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INSIDE

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IN FUTURE ISSUES

The dilemma of isolated wetlands since SWANCC

When the U.S. Supreme Court decided *SWANCC [Solid Waste Agency of Northern Cook County] v. United States Army Corps of Engineers* (531 U.S. 159) in 2001, there was an assumption that the isolated wetland question had been laid to rest. This was a mistaken assumption. In the wake of SWANCC, state and federal regulatory authorities and the circuit courts have adopted a very narrow reading of this landmark decision.

SWANCC has been construed to limit federal jurisdiction over isolated wetlands when that jurisdiction stems from the "migratory bird rule." However, the court actually found that federal jurisdiction could not be assumed over isolated wetlands based solely upon the interstate commerce clause as enunciated in the migratory bird rule. The SWANCC court upheld the "significant nexus test" established in *U.S. v. Riverside Bayview Homes, Inc.* (106 S.Ct. 455 (1985)), as applied to the existence of a hydrologic connection. If the jurisdiction is based upon a "hydrologic connection" as well as the interstate commerce clause, the jurisdiction over such wetlands is not misplaced. In other words, the U.S. Army Corps of Engineers cannot regulate an isolated wetland by claiming that it is suitable habitat for a migratory species of waterfowl. The Corps must substantiate its jurisdictional claim by demonstrating that the isolated wetland bears a hydrologic connection to a navigable body of water.

Establishing a hydrologic connection between an isolated wetland and a navigable body of water would seem impossible. However, the emergence of the watershed view has made it far easier to do so. In a recent D.C. circuit case, the court stated that wetlands and waters were part of a "seamless web" of hydrological activity, the whole of which an agency must possess power to regulate for effective pollution control. *Friends of the Earth v. EPA*, 346 F. Supp. 2d 182 (2004). This sentiment echoes more recent interpretations of the legislative intent prescribed to have been in effect when the CWA was passed in its entirety. According to recent judicial interpretation, the legislative intent of SWANCC was the protection of navigable waters. Navigable waters are not to be limited to those bodies that are navigable in fact but also those water bodies that could have an effect upon waters that are navigable in fact. In essence, what may appear to be an isolated wetland several miles distant from a navigable waterway may in fact be subject to federal regulation based upon the hydrologic connection theory.

How can a farmer determine if the low patch of ground in the middle of a cultivated field, or the stretch of wood with a single vernal pool bordering the cultivated field, is subject to state or federal regulation? The answer to this question depends upon how recently the wetland was subject to active cultivation and the extent of biodiversity it supports.

According to USACE regulations, a farmed wetland escapes jurisdiction if the area in question

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State law claims not preempted by Federal Crop Insurance Act

In *Buchholz v. Rural Community Ins. Co.*, 402 F.Supp.2d 988 (W.D. Wis. 2005), the United States District Court for the Western District of Wisconsin held that plaintiffs' state law claims against a crop insurance company were not preempted by the Federal Crop Insurance Act, 7 U.S.C. §§ 1501-1524.

Plaintiffs Clifford Buchholz and Audrey Passe were unmarried individuals who jointly operated a farming operation. *Buchholz*, 402 F.Supp.2d at 992. The plaintiffs maintained a joint checking account for the farming operation and were both obligated on a loan that financed the operation. *See id.* In addition, the plaintiffs each reported income from the operation on their individual tax returns. *See id.* In February of 2003, Audrey Passe executed an application for crop insurance with Vine Vest, LLC, a private crop insurance company that provided crop insurance coverage. *See id.* The crop insurance policy was taken out in Audrey Passe's name only, though the plaintiffs later asserted that the crop insurance agent led them to believe that the policy would cover all crop shares in which the plaintiffs had an interest. *See id.* at 992-93.

In the fall of 2003, Clifford Buchholz supervised the granary deliveries of crops produced on the plaintiffs' farming operation, and, on occasion, delivered the crops to the granary himself. *See id.* at 993. The granaries to which the crops were delivered listed Clifford Buchholz as the "seller" or "vendor" of the crops. *See id.* After the 2003 harvest, Audrey Passe submitted a crop

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is an active prior converted cropland or a farmed wetland. A prior converted cropland was drained, dredged, filled, leveled or otherwise manipulated before December 23, 1985 to facilitate agricultural production. The prior converted cropland must lack specific hydrologic criteria, have had a crop in production at least once since December 23, 1985, and cannot be characterized as "abandoned." A prior converted cropland is considered abandoned when it is not placed under agricultural production for more than five consecutive years and at least emergent wetland characteristics return.

Farmed wetlands are similar to prior converted cropland but retain enough hydrologic criteria to be considered valuable wetland habitat subject to federal jurisdiction under Section 404 of the Clean Water Act. Farmed wetlands may be drained via a tile system. The drainage system or intensity of a farmed wetland cannot be altered without first obtaining a permit under Swampbuster. NRCS can provide an agricultural producer with information concerning the existence and type of wetlands on his property.

