

No. 06-628

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2006**

In re Meghan Cannella, Debtor

Paul Hage, Esq.,

Petitioner,

v.

Meghan Cannella,

Respondent.

December 12, 2006

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT IS GRANTED, LIMITED TO CONSIDERATION OF THE FOLLOWING QUESTIONS:

1. Whether the restrictions on attorney advice in section 526(a)(4) of the Bankruptcy Code violate the First Amendment of the Constitution.
2. Whether the section 362 automatic stay prevents a chapter 7 debtor's attorney from collecting fees incurred for post-petition services provided pursuant to a prepetition retention agreement.

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**UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT**

IN MEGHAN CANNELLA, DEBTOR

Case No. 06-4080

Meghan Cannella,

Appellant,

v.

Paul Hage,

Appellee.

Decided: October 10, 2006

Before Judges BLAYLOCK, GUTIERREZ and WOLPERT

BLAYLOCK, Circuit Judge, for the Court.

The present appeal requires the Court to consider the following two issues: 1) whether the recently-enacted consumer protection provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”) unconstitutionally abridge the free speech rights of attorneys representing consumer debtors; and 2) whether the section 362 automatic stay permits lawyers representing consumer chapter 7 debtors to collect fees incurred for bankruptcy-related services that are performed after the filing of the chapter 7 petition. Both issues were resolved in favor of the chapter 7 debtor’s attorney below. For the reasons explained below, we disagree on both points and reverse.

I. Factual Background and Procedural History

This appeal arises out of a chapter 7 bankruptcy case filed in November of 2005 by attorney Paul Hage on behalf of his then client, Meghan Cannella. This appeal arose from a summary judgment order and there is no dispute as to the relevant facts.

Cannella, a resident of the State of Bliss, approached attorney Hage for bankruptcy advice after being laid-off in late October from her job as a ticket agent with Northwest Airlines. Since she barely missed the mid-October deadline for filing under the former, more lenient, version of the bankruptcy law, Hage evaluated her situation under the BAPCPA amendments,¹ which impose a “means test” for determining eligibility for chapter 7 bankruptcy relief.

Hage determined that chapter 7 relief would be more beneficial to Cannella than chapter 13 relief² because her unsecured debts greatly exceeded her ability to pay, she had an uncertain employment future with an airline that was itself in bankruptcy, and she did not own a home or have substantial non-exempt assets. The new BAPCPA “means test” presented a difficulty, however, because under its formula Cannella had approximately \$400 of monthly disposable income, triggering a presumption of “abuse”. *See* 11 U.S.C. §707(b)(2).³

One of the expenses that may be deducted from current monthly income under the means test is the monthly payment on any secured debt. *See* 11 U.S.C. §707(b)(2)(A)(iii). At the time

¹ Although a few provisions had different effective dates, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005), applied to cases filed on or after October 17, 2005.

² While a chapter 7 debtor must turn over non-exempt assets, the debtor receives a discharge of most debts and does not have to commit future earnings to the repayment of discharged debts. In contrast, a chapter 13 debtor generally is required to devote all disposable income over five years to a repayment plan.

³ The means test deducts certain allowed expenses from the debtor’s “current monthly income” to determine how much disposable income the debtor could afford to repay creditors in a chapter 13 plan. Since Cannella’s income exceeded the median income for her state and family size, the determination that she had more than \$200 in monthly disposable income raised a presumption of abuse that likely would result in dismissal of a chapter 7 petition. Since current monthly income is based on the average income over the past six months, Cannella was deemed to have disposable income notwithstanding her recent lay off.

Cannella approached Hage, she owned a nine year-old Ford Taurus that was fully paid for. Although she did not have any car payments, the car was in poor condition and subject to periodic mechanical breakdowns. Problems with her car had caused her to miss work on several occasions, resulting in disciplinary action by her employer and making her uncertain employment situation even more precarious. Hage advised Cannella to trade-in her Taurus and purchase a reliable new car on credit before filing for bankruptcy. He told her that the purchase of a basic reliable car on the eve of bankruptcy would not likely be viewed as an abuse by the local bankruptcy judge because it was a reasonable step to take to protect her job and her ability to support herself in the future. He further advised her that she might not be able to purchase a car on credit after filing bankruptcy, or might be charged a much higher interest rate, should her old vehicle need to be replaced in the near future. Hage also stated that the monthly payments on the new secured automobile debt could be deducted from her disposable income and would make it possible for her to pass the means test and use chapter 7 instead of chapter 13. Although Hage testified in his deposition that each of these factors were reasons why he advised Cannella to incur a new automobile loan, he admitted that he would not have advised Cannella to purchase a car on credit if she had not been planning to file bankruptcy.

Hage generally charges \$1,000 in attorney's fees for representing debtors in chapter 7 bankruptcy cases. Hage and Cannella entered into a retention agreement on November 10, 2005, whereby Hage agreed to represent Cannella in all aspects of her chapter 7 case and Cannella agreed to pay his \$1,000 fee. Since Cannella was unable to pay the entire fee, the contract allocated the fee between prepetition and post-petition services and required an advance payment of \$600 to cover the fees incurred in prepetition consultation and the preparation and

filing of the petition and related schedules. Cannella paid Hage \$600 in cash. The remaining \$400 in fees for work to be performed post-petition was represented by four post-dated checks of \$100 each, drawn on Cannella's checking account and dated December 1, 2005, January 1, 2006, February 1, 2006, and March 1, 2006. Hage and Cannella agreed that Hage would cash the checks on their respective dates for his post-petition representation of her during those time periods.

