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Fraudulent, Unfair, or Deceptive Conduct**

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Introduction

A "Bankruptcy Petition Preparer" (the "Preparer") is a non-attorney who assists pro se debtors in the preparation of bankruptcy petitions and documents related to filing for bankruptcy.¹ Preparers are regulated under section 110 of title 11 of the United States Code (the "Code").² This section of the Code severely limits the scope of a Preparer's duties.³ Preparers lack the same rigorous legal and ethical training acquired by bankruptcy attorneys; therefore, some Preparers try to take advantage of debtors who are often ignorant of the bankruptcy system.⁴ Section 110 of the Code outlines sanctions to deter Preparers from behaving in an unscrupulous manner.⁵

The legislative purpose of section 110 is to protect consumers from abuses by nonlawyer petition preparers.⁶ This includes protecting debtors from misrepresentation or conduct that is "fraudulent, unfair, or deceptive."⁷ To reprimand Preparers that engage in this conduct, a court can

¹ 11 U.S.C. § 110(a).

² 11 U.S.C. § 110.

³ *In re Jackson*, 2014 WL 5575293 at *9-10 (B.A.P. 9th Cir. 2014).

⁴ *Id.* at *7.

⁵ 11 U.S.C. § 110(j).

⁶ *In re Torres*, 2015 WL 458057 at *12 (Bankr. S.D. Tex. 2015).

⁷ 11 U.S.C. § 110(j).

order injunctive relief, order damages to be paid to the debtor, or enjoin the person from taking on the role of a bankruptcy petition preparer.⁸

Two questions that arise are: (1) What behavior is regarded as fraudulent, unfair, or deceptive conduct, and (2) what sanctions can a court impose beyond those listed in section 110? Part I of this Memorandum discusses the types of behavior by Preparers that constitute misconduct under section 110. Part II discusses the different types of sanctions a court can order to prevent Preparers from taking advantage of their debtor clients.

I. Fraudulent, unfair, or deceptive conduct

Section 110(j) allows the court to sanction a Preparer if that Preparer engaged in "fraudulent, unfair, or deceptive conduct."⁹ This type of misconduct is not explicitly defined in the statute. Courts have defined "unfair or deceptive acts" to include any conduct or omissions that are likely to mislead a reasonable consumer.¹⁰ Such conduct includes the unauthorized practice of law, the use of the word "legal" and similar phrases in advertising, and collecting or receiving payments from debtors.¹¹

A. Unauthorized practice of law

"Unfair or deceptive acts" includes the unauthorized practice of law. A violation of unauthorized practice of law occurs "whether a person engages in activity that is restricted to the purview of a licensed practitioner of law."¹² This includes Preparers who hold themselves out to

⁸ *Id.*

⁹ U.S.C. § 110(j).

¹⁰ See *In re Gaftick*, 333 B.R. 177, 190 (Bankr. E.D. N.Y. 2005) (finding Petitioner's advertisement failed to disclose certain additional fees that could be charged to a debtor client if the client failed to waive the fees).

¹¹ See *In re Skobinsky*, 167 B.R. 45, 49 (E.D. Pa. 1994); see also *In re Rosario*, 493 B.R. 292, 340 (Bankr. D. Mass. 2013).

¹² See *Skobinsky*, 167 B.R. at 50 (Preparer who assisted debtors by discussing the various chapters under which relief could be sought engaged in the unauthorized practice of law).

be attorneys and Preparers who use the designation "esquire."¹³ Another example is when a Preparer appears before the court on behalf of the debtor.¹⁴

Because Preparers do not have legal knowledge, section 110 prevents a Preparer from making inaccurate legal decisions that hurt their debtor clients.¹⁵ However, a Preparer was found not to have engaged in the unauthorized practice of law when she provided a client with a document providing "specific advice about the bankruptcy process."¹⁶ There was no evidence that the Preparer gave her debtor client legal advice directly; therefore, the Preparer did not violate section 110.¹⁷

B. Use of "legal" in advertisements

"Unfair or deceptive acts" includes a Preparer deceiving his or her clients by wrongly claiming that a Preparer is a legal service. Section 110(f) of the Code prohibits non-attorney Preparers from advertising under any category that includes the word "legal," or any other similar terms.¹⁸ This provision is violated by any advertising that suggests that a non-attorney Preparer can provide legal services.¹⁹ Included is the term "paralegal."²⁰ Courts also look to the context of the advertisement to determine if the Preparer is offering legal services; however, the term "lawyer" is not enough to constitute a violation of the statute.²¹

¹³ See *In re Wagner*, 241 B.R. 112, 119 (Bankr. E.D. Pa. 1999).

¹⁴ See *In re De Jesus*, 2012 WL 5457210 at *3 (Bankr. D. P.R. 2012) (holding that Preparer's representation of debtor client before the court through a letter/request is a violation of section 110).

