presented and Seidel signed two documents: the first document was titled "Basic Bankruptcy Flat Fee Agreement", which described the services Warren would provide. The second document was titled "Be Careful How You Use Credit Cards," which warned debtors of the consequences of credit card use immediately prior to filing a bankruptcy case. At Warren's request, Seidel obtained an appraisal of her home and contacted National City, the entity holding the first mortgage on her residence. The balance owed on her first mortgage exceeded the property value of her home, which qualified Seidel to obtain relief under Chapter 13.

Prior to the meeting with the creditors, National City filed a Proof of Claim, which, on its face, indicated an outstanding mortgage balance that was materially less than the amount that was given to Seidel in the previous month.

Seidel expressed concern regarding the conflicting amounts shown in the paperwork but was assured by Warren that her case was "fine" and she had nothing to worry about. However, because of these conflicting amounts, which showed that Seidel owed less than what her home was appraised for; Seidel failed to meet the requirements to eradicate the second mortgage on her home, thus not qualifying her for relief provided under Chapter 13. After unsuccessful attempts to reach Warren after filing the bankruptcy proceeding, Seidel wrote a letter to the bankruptcy judge objecting to the claim provided by National City as being mistaken, which caused the court to hold a hearing on the claim. Seidel appeared at the hearing without being represented by Warren and cleared the way to confirmation of her Chapter 13 plan. These events led the court to schedule a hearing into the Warren's conduct.

HOLDING: Sanctions imposed.

REASONING: Bankruptcy Code Section 526(a)(4) explicitly prohibits an attorney from advising a debtor to incur more debt for the purpose of obtaining bankruptcy related legal services. The court did not take into account that Seidel consented to and was informed of the consequences of using her credit card prior to a bankruptcy proceeding. Section 526(a)(4) unambiguously states that its prohibition may not be waived even if a client is advised of the consequences of charging a credit card immediately prior to pursuing bankruptcy relief.

Section 523(a)(2)(A) of the Bankruptcy Code excepts from a debtors discharge "any debt for money, ... services or an extension, renewal, or refinancing of credit, to the extent obtained by ... false pretenses, a false representation, or actual fraud ...." In determining false representation encompassed by § 523(a)(2)(A) and the use of credit cards, courts look to the subjective intent of the debtor at the time of the credit card use. See *In re Manning*, 280 B.R.171, 185 (Bankr. S. D. Ohio 2002) (citing *Rembert v. AT&T Universal Card Servs., Inc.*, (*In re Rembert*), 141 F.3d 277, 281 (6th Cir. 1998)). The court determined in the present case, Seidel did not intend to pay the debt incurred (i.e., the charge on the credit card) for the lawyer's fee; rather she intended to seek bankruptcy protection and to pay only a yet to be determined percentage of the debt through her bankruptcy. Thus, use of her credit card to pay the Warren's fee is a false representation within the meaning of § 523(a)(2)(A) of the Bankruptcy Code. The court noted that Warren has been a bankruptcy practitioner for approximately eighteen years, and therefore knew that Seidel, who was preparing to file bankruptcy, had no intention of repaying the credit card debt incurred to pay his fee. By accepting payment via credit card, Warren not only allowed Seidel to incur additional debt, but assisted his client in conduct that he knew to be fraudulent.

In addition to the cease and desist order, Warren was ordered to refund the $3,264 to Seidel's credit card. Warren was also required to file a list with the court of every case he filed since October 11, 2005, in which all or part of the fees were charged to a bankruptcy client's credit card, and was subject to further investigation by the U.S. Trustee of his transactions with his bankruptcy clients to determine whether further action should be taken.

DEBT COLLECTION

FDCPA FEE-SHIFTING APPLIES TO APPELLATE PROCEEDINGS

Anchondo v. Anderson, Crenshaw & Associates, L.L.C, 616 F. 3d 1098 (10th Cir. 2010).

FACTS: Elsa Anchondo was the lead plaintiff in a class action lawsuit against Anderson, Crenshaw and Associates for claims under the Fair Debt Collection Protection Act (FDCPA). After the parties agreed to a settlement in favor of Anchondo, the district court awarded Anchondo $63,333.52 in fees and costs. Anderson then appealed the award of fees.