After her initial consultation with Hage, Cannella traded in her old car and purchased a new 2005 Nissan Sentra on credit. As agreed, Hage then filed her petition under chapter 7 in the United States Bankruptcy Court for the Northern District of Bliss. After the filing, Hage continued to render legal services to Cannella. He represented her at the section 341 meeting of creditors and followed up by communicating with the bankruptcy trustee to answer his questions about Cannella's petition. No party moved to dismiss her case for abuse under section 707(b). With Hage's assistance, Cannella entered into a reaffirmation agreement for the car loan pursuant to section 524(c) of the Bankruptcy Code.⁴ Hage cashed the December and January checks as agreed. The funds in her checking account that were applied to those checks represented wages earned by Cannella after the bankruptcy filing.

Shortly thereafter, Cannella and Hage had a falling out over her desire to reaffirm another debt, the secured debt for her wide-screen HDTV. Hage testified that he did not believe that Cannella had the ability to make the payments and therefore he could not sign the attorney declaration that the agreement did not impose an undue hardship on her as required by section 524(c)(3). Cannella became angry and fired Hage as her attorney. Hage returned the uncashed

⁴ By reaffirming the debt, Cannella will remain obligated on the automobile loan notwithstanding her chapter 7 discharge.

February and March checks to Cannella.

Cannella then retained attorney Jon Finelli to represent her in connection with her bankruptcy case. Finelli filed the instant adversary action against Hage seeking recovery of all fees paid to Hage by Cannella. Cannella's complaint asserted two theories of recovery. Count I of her Complaint sought recovery of all fees paid to Hage, plus reasonable attorneys fees and costs for this action, under new section 526(c)(2).⁵ In support of her claim, she alleged that Hage violated section 526(a)(4) by advising her to obtain the car loan.⁶ Section 526(a)(4), a provision added by BAPCPA, provides, in relevant part:

- (a) A debt relief agency shall not –

- (4) 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 as part of preparing for or representing a debtor in a case under this title.

11 U.S.C. §526(a)(4).

Count II of Cannella's complaint seeks recovery of the \$200 collected by Hage by cashing the post-dated checks. Cannella alleged that Hage willfully violated the section 362 automatic stay by cashing those checks after her chapter 7 petition was filed.⁷ She seeks

⁵ Section 526(c)(2) provides:

- (2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have-
 - (A) intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 with respect to a case or proceeding under this title for such assisted person

11 U.S.C. § 526(c)(2). Although section 526(c)(2) permits recovery of actual damages, Cannella does not allege that she was damaged and merely seeks recovery of amounts paid to Hage, plus costs and attorney's fees.

⁶ Cannella initially alleged that the retention agreement also violated section 526(a)(4) by inducing her to incur a debt owed to Hage for his chapter 7 attorney's fee. She has not pursued that theory on appeal and we do not address it.

⁷ Cannella alleges that cashing the checks constitutes an act to collect a claim against the debtor that arose before the commencement of the case in violation of section 362(a)(6). Although section 362(b)(11) permits the presentment

recovery of the \$200, plus punitive damages, costs and attorneys fee pursuant to section 362(k)(1).⁸

After discovery, Hage moved for summary judgment on both counts. With respect to Count I, Hage admitted that section 526 applied because he was a “debt relief agency”⁹ and Cannella was an “assisted person,” but he asserted that the prohibition against advising a client to incur additional debt was an unconstitutional restriction on protected professional speech under the First Amendment. With respect to Count II, Hage asserted that the section 362 stay did not apply to attorney’s fees owed to a chapter 7 debtor’s attorney for services rendered post-petition. The parties stipulated that Hage’s fee was reasonable and that the post-petition services he provided to Cannella were worth at least \$200.

On June 12, 2006, the Honorable Richard Corbi, United States Bankruptcy Judge for the Northern District of Bliss, granted Hage’s motion as to both counts. Cannella appealed, and the District Court affirmed without opinion. This appeal followed.

II. Discussion

As a preliminary matter, a court of appeals reviews the grant or denial of a summary judgment motion under a *de novo* standard of review, applying the same legal standard utilized

of a negotiable instrument, Hage does not contend, nor could he, that cashing these checks comes within the narrow confines of that exception to the automatic stay. *See* 3 Collier on Bankruptcy ¶ 362.05[11] (15th ed. rev. 2005) (noting that the section 362(b)(11) exception to the stay “permits the presentment of the instrument, which may enable the holder to enforce the instrument against secondary obligors,” but does not authorize enforcement against the debtor).

⁸ That section provides:

- (1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. §362(k)(1).

⁹ We note that the lower courts are split on the question of whether the “debt relief agency” definition includes attorneys. *Compare In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66, 69 (S.D. Ga. 2005) (holding that debtor attorneys are not debt relief agencies), *with Olsen v. Gonzales*, 350 B.R. 906, 912 (D. Or. 2006) (stating that definition includes debtor attorneys).

by the court below. *Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090, 1092 (10th Cir. 2006). *See also Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1280 (Fed. Cir. 2005) (“We review a district court’s grant of summary judgment without deference, reapplying the same standard used by the district court”) (citation omitted). To that end, summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *See* Fed. R. Civ. P. 56(c). In this matter, there are no genuine issues of material fact in dispute; consequently, the court is only charged with the task of determining whether the substantive law was correctly applied by the lower court. *Kruchowski*, 446 F.3d at 1092.

A. Reasonable Ethical Restrictions on Lawyer Speech are Constitutional

Notwithstanding the dissent’s “sky is falling” rhetoric, this case involves nothing more than an ethical rule imposed on those engaged in the business¹⁰ of representing unsophisticated consumers in bankruptcy cases. It regulates the conduct of “debt relief agencies,” a term that includes, but is not limited to, attorneys. The clients in these cases often are in desperate straits and easily fall prey to the schemes devised by unscrupulous attorneys, bankruptcy petition preparers, debt repair agencies and assorted others trying to separate our most destitute citizens from their last dollars. These abuses are well-documented and cry out for a response.¹¹ Section 526(a)(4), at issue here, is but one small part of a comprehensive package of consumer protection

¹⁰ Pro-bono attorneys and not-for-profit legal service providers are excluded from the “debt relief agency” definition and thus are not subject to these regulations. *See* 11 U.S.C. § 101(12A).