Once an agricultural producer has determined that the wetlands on his property are subject to regulation, the type of wetland and the level of biodiversity it supports, becomes crucial. The USEPA and USACE have issued a joint memorandum stating that wetland mitigation should take place in the following order: 1) avoidance of impact; 2) minimization of impact; and 3) appropriate mitigation for unavoidable impacts.

Destroying an isolated wetland in Ohio without obtaining the applicable permits can have dire consequences. Where a wetland has been degraded or destroyed without prior authorization, the wetland will be considered a Category Three wetland, unless the applicant demonstrates that a lower category is appropriate based on other information including, but not limited to, adjacent vegetation, aerial photographs, U.S. fish and wildlife service national wetland inventory maps, Ohio wetland inventory maps, public information, on—site inspections, previous site descriptions, and soil maps.

Generally, wetlands are divided into three functional categories. Ohio EPA's wetland anti-degradation policy categorizes wetlands according to four factors: the wetland's relative functions and values, its sensitivity to disturbance, its rarity, and its potential to be adequately compensated for by wetland mitigation in the event of loss or destruction. Pursuant to OAC 3745—1—54, wetlands are divided into 3 separate categories according to these three factors.

A Category One wetland in Ohio is commonly an isolated wetland with very little biodiversity. It supports minimal wildlife habitat, and minimal hydrological and recreational functions as determined by an appropriate wetland evaluation methodology. It is characterized by a low potential to achieve advanced wetland functions and a predominance of nonnative species such as narrow-leaved cattail, purple loosestrife and reed canary grass.

Category One wetlands are defined as "limited quality waters" because of the extent of their degradation and their limited restoration potential. Category One wetlands may include, but are not limited to the following: acidic ponds created or excavated on mined lands without a connection to other surface waters throughout the year and that have little or no vegetation, and wetlands that are hydrologically isolated and comprised of vegetation that is dominated (greater than eighty per cent area cover) by species including, but not limited to: *Lythrum salicaria; Phalaris arundinacea*; and *Phragmites australis*.

Ohio Category Two wetlands support moderate wildlife habitat or hydrological or recreational functions as determined by an appropriate wetland evaluation methodology. Wetlands assigned to Category Two may include, but are not limited to: wetlands dominated by native species but generally without the presence of, or habitat for, rare, threatened or endangered species; and wetlands which are degraded but have a reasonable potential for reestablishing lost wetland functions. They are generally dominated by native species such as buttonbush, alder and buckthorn, but do not demonstrate the presence or habitat for rare, threatened or endangered species. These wetlands have great potential for restoration.

Ohio Category Three wetlands support significant biodiversity and superior habitat and often contain one or more rare, threatened or endangered species. Wetlands assigned to Category Three may include, but are not limited to: wetlands which contain or provide habitat for threatened or endangered species; high quality forested wetlands, including old growth forested wetlands, and mature forested riparian wetlands; vernal pools; and wetlands which are scarce regionally and/or statewide including, but not limited to, bogs and fens.

For any disturbance of an isolated wetland, no matter which category it falls under, there are mitigation requirements mandated by the state of Ohio. Ohio's mitigation requirements are based upon a "no net loss" philosophy. This means that every acre of wetland that is lost must be replaced on a quid pro quo basis. The rate of replacement increases as the value of the wetland being destroyed increases. Therefore, the mitigation requirements for the destruction of 1 acre of a Category One wetland will be significantly less than the mitigation required for the destruction of a Category Three wetland. Any impact to a Category Three wetland is frowned upon by both state and federal regulatory authorities and to be avoided if at all possible.

For landowners with wetlands present on their property and who are considering a project impacting the wetland water quality or status, it is best to obtain a professional delineation from an accredited engineering firm. Once the engineering firm determines the type of wetland that exists on the property in question, that delineation must be certified by the U.S. Army Corps of Engineers and the Ohio EPA must issue a water quality certification pursuant to §401 of the Clean Water Act.

—Andrea J. Kirk, Capital University, Columbus, OH

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Conference Calendar

International Biotechnology Roundtable.
June 27, 2006, Danforth Plant Science Center, St. Louis, MO.
Sponsored by the AALA.
Contact information as soon as it is available.

Open space easements

This case is a significant test of rights distribution when farmland is preserved through an open space easement. Private landowners who wish to grant rights to third parties must be aware of exercising those rights in the context of an underlying easement. While the Supreme Court of Pennsylvania may review this decision, the future of open space and other types of conservation easements hangs in the balance.

In 2000, the Ephrata Area School District (EASD) purchased approximately 80 acres of land on which it proposed to construct an elementary school. EASD originally wanted to build the primary access road through Market Street, but was unable to because of serious traffic and safety concerns. Following Township and Borough recommendations, Hummer Road and Meadow Valley Roads were to become the primary and secondary access roads, respectively. To construct the secondary access road, EASD purchased a 50-foot strip of land from private landowners.

