



Milavetz Gallop and Milavetz P.A.’s Challenge to the Ill Conceived and Poorly Written “ Bankruptcy Abuse and Consumer Protection Act of 2005. (BAPCPA). “¹

By Barbara Nilva Nevin.

What is the harm of doing the right thing? What is the harm of doing our job as legislators and making sure we do not stick the entire bankruptcy community with these provisions that do not make any sense? Senator Russ Feingold, referring to BAPCPA. March 2005

So it’s a stupid law.

Now, where is the prohibition of stupid laws in the Constitution ? Justice Scalia referring to BAPCPA, during Oral Argument of *Milavetz v, the United States.*²

Prior to the year 2000, Congress began their attempt to enact BAPCPA. This act became law on October 17, 2005. The law has been characterized as paternalistic as it prevents the public from receiving information from lawyers that Congress believes the public should not have.

The law was pushed through Congress, in part, by Washington lobbyists such as Haley Barbour former chairman of the Republican National Committee, and Lloyd Bentsen former Senator and Treasury Secretary. These lobbyists represented banks and credit card companies. One such credit card company, MBNA, apparently delivered a \$200,000.00 contribution to the National Republican Senatorial Committee on the day of an earlier house vote on the Bankruptcy Bill. The price tag for the contributions by special interest groups was over \$20,000,000.00.³

¹ This article is not intended to be a complete legal analysis of *Milavetz et al v. The United States*. If one wishes to review the decision of the United States Supreme Court. the oral argument and our legal briefs, please go to our website at Milavetzlaw.com.

² *Milavetz et al v. the United States* 559 U.S. ____ (2010) (oral Argument) December 1, 2009

³ *Soaked by Congress* , By Donald Bartlett and James B. Steele, Laura Karmatz and Andrew Goldstein, Time Magazine May 15, 2000

Women needing advice, being unemployed, suffering medical problems, serving their country, or having other dire financial situations were not in a position to hire lobbyists to protect their interests.

BAPCPA has been universally criticized by consumer bankruptcy attorneys, academics, and even Judges.⁴

Although some people believe BAPCPA was written by lobbyists, the statute also reflected the views that many people in the United States hold, that “lawyers are not to be trusted,” and that they cause, through their legal advice,” people to take unfair advantage of the legal system.”⁵

This perception was enhanced by some members of Congress who attempted to portray bankruptcy as a method for unscrupulous debtors trying to run up debts and have them magically disappear.⁶ Representative George Gekas declared, “In 1997 Americans filed an all-time record of 1.33 million consumer bankruptcy petitions, which erased an estimated \$40 billion in consumer debt. Those losses are passed on to (other) consumers, resulting in a hidden tax for every American household. The only reasonable explanation is that the stigma of bankruptcy is all but dead. It is simply too easy to file.”

The reality of the situation is that two out of three people who have filed, have lost a job. Half have experienced serious health problems. Fewer than 9 percent have not suffered a job loss, medical event or divorce. 44% of filers were couples, 30% were women filing alone, and 26% were men filing alone.⁷

Perhaps many congressmen and women felt by keeping the public uninformed through BAPCPA, fewer bankruptcies would be filed.

⁴ See Jennifer Emens-Butler, *Bankruptcy Reform: Gather ‘Round Children, Yes the Sky is Falling*, Vt. B.J. Spring 2005, at 26 “(N)o established group of attorneys, including the American Bar Association, judges, law professors bankruptcy practitioners, women or consumer advocates supported the bill.”

⁵. See for example the television program “Facing Kate,” about a disillusioned lawyer, leaving her law practice, which helps to foment the anti-lawyer sentiment. Also the public is bombarded with movies which depict attorneys in unflattering ways. Please see “Bad Lawyers in the Movies,” *The Nova Law Review* Volume 24, Number 2 (Winter 2000.) (This article analyzes the movie industry which tends to depict lawyers unfavorably as in *Body Heat*, *The Devil’s Advocate*, *The Firm*, etc.)