¹¹ The United States Trustee’s Civil Enforcement Initiative consistently identified problems such as debtor misconduct and abuse and misconduct by attorneys and other professionals. *See* J. Christopher Marshall, *Civil Enforcement Initiative: An Early Report*, J. Nat’l Ass’n Bankr. Tr. 39 (Fall 2002).

regulations ensuring that honest but unfortunate debtors, often already victims of easy credit scams, are not victimized again by the very professionals they turn to for help.

Hage must rely on a facial challenge to the constitutionality of section 526(a)(4).¹² Hage could not prevail on a challenge to the provision “as applied” to the specific speech involved here because his scheme to circumvent the means test by advising Cannella to purchase a new car on credit is the very conduct Congress properly targeted by the section 526(a)(4) prohibition on advising clients to incur additional debt in contemplation of bankruptcy. Not only did Hage’s advice subvert Congress’ intent, it put Cannella at great risk of being denied relief on the ground that *she* committed bankruptcy abuse -- when all she did was follow the advice of her lawyer. While an injured client might have a malpractice claim, BAPCPA gives clients an alternative, more efficient and more effective remedy. In addition, the statute goes further and seeks to *prevent* the injury by imposing a penalty on those who give such improper advice, providing for forfeiture of fees and a punitive damage recovery, whether or not the client suffers injury. This “private attorney general” structure of imposing a statutory penalty, actual damages and attorney’s fees is a common feature of consumer protection legislation and helps enforce the regulation.

The section is not unconstitutional. While the First Amendment to the Constitution guarantees freedom of speech, its application turns on the nature of the speech involved and the context in which it is applied. Restrictions on pure speech in a non-commercial context are

¹² Hage’s arguments do not even approach the high threshold required to succeed on a facial challenge. *See Sabri v. United States*, 541 U.S. 600, 609, 124 S.Ct. 1941, 1948, 158 L.Ed.2d 891 (2004); *see also*, Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 571, 579 (2005) (stating that challenger will have little success in invalidating a statute as facially invalid because the challenger must prove that there is no situation where the act would be valid).

subject to a strict scrutiny test and rarely pass muster. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2837, 106 L.Ed.2d 93 (1989). In contrast, ethical rules that limit attorney speech are measured under the less exacting “intermediate scrutiny” standard. *See In re R.M.J.*, 455 U.S. 191, 203-04, 102 S.Ct. 929, 937-38, 71 L.Ed.2d 64 (1982). That standard balances the First Amendment rights of attorneys against the government’s legitimate interest in regulating the activity in question and permits reasonable regulations that are narrowly tailored and necessary to achieve a legitimate governmental interest. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075, 111 S.Ct. 2720, 2745, 115 L.Ed.2d 888 (1991).

Lawyers occupy a unique position in our system. Not only are they representatives of and advocates for their clients, but they are also officers of the court who bear special responsibility for ensuring the integrity and fairness of our judicial system. *See Oharalik v. Ohio State Bar Ass’n*, 436 U.S. 447, 460, 98 S.Ct. 1912, 1920, 56 L.Ed.2d 444 (1978) (noting that lawyers are “assistants to the court in search of a just solution to disputes”). The governmental “interest in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice.” *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975). This special role requires that speech rights be balanced against the government’s interest in preserving the integrity of the judicial process. Under the intermediate scrutiny standard applicable to lawyer ethical rules, section 526(a)(4) reflects a “constitutionally permissible balance because it (1) serve[s] the State’s legitimate interest in regulating the activity in question and (2) imposed only narrow and necessary limitations on speech.” *Gentile*, 501 U.S. at 1075, 111 S.Ct. at 2745, 115 L.Ed.2d 888.

Undoubtedly, the government's interest in preserving the integrity of the judicial system is a substantial one. The speech limitation in section 526(a)(4) does not violate the First Amendment because incurring debt that is fraudulent or that is abusive because it is intended to undermine the bankruptcy process is impermissible. A prohibition on advice to incur such debt serves the government's legitimate interest in preventing officers of the court, such as lawyers, from encouraging their clients to abuse the bankruptcy process.

Hage cites several situations where giving advice to incur additional debt would not be abusive and he argues that the alleged overbreadth of the section chills protected speech. Several lower courts have relied on similar arguments to strike down the provision. *See Milavetz, Gallop & Milavetz P.A. v. United States*, 2006 WL 3524399 at *4 (D. Minn. Dec. 7, 2006) (striking down section 526(a)(4) as overbroad); *Zelotes v. Martini*, 352 B.R. 17, 24 (D. Conn. 2006) (same); *Olsen*, 350 B.R. at 916 (same); *Hersh v. United States*, 347 B.R. 19, 25 (N.D. Tex. 2006) (same). Most of Hage's examples depend upon a misreading of the statute. The provision does not impose a blanket prohibition on advice to incur additional debt in advance of bankruptcy, but merely prohibits advice to incur additional debt "in contemplation of bankruptcy." By restricting the provision to situations where the planned bankruptcy filing is the reason for the advice, the section is appropriately tailored.¹³ Although Hage asserts various non-bankruptcy reasons for advising Cannella to purchase a new car on credit, he admits that he would not have given that advice had she not planned to file bankruptcy. Hage's advice was designed to game the means

¹³ Not only is this a natural reading of the statutory language, but it avoids the constitutional issue. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988) (holding that statutes should be construed to avoid constitutional challenge).

test and subvert the Bankruptcy Code’s goal of requiring a fair repayment of debt by those debtors who have the ability to do so. This is the type of improper lawyer speech that undermines the integrity of the bankruptcy process and that Congress legitimately can prohibit. Even if there may be some rare situations where section 546(a)(4) applies to non-abusive speech,¹⁴ the intermediate scrutiny test does not require a perfect fit but merely a reasonable one. *See Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3035, 106 L.Ed.2d 388 (1989). Section 546(a)(4) imposes reasonable limitations on lawyer speech that are narrowly tailored and necessary to prevent evasion of the means test and to protect clients from the negative consequences of following such advice. As such, the provision is Constitutional.