The parties later modified the agreement between the landowners and EASD to reflect acquisition of a right-of-way[1] "under and subject to" the rights of the Lancaster County Preserve Board (Board), a county agency, who held an open space easement[2] over the private property. The Board voted to grant EASD the right-of-way over the newly purchased strip of land. The Board removed the 50-foot piece of land from the open-space easement.

After obtaining the Board's approval, EASD subsequently sought the County's approval of the right-of-way, although the School District later argued that the County's approval was unnecessary. The County denied EASD's request, preventing them from constructing the secondary access road.

At the trial court level, EASD moved for a declaratory judgment that County approval was not needed for the acquisition of right-of-way over the private land. They also sought a declaratory judgment that the proposed right of way did not violate the County's open space easement. The County disagreed, but somewhat inexplicably conceded that EASD's proposed right-of-way did not violate its open space easement. The trial court granted the County's subsequent motion for summary judgment, holding that EASD could not be granted a right-of-way without the County's approval. EASD appealed that decision.

The Commonwealth Court held that EASD did not need the County's consent to obtain a right-of-way over the open space easement on the Lauver's land.

The majority analyzed both common law and the language of the Act.

When a tract of land is subject to an easement, the servient owner may make any use of the land that does not unreasonably interfere with the use and enjoyment of the easement. This means that the servient owner retains the right to grant additional easements in the same land to other persons, as long as the first easement is not exclusive and is not burdened by the second easement. This is a universally accepted rule which also applies whether the servient tenement is burdened by a conservation easement. In this case, the County conceded that EASD's proposed right-of-way would unreasonably interfere with the prior open space easement.

Section 11(a) of the UCEA (the Act) states in relevant part that "the ownership by…a local government unit of an open space property interest[3] shall not preclude the acquisition…and use of rights-of-way." Thus, prior ownership of an open space easement does not in and of itself preclude a third party from acquiring a right-of-way over that easement.

Additionally, the court cited the third sentence of section 11(a), which says that "in the case of acquisition from a local government unit…such acquisition shall occur only if the governing body, after public hearing with notice to the public, shall approve such acquisition." From this language, it would appear that EASD might need the County's consent and approval to secure a right-of-way over the prior easement. The court, however, reasoned that EASD was not acquiring the right-of-way from the County; it was acquiring the right-of-way from private landowners. Relying on an analysis of the plain language of the Act, the court noted that there is no requirement in Section 11(a) for an entity to obtain the approval of a governing body in order to acquire a right-of-way from a private landowner.

The court further credited its reasoning by pointing out that the Act comports with the common law principle that a landowner of a servient estate may grant subsequent easements so long as the prior easement is not exclusive and not burdened by the subsequent easements.

Senior Judge Kelley, in writing for the dissenting members, looked to different documents to arrive at his conclusion. He began by stating the well settled proposition that the rights and liabilities of parties to an express easement are determined by the terms of the agreement, unless those terms are ambiguous. Generally, the language of the agreement should be interpreted to give effect to the intentions of the parties. Judge Kelley later argued that interpretation of the Act is wholly unnecessary in this case.

In this case, the grant provided that use of the land would be restricted to "agricultural and directly associated uses", which the grant later broadly defined. The agreement also contained a provision that "other similar uses may be considered upon written request to the Lancaster County Agricultural Preserve Board…" Thus, Judge Kelley argued, the Board's approval was required even where the proposed right-of-way and the access road structure do not violate the easement.

Judge Kelley then addressed the majority's interpretation of the Act. He relied mainly on the history of the document, examining the language of the Act prior to the 1996 amendment, which required County approval if a right-of-way over an easement is acquired by a body other than a public utility.

The consequences of the majority interpretation would be that no approval would be acquired in a case like this where a private party retains ownership of the servient estate. The prospect for destruction of open space easements by local governments runs contradictory to the Open Space Lands Act.[4] Basically, that act's intent is to maximize the benefit of open spaces. By interposing government approval in a case such as this, open space easements would be protected by several safeguards.

—Keith D. Hickman, Penn State Dickinson

[1] See Terms Section.

[2] See Terms Section.

[3] The Act further defines "interest in real property" as "any right in real property including, but not limited to a fee simple, easement, remainder, future interest, transferable development right, lease, license, restriction or covenant of any sort, option or contractual interest or right concerning the use of or power to transfer property."

[4] 32 P.S. § 5001

Federal Register 1/16/06-2/24/06

BLACK STEM RUST. The APHIS has adopted as final regulations which amend the black stem rust quarantine regulations by changing the movement restrictions in order to allow clonally propagated offspring of rust-resistant Berberis cultivars to move into or through a protected area without completing the currently required two-year growth period. The proposed regulations also add 13 varieties to the list of rust-resistant Berberis species. **71 Fed. Reg. 5777 (Feb. 3, 2006)**.

BRUCELLOSIS. The APHIS has issued interim regulations which change Idaho from a Class Free state to a Class A state, requiring all bovine animals to be moved interstate to test negative for brucellosis unless the animals are moving directly to slaughter or a quarantined feedlot. **71 Fed. Reg. 2991 (Jan. 19, 2006)**.