HOLDING: Affirmed.

REASONING: The Tenth Circuit held that, like the Truth in Lending Act (TILA), the FDCPA's fee-shifting provision includes appellate actions. The court held that the district court properly applied the lodestar method and conducted an appropriate review of Anchondo's attorney's billing records. The Court relied on *Gallegos v. Stokes*, 593 F.2d 372, 376 (10th Cir. 1979), which held the plaintiff "was entitled to attorney's fees for the successful defense of this appeal." Although *Gallegos* recognized a right to appellate fees under the Truth in Lending Act (TILA) rather than the FDCPA, the fee-shifting provisions of the two statutes are identical. The court noted "in the case of any successful action to enforce the foregoing liability [for violation of the TILA or FDCPA]" the plaintiff may recover "costs of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. § 1640(a) (3) (TLA) and § 1692k (a) (3) (FDCPA).

Following the reasoning applied in *Gallegos*, the Tenth Circuit granted Ms. Anchondo's request for fees incurred in defending the appeal. In its opinion the Court held that because "the operative fee-shifting provisions of the [TILA and FDCPA] are identical…plaintiff is statutorily entitled to fees and costs for this appeal."

BANKRUPTCY CODE'S "DEBT RELIEF" CLAUSES AS APPLIED TO ATTORNEY'S UPHELD

Conn. Bar Ass'n v. United States, 620 F.3d 81 (2nd Cir. 2010).

FACTS: The plaintiffs, attorneys and a bankruptcy debtor, sued the United States and officials, stating that various provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") were unconstitutional. Specifically, plaintiffs argued the following sections violated their First Amendment rights to free speech: Section 526(a)(4) of the Bankruptcy Code that prohibits debt relief agencies from advising clients to incur more debt in contemplation of bankruptcy, or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as par to preparing for or representing a debtor in a bankruptcy case; Section 527(a) and (b) of the Bankruptcy Code, which require the debt relief agency provide an assisted person with certain notices; Section 528(a)(1)-(2) of the Code , which require debt relief agencies to execute a written contract with an assisted person; Section 528(a)(3)-(4) and (b)(2), which mandate language to be included in the debt relief agency advertisements. Plaintiffs also stated that the contract requirements violated the Fifth Amendment's Due Process Clause.

The district court construed the term "debt relief agency" broadly to include attorneys who represent anyone that meets the statutory definition of "assisted person", not just consumer debtors. The district court held that section 526(a)(4) of the Code's proscription on certain advice to assume debt is an unconstitutional restriction on speech. The district court also held that the disclosure requirements of section 527 of the Code do not violate the First Amendment. The contract requirements of 528(a)(1)-(1) also do not violate the First Amendment of the Due Process Clause as well. The advertising mandates of 528(a)(3)-(4), however, violate the First Amendment when applied to attorneys representing persons other than consumer debtors

Subsequently, the Supreme Court resolved several of the issues of this case in *Milavetz, Gallop & Milavetz P.A. v. United States*, 130 S. Ct. 1324 (U.S. 2010). *Milavetz* held that the term "debt relief agency" does apply to attorneys, but only those assisting consumer debtors who are contemplating bankruptcy. The Court also stated that the "in contemplation of" provision of 526(a)(4) applies to and prohibits advising an assisted person to incur more debt in contemplation of bankruptcy. That conduct is abusive per se. The Court rejected the First Amendment challenge to the advertising requirements pertaining to speech that was commercial in nature and compelled only disclosures. The Court also determined that the proper standard of review was the rational basis test, and that the advertising requirements passed this test because this reasonably relates to the government's interests in preventing deception of consumer debtors contemplating bankruptcy.

The plaintiffs claimed that the district court erred in including attorneys in the term "debt relief agency," and erred in dismissing their constitutional challenges regarding disclosure requirements and contract requirements.

HOLDING: Affirmed.

REASONING: The term "debt relief agency" under the Bankruptcy Code, applies to attorneys, but only those assisting consumer debtors who are contemplating bankruptcy. The Code defines a debt relief agency as any person who provides any bankruptcy assistance to an assisted person in return for payment. An assisted person does not include all attorneys who provide bankruptcy assistance, but it applies to attorneys who as professionals offer bankruptcy related services to consumer debtors. *Milavetz* foreclosed this issue.