B. Fees Incurred for Post-Petition Services Are Stayed

The second issue Cannella raises in this appeal is her claim that Hage violated the automatic stay of the Bankruptcy Code by attempting to collect the attorney’s fees earned pursuant to a prepetition employment agreement after her bankruptcy petition was filed. Section 362 stays any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the bankruptcy case. *See* 11 U.S.C. § 362. Section 362 provides in relevant part that:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

¹⁴ For example, Hage argues that there is no abuse where a family member loans the debtor money with full knowledge that the debtor plans to use the money to pay an attorney to file bankruptcy. We question why such a family transaction would be structured as a “loan” rather than the gift that it actually will become by virtue of the debtor’s bankruptcy discharge. We also note that giving a client advice to incur debt in order to pay the fee puts the lawyer in an untenable ethical position that may justify a prophylactic ethical rule. However, even accepting Hage’s assertion that such advice is proper, minor and rare instances of overbreadth are insufficient to invalidate the statute.

* * *

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(6). The filing of a petition under chapter 7 constitutes an order for relief. 11 U.S.C. § 301(b). While the ultimate relief sought by the debtor is the discharge of debt that comes at the conclusion of the case, the petition date marks the point in time that the debtor receives relief from his or her prepetition debts. Most of the property owned by the debtor on the petition date becomes property of the bankruptcy estate that will be available for distribution to creditors. Property acquired by the debtor post-petition, such as wages earned after the filing, does not become property of the chapter 7 estate, but remains property of the debtor. *See* 11 U.S.C. §§ 541(a)(6). The discharge under section 524 operates as a permanent injunction preventing the holders of discharged debts from attempting to collect those debts from the debtor or from property of the debtor. *See* 11 U.S.C. § 524(a). The automatic stay operates much like a preliminary injunction, protecting the debtor and his or her property from creditor action during the time between the filing and the grant (or denial) of discharge. *See* 11 U.S.C. § 362(c)(2)(C). The question presented by this appeal, namely the status of the fee claim of the attorney representing the debtor in the chapter 7 case, can arise as a discharge or automatic stay issue. The answer is the same in both contexts. The attorney's claim is a prepetition debt and, as such, is stayed by the bankruptcy filing and subsequently discharged. Whatever the policy arguments for exempting fee claims, we have no authority to create non-statutory exemptions to either section 362 or section 524. To do so would usurp the role designated to Congress by our Constitution.

Hage attempts to avoid the effect of the stay by arguing that the fees arising from services performed post-petition represent a post-petition claim, despite the fact that the fee claim arose under a prepetition contract with the debtor. *See Gordon v. Hines (In re Hines)*, 147 F.3d 1185, 1191 (9th Cir. 1998) (noting that no enforceable right to payment arises until services are performed); *see also Knutson v. Tredinnick (In re Tredinnick)*, 264 B.R. 573, 577-78 (Bankr. 9th Cir. 2001) (holding that chapter 7 debtor's obligation on prepetition contract for post-petition services arose only post-petition when services were performed).

To properly determine whether or not the stay applies to Hage's attempted post-petition recovery of legal fees contracted for prepetition, it is necessary to decide whether or not these fees qualify as a "claim" as defined by section 101(5) of the Bankruptcy Code. A claim is defined in section 101 of the Bankruptcy Code as:

- (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
- (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. 101(5)(A)&(B). Courts generally construe the definition of a claim broadly so as to promote participation in the case by creditors, assure equality of distribution, and enhance the debtor's fresh start, all of which further the policy goals on which the Bankruptcy Code is predicated and bankruptcy cases administered. *See, e.g., Airline Pilots Ass'n v. Cont'l Airlines (In re Cont'l Airlines)*, 125 F.3d 120, 132 (3d Cir. 1997), *cert. denied sub nom., LLP Claimants v. Cont'l Airlines*, 522 U.S. 114, 118 S.Ct. 1049, 140 L.Ed.2d 113 (1998); *Am. Law Ctr. PC v. Stanley (In re Jastrem)*, 253 F.3d 438, 442 (9th Cir. 2001). A claim is deemed prepetition if it becomes vested before the commencement of the bankruptcy case or if other circumstances

surrounding the relationship of the parties gave rise to a legal obligation or right to payment between the debtor and the creditor. See *Epstein v. Official Committee of Unsecured Creditors of Estate of Piper Aircraft Corp. (In re Piper Aircraft Corp.)*, 58 F.3d 1573, 1576-77 (11th Cir. 1995) (adopting “modified prepetition relationship test” to determine whether future product liability claimants held claims against the debtor). It is clear that in this situation Hage’s right to his post-petition fees was based on his prepetition contract with the Cannella.