CONSERVATION SECURITY PROGRAM. The NRCS has announced the CSP-06-01 sign-up that will be open from February 13, 2006, through March 31, 2006, in selected 8-digit watersheds in all 50 states, Guam, and the Caribbean, which can be viewed at http://www.nrcs.usda.gov/programs/csp/2006_CSP_WS/index.html. These watersheds were selected using the process set forth in the regulations. In addition to other data sources, this process used National Resources Inventory data to assess land use, agricultural input intensity, and historic conservation stewardship in watersheds nationwide. NRCS State Conservationists recommended a list of potential watersheds after gaining advice from the State Technical Committees. The Secretary of Agriculture announced on August 25, 2005,

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Are you a debt relief agency? You might be surprised and you should be concerned

By Susan A. Schneider

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was signed into law on April 20, 2005 as Public Law No. 109-8.[1] Most provisions of the bill were not immediately effective, but rather took effect with respect to cases filed on or after October 17, 2005.[2]

This massive new act makes profound changes in bankruptcy law, some of which are controversial. The requirements regarding "debt relief agencies" provide an example of a particularly a controversial change that has generated concern among the bar. The definition of this term by the new act is expansive, and if a person or entity falls within the term, violating the act's requirements can result in serious consequences.

This article provides an overview of the definition of a debt relief agency and the requirements now in place for such entities. It also discusses challenges to the requirements that have been brought in the courts.

Defining the term

The Bankruptcy Code, as amended by the new act provides that the term 'debt relief agency' means "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110."[3]

Specifically excluded from this definition are the following categories of persons and entities:

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or

(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

There are three key elements to the definition of a debt relief agency. First, the person must provide "bankruptcy assistance." Second, this assistance must be provided to an "assisted person." Third, the assistance must be provided in return for money or other valuable compensation.

The term "bankruptcy assistance" is defined as "any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title."[4] Thus, it appears that attorneys could be included in the definition.[5] Moreover, "bankruptcy assistance" is not limited to those who file a bankruptcy case for their client. Providing any information or advice about bankruptcy to an "assisted person" can fall within the scope of this definition.

The term "assisted person" means "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000."[6] "Consumer debt" is "debt incurred by an individual primarily for a personal, family, or household purpose."[7] It appears that most farm clients will not qualify as assisted persons because of the extent of their business debt. Similarly a farmer is likely to have more than $150,000 in nonexempt farm assets, unless the value of nonexempt property is construed to mean equity.

The third requirement limits the definition to those who receive compensation for the information or advice provided. This distinction could be critical for volunteer organizations that work with financially distressed individuals. However, it describes the typical attorney-client relationship.

Restrictions on debt relief agencies

Section 526 of the Bankruptcy Code lists the restrictions imposed on debt relief agencies.[8] These relate to the agency's duty to the assisted person, and each also applies to any "prospective assisted person."[9] The restrictions are drafted with detailed and expansive language, e.g., "directly or indirectly, affirmatively or by material omission,"[10] but each can be generally summarized. A debt relief agency must not:

- "fail to perform" any service promised to the assisted person in connection with a bankruptcy proceeding;
- advise the assisted person to make an "untrue and misleading" statement in a document filed in a bankruptcy proceeding;
- make any misrepresentation to an assisted person regarding the services that will be provided or the benefits and risks of filing bankruptcy;
- advise an assisted person to incur more debt in contemplation of filing bankruptcy.[11]

The last of these restrictions raises concern. It is poorly drafted, but as written, it appears that the debt relief agency cannot advise the assisted person to incur more debt nor can the agency advise the debtor to pay for bankruptcy related services. Although not completely consistent with the language used, it is this author's assumption that Congress intended to prohibit debt relief agencies from advising assisted persons to borrow money for any purpose prior to filing bankruptcy, including the purpose of paying an attorney retainer fee. The actual language of this subsection provides that a debt relief agency shall not "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 performed as part of preparing for or representing a debtor in a case under this title."[12]

Section 526 provides that any waiver by any assisted person of any protection or right provided under this section will not be enforceable against the debtor [sic - assisted person?], but may be enforced against a debt relief agency.[13]

Requirements placed on debt relief agencies

Sections 527 and 528 set forth explicit requirements for debt relief agencies. Section 527 contains the disclosure requirements that are imposed on debt relief agencies[14] and § 528 contains requirements regarding the services advertised and provided by debt relief agencies.[15]

Under § 527, a debt relief agency must provide the assisted person with a copy of the written notice that is required under section 342(b)(1).[16] This is the notice that the bankruptcy clerk is required to give the consumer debtor before the commencement of their case.[17] This notice must include a brief description of the types of bankruptcies and the types of services available from credit counseling services.[18]

Section 527 also requires that "not later than 3 business days after the first date that the debt relief agency first offers to provide bankruptcy assistance to an assisted person," the agency must provide "a clear and conspicuous written notice" that advises that:

- all information required in connection with the bankruptcy must be "complete, accurate, and truthful;"
- all assets and all liabilities must be "completely and accurately disclosed in the documents filed to commence the case," and when the replacement value for an asset is required, this value must be provided and it

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must be based on a reasonable inquiry;[19]
· the debtor's current monthly income, the amounts required for means testing under § 707(b)(2), and, in Chapter 13 cases, disposable income amounts will be required to be determined based on "reasonable inquiry" and provided as part of the bankruptcy; and
· information that an assisted person provides during their case may be audited, and that failure to provide such information may result in dismissal of the case or other sanction, including a criminal sanction.[20]

Section 527 requires a debt relief agency to maintain a copy of this notice for 2 years after the date on which the notice is given the assisted person.[21]

In addition to this notice, at the same time, i.e., within 3 business days of the date that bankruptcy assistance is offered, the debt relief agency must also provide the assisted person with the following statement, or one that is "substantially similar." The statement must be "clear and conspicuous" and it must be given as a single document separate from other documents or notices provided to the assisted person:

"IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.

"If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the contract before you hire anyone.

"The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

"Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, as well as in some cases a Statement of Intention need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

"If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

"If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

"If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

"Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice."[22]

If the debt relief agency prepares the bankruptcy petition and schedules for the assisted person, the agency is responsible for making "reasonably diligent inquiry of the assisted person or others so as to obtain such information reasonably accurately for inclusion on the petition, schedules or statement of financial affairs."[23]

If the debt relief agency is assisting the debtor to complete their own documents, within 3 business days of the date that bankruptcy assistance is offered, the agency must "to the extent permitted by nonbankruptcy law,"[24] provide each assisted person with "reasonably sufficient information" provided in a "clear and conspicuous writing" advising them how to provide all the information that will be required of them under § 521.[25] This advice must include:
· how to value assets at replacement value, determine current monthly income, determine the amounts specified for means testing in § 707(b)(2) and, in a chapter 13 case, how to determine disposable income;
· how to complete the list of creditors, including how to determine what amount is owed and what address for the creditor should be shown; and
· how to determine what property is exempt and how to value exempt property at replacement value as defined in § 506.[26]

Section 528 includes the explicit requirements that are imposed on debt relief agencies with respect to the services that they provide and the way that they advertise these services. With respect to the services that they provide to assisted persons, this section provides that within 5 business days of providing any bankruptcy assistance services to an assisted person, and prior to the filing of a bankruptcy petition, a written contract must be formed with the assisted person. This contract must explain "clearly and conspicuously" the services that the debt relief agency will provide to the assisted person, the charges for these services, and the terms of payment. The assisted person must be provided with a copy of the fully executed and completed contract.[27]

The provisions in § 528 regarding advertising require that any advertisement of "bankruptcy assistance services or of the benefits of bankruptcy that are directed to the general public" must clearly and conspicuously disclose that the services or benefits involve bankruptcy relief.[28]

This section also provides that the advertisement must "clearly and conspicuously" include the statement, "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."[29]

Section 528 further provides that the phrase "an advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public" includes descriptions of bankruptcy assistance in connection with a chapter 13 plan even if chapter 13 is not mentioned in the advertisement. It will also include advertisements that use statements such as "federally supervised repayment plan" or "federal debt restructuring help" or other statements that could lead a reasonable consumer to believe that debt counseling was being offered instead of bankruptcy assistance.[30]

Public advertisements offering assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt are required to disclose clearly and conspicuously that the assistance may involve bankruptcy and they must also include the statement "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."[31]

Enforcement provisions

Section 526(c) sets forth the enforcement provisions applicable to violations of §§ 526, 527, or 528. It provides that "[a]ny contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements" of these sections "shall be void and may not be enforced by any Federal or State court or by any other person, other than such assisted person."[32]

Section 526(c) further provides that a debt relief agency will be liable to the assisted person for fees paid for the bankruptcy assistance received, for actual damages, and for reasonable attorneys' fees and costs if the debt relief agency is found to have -
· intentionally or negligently failed to comply with any provision of §§ 526, 527, or 528 with respect to bankruptcy proceeding for the assisted person;
· provided bankruptcy assistance to an assisted person in a bankruptcy proceeding that is dismissed or converted because of

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Debt relief agency/Cont. from page 5

such agency's intentional or negligent failure to file a required document including those specified in § 521; or

· intentionally or negligently disregarded the material requirements of the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.[33]

The state is authorized totake action, in addition to its state law remedies, whenever it has "reason to believe" that a person has violated § 526 and may bring an action to enjoin the violation or bring an action on behalf of its residents to recover the actual damages of assisted persons arising from the violation. In the case of a successful action in either instance, the state "shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court."[34] The U.S. district courts of the United States for districts located in the State are given concurrent jurisdiction over these actions.[35]

Section 526 also provides that notwithstanding any other provision of Federal law and in addition to any other remedy, if the court finds that a person intentionally violated § 526 or engaged in a clear and consistent pattern or practice of violating it, the court may enjoin the violation or impose an appropriate civil penalty. The court may take such action on its own motion, on the motion of the United States trustee, or on the motion of the debtor.[36]