This court went on to repeat what the Supreme Court stated in *Milavetz* regarding the "in contemplation of" provision of the Code. The Circuit court directed the district court to dismiss plaintiff's constitutional challenge to the "in contemplation of" provision of 526(a)(4) that prohibits advising an assisted person to incur more debt in contemplation of bankruptcy, because this conduct is abusive per se. This provision refers to a specific type of misconduct and its proscription is not unconstitutionally broad. This kind of conduct is also designed to manipulate the protections of the bankruptcy system.

The standard of review for advertising requirements for professionals who offer bankruptcy-related services to consumer debtors is the rational basis test because this reasonably relates to the government's interests in preventing deception of consumer debtors contemplating bankruptcy. The Bankruptcy Code has disclosure requirements rather than an affirmative limitation on commercial speech. Commercial speech has only limited protection with regards to First Amendment free speech rights.

Commercial speech also is regulated because commercial speakers have extensive knowledge of both the market and their products, so they are well situated to evaluate the accuracy of their messages. Also, commercial speech is more durable and less central to the interests of the First Amendment. Commercial speech also relates to the economic interest of the speakers and their audience. The Supreme Court in *Milavetz* determined that the Code's statutory provisions regulate only commercial speech. The contract requirements of 528(a)(1)-(2) also qualify as commercial speech. The disclosure requirement of the Code that provides consumer debtors with basic information about bankruptcy is also commercial speech. The challenged statutes mandate disclosure, but do not suppress speech; therefore the rational basis test is the appropriate standard of review. The notice requirement of section 527 is not unconstitutional, and the district court's dismissal of the plaintiffs' complaint is affirmed.

FDCPA DOES NOT REQUIRE EXPLICIT DEMAND FOR PAYMENT

Gburek v. Litton Loan Servicing LP, 614 F.3d 380 (7th Cir. 2010).

FACTS: Camille Gburek received a home loan that was serviced by Litton Loan Servicing. When Gburek fell behind on her home mortgage payments, Litton sent her a letter asking for her financial information and offered to discuss ways she could avoid foreclosure of her home. Gburek then received a second letter from Titanium Solutions on behalf of Litton offering to work with Gburek on foreclosure alternatives and asking for her financial information. Gburek then filed suit claiming Litton had violated the Fair Debt Collection Practices Act in its debt collection efforts. Gburek alleged Litton used deceptive means to obtain Gburek's personal information and used unfair and unconscionable means to collect or attempt to collect a debt.

The United States District Court for the Northern Dis-

trict of Illinois, Eastern Division, granted Litton's motion to dismiss. The court held Litton's letter did not contain an express demand for payment and was not considered an attempt to collect a debt. Therefore, it did not fall within the scope of the FDCPA. Gburek appealed.

HOLDING: Reversed and remanded.

REASONING: Communication from a debt collector to a debtor is covered by the FDCPA if it is made in connection with the collection of a debt. For the FDCPA to apply, two criteria must be met: 1) the defendant must qualify as a debt collector and 2) the communication by the debt collector must have been made in connection with the collection of any debt.

The court noted three prior cases it decided in determining whether a communication from a debt collector was made in connection with collecting a debt. In *Bailey v. Security Nat. Servicing Corp*, 154 F.3d 384 (7th Cir. 1998), the court stated that an explicit demand for payment alone does not qualify as a communication made in connection with the collection of a debt; the absence of a demand for payment was just one of several factors that influence the outcome. In *Horkey v. J.V.D.B. & Associates*, 333 F.3d 769 (7th Cir. 2003), the court clarified its statement that a communication does not have to make an explicit demand for payment in order to fall within the scope of the FDCPA. A communication made specifically to induce the debtor to settle her debt will be sufficient to trigger the FDCPA. Finally, in *Ruth v. Triumph P'ships*, 577 F.3d 790, 798 (7th Cir. 2009) the court concluded that a privacy letter that was sent with a collection letter fell within the scope of the FDCPA, because it was sent in connection with an attempt to collect a debt. Based on these three cases, the court concluded that whether the communication was made in connection with the collection of any debt has several factors, including absence of a demand for payment, the nature of the parties' relationship, and the purpose and context of the communication viewed objectively. Whether a communication was sent in an attempt to collect a debt is a question of objective fact that has to be proven like any other fact.

