid a presumption of abuse, 11 U.S.C. § 707(b)(2)). See United States v. Wells, 283 U.S. 102, 110 (1931) (interpreting the phrase “in contemplation of death” in a tax statute governing gifts to mean that the “thought of death is the impelling cause of the transfer”). This provision thus serves the purpose that ethical rules must serve, i.e., protection of the integrity of the legal system, see Memorandum in Support of Defendants’ Motion to Dismiss at 14-15; Gentile, 501 U.S. 1075, and should be reviewed under the balancing standard applicable to such rules, as the Cantella court reviewed § 6068(c), 263 F.Supp. 2d at 1076.

Plaintiffs' second argument is that the Court should apply the strict scrutiny standard to protect the independence of the judiciary. Quoting from Legal Services Corp. v. Velazquez, 531 U.S. 533, 545 (2001), plaintiffs note that “ [a]n informed, independent judiciary presumes an informed, independent bar.’ ” Plaintiffs' Response at 4. They then add that § 526(a)(4) impairs their ability to fully advise their clients and thus “must be reviewed under strict scrutiny.” Id.

Plaintiffs' argument is without merit. The law in question in Velazquez prevented an attorney funded by the Legal Services Corporation (LSC) from “arguing to a court that a state [welfare] statute conflict[ed] with a federal statute or that either a state or federal [welfare] statute by its terms or in its application [] violat[ed] [] the United States Constitution.” 531 U.S. at 537. The Court in Velazquez concluded that the statute impaired the judicial function because it limited LSC attorneys' abilities to “advise the courts of serious questions of statutory validity,” thereby infringing on the courts' primary mission of interpreting the law and the Constitution. Id. at 545. Section 526(a)(4) does not limit a lawyer's ability to *advise the court*, i.e., to make “all the reasonable and well-grounded arguments necessary for proper resolution of the case.”³ See id. Therefore, § 526(a)(4) does not interfere with the courts' core function of interpreting the law and the Constitution and so does not threaten the independence of the judiciary.

³ Instead, assuming that it deters the advice at which it is aimed and the related debtor conduct, § 526(a)(4) alters the facts of the cases on which courts make their decisions, by affecting the amount of debt involved in the cases. Nothing in Velazquez suggests that laws that affect the facts of the cases on which the courts render decisions impair the judicial function. There is good reason for the silence: Such laws, and there undoubtedly are many (e.g., laws against stealing almost certainly affect how much property is in debtors' estates) do not trench on the courts' ability to interpret the law and the Constitution.

2. Section 526(a)(4) satisfies the balancing test.

Plaintiffs argue in the alternative that § 526(a)(4) does not satisfy the balancing test because it is not narrowly tailored to accomplish its purpose. Plaintiffs' response at 8; see also Gentile, 501 U.S. at 1075-76. As examples of § 526(a)(4) allegedly restricting speech beyond that justified by its purpose, plaintiffs argue that it prohibits an attorney from advising an assisted person to borrow money from a friend or relative to pay his or her bankruptcy attorney or to borrow money against nonexempt assets to increase the value of his or her exempt assets.

The purpose of § 526(a)(4), however, justifies the limitations challenged by plaintiffs. With respect to a debtor borrowing to pay his or her bankruptcy attorney, § 526(a)(4) states that a "debt relief agency shall not . . . advise an assisted person or prospective assisted person to incur more debt to . . . to pay an attorney for services . . . in a case under this title." This a narrowly tailored ethical rule. It protects the integrity and fairness of the bankruptcy system by discouraging attorneys from using their position as the "trusted agents of their clients," Ohralik, 436 U.S. at 460 (quotations omitted), to secure preferential treatment for themselves by counseling clients to pay them so that they (the lawyers) can avoid the sting of discharge at the expense of other creditors, who will receive less money than they otherwise would have. See Memorandum in Support of Defendants' Motion to Dismiss at 14-15 (explaining that protecting the integrity of the bankruptcy system encompasses ensuring the fair distribution of assets to creditors); see also 11 U.S.C. § 329(b) (providing remedies against attorneys who overcharge for their services).