Section 526 concludes by providing that no provision of §§ 526, 527, 528 can "annul, alter, affect, or exempt any person subject to such sections from complying with any law of any State except to the extent that such law is inconsistent with those sections, and then only to the extent of the inconsistency."[37] It provides that no provision shall be "deemed to limit or curtail the authority or ability of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State; or of a Federal court to determine and enforce the qualifications for the practice of law before that court."[38]

Challenges to the inclusion of attorneys in the definition of debt relief agency

On October 17, 2005, the date when most provisions of the new act took effect, Judge Lamar W. Davis, Chief Judge of the Bankruptcy Court for the Southern District of Georgia issued an order holding that attorneys licensed to practice law who were members of the bar of the Bankruptcy Court were not "covered by the provisions of the Code regulating debt relief agencies."[39]

The court noted that the definition of "debt relief agency" did not include the word attorney or lawyer; that it included "bankruptcy petition preparer;" and that the definition of "bankruptcy petition preparer" specifically excluded attorneys and their staff.[40] The court further noted that "attorney" is also defined in the act, with no reference to "debt relief agency."[41] The court then tried to reconcile this with the inclusion of "legal representation" within the definition of "bankruptcy assistance." The court admitted that this seemed to imply that attorneys would be included, but explained this away by suggesting that "legal representation" was used to authorize the bankruptcy courts to take action against the unauthorized to practice law. Judge Lamar found the debt relief agency restrictions to be "intended to regulate that universe of entities who assist persons but are not attorneys."[42]

The court found that because §526(c) authorizes the Court on its own motion to enjoin violations of the debt relief agency provisions or to impose civil penalties on a violator, the court must also have the authority to interpret who should not be found in violation. This authority "complements the inherent authority of a Court to regulate the practice of the members of its bar."[43] The court noted that it would be a "breathtakingly expansive interpretation of federal law to usurp state regulation of the practice of law via the ambiguous provisions of this Act, which in no clear fashion lay claim to the right to do any such thing."[44] If Congress meant to "ensnare attorneys in the thicket of §§ 526, 527, and 528, it would have used the term 'attorney' and not 'debt relief agency.'"

In the case of *Milavetz, Gallop & Milavetz, P.A. v. United States*, No. 05-CV-2626 (D. Minn.) (filed Nov. 10, 2005), a Minneapolis law firm that represents consumers in bankruptcy challenged the application of the "debt relief agency" provisions to attorneys as unconstitutional. The action alleges that the provisions limit an attorney's ability to ethically and competently advise and represent clients, illegally restrict an attorney's right to free speech, and illegally restrict the public's right to receive information from attorneys, presumptively protected under the First Amendment of the United States Constitution. The plaintiffs also allege that the provisions are unconstitutionally vague. Other similar actions are anticipated.

Did Congress really intend the application of these provisions to attorneys?

That attorneys would be "debt relief agencies" is not intuitive. In fact, in line with Judge Lamar's arguments, in the OMB analysis of the bill, reference is made to "bankruptcy attorneys, creditors, bankruptcy petition preparers, debt-relief agencies, consumer reporting agencies, and credit and charge-card companies", as though listing six different categories.[45]

The Bankruptcy reform bill was massive — over 500 pages of detailed and complex amendments to an already complex code. Could the inclusion of the attorney language be an inadvertent error or oversight? Apparently not. On the floor of the House on the day that the new act passed, Representative Watt from North Carolina proposed an amendment that would have removed attorneys from the definition of debt relief agency. As he described his amendment,

> Amendment 05 corrects the provisions that would require bankruptcy attorneys to identify and advertise themselves as debt relief agencies and comply with intrusive new regulations that would interfere with the confidential attorney-client relationship. Sections 227 and two twenty — through 229 of the bill would seriously interfere with the attorney-client relationship by prohibiting debtor's bankruptcy attorneys and many non-bankruptcy attorneys from giving their clients certain proper bankruptcy planning advice. These provisions would also have a chilling effect on debtor's lawyers and their firms by requiring all of their newsletters, seminars, advertising materials to include awkward and misleading statements identifying themselves as debt relief agencies."[46]

The amendment was voted down on a voice vote and shortly thereafter, the new act, including the debt relief agency requirement was passed.[47]

The new provisions of the bankruptcy Code that are discussed in this article are both poorly drafted and complex. It is hoped that members of the AALA who read this article will provide additional commentary on this subject, sharing their interpretations with respect to the debt relief agency provisions and reporting on cases that are decided with respect to this provision as well as the other controversial provisions of the new act. The author urges members are urged to contact her at saschneider@earthlink.net and/or to submit additional commentary to the *Ag Law Update*.

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[1] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.).

[2] *Id.* at § 1501, 119 Stat. at 216.

[3] 11 U.S.C. § 101(12A).

[4] 11 U.S.C. § 101(4A).