The contract was entered into prepetition and as such Hage’s legal right to payment under that contract is a prepetition claim subject to the Bankruptcy Code’s automatic stay provision in section 362. “One contract gives rise to one claim, meaning a ‘right to payment, whether or not such right is . . . fixed, contingent, matured [or] unmatured.’” *Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125, 1128-29 (7th Cir. 2003) (citing *Pa. Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 559, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990)), *cert. denied*, 541 U.S. 1043, 124 S.Ct. 2176, 158 L.Ed.2d 733 (2004). Hage’s attempt to collect on this legal right to payment from the debtor’s post-petition assets is a clear violation of the automatic stay. In so holding, this Court joins most other courts that have addressed the issue of legal fees incurred by chapter 7 debtor’s attorney in the stay context or in the analogous discharge context. See *Fickling v. Flower, Medalie & Markowitz, Esqs. (In re Fickling)*, 361 F.3d 172, 175 (2d Cir. 2004) (holding that debtor’s attorney’s fees incurred in a converted chapter 11 case were subject to chapter 7 discharge); *Bethea*, 352 F.3d at 1129 (holding that unpaid installments owed to chapter 7 debtor’s attorney pursuant to prepetition retainer agreement were discharged); *cf. Rittenhouse v. Eisen*, 404 F.3d 395, 397 (6th Cir. 2005), *cert. denied*, ___ U.S. ___, 126 S. Ct. 378, 163 L.Ed.2d 165 (2005) (holding that unpaid installments of pre-petition chapter 7 attorney’s fee were

discharged); *Hessinger & Assocs. v. United States Trustee (In re Biggar)*, 110 F.3d 685, 688 (9th Cir. 1997) (holding that chapter 7 debtor's obligation to pay attorney for prepetition legal work, to be paid in installments post-petition, was dischargeable as a prepetition debt); *In re Nieves*, 246 B.R. 866, 872 (Bankr. E.D. Wis. 2000) (stating "The great weight of authority holds that a chapter 7 discharge covers attorney's fees owed by a debtor for services involved in preparation for filing the bankruptcy case, notwithstanding any terms of the agreement between debtor's attorney and the debtor to the contrary") (citations omitted).

Hage argues that the bankruptcy system requires the participation of competent counsel to perform necessary post-petition services in order to function properly and that chapter 7 consumer debtors will be unable to obtain legal representation if the attorney's right to collect fees for post-petition services is subject to the automatic stay and the right to payment ultimately discharged. While we acknowledge the importance of these policy considerations, we are not free to legislate from the bench. "That argument about what makes for good public policy should be directed to Congress; the judiciary's job is to enforce the law Congress enacted, not write a different one that judges think superior." *Bethea*, 352 F.3d at 1127-28 (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 460-62, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002)). We need look no further than the recent Supreme Court decision in *Lamie v. United States Trustee* to see that this is the proper approach to use when construing the Bankruptcy Code in the context of a fee claim by chapter 7 debtor's counsel. 540 U.S. 526, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004).

In *Lamie*, the Supreme Court was faced with the question of whether it should correct an alleged Congressional oversight in failing to list the attorney for the debtor among the professionals entitled to receive compensation from the bankruptcy estate. Despite strong policy

arguments similar to those raised here, the Court held that “where the statute’s language is plain the sole function of the courts, at least where the disposition of the statute’s text is not absurd, is to enforce the statute according to its terms.” *Lamie*, 540 U.S. at 534, 124 S.Ct. at 1030, 157 L.Ed.2d 1024 (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (quoting *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989))). The Court went on to state that “[t]here is a basic difference between filling a gap left by Congress’ silence and rewriting rules that Congress has affirmatively and specifically enacted.” *Id.* at 538, 124 S.Ct. at 1032, 157 L.Ed.2d 1024. Here, to ignore the plain language of section 362 is contrary to the appropriate role of the judiciary and undercuts Congressional authority. “If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent. ‘It is beyond our province to rescue Congress from its drafting errors and to provide what we might think... is the preferred result.’” *Id.* at 542, 124 S.Ct. at 1034, 157 L.Ed.2d 1024 (quoting *United States v. Granderson*, 511 U.S. 39, 68, 114 S.Ct. 1259, 127 L.Ed.2d 611 (1994) (concurring opinion)).

In light of the above, it is clear that Hage’s actions in cashing post-dated checks after the filing of the chapter 7 petition violated the automatic stay.

III. Conclusion

For the foregoing reasons, we reverse the decision reached by the District Court and remand the matter for further proceedings consistent with this opinion.

WOLPERT, Circuit Judge, dissenting:

I must respectfully dissent from the majority's disposition of this case with respect to both issues on appeal.

A. BAPCPA Unconstitutionally Prohibits Lawful Professional Advice

What the majority sees as a benign ethical regulation that should be given effect even though it lacks drafting precision, I see as a direct attack on the very foundation of our adversarial system of justice. It is no secret that the BAPCPA amendments are the product of a concerted lobbying and campaign contribution effort by the consumer credit industry. *See* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 485, 498-99 (2005) (noting role of consumer credit industry in spearheading bankruptcy reform effort). Although the industry obtained amendments that tilted the balance in its favor on most substantive aspects of consumer bankruptcy law affecting it, that was not enough. Even a cursory reading of section 526 shows that its function is to deprive consumers of legal representation. The section is designed to discourage lawyers from representing consumer debtors, to prevent them from providing competent advice, and to punish them for zealously representing their clients' interests. *See* Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability under the New Bankruptcy Law*, 79 Am. Bankr. L.J. 283, 330 (2005). The argument that section 526(a)(4) is an ethics rule is patently absurd. The Appellant has not identified a single scenario of unlawful advice that is not already

addressed by either the existing ethics rules or criminal sanctions.¹⁵ The only new thing that section 526(a)(4) adds to the law is a prohibition on bankruptcy attorneys advising clients to lawfully incur non-fraudulent debts. The provision is nothing more than a “gag rule” designed to discourage lawyers from giving lawful and appropriate advice to their clients and, as such, it must be stricken as a facially unconstitutional restriction on protected speech under the First Amendment. *See Va. v. Am. Booksellers Ass’n*, 484 U.S. 383, 392-93, 108 S.Ct. 636, 643, 98 L.Ed.2d 782 (1988) (justifying finding of facial invalidity on the basis of chilling effect and self-censorship).