¹⁵ See *In re Dunkle*, 272 B.R. 450, 456 (Bankr. W.D. Pa. 2002) (Preparer "inaccurately selected and classified debtor clients' exemptions," harming the debtor clients' bankruptcy cases).

¹⁶ *In re Leon*, 317 B.R. 131, 133 (Bankr. C.D. Cal. 2004).

¹⁷ *Id.*

¹⁸ 11 U.S.C. § 110(f)(1).

¹⁹ See *In re Rosario*, 493 B.R. at 350 (non-attorney Preparer's use of the suffix "J.D." on his business cards and company's website violated section 110); see also *Finch v. Finch*, 2004 WL 2272152 at *11 (Bankr. M.D. Tenn. 2004) (incorporating the word "legal" in the Preparer company's telephone number violated section 110).

²⁰ See *In re Burdick*, 191 B.R. 529, 535 (Bankr. N.D. N.Y. 1996).

²¹ See *In re Langford*, 2007 WL 3376664 at *9 (M.D. N.C. 2007) (holding that Preparer's use of "lawyer" in an advertisement did not violate section 110 since the advertisement explained that the company did not hire lawyers and, therefore, the advertisement did not promise legal services).

C. *Collecting or receiving payments on behalf of debtor*

Section 110(g) prohibits a Preparer from "collecting" or "receiving" any payment from the debtor or on the debtor's behalf for the filing fee.²² A Preparer's practice of accepting bank checks or money orders from debtors to pay for filing fees violates this section of the Code.²³ Violations of this section includes when Preparers charge additional fees on top of a filing fee.²⁴ An exception exists when a preparer arranges for a messenger to deliver the debtor's filing fee directly to the court.²⁵

II. Penalties and sanctions

Sections 110(j) and 110(l) outline specific penalties and sanctions that a court may order against a Preparer who violates any section in this statute.²⁶ These penalties and sanctions include damages,²⁷ disgorgement of fees,²⁸ and injunctions.²⁹ A court can order any one of these penalties or can choose to submit the Preparer to all three. This decision depends on the severity of the case at hand. A court can also choose to permanently enjoin a Preparer from preparing any future petitions if the Preparer continually engages conduct that violates the Code.³⁰

A. *Damages*

Section 110(i) states that a Preparer "shall" be held liable in certain minimum amounts as actual damages to his or her debtor client.³¹ A debtor is entitled to recover actual damages plus "the greater of \$2000" or "twice the amount paid by the debtor to the bankruptcy petition preparer

²² 11 U.S.C. § 110(g)(1).

²³ Rosario, 493 B.R. at 342.

²⁴ *In re Howard*, 351 B.R. 371, 378 (Bankr. W.D.La. 2005).

²⁵ *In re Reed*, 208 B.R. 695, 696-97 (Bankr. N.D.Cal. 1997) (holding Preparer out to be an agent of the debtor because she did not collect or receive the funds directly.)

²⁶ 11 U.S.C. § 110.

²⁷ *Id.* at § 110(i)

²⁸ *Id.* at § 110(j)

²⁹ *Id.*

³⁰ Dunkle, 272 B.R. at 455.

³¹ See *Wynns v. Adams*, 426 B.R. 457, 466 (E.D.N.Y. 2010).

for the preparer's services."³² By setting a minimum damage amount, Congress' intent was to liquidate uncertain actual damages.³³ This encourages debtor clients who have been misled to bring suit against unscrupulous Preparers.³⁴

A Preparer that participates in "fraudulent, unfair, or deceptive" acts can be held liable for damages to debtor clients, even if the clients did not suffer actual damages from the Preparer's actions.³⁵ A court can also award damages to a debtor client even if the Preparer's unscrupulous behavior was not deemed to be the cause of the damages.³⁶

Although a court can award damages to debtor clients, these damages must not be unreasonable.³⁷ But there are some cases where treble damages were found to be warranted. A fine shall be tripled if a petition preparer "prepared a document for filing in a manner that failed to disclose the identity of the bankruptcy petition preparer."³⁸

B. Disgorgement of fees

Section 110(j) allows for courts to award debtor clients with disgorgement of fees if a Petitioner acts in a fraudulent, unfair, or deceptive manner.³⁹ Courts look to the actions of the Preparer to determine if the disgorgement of fees is necessary.⁴⁰ Courts have held that the

³² 11 U.S.C. § 110(i).

³³ See *Wynns*, 426 B.R. at 466.

³⁴ *Id.*

³⁵ See *In re Evans*, 413 B.R. 315, 329 (Bankr. E.D.Va. 2009).

³⁶ See *In re Atayde*, 637 Fed. Appx. 337, 337 (9th Cir. 2016) (although Preparer violated section 110 and caused dismissal of the debtor client's bankruptcy case, the Preparer's actions did not cause the debtor to lose her house because the debtor was unable to fund a chapter 13 bankruptcy plan due to unemployment).

³⁷ See *Schaffner v. U.S. Trustee*, 485 B.R. 130, 135 (E.D.KY 2012) (doubling monetary sanctions found unreasonable).