[5] See, Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 571, 576 (2005); Keith M. Lundin, *Ten Principles of BAPCPA: Not What was Advertised*, 24 Am. Bankr. Inst. J. 1, 69 (Sept.2005); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005"*, 79 Am. Bankr. L.J. 191, 206-07 (Spring 2005).

[6] 11 U.S.C. § 101(3).

[7] 11 U.S.C. § 101(8).

[8] 11 U.S.C. § 526.

[9] 11 U.S.C. § 526(a).

[10] 11 U.S.C. § 526(a)(3).

[11] 11 U.S.C. § 526(a).

[12] 11 U.S.C. § 526(a)(4).

[13] 11 U.S.C. § 526(b).

[14] 11 U.S.C. § 527.

[15] 11 U.S.C. § 528.

[16] 11 U.S.C. § 342(b)(1).

[17] Presumably the clerk's duty under this section will be accomplished through disclosures contained on the official form and attested to by the debtor under 11 U.S.C. § 521.

[18] 11 U.S.C. § 342(b)(1).

[19] The actual language regarding this requirement provides that "the replacement value of each asset as defined in section 506 must be stated in those documents where requested after reasonable inquiry to establish such value." *Id.*

[20] 11 U.S.C. § 527(a)(2).

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[21] 11 U.S.C. § 527(d).
[22] 11 U.S.C. § 527(b).
[23] 11 U.S.C. § 527(c).
[24] Presumably, this takes into consideration state law that restricts the unauthorized practice of law.
[25] 11 U.S.C. § 527(c) (referencing the listing of the debtor's duties in 11 U.S.C. § 521).
[26] 11 U.S.C. § 527(c).
[27] 11 U.S.C. § 528(a).
[28] 11 U.S.C. § 528(a)(3).
[29] 11 U.S.C. § 528(a)(4).
[30] 11 U.S.C. § 528(b)(1).
[31] 11 U.S.C. § 528(b)(2).
[32] 11 U.S.C. § 526(c)(1).
[33] 11 U.S.C. § 526(c)(2).
[34] 11 U.S.C. § 526(c)(3).
[35] 11 U.S.C. § 526(c)(4).
[36] 11 U.S.C. § 526(c)(5).
[37] 11 U.S.C. § 526(d)(1).
[38] 11 U.S.C. § 526(d)(2).
[39] *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66 (Bankr. S.D. Ga. 2005).
[40] *Id.* at 69.
[41] *Id.* (referencing the definition of attorney at 11 U.S.C. §101(4)).
[42] 332 B.R. at 70.
[43] *Id.* at 67, 68 n.1.
[44] *Id.* at 71.
[45] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, *Rept. of the Comm. on the Judiciary*, H.R. Rep. No. 109-31, 109th Cong. at 38 (Apr. 8, 2005).
[46] *Id.* at 524.
[47] *Id.*

Crop insurance claims/Cont. from p. 1

loss claim for $184,149.00 to Vine Vest, LLC. *See id.* Vine Vest, LLC denied the claim on the grounds that "the production records supporting the claim were 'not in [Passe's] name.'" *Id.* The plaintiffs met with representatives from Vine Vest, LLC soon thereafter, and asserted that they farmed jointly. *See id.* A few days later, Vine Vest, LLC reaffirmed its denial of the crop loss claim. *See id.* The plaintiffs later brought an action in federal district court for breach of contract and bad faith. The plaintiffs also asserted that "defendant should be estopped from denying coverage, or, in the alternative, the policy should be reformed to cover plaintiffs' entire crop loss." *Id.* at 994.

The court stated that the defendant "appears to argue" that the plaintiffs' state law claims are preempted by the FCIA. *See id.* It explained that while the Seventh Circuit has not considered whether the FCIA preempts state law claims, the circuit courts that have addressed the issue have determined "[a]lmost unanimously" that the FCIA does not preempt state law claims. *See id.* (citations omitted).

The court explained that the purpose of the FCIA is "'to promote the national welfare by improving the economic stability of agriculture through a system of crop insurance.'" *Id.* (quoting 7 U.S.C. § 1502) (citing *Kansas ex rel. Todd v. United States*, 995 F.2d 1505, 1507 (10th Cir. 1993)). It further explained that the FCIA "promotes stability by encouraging farmers to purchase ... insurance that protects them against loss from natural disasters." *Id.* The court concluded the following:

> If plaintiffs were to prove that the information provided by defendant's agent ... led them to obtain less crop insurance than they believed they were receiving, reforming the contract or estopping defendant from denying them coverage would not stand as an obstacle to accomplishing the Congress's objective of improving economic stability of the agricultural system. Furthermore, the Act does not explicitly preempt state causes of action against an insurance company that has willfully or negligently misled an insured to its detriment. Therefore,... plaintiffs' state law causes of action against defendant are not preempted by the Federal Crop Insurance Act.

Id. (citation omitted).