This provision, one of several BAPCPA amendments targeted at consumer bankruptcy lawyers, prevents attorneys from advising clients to take actions that are lawful, and in certain circumstances, advisable. Regardless of whether a strict scrutiny standard or the more lenient *Gentile* analysis is applied to the legislation, the prohibition on advising clients to incur debt in contemplation of bankruptcy violates the First Amendment.

Professional speech, such as that restricted by section 526(a)(4), is entitled to the highest level of constitutional protection. *See NAACP v. Button*, 371 U.S. 415, 429, 83 S.Ct. 328, 336 (1963) (rejecting purported ethical limitation on vigorous advocacy). Therefore, legislation regulating the content of such speech is subject to strict scrutiny. The section 526(a)(4) restrictions can survive only if they (1) advance a compelling state interest and (2) represent the least restrictive means of achieving that interest. *See Sable Commc’ns of Cal., Inc. v. FCC*, 492

¹⁵ Incurring a fraudulent debt in contemplation of bankruptcy is a crime, *see* 18 U.S.C. § 157, and advising a client to engage in such unlawful conduct exposes the lawyer to criminal sanctions, *see* 18 U.S.C. § 2 (imposing criminal liability for counseling an offense). Similarly, the Model Rules of Professional Conduct, which apply to lawyers like Hage who are licensed to practice in the State of Bliss, prohibit an attorney from advising a client to engage in unlawful or fraudulent conduct. *See* Model Rules of Professional Conduct, Rule 1.2(d).

U.S. 115, 126, 109 S.Ct. 2829, 2837, 106 L.Ed.2d 93 (1989).

The majority argues, however, that the legislation is an “ethical rule” and is therefore entitled to a more lenient level of constitutional review. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075, 111 S.Ct. 2720, 2745, 115 L.Ed.2d 888 (1991). In *Gentile*, the court found that when dealing with legislation addressing ethical issues, a “constitutionally permissible balance” is achieved if two factors are met, namely: 1) the government has a legitimate interest in regulating the activity in question; and 2) the limitation narrowly and necessarily imposes on the lawyer’s speech. *Id.* at 1075, 111 S.Ct. at 2745, 115 L.Ed.2d 888. However, even under the more lenient intermediate scrutiny standard articulated in *Gentile*, section 526(a)(4) fails to pass constitutional muster.

In enacting BAPCPA, Congress sought to remedy perceived fraud and abuse in the bankruptcy system. The legislative history indicates that Congress passed BAPCPA to address findings of “debtor misconduct and abuse” and “misconduct by attorneys and other professionals” within the bankruptcy system. *See* H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 5 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 92. One such perceived abuse was that filers often took on additional debt “in contemplation” of bankruptcy and then sought to have that debt discharged. In an attempt to remedy this situation, Congress banned bankruptcy attorneys from advising their clients to take on such debt. Under the more lenient *Gentile* test, even if the government has a legitimate interest in regulating the advice of bankruptcy attorneys, the legislation must be narrowly tailored to that interest. *See Gentile*, 501 U.S. at 1075, 111 S.Ct. at 2745, 115 L.Ed.2d 888. Section 526(a)(4) fails to satisfy this requirement.

Prior to today's decision, courts that have addressed this question uniformly conclude that the section 526(a)(4) restrictions on advising clients to incur debt in contemplation of bankruptcy are unconstitutionally overbroad. *See Milavetz, Gallop & Milavetz P.A. v. United States*, 2006 WL 3524399 at *4 (D. Minn. Dec. 7, 2006); *Zelotes v. Martini*, 352 B.R. 17, 24 (D. Conn. 2006); *Olsen v. Gonzales*, 350 B.R. 906, 916 (D. Or. 2006); *Hersh v. United States*, 347 B.R. 19, 25 (N.D. Tex. 2006). Taking on additional debt "in contemplation" of bankruptcy does not necessarily constitute abuse. There exist numerous plausible, legal reasons for incurring debt in contemplation of bankruptcy.

For example, it is wholly appropriate for a lawyer to advise his or her client on non-abusive matters such as taking out a loan (1) to obtain the services of a bankruptcy attorney or to pay the bankruptcy filing fee, 2) to convert a non-exempt asset to an exempt asset, or 3) to refinance a mortgage in order to pay off other debts. *See Milavetz*, 2006 WL 3524399 at *4, *Zelotes*, 352 B.R. at 24; *Olsen*, 350 B.R. at 916; *Hersh*, 347 B.R. at 24. Nonetheless, section 526(a)(4) restricts Hage's ability to provide legal advice to his client on these important matters. Accordingly, the statute is not narrowly tailored to further the government's legitimate purpose of preserving the integrity of the bankruptcy process.

Indeed, if the integrity of the judicial process is the asserted governmental interest, then section 526(a)(4) serves to undermine, rather than enhance, that interest. The effect of this legislation is to limit an attorney's ability to counsel a client and to give the client the best advice possible. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545, 121 S.Ct. 1043, 1051, 149 L.Ed.2d 63 (2001) (deeming unconstitutional a statute that sought to prohibit the analysis of certain legal issues by counsel because it prohibited speech and expression upon which courts

must depend for the proper exercise of the judicial power). Simply put, the government is not permitted to confine attorneys in this manner. *Id.* at 548, 121 S.Ct. at 1052, 149 L.Ed.2d 63.