³⁸ 11 U.S.C. § 110(1)(2)(D); see *In re Alloway*, 401 B.R. 43, 47 (Bankr. D.Mass. 2009) (Preparer who omitted required information from petitions he prepared, failed to advise clients that he was not an attorney, and failed to disclose the fees that he collected was found to have rightly been subjected to treble damages); see also *In re Oliphant*, 511 B.R. 773, 784 (Bankr. W.D.Va. 2014) (petitioner who failed to disclose his identity as a bankruptcy petition preparer was fined triple the amount imposed for each petition that he filed without disclosure).

³⁹ 11 U.S.C. § 110(j).

⁴⁰ See *Burdick*, 191 B.R. at 538 (petitioner's "actions demonstrated a blatant disregard and lack of respect for the legal system and the bankruptcy process).

disgorgement of fees does not constitute damages and is in no way punitive.⁴¹ Disgorgement compensates a debtor for paying more than the value of the services rendered.⁴² A court has the means to calculate, and therefore determine, that value.⁴³

Like damages, courts have held that the disgorgement of fees was not necessary in some cases. For example, in the case *In re Oliphant*, the court ruled that there should be a limit to the amount of the Preparer's fee to be disgorged.⁴⁴ Even though the Preparer grossly misstated his abilities as a bankruptcy petition preparer to his debtor clients, the courts saw that the Preparer's actions still had some value to his debtor clients.⁴⁵ In another case, *In re Moran*, the court declined to order the disgorgement of Preparer's fees since there was no guidance regarding the appropriate fee to be charged by Preparers in that jurisdiction.⁴⁶

C. *Injunctions*

Section 110(j) outlines how a court can award an injunction if a Preparer engages in fraudulent, unfair, or deceptive actions.⁴⁷ There are two types of injunction available: temporary and permanent injunctions.⁴⁸ There is no geographic limit on an injunction under section 110.⁴⁹ Courts have found that a nationwide preliminary injunction order is not an abuse of discretion under section 110(j)(2).⁵⁰ Courts have noted that Congress did not impose geographic limitations when writing this section of the code.⁵¹

⁴¹ See *In re Sustaita*, 438 B.R. 198, 20 (B.A.P. 9th Cir. 2010) (Preparer who was permanently enjoined from acting as a bankruptcy petition preparer still filed petitions on behalf of debtors; therefore, disgorgement of Preparer's fees was warranted).

⁴² *Id.* at 213.

⁴³ *Id.*

⁴⁴ 511 B.R. at 782.

⁴⁵ *Id.*

⁴⁶ 256 B.R. 842, 851 (Bankr. D.N.H. 2000).

⁴⁷ 11 U.S.C. § 110(j).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at § 110(j)(2); see *Bartok v. DeAngelis*, 2012 WL 664928 at *8 (D.N.J. 2012).

⁵¹ *Id.*

Preparers can be temporarily enjoined from acting as a bankruptcy petition preparer until they request a hearing and demonstrate to the court that they should be relieved of their injunction.⁵² There are some cases where Preparers can be temporarily enjoined from working as a bankruptcy petition preparer, as well as permanently enjoined from participating in other court-related activities.⁵³

Courts can also permanently enjoin Preparers from acting in a specific jurisdiction.⁵⁴ Preparers can also be enjoined from having others act in concert with them – even if that person works for a fee.⁵⁵ Preparers who have been permanently enjoined may also be required to provide the court with a list of current clients in order to provide a refund to every one of those parties.⁵⁶

Conclusion

Under section 110, debtors may be afforded relief for a bankruptcy petition preparer's fraudulent, unfair, or deceptive conduct.⁵⁷ There is a wide variety of relief available, including damages, disgorging of fees, and injunctive relief. This affords debtor clients the opportunity to protect themselves. This is a major reason behind why Congress added section 110 into the bankruptcy code.⁵⁸ Therefore, section 110 plays an important role in the bankruptcy code by protecting people who are already in a rather stressful position by protecting them from being taken advantage of by bankruptcy petition preparers.

⁵² See *In re Cash*, 2013 WL 1191745 at *9 (Bankr. N.D. Tex. 2013).

⁵³ See *In re Boettcher*, 262 B.R. 94, 97 (Bankr. N.D. Cal. 2001) (petitioner was temporarily enjoined from her position as a bankruptcy petition preparer, and permanently enjoined from obtaining, selecting, or recommending any form of pleading on behalf of the debtor from any source).

⁵⁴ See *In re Bonarrigo*, 282 B.R. 101, 107 (D. Mass. 2002) (Preparer was permanently enjoined from acting as a bankruptcy petition preparer due to a violation of section 110).

⁵⁵ See *Alloway*, 401 B.R. at 48.

⁵⁶ See *Wagner*, 241 B.R. at 123.

⁵⁷ 11 U.S.C. § 110.

⁵⁸ *Torres*, 2015 WL 458057 at *12.