The text of letters sent to Gburek indicated Litton wanted her to settle her mortgage loan. Though it did not explicitly ask for payment, the letters offered to discuss repayment options, which qualify as communication in connection with an attempt to collect a debt. The FDCPA does not require an explicit demand for payment. The mortgagor's letter stated the homeowner could avoid foreclosure and they would discuss foreclosure alternatives if she submitted some financial information. Those statements brought her claim within the scope of the FDCPA. This letter was mortgagor's opening communication in an attempt to collect the homeowner's defaulted home loan. The offer to discuss repayment options was considered debt settlement options and qualified as a communication in connection with an attempt to collect a debt.

A BANKRUPTCY TRUSTEE COULD SEEK TO RECOVER A DEBTOR'S PERSONAL PROPERTY THAT SHE HAD DECLARED EXEMPT IN HER CHAPTER 7 CASE

Schwab v. Reilly, 130 S.Ct. 2652 (2010).

FACTS: Nadejda Reilly filed for Chapter 7 bankruptcy when her catering business failed. Reilly claimed some of her business equipment as exempt and assigned an estimated market value that equaled to $10,718. William G. Schwab, the bankruptcy trustee, did not object to the claimed exemptions because the dollar value assigned to each fell within the limit of § 522 (d) (5) and (6) of the Bankruptcy Code. However, the value of the equipment was appraised to have a market value of up to $17,200. The trustee asked the Bankruptcy Court for permission to auction the equipment so that Reilly would receive the amount she exempted ($10,718), and the estate could distribute the remaining funds to her creditors. Reilly rejected the auction, claiming that by equating the value of her claimed exemptions in equipment with the equipment's estimated market value, she had put the trustee and her creditors on notice about her intentions to exempt the equipment's full value, even if the value turned out to be more than the amount she declared and that the Code allowed. Reilly stated that since the trustee did not object within statutory period provided for in the Federal Rules of Bankruptcy (Rule 4003 b), it forfeited its right to its claim on any portion of the equipment value.

The Code defines the debtor's assigned value on the "property to be claimed as exempt" as the value assigned on the debtor's interest on the property.

The Bankruptcy Court denied the trustee's motion, and the district court denied relief. The Third Circuit Appellate Court held that by equating the value of her exemptions with the equipment's market value, Reilly intended to exempt the equipment's full value. The trustee was required to object, and his failure to object entitled Reilly to exempt the full value of her equipment, even if the value was more than what Reilly declared and the Code allowed.

The trustee claimed that the Code defined "property claimed as exempt" as an interest in the particular asset not to exceed a certain dollar amount, not the asset itself. The value of the exempt property claimed should be considered as the dollar value the debtor assigned on his or her interest in the asset. It was not the value that the debtor assigned on the asset itself.

HOLDING: Reversed and remanded.

REASONING: The trustee had no duty to object to Reilly's valid claimed exemptions. The Code defines the debtor's assigned value on the "property to be claimed as exempt" as the value assigned on the debtor's interest on the property; it is not the value assigned on the asset itself. An interested party does not need to object to an exemption claimed in this manner in order to preserve the estate's ability to recover the value in the asset beyond the debtor's declared exempted amount. The values listed by Reilly for her business equipment were within the Code limits and did not raise a warning flag to the trustee. The trustee had no cause to object. The Court of Appeals' view of the trustee's statutory obligation to object to a dollar value given on the form is inconsistent with the Code. The trustee had no obligation to object to the exemption here in order to preserve the estate's right to retain any value in the equipment.