The majority's focus on Hage's alleged "gaming" of the means test shows how pernicious these restrictions are. Notwithstanding the majority's bald assertion that such advice is abusive, nothing in the statute prevents a debtor from incurring new debt in contemplation of bankruptcy. Nor does the statute prohibit the debtor from incurring debt or taking other actions, even if those actions are taken with an intent to alter the means test calculation. The test established by section 707 is "abuse," an inquiry focused on ability to repay -- with the means test merely creating a presumption. *See* 11 U.S.C. § 707(b). The question for the bankruptcy court is whether it is abusive for Cannella to seek a discharge of her debts in light of her acquisition of a new automobile. While it likely would be abusive for Cannella to purchase an expensive luxury car on credit on the eve of filing chapter 7, her credit-purchase of an inexpensive reliable car with reasonable monthly loan payments to replace an unreliable older car is an objectively reasonable decision, a view confirmed by the trustee's decision (after investigation) not to bring a section 707 dismissal motion. *Accord, Milavetz*, 2006 WL 3524399 at *4 (stating that advice to purchase a replacement car may be proper); *Zelotes*, 352 B.R. at 24 (same). The ironic effect of section 526(a)(4) is that unsophisticated consumer debtors may lawfully incur such debt and thereby avoid the means test presumption if they happen to figure that out on their own, but their attorneys are prevented from informing them of this lawful option. Limiting the lawful legal advice available to one party to a judicial proceeding does not preserve the integrity of the judicial process. Further, if the true focus is preventing subversion of the means test as the legitimate governmental interest served by section 526(a)(4), the best way to advance that

interest would be to prohibit the conduct entirely. A regulation prohibiting speech in the absence of any prohibition on the underlying conduct is neither narrow nor necessary.

Section 526(a)(4) is overly restrictive in at least two respects: (1) it prevents lawyers from advising their clients to take lawful actions; and (2) it extends beyond abuse to prevent advice to take prudent and often necessary actions. *See, Milavetz*, 2006 WL 3524399 at *4; *Zelotes*, 352 B.R. at 24; *Olsen*, 350 B.R. at 916; *Hersh*, 347 B.R. at 25; *see also*, Robert Wann, Note, “*Debt Relief Agencies: Does the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Violate Attorneys’ First Amendment Rights?*,” 14 Am. Bankr. Inst. L. Rev. 273, 288 (2005). This would be a very different case if there were no conceivable situations, or even just a few rare circumstances, where an attorney could counsel a client to incur additional debt that would not constitute abuse. Accordingly, because the regulation is not sufficiently narrow to achieve the legitimate interest of preventing abuse in the bankruptcy system, section 526(a)(4) fails to satisfy either the strict scrutiny standard or the more lenient *Gentile* balancing test.

B. Fees Earned Post-Petition Are Not Subject to the Automatic Stay

While the majority gives lip service to the policy arguments raised by Hage, it fails to acknowledge that its interpretation of the section 362 automatic stay precludes a chapter 7 debtor’s attorney from receiving payment for services performed post-petition. In my view, Hage’s point is not merely an argument about what might be good public policy – something appropriately addressed to Congress and not to the courts. It is instead a compelling showing that the majority’s “plain language” interpretation produces a truly *absurd* result, thereby requiring the Court to abandon a purely linguistic interpretive approach and to incorporate policy considerations into its analysis.

Here, Hage used post-dated checks because there is no other method available to ensure payment of fees incurred for post-petition services. See Kerry Haydel Ducey, Note, *Bankruptcy, Just for the Rich? An Analysis of Popular Fee Arrangements for Pre-Petition Legal Fees and a Call to Amend*, 54 Vand. L. Rev. 1665 (2001). Could Hage have charged a flat fee or obtained a retainer to cover both the preparation and filing of the petition and representation on various post-petition matters? In either instance, at the time of filing, the portion of the flat fee or retainer attributable to post-petition services would not yet have been earned by the attorney. Under the broad definition of property of the estate in section 541, the debtor's right to recover unearned fees constitutes property of the estate. See, e.g., *Arens v. Boughton (In re Prudhomme)*, 43 F.3d 1000, 1004 (5th Cir. 1995); *Fiegen Law Firm, P.C. v. Fokkena (In re On-line Servs., Ltd.)*, 324 B.R. 342, 345–46 (Bankr. 8th Cir. 2005). Thus, the trustee could reject the agreement and demand a refund of the unearned portion of a flat fee or the turnover of retainer funds that had not been applied to prepetition work. In both cases, the recent Supreme Court decision in *Lamie v. United States Trustee*, 540 U.S. 526, 538, 124 S.Ct. 1023, 1032, 157 L.Ed.2d 1024 (2004), would bar payment of Hage's fees from this property of the estate. Therefore, even if his claim for work performed post-petition were considered an administrative claim, *Lamie* forecloses the opportunity to be paid on such a claim.

It would seem that attorneys who want to avoid working for free should limit their practices to the preparation and filing of petitions, and thereafter leave the debtors to fend for themselves. However, the local rules of many jurisdictions, including the Northern District of Bliss, provide that an attorney who files a petition on behalf of a client is precluded from withdrawing from the representation without leave of court. Such rules are necessary because

the filing of the petition is only the beginning of a bankruptcy process that requires the active and conscientious participation of debtor's counsel. Many critically important aspects of the bankruptcy case occur post-petition, such as the meeting of creditors, objections to discharge and determinations of dischargeability, the filing of the debtor's statement of intention under section 521(a)(2), redemption under section 722 and reaffirmation under section 524(c), just to name a few. The result, however, is highly inequitable if the attorney is forced to perform these essential post-petition services without the prospect of being compensated.

The reaffirmation provisions of section 524(c) are of no help for several reasons. First, because the attorney is ethically obliged to continue the representation with or without payment, the debtor will have no incentive to reaffirm the prepetition fee agreement. *Gordon v. Hines (In re Hines)*, 147 F.3d 1185, 1190 (9th Cir. 1997) (noting difficulties with reaffirmation). Second, the attorney suffers from an inherent conflict of interest, and would have to recommend that the debtor consult outside counsel. *Id.* Third, even if the debtor enters into the agreement, he or she can rescind the agreement under section 524(c)(4) "any time prior to discharge or within sixty days after the agreement is filed with the court, whichever occurs later." See 11 U.S.C. § 524(c)(4). The attorney will have completed most of the post-petition services before the rescission period expires. Such a dynamic would result in an inequitable windfall for the debtor.