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the preliminary list of FY 2006 watersheds based on the President's budget. Of those 110 watersheds, CSP will be offered in 60 watersheds nationwide based on available funding. The sign-up will only include those producers who are not participants in an existing CSP contract. Applicants can submit only one application for this sign-up. To be eligible for CSP, a majority of the agricultural operation must be within the limits of one of the selected watersheds. Applications which meet the minimum requirements as set forth in the Interim Final Rule will be placed in enrollment categories for funding consideration. Categories will be funded in alphabetical order until funds are exhausted. If funds are not available to fund an entire category, then the applications will fall into subcategories and funded in order until funds are exhausted. If a subcategory cannot be fully funded, applicants will be offered the FY 2006 CSP contract payment on a prorated basis. **71 Fed. Reg. 6250 (Feb. 7, 2006)**.

CROP INSURANCE. The FCIC has issued proposed regulations amending the common crop insurance regulations, peanut crop insurance provisions, to remove all references to quota and non-quota peanuts and add provisions that will allow coverage for peanuts whether or not they are under contract with a sheller to better meet the needs of insured producers. The changes will apply for the 2007 and succeeding crop years. **71 Fed. Reg. 4056 (Jan. 25, 2006)**.

CROP INSURANCE. The FCIC has issued proposed regulations which add provisions for mint crop insurance to the common crop insurance basic provisions. The proposed regulations make the pilot mint crop insurance program permanent. **71 Fed. Reg. 6016 (Feb. 6, 2006), adding 7 C.F.R. § 457.169**.

FARM LABOR. The National Agricultural Statistics Service has issued farm employment figures as of February 17, 2006. There were 796,000 hired workers on the nation's farms and ranches the week of January 8-14, 2006, up 3 percent from a year ago. Of these hired workers, 616,000 workers were hired directly by farm operators. Agricultural service employees on farms and ranches made up the remaining 180,000 workers. Farm operators paid their hired workers an average wage of $10.11 per hour during the January 2006 reference week, up 33 cents from a year earlier. Field workers received an average of $9.15 per hour, up 44 cents from January 2005, while livestock workers earned $9.25 per hour compared with $9.20 a year earlier. The field and livestock worker combined wage rate, at $9.19 per hour, was up 29 cents from last year. The number of hours worked averaged 38.2 hours for hired workers during the survey week, up 3 percent from a year ago. All NASS reports are available free of charge on the internet. For access, go to the NASS Home Page at: http:/www.usda.gov/nass/. **Sp Sy 8 (2-06).**

MEAT INSPECTION. The FSIS has issued interim regulations amending the federal meat inspection regulations to provide for a voluntary fee-for-service program under which official establishments that slaughter horses will be able to apply for and pay for ante-mortem inspection. The fiscal year 2006 Appropriations Act prohibits the use of appropriated funds to pay the salaries or expenses of FSIS personnel to conduct ante-mortem inspection of horses. The Joint Explanatory Statement of the Committee of Conference on the FY 2006 appropriations bill for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies, however, provides that the Department of Agriculture is obliged to provide for inspection of meat for human consumption. FSIS is establishing this fee-for-service program under the Agricultural Marketing Act. Post-mortem inspection and other inspection activities authorized by the Federal Meat Inspection Act at official establishments that slaughter horses would continue to be paid for with appropriated funds, except for overtime or holiday inspection services. **71 Fed. Reg. 6337 (Feb. 8, 2006)**.

TUBERCULOSIS. The APHIS has issued an interim regulation amending the bovine tuberculosis regulations by removing Minnesota from the list of accredited-free states and adding the state to the list of modified accredited advanced states. **71 Fed. Reg. 4808 (Jan. 30, 2006)**.

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MEMBERSHIP RENEWALS. If you have not yet sent in your 2006 dues, please do so now to prevent interruption of member services, such next month's *Update* and inclusion in the 2006 printed membership directory. Members may also use the forms online in Word or PDF format at http://www.aglaw-assn.org.

2006 MEMBERSHIP RECRUITMENT PROGRAM. As an extra incentive this year, we are offering new members a sign-up premium of a free copy of the 2005 conference handbook on CD. The CD also contains the archives of the Update from 1999-2005. This CD is worth the cost of dues by itself and can make a great incentive for prospective new members. Recruiting members also gives you the chance to win a free registration to the 2006 annual conference in Savannah, GA. In 2005, all recruiters received at least a $25 gift certificate from Amazon.com so everyone wins.

UPDATE BY E-MAIL. Many thanks to all the members who switched to the e-mail version of the *Update*. This has saved and will continue to save the association a considerable amount of expense by reducing our printing and postage costs. If you would like to see a sample PDF file of the e-mail *Update*, please send me an e-mail at RobertA@aglaw-assn.org and I will send a sample file.

2006 CONFERENCE. President-elect Steve Halbrook is well into the planning of an excellent program for the 2006 Annual Agricultural Law Symposium at the Hyatt Regency on the Savannah riverfront in Savannah, Georgia, October 13-14, 2006. As soon as the program is virtually complete, we will post it on the AALA web site. Mark your calendars and plan a trip to "America's First City." Brochures will be printed and mailed as soon as the program plans are complete.

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