As for advice to borrow to increase the value of the debtor's exempt assets, this is advice given because the assisted person plans to file for bankruptcy (whether assets are exempt or nonexempt matters only because of the impending bankruptcy), and it is aimed at allowing the

assisted person to take advantage of discharge (because the assisted person benefits from the loan without absorbing its costs) at the expense of creditors. Thus, the purpose underlying § 526(a)(4) straightforwardly supports restricting advice to borrow against nonexempt assets to increase the value of exempt assets. See Memorandum in Support of Defendants’ Motion to Dismiss at 14.

C. Section 526(a)(1) Does Not Make Lawyers Liable For Failing to Perform Promised Services That Become Unnecessary or Unethical and Will Not Chill Speech.

We explained in our opening brief that § 526(a)(1) does not require attorneys to perform services that become unnecessary or unethical, as interpreting it to do so would contravene the interpretive norms that statutes are to be interpreted in light of their purpose and so as to avoid absurd results. Memorandum in Support of Defendants’ Motion to Dismiss at 17-18. We added that § 526(a)(1) will not chill speech even if it requires lawyers to perform such services because they will still have strong ethical and commercial incentives to explain to clients and potential clients what services they plan to provide; lawyers will simply phrase their promises in conditional language. Id. at 18-19.

Plaintiffs respond that § 526(a)(1), indeed, requires attorneys to perform unnecessary or unethical services. In support of this argument, they offer the following syllogism. As their major premise, they concede (or assume for the sake of argument, their memorandum is not clear) that Congress’s purpose in enacting the BAPCPA was to reduce the amount of unethical conduct by attorneys. Plaintiffs’ Response at 10. For their minor premise, they assert that this is “a protection of the debtor, not the attorney.” Id. at 10. And for their conclusion, they posit that, therefore, “the Congressional purpose was to require attorneys to do those things their clients request.” Id. To bolster this simple syllogism, plaintiffs discuss two hypothetical situations (one involving a divorced

couple and the other involving an ill debtor) in which it would be unethical for an attorney to perform promised services. Id. at 9-10. Finally, plaintiffs insist that if § 526(a)(1) requires them to perform services that have become unethical, then their only option will be to abstain from promising services. Id.

Plaintiffs' arguments fail. Their syllogism falls apart at the minor premise. While it is true that Congress enacted the BAPCPA, in part, to reduce the amount of unethical conduct by debtors' attorneys, it is not true that the BAPCPA thus protects only debtors. Reducing the amount of unethical conduct by attorneys also protects creditors by, for example, reducing the likelihood that they will be forced to write off debts that were incurred to take advantage of discharge. See 2005 U.S.C.C.A.N. 88, 89 (explaining that Congress's purpose in enacting 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"). But even if plaintiffs' minor premise were true, it would not necessarily be true that Congress would want attorneys to do those things that their clients request, for presumably circumstances exist when a debtor wants his or her attorney to perform unethical services that would redound to the debtor's detriment, as would be the case if a debtor's petition were dismissed because of conduct by his or her attorney.

Plaintiffs' hypothetical dilemmas do not save their response. The hypothetical situation involving the couple that divorces after hiring a bankruptcy attorney suggests that a bankruptcy attorney would violate Oregon Rule of Professional Conduct (ORPC) 1.7, which relates to conflicts of interest, if he or she were forced to represent both parties because one divorced debtor often will become a creditor of the other. Plaintiffs' Response at 9. This hypothetical does not present a difficult problem: § 526(a)(1) does not make an attorney liable for failing to perform services that

have become unethical. Memorandum in Support of Defendants’ Motion to Dismiss at 17-18. Interpreting the statute otherwise would ignore the purpose of the statute and lead to absurd results, in contravention of established interpretive principles. Id. at 17-18 & n. 8. The hypothetical involving the ill debtor seems to raise the question of whether § 526(a)(1) makes an attorney liable for failing to perform a service that is not unethical pursuant to a hard and fast rule of professional conduct, but which is unethical to the attorney in the “exercise [of his or her] independent professional judgment” in light of “moral, economic, social and political factors” that are “relevant to the client’s situation.” ORPC 2.1. If, as plaintiffs suggest, ORPC 2.1 delegates to attorneys some discretion to determine when they believe that providing services is unethical, then an attorney who appropriately exercises that discretion will not be punished under § 526(a)(1) because it does not make attorneys liable for failing to provide services that have become unethical. Memorandum in Support of Defendants’ Motion to Dismiss at 17-18.