The obvious solution to this dilemma is a recognition that the automatic stay simply does not apply to chapter 7 attorney's fees incurred for services performed post-petition. Such a solution imposes no hardship on the consumer debtor and violates no bankruptcy policy. As happened in the instant case, the debtor is free at any time to terminate the attorney's services

and be relieved of any further obligation to pay. This result can be reached in any of several ways.

The court in *Hines* relied on the policy concerns discussed above and the necessity of attorneys to the proper administration of the bankruptcy system to fashion a judicially created right to payment for post-petition chapter 7 attorney's fees. *Hines*, 147 F.3d at 1191. While the absurdity of the result created by the plain language interpretation may justify the *Hines* approach, I believe that approach is unnecessary because compensation for post-petition attorney's fees may be awarded in harmony with the language of the Code.

Canella asserts that Hage's claim for post-petition fees is a prepetition claim because Hage performed the post-petition services pursuant to a prepetition retention agreement. Therefore, according to Canella, cashing the postdated checks was an act to collect a prepetition claim in violation of the automatic stay, and the fees must be disgorged. *See* 11 U.S.C. § 362(a)(6). In my view, however, Hage's claim for post-petition fees is more properly viewed as a post-petition debt that can be collected from Canella's post-petition assets without violating the stay.

Section 101(5)(A) of the Code defines a "claim," as "a right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." As the Third Circuit Court of Appeals recognized in *Avellino & Bienes v. M. Frenville Co., Inc. (In re M. Frenville Co., Inc.)*, 744 F.2d 332, 336 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 911, 83 L.Ed.2d 925 (1985), "the crucial issue, however, is when did [the] right to payment arise, for the automatic stay provision applies only to claims that arise prepetition." Here, the prepetition agreement did not

create a right to payment for post-petition services. Hage had no right to be paid for the post-petition services until he performed those services. Further, Cannella was free to decide whether or not to terminate Hage, and Hage had recourse to the postdated checks only if and to the extent that such services were provided. Indeed, Hage returned the checks representing fees that had not yet been earned. Despite the existence of a prepetition agreement, Hage's right to payment for post-petition fees is dependent on a "total contingency" well beyond the contingency contemplated by claim definition. *Hines*, 147 F.3d at 1191 n.9 (noting that performance by the attorney goes to the essence of the right to payment and presents an element of total contingency different in kind from that contemplated by the statute). Thus, Hage's claim against Cannella did not accrue until after the petition was filed. *Hines*, 147 F.3d at 1194 (Tashima, C. J., concurring).

Although generally a claim arising from a prepetition contract would be viewed as arising prepetition, attorney retention agreements are different. Under an ordinary contract, the non-debtor party may have a right to payment for as yet unperformed future services because breach of the contract gives rise to a claim for damages based on the non-debtor party's expectation interest – or benefit of the bargain. In contrast, the ethical rules applicable to attorneys require that the client have at all times the right to terminate the representation and recover the unearned portion of the fee. See Charles W. Wolfram, *Modern Legal Ethics* ¶ 9.5.2, p. 546 (Prac. ed. 1986) (noting uniformity of rule that a discharged attorney cannot recover on contract but only on the basis of quantum meruit). Thus, an attorney has no claim for damages based on his or her contractual expectation interest and has no right to payment unless and until services are actually performed.

Alternatively, even if Hage’s fee claim for post-petition services is viewed as creating a prepetition claim, section 329 insulates the claim from the section 362 automatic stay and the section 524 discharge provision. Section 329 governs the fee relationship between a debtor and his or her lawyer, whether the fees are paid by the estate, the debtor, or some third party, and whether the fees are paid before or after the petition is filed. Under section 329, an attorney representing a debtor must “file with the court a statement of compensation paid or agreed to be paid.” 11 U.S.C § 329(a). The court has authority to review the fees and order the return of fees if the “compensation exceeds the reasonable value” of the services. 11 U.S.C. § 329(b). Section 329 is a section dealing specifically with attorney’s fees and specifying their treatment in the bankruptcy case. Its express language covers fees “agreed to be paid” like those at issue here. By contrast, sections 362 and 524 are general sections dealing with the entire range of relationships that can give rise to claims and debts. The most harmonious interpretation of the Code is to read section 329 as governing the treatment of agreements to provide post-petition services, to the exclusion of sections 362 and 524. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524, 109 S.Ct. 1981, 1992, 104 L.Ed.2d 557 (1989) (stating “a general statutory rule usually does not govern unless there is no specific rule”).¹⁶ Accordingly, the only question is whether the compensation paid or agreed to be paid to Hage exceeded the reasonable value of the services provided by him. In this case, the parties have stipulated that Hage’s compensation did not exceed the reasonable value of the services provided by him to Cannella. Consequently, I would affirm the decision below.

¹⁶ I do not contend that the majority’s view renders section 329 superfluous. That argument has been rejected by *Fickling v. Flower, Medalie & Markowitz, Esqs. (In re Fickling)*, 361 F.3d 172, 176 (2d Cir. 2004), and *Rittenhouse v. Eisen*, 404 F.3d 395, 397 (6th Cir.), *cert. denied*, ___ U.S. ___, 126 S.Ct. 378, 163 L.Ed.2d 165 (2005). Instead I contend that section 329 can be read together with sections 362 and 524.

For the aforementioned reasons, I cannot join the majority's opinion and must respectfully dissent.