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Attorneys Push Bankruptcy Act Challenges

Ruling in Minnesota case could affect litigation in Connecticut

At a time when bankruptcy threatens a growing number of Americans, the laws that govern the process may undergo changes after the U.S. Supreme Court hears arguments during its next term.

The high court granted review last week of a case involving a Minnesota law firm's challenge of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). That act was passed in 2005 and has been the cause of much court activity throughout the country, including Connecticut.

When the Supreme Court hears *U.S. v. Milavetz, Gallop & Milavetz*, there will be arguments from lawyers that the bankruptcy reforms limit their freedom of speech and are too broad. Under one part of the law, attorneys cannot advise their clients to take on additional debt when the client is considering bankruptcy, even if that debt is linked to needed medical treatments, for example.

Hartford bankruptcy and reorganization attorney Barry S. Feigenbaum, of Rogin Nassau, is intimately familiar with the arguments. In May 2006, he filed a similar lawsuit challenging the constitutionality of the bankruptcy laws and disputing the notion that attorneys are "debt relief agencies," as defined by the law. Feigenbaum represents the Connecticut Bar Association, the National Association of Consumer Bankruptcy Attorneys and numerous individual lawyers, including several in Connecticut.

His case, *Connecticut Bar Association v. U.S.*, currently awaits a hearing in the 2nd Circuit Court of Appeals. Meanwhile, another Connecticut-based challenge, *Zelotes v. Adams*, was argued last October in the 2nd Circuit.

Managing Editor Douglas Malan caught up with Feigenbaum last week to get a clearer picture of the court activity.

LAW TRIBUNE: How far back does this dispute over bankruptcy reform go?

BARRY FEIGENBAUM: Attorneys and attorney groups objected to provisions of BAPCPA when it was first proposed in Congress. BAPCPA was debated over several congressional sessions during the Clinton and Bush presidencies. It was only approved and signed into law during the Bush administration.

LAW TRIBUNE: In your opinion, how do current bankruptcy laws negatively affect bankruptcy attorneys?

FEIGENBAUM: There are many provisions of BAPCPA which inhibit legitimate debtor relief. In the CBA case, the Connecticut Bar Association and the National Association of Consumer Bankruptcy Attorneys challenged provisions which directly affected the advice attorneys can give to their clients, certain mandatory disclosure requirements and certain restrictions on advertising. For example, Section 526(a)(4), which [Connecticut federal court] Judge [Christopher F.] Droney held unconstitutional, would prohibit an attorney from advising a client to borrow money to pay for necessary medical procedures, or for a vehicle which is necessary for a job. Other sections require written disclosures to clients about the bankruptcy process which are not accurate and are confusing to clients. The plaintiffs claim that this imposition by the government on the attorney-client relationship violates the First Amendment.

In addition, the plaintiffs are claiming that some of these provisions related to "debt relief agencies" do not apply to attorneys at all.

Law Tribune File Photo

Attorney Barry Feigenbaum, who is representing several plaintiffs in a lawsuit against the government, said the dispute over bankruptcy reform stretches back to debate during the Clinton administration.

LAW TRIBUNE: What does the U.S. Supreme Court's decision to hear the *Milavetz* case mean for the future of your case?

FEIGENBAUM: In the *Milavetz* case, the 8th Circuit held that the provisions of BAPCPA which prohibit attorneys from advising their client to incur debt were unconstitutional, but held that attorneys representing consumer debtors were "debt relief agencies" and that the required advertising statements were constitutional. In *Milavetz*, both the plaintiff and the government asked for Supreme Court review. Accordingly, most, but not all, of the provisions which are in issue in the CBA case will be addressed by the Supreme Court in the context of the *Milavetz* case.

LAW TRIBUNE: What has happened to send your case to the 2nd Circuit?

FEIGENBAUM: Judge Droney, in his September 9, 2008 decision, ruled for the plaintiffs on certain matters and against them on others. Accordingly, there were appeals filed by both sides. In particular, Judge Droney found that certain provisions of BAPCPA which prohibit attorneys from advising their clients to incur debt were unconstitutional and upheld the other challenged provisions to the extent that they apply to attorneys representing consumer debtors.

LAW TRIBUNE: Do you suspect the 2nd Circuit will hold off hearing your case until the Supreme Court rules in *Milavetz*?

FEINGENBAUM: That is in the discretion of the 2nd Circuit.

LAW TRIBUNE: What bearing does *Zelotes v. Adams* have on your CBA case?

FEIGENBAUM: In *Zelotes*, the district court ruled that the prohibition against advising clients to incur debt was unconstitutional. This ruling is in accord with the ruling in the CBA case and the ruling by the 8th Circuit in *Milavetz*. The *Zelotes* decision is also on appeal in the 2nd Circuit. Both the CBA and NACBA filed an amicus brief in support of the plaintiff in the 2nd Circuit. ■