Finally, plaintiffs’ unconvincingly argue that if § 526(a)(1) makes them liable for failing to perform services that have become unethical, then their only recourse will be to abstain from making promises. Even if § 526(a)(1) made attorneys liable for failing to perform such conduct, plaintiffs could and, given the commercial and ethical incentives, likely would obey the statute by couching promises in conditional language, not by abstaining from speech. See Memorandum in Support of Defendants’ Motion to Dismiss at 18-19.

D. Section 527 Is Constitutional Because Statutes Can Require Licensed Professionals to Disclose Accurate Factual Information.

Claim Three of plaintiffs’ Complaint suggested four ways in which § 527 violated the Constitution by “compelling” speech. Complaint at ¶¶ 4, 21. Plaintiffs’ have explicitly abandoned

arguments about one claimed problem (involving bankruptcy information sheets), Plaintiffs' Response at 10-11, and have implicitly abandoned two others (involving information on how to file for bankruptcy and the different chapters of bankruptcy), Complaint at ¶¶ 4, 21, by not challenging defendants' arguments on them, Memorandum in Support of Defendants' Motion to Dismiss at 19-21. All that remains of Claim Three then is the assertion that § 527 violates the Constitution by obligating attorneys to tell debtors that "in some localities you can get help from a bankruptcy petition preparer who is not an attorney." 11 U.S.C. § 527(b).

Plaintiffs offer two arguments to support their remaining challenge to § 527. The first is that, contrary to the argument in our opening memorandum, Planned Parenthood of Southeast Pennsylvania v. Casey, 505 U.S. 833, 884 (1992), does not support the constitutionality of § 527 because this section does not require plaintiffs to inform clients of risks of filing bankruptcy but to inform them that they " 'can go somewhere else that is cheaper.' " Plaintiffs' Response at 11. Plaintiffs add that this disclosure requirement amounts to "ill-advised" advice because bankruptcy petition preparers are not very helpful and operate on the margins of the law. Id. Plaintiffs' second argument is that § 527 obligates them to disclose their opponents viewpoints in violation of the First Amendment as interpreted by the Supreme Court in Pacific Gas & Electric Co. v. Public Utility Commission, 475 U.S. 1 (1986). Id. at 12.

Plaintiffs' first argument is wrong. By requiring lawyers to tell debtors that they can hire petition preparers in certain situations, § 527 obliges lawyers to inform debtors about one of their options with regard to filing for bankruptcy. But contrary to plaintiffs' argument, Casey does not distinguish between requiring licensed professionals, in the interest of full disclosure, to divulge information on options and requiring them to divulge information on risks: Casey upheld a statute

that commanded doctors to inform any woman contemplating an abortion about “the assistance available should she decide to carry the pregnancy to full term” Casey, 505 U.S. at 883. Therefore, Casey supports the argument that § 527 is constitutional.⁴

Plaintiffs’ second argument similarly lacks merit. The basic proposition for which plaintiffs cite Pacific Gas & Electric, 475 U.S. at 20-21, namely, that a person should not be required to disclose another’s point of view, garnered the support of only a plurality of the Court, so it is not part of the opinion’s holding. But even if it were, it would not dictate that this Court find § 527 unconstitutional. First, § 527 does not require lawyers to disclose others’ points of view, it only requires them to disclose a relevant fact in the interest of full disclosure. Lawyers have to advise clients only that hiring a petition preparer is an option in certain localities; they do not have to advise their clients that they should, in fact, hire a petition preparer. Second, Pacific Gas & Electric did not involve the speech of licensed professionals, which may be subject to regulations to which others’ speech may not. See Ohralik, 436 U.S. at 460; Gentile, 501 U.S. at 1073. Rather, the Court in that case concluded that the speech at issue was subject to full First Amendment protection. Pacific Gas & Electric, 475 U.S. at 8-9. Third, in Pacific Gas & Electric, the Court worried that the statute favored one side of a debate over the other because it did not equally constrain both sides. Id. at 14-15. Here, to the contrary, § 527 treats both sides equally, as it requires petition preparers to tell clients that they can hire attorneys. § 527(b); 11 U.S.C. § 101 (12A) (including petition preparers in the definition of debt relief agency). Finally, as Casey addresses the question at issue more specifically and more recently, it controls.

⁴ Plaintiffs did not dispute defendants’ argument that Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), supports the conclusion that § 527 is constitutional. See Defendants’ Memorandum in Support of Motion to Dismiss at 20-21 n. 11.