⁶ See *Soaked by Congress*, By Donald Bartlett and James B. Steele, Laura Karmatz and Andrew Goldstein, *Time Magazine* May 15, 2000

⁷ *The Fragile Middle Class; Americans in Debt*; Elizabeth Warren Harvard Law School Smith Business Solutions.

BAPCPA as written, prohibits lawyers from abiding by state rules of professional conduct which provide that the lawyer competently represent the client.⁸ The ethical practice of the profession of law has been traditionally regulated by the States, rather than by Congress.⁹

Many of our law firm's clients have filed bankruptcy because of personal catastrophes in their lives. Our law firm has represented numerous personal injury clients whose lives were disrupted by an accident or wrongful death. As a result, their bills increased and they struggled to pay their daily living expenses. Bankruptcy may often be a good option.

When BAPCPA was passed, the lawyers in our law firm were dismayed to learn that the new law illegally stated lawyers could not "advise an assisted person to incur more debt in contemplation of bankruptcy." This language illegally attempted to prevent us from telling our clients to refinance their homes at a lower interest rate before the impending bankruptcy harmed their credit. We were also forbidden under this law to give our clients prudent advise prior to filing bankruptcy regarding purchasing a car, incurring medical bills, co-signing on their child's student loan, or replacing a broken furnace. This honest advise would not have been considered fraudulent prior to the new law. Further, if we gave such advise, under the new law, an attorney could be liable to the client for their actual damages, if their debts were not discharged. The amount of liability could include the amounts of debts that were not discharged..¹⁰

Robert Milavetz, the founder of our law firm, and I, filed a Declaratory Judgment in Federal Court to declare portions of BAPCPA unconstitutional. Our challenge took us into Federal District Court, the Eighth Circuit and finally the United States Supreme Court. We prevailed in the Federal District Court, before Chief Judge James Rosenbaum on every issue.

In the Eighth Circuit, we prevailed on the portion of our argument that the law concerning attorney advise giving, was overbroad and violative of the First Amendment. The Court of Appeals declared this portion of BAPCPA unconstitutional. Both the United States and our law firm were granted certiori before the United States Supreme Court to review portions of the Eight Circuit Opinion.¹¹

Although the Supreme Court did not explicitly declare BAPCPA, unconstitutional, we were able to have the law narrowed considerably on First Amendment grounds. The decision emphasized that lawyers are allowed to speak candidly with their clients about the incurrence of

⁸ For example, Minnesota's Rule of Professional Conduct 1.1 provides "a lawyer shall provide competent representation to a client.

⁹ Middlesex County Ethics v. Garden State Bar Association 457 U.S. 423 (1982)

10. Section 526 of the Bankruptcy code Restrictions on Debt Relief Agencies

11. Milavetz et al v. the United States

debt and clarified that BAPCPA only prohibits lawyers from counseling a client to load up on bad debt prior to filing bankruptcy.¹²

The U.S. Supreme Court addressed one of the most important issues that Americans are faced with today. The Court upheld the power of Congress under Article One of the U.S. Constitution. Congress presumably reflects the opinion of a majority of the people. At the same time, under Article Three of the U.S. Constitution, the Court upheld its judicial function and protected the fundamental American values in our Constitution. The Supreme court structured its decision so as not to explicitly hold an important act of congress unconstitutional, but did construe the act to preserve the fundamental rights of all Americans to receive honest and ethical legal advise so Americans are able to make good personal decisions in exercising their legal rights.

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Ms. Nevin is a part time Conciliation Court Referee in Hennepin County Minnesota and is Chairman of the Senior Commission for the City of Chanhassen, Minnesota. She is also the Chaplain and Patriotic Officer of the Southwest Chapter of Blue Star Mothers of Minnesota, as her son has served in the United States Marine.

Ms. Nevin has been voted a Super Lawyer by her peers consistently for the past several years. She is licensed to practice law in the State of Minnesota and is a member of the Minnesota Bar Association. She is a member of the United States District Court for the District of Minnesota, is licensed to practice in the United States Supreme Court, and belongs to the American Association for Justice.

¹² Justice Sotomayor stated “ Even if the statute were not clear in this regard, we would reach the same conclusion about its scope because the inhibition of frank discussion serves no conceivable purpose within the statutory scheme.”