Sections 522 (d)(5) and (6) of the Code state that claims to exempt such interests are statutorily permissible and unobjectionable if the value of the claimed interest is below a particular dollar amount and falls within the allowed range given by the Code. The trustee is entitled to rely on the value given by the debtor as evidence of the claim's validity. In this case, the property was not objectionable, so the lack of objection did not violate Rule 4003 b of the Code. An interested party must object to a claimed exemption if the amount listed is not within the statutory limits of exemptions. The trustee should be able to compare the value of the claimed exemption with the asset's estimated market value without having to consult separate schedules. The trustee is entitled to evaluate the values the debtor provides based on only three entries given by the debtor: the description of the business equipment in which the debtor claims the exempt interest; the Code provisions regarding claimed exemptions; and the amounts the debtor listed under "value of claimed exemption." The market value estimate given by Reilly helped the trustee in administering the estate because it identified assets that may have values beyond the dollar amount the debtor claimed as exempt.

The trustee is entitled to rely on the value given by the debtor as evidence of the claim's validity.

With regards to the policy of the Code that encourages fresh starts for debtors and discourages trustees and creditors from sleeping on their rights, the Court states that Congress has balanced the difficult choices that exemption limits impose on debtors along with the economic harm it creates for creditors. It is not for the Court to alter the balance by requiring trustees to object to claimed exemptions that fall within the bounds given in the Code.

Title to the asset remains with the estate, and, if an interested party does not timely object to the claimed interest, the debtor will be guaranteed a payment in the dollar amount of the exemption. The debtor should declare the value of her claimed exemption in a clear manner. This will encourage the trustee to object to the exemption if he wishes to challenge it in order to preserve for the estate any value in the asset beyond the statutory limits. If the trustee does not object, or if the objection is overruled, the debtor will be required to either forfeit the portion of the exemption that exceeds the statutory allowance, revise other exemptions or arrange with her creditors to allow the exemption.

ARBITRATION

SUPREME COURT RULES ARBITRATION AGREEMENT CAN REQUIRE ISSUE OF UNCONSCIONABILITY MUST BE DECIDED BY THE ARBITRATOR

Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct. 2772 (2010).

FACTS: Respondent Antonio Jackson filed an employment-discrimination suit against petitioner Rent-A-Center, his former employer, in the United States District Court for the District of Nevada. Rent-A-Center filed a motion under the FAA to dismiss or stay the proceedings, 9 U.S.C. §3, and to compel arbitration based on the Arbitration Agreement Jackson signed as a condition of his employment. Jackson opposed the motion on the grounds that the Agreement was unenforceable in that it was unconscionable under Nevada law.

The District Court granted Rent-A-Center's motion. The Ninth Circuit reversed in relevant part. Certiorari was granted.

HOLDING: Reversed.

REASONING: Under the FAA, where an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, if a party challenges specifically the enforceability of that particular agreement, the district court considers the challenge. But if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator.

Section 2 of the FAA places arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc. v. Cardenga*, 546 U.S. 440 (2006). In the instant case, the Agreement included two relevant arbitration provisions: it provided for arbitration of all disputes arising out of Jackson's employment, including discrimination claims, and it gave the "Arbitrator… exclusive authority to resolve any dispute relating to the [Agreement's] enforceability… including… any claim that all or any part of this Agreement is void or voidable." Rent-A-Center sought enforcement of the second provision, which delegates to the arbitrator the "gateway" question of enforceability. *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-85. A court must enforce the delegation provision under §§3 and 4 unless it is unenforceable under §2.

There are two types of validity challenges under §2: one "challenges specifically the validity of the agreement to arbitrate," and "[t]he other challenges the contract as a whole," *Buckeye*, *supra*, at 444. Only the first is relevant to a court's determination of an arbitration agreement's enforceability, *see, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404, because under §2 "an arbitration provision is severable from the remainder of the contract," *Buckeye*, *supra*, at 445. That does not mean that agreements to arbitrate are unassailable. If a party challenges the validity under §2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with the agreement under §4. That is no less true when the precise agreement to arbitrate is itself part of a larger arbitration agreement. Because here the agreement to arbitrate enforceability (the delegation provision) was severable from the remainder of the Agreement, unless Jackson challenged the delegation provision specifically, it must have been treated as valid under §2 and enforced under §§3 and 4.

The District Court correctly concluded that Jackson challenged only the validity of the contract as a whole. In his brief to this Court he raised a challenge to the delegation provi-