E. Section 528 Does Not Compel Untrue Speech In Violation of the Constitution.

We argued in our opening memorandum that § 528's disclosure requirements do not violate the Constitution. Memorandum in Support of Defendants' Motion to Dismiss at 22-25. The Supreme Court has held that laws can require advertisements to include factually correct disclosures to prevent deception, without running afoul of the First Amendment, so long as the laws are reasonably related to the government's interest in preventing deception and not unduly burdensome. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985). Section 528 requires, in relevant part, that a debt relief agency include, in advertisements implicitly or explicitly touting bankruptcy assistance services, the following statement or a substantially similar one: "We are a debt relief agency. We help people file for bankruptcy assistance under the Code." 11 U.S.C. § 528(a)(4), (b)(2)(B). As we explained in our opening memorandum, this requirement is reasonably related to the government's interest in preventing deception and is not unduly burdensome. Memorandum in Support of Defendants' Motion to Dismiss at 24-25.

Only one plaintiff, Jason C. McBride, challenges § 528's disclosure requirement. Because he "advises his clients to file for bankruptcy" and "about the dischargeability of spousal and child support," he is, he says, a debt relief agency. Plaintiff's Response at 12. Thus, he is subject to § 528's disclosure requirements, he argues, even though he does not "represent clients in bankruptcy matters" or "file petitions for relief under the Bankruptcy Code." Id. at 12-13. He insists that he would like to include information about bankruptcy in his advertisements. Id. at 13. But if he were to do so, he maintains, he would be forced to make § 528's required disclosure, which would be misleading. Id. at 13. The disclosure would be misleading, he contends, because it suggests that he "represents clients in bankruptcy matters" when, in fact, he does not. Id. He concludes that this

requirement chills his speech because it gives him a Hobson's choice: face sanctions for failing to include the required disclosure or be "inundated with clients that he has no interest in representing." Id. at 13-14.

Mr. McBride's argument falls short. Section 528's disclosure is not misleading in the circumstances described above. According to his own argument, Mr. McBride advises clients to file for bankruptcy. His argument turns on the assumption, then, that this service does not amount to "help[ing] people file for bankruptcy assistance." This assumption is faulty. Advising a client to file for bankruptcy is the first step in helping the person to file; a client cannot file for bankruptcy relief until he or she decides to do so. The required disclosure does not mislead anyone in this circumstance: It states that the debt relief agency "help[s]" people file for bankruptcy assistance, not that the debt relief agency "files bankruptcy petitions." See 11 U.S.C. § 528(a)(4), (b)(2)(B). That one of Mr. McBride's services amounts to help in filing for bankruptcy assistance suffices to establish that the disclosure is not misleading as to Mr. McBride. The disclosure is not misleading simply because he provides other services in addition to helping people file for relief under the Code; the disclosure does not indicate otherwise. What is more, as § 528 requires the disclosure recited in the text of the statute, or a substantially similar one, § 528(a)(4), (b)(2)(B), Mr. McBride could state that he "advises people about filing for bankruptcy assistance under the Code" instead of that he helps people file for assistance. Finally, nothing in the Code prohibits an advertisement from adding details to the disclosure, so Mr. McBride could explain in his advertisements that he does not file bankruptcy petitions.⁵

⁵ Mr. McBride does not specifically state in his argument that the clients whom he advises about filing for bankruptcy and the dischargeability of debts are "assisted persons" under the Code. See 11 U.S.C. § 101(3). If they are not, then Mr. McBride does not have standing to challenge § 528

F. Sections 526-28 Are Not Unconstitutionally Vague.

In our opening Memorandum, we explained that the definition of “assisted person,” 11 U.S.C. § 101(3), is sufficiently determinate to satisfy the Due Process Clause. Memorandum in Support of Defendants’ Motion to Dismiss at 25-27. The term “nonexempt” has a settled meaning in bankruptcy law, and the Bankruptcy Code itself, which to our knowledge has never been held to be unconstitutionally vague, provides no less guidance about the valuation of assets and application of exemptions than it did prior to the enactment of the BAPCPA. *Id.* at 27.

