

CBA Loses Challenge To Federal Bankruptcy Act

2nd Circuit echoes high court, upholds rules on advertising and advice

By **CHRISTIAN NOLAN**

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It took nearly four-and-a-half years for the Connecticut Bar Association to get the news that it didn't necessarily want to hear. Connecticut bankruptcy lawyers will have to make sure their clients don't go on a shopping spree before filing for bankruptcy.

And attorneys, whether devoted exclusively to bankruptcy or simply dabbling in it to draw in some extra income, will also need to include a disclaimer in their advertisements noting they're a "debt relief agency," a term lawyers believe puts them on par with less-savory non-legal professionals.



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Attorney Eugene S. Melchionne said some attorneys are ignoring provisions of the federal bankruptcy law, especially a section that requires advertising to state that the legal practice is 'a debt relief agency.'

Last week's ruling, from the U.S. 2nd Circuit Court of Appeals, comes after the CBA challenged the constitutionality of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Lawyers were immediately upset after then President George W. Bush passed the measure, as

they believe it restricted their ability to provide legal counsel to clients in need of help in getting out of debt.

For instance, one of the plaintiffs, Eugene S. Melchionne, a Waterbury attorney whose practice is entirely composed of bankruptcy law, had a client, Anita Johnson, who went into debt due to medical bills for breast cancer. Melchionne said he couldn't properly go over her financial options with her to ensure appropriate medical treatment for fear of violating the statute that prevents him from advising expenditures prior to filing for bankruptcy.

"We're not supposed to tell clients to incur debt. Well there are legitimate reasons for incurring debt," said Melchionne.

Soon other similar legal challenges against the federal government regarding the new statute started popping up elsewhere, including Minnesota. So the U.S. Supreme Court took up that case from the 8th Circuit Court of Appeals and issued a ruling this past March. The nation's highest court ruled that Congress likely was looking to prevent abuse of the bankruptcy laws when muzzling what lawyers can say to their clients about incurring more debt.

Justice Sonia Sotomayor said the prohibition should be narrowly interpreted to apply to advice to run up debt that will soon be discharged and uncollectable. The act is violated, she wrote, "only when the impetus of the advice to incur more debt is the expectation of filing for bankruptcy and obtaining the attendant relief."

'A Disappointment'

To the surprise of no one that had read the Supreme Court opinion, the 2nd Circuit, in a decision written by Judge Reena Raggi, echoed the nation's highest court in turning aside the CBA's challenge. But that didn't make last week's opinion any easier for the CBA's lawyer – Barry S. Feigenbaum, of Hartford's Rogin, Nassau – to stomach.

"I think that the statute is a disappointment and the course of the appellate court rulings was a disappointment," said Feigenbaum. "Congress needs to go back and re-examine what it did and amend some of these statutes."

Melchionne said despite the recent court rulings, many lawyers are not complying with the statute. For instance, he said many lawyers offering bankruptcy help as part of their practice are not including in their advertising the disclaimer: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.”

“I see a lot of lawyers who don’t put any of the required language into their ads,” said Melchionne. “There’s new lawyers who are going into bankruptcy and don’t understand the disclosures they’re supposed to give.”

Also, Melchionne said lawyers still feel as though they need to walk the tightrope when their clients ask questions about expenditures prior to filing for bankruptcy, given the way the law is worded. “I think that’s the part that was left open ended,” said Melchionne. “I don’t think [the 2nd Circuit] decision helps clarify any of that.”

He continued: “I think [the Supreme Court] side-stepped the issue. It’s a tough one when [the statute] says....you can’t advise a potential client to incur debt. The whole idea of pre-bankruptcy planning is discouraged.”

Melchionne said the latest ruling appears to wrap up all the pending legal challenges to the now five-year-old bankruptcy statute. Lawyers will now pay attention to how it’s enforced.

“The Supreme Court left some areas open to interpretation and the current administration doesn’t appear to be too interested in prosecuting attorneys for the most part,” Melchionne said. •