Plaintiffs respond with five basic arguments. First, they argue that when practicing in Washington, which allows debtors to choose between federal and state exemptions, they do not know whether to apply state or federal exemptions. Plaintiff’s Response at 15. Second, they argue that §§ 526-28 do not tell them how to value assets, including “a redemption right in an asset that expires in 20 days.” *Id.* at 15-18. Third, they argue that §§ 526-28 do not define the term “nonexempt.” *Id.* at 18-20. Fourth, they maintain that the Code must be more specific now than it has been over the last quarter century or so because determining whether property is exempt is a different task after the enactment of the BAPCPA. *Id.* at 20. Fifth, they insist that §§ 526-28 are unconstitutional because they allow arbitrary and discriminatory enforcement. *Id.* at 21.

None of the arguments has merit. Plaintiffs’ first argument requires some explanation. Plaintiffs maintain that the value of a debtor’s nonexempt assets may be under \$150,000 if one uses the Washington state exemptions and over \$150,000 if one uses the federal exemptions, or vice versa. Plaintiffs’ response at 15. If one of the plaintiffs chooses a set of exemptions that leads to

because he is not a debt relief agency and therefore the provision does not apply to him. 11 U.S.C. §§ 101(12A), 528. We assume for this argument that the clients to whom Mr. McBride refers are assisted persons.

a valuation of over \$150,000 and therefore acts as if the BAPCPA does not apply, and the Court chooses a set that leads to a valuation of under \$150,000, then, plaintiffs insist, the one of them could be punished for not following the BAPCPA. Id. Thus, plaintiffs maintain, the Code should tell them which set of exemptions to apply. See id. This argument is fundamentally flawed. To conclude that a debtor's lawyer could be sanctioned for choosing one set of exemptions instead of the other is to conclude that the BAPCPA repeals the provision of the Code that allows states to give debtors a choice, 11 U.S.C. § 522(b), but nothing in the BAPCPA repeals this provision. Thus, plaintiffs' argument fails.

Plaintiffs' second argument fails because it demands more specificity from §§ 526-28 than circumstances allow or Supreme Court precedent requires. Plaintiffs argue that §§ 526-28 are unconstitutionally vague because they do not precisely explain how to value "a redemption right in an asset that expires in 20 days," or a car, or a life estate in real property, or innumerable other assets. Plaintiffs' Response at 15-16. Plaintiffs' argument demands that the Code's language be unlimited in scope and mathematical in certainty. Logic and precedent refute this argument. Common sense tells us that the Code could not tell plaintiffs how to value every asset imaginable, and the Supreme Court has stated that "precise guidance has never been required [] of regulations," Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989), and that "we can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110 (1972). Importantly, the Code provides no less guidance about valuation than it has in the past, and to our knowledge, it has never been held to be unconstitutionally vague.

Plaintiffs' third argument, that §§ 526-28 are unconstitutionally vague because the definition of "assisted person" does not define the term "nonexempt," is unpersuasive because the Supreme

Court has defined the term “exempt” in the context of bankruptcy. In Owen v. Owen, 500 U.S. 305, 308 (1991), the Supreme Court explained that “[a]n exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtor.” Given the Supreme Court’s specific guidance on the definition of the term “exemption” under the Code, the term “nonexempt” is not too vague because a lawyer need not possess extraordinary intelligence to understand its meaning and it does not create a threat of arbitrary and discriminatory enforcement. See Hill v. Colorado, 530 U.S. 703, 732 (2000).

Plaintiffs’ fourth argument is similarly without merit. The argument is that, after the enactment of the BAPCPA, the task of determining whether property is exempt is different than it was prior to the enactment of the BAPCPA. There is no support for this proposition. Different consequences flow from exemption determinations in the wake of the BAPCPA, but the task itself has not been altered: Plaintiffs must determine whether the law allows “an interest to be withdrawn from the estate (and hence from the creditors) for the benefit of the debtor,” Owen, 500 U.S. at 308.

Finally, Plaintiffs’ fifth argument, that §§ 526-28 are unconstitutional because they allow for discriminatory and arbitrary enforcement, is a mere conclusion. The Supreme Court has held that a statute is unconstitutionally vague in violation of the Due Process Clause if “if it authorizes or even encourages arbitrary and discriminatory enforcement.” Hill, 530 U.S. at 732. But as detailed above, plaintiffs cannot show that §§526-28 allow or encourage arbitrary and discriminatory enforcement.

Conclusion

For the reasons stated above and in Defendants’ Memorandum in Support of Motion to Dismiss, the Court should dismiss plaintiffs’ complaint for failure to state a claim upon which relief can be granted.

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Respectfully submitted,

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