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CURRENT ISSUES RELATING TO THE USE OF SECTION 105: OF STAYS AND CONTEMPT POWERS OF THE BANKRUPTCY COURT

Presented by

Honorable Margaret A. Mahoney
Chief United States Bankruptcy Judge
United States Bankruptcy Court for the
Southern District of Alabama
201 St. Louis Street
Mobile, Alabama 36602
Telephone: 251-441-5628

Grand Hyatt Atlanta Hotel
Atlanta, Georgia

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CURRENT ISSUES RELATING TO THE USE OF SECTION 105: OF STAYS AND CONTEMPT POWERS OF THE BANKRUPTCY COURT

Few legal concepts have bedeviled courts, judges, lawyers and legal commentators more than contempt of court.[1]

This paper discusses recent case law in regard to section 105 of the Bankruptcy Code.

Section 105(a) states:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

There have been a variety of issues raised about this favorite power of bankruptcy judges. Some of the cases seem to limit the powers of the courts to use section 105; others seem to expand the powers. As the title to this paper suggests, the main issues raised have been in the stay and contempt arenas.

There will be three parts to this paper. Part I will discuss the injunctive powers of the bankruptcy court and supplemental stays. Part II will discuss the similarities and differences between sections 362 and 105 of the Bankruptcy Code. Part III will discuss the bankruptcy courts' contempt powers.

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[1]JudgeWilliam F. Chinnock, as quoted in footnote 1 of *The Law of Contempt of Court*, 34 U. Tol. L. Rev. 309 (Winter 2003).

PART I.

Injunctions and Stays

Injunctions have been issued under the authority of section 105 since the institution of the Bankruptcy Code.[2] There is a need for injunctive power in bankruptcy cases even though the automatic stay enjoins most actions against the debtor. What is the need? To enjoin actions against the debtor that are not stayed and/or to enjoin actions against third parties. The need for such an injunction may arise in many contexts.

Actions against third parties have been stayed if the actions would affect the debtor or property of the estate.[3] For instance, the classic situation is a suit against the principal of the debtor who has guaranteed the debt of the debtor. Courts enjoin such suits because they distract the principal from the reorganization effort[4] and/or deplete funds of the principal that might be

[2]Missouri v. U.S. Bankruptcy Court for the Eastern District of Arkansas, 647 F.2d 768 (8th Cir. 1981); NLRB v. Brada Miller Freight System, Inc. (*In re* Brada Miller Freight System, Inc.), 16 B.R. 1002 (N.D. Ala. 1981); Carter v. Van Buskirk (*In re* Carter), 16 B.R. 481 (W.D. Mo. 1981); First Fed. Sav. & Loan Ass'n of Little Rock, 12 B.R. 147 (E.D. Ark. 1981); Taylor v. Widdowson (*In re* Taylor), 16 B.R. 322 (Bankr. D.Md. 1981); Bray v. Holley (*In re* Bray), 12 B.R. 359 (Bankr. M.D.Ala. 1981); Schatzman v. Dep't. of Health and Rehab. Servs. of the State of Florida, 4 B.R. 704 (Bankr. S.D.Fla. 1980).

[3]IRS v. Kaplan (*In re* Kaplan), 104 F.3d 589, 595 (3rd Cir. 1997); Monarch Life Ins. C. v. Ropes & Gray, 65 F.3d 973 (1st Cir. 1995); *In re* Nat'l Century Fin. Enterprises, Inc., 298 B.R. 133 (Bankr. S.D. Ohio 2003).

[4]The Chase Manhattan Bank (Nat'l Assn.) v. Third Eighty-Ninth Assocs., 138 B.R. 144 (S.D.N.Y. 1992); Lazarus Burman Assoc., et al., v. Nat'l Westminster Bank USA, 161 B.R. 891 (Bankr. E.D.N.Y. 1993).

used in confirmation of a plan.[5] They also may result in court decisions that have a preclusive effect on legal issues important to the bankruptcy case.[6]

Parties have used section 105 as the basis for requested stays in a variety of situations recently. Some attempts were successful; others were not.

In the recent corporate scandal cases where officers and directors of debtors have allegedly committed illegal acts that caused the debtors' bankruptcies, the section 105 injunction has been used to stay use of insurance funds. Principals of the debtor desire use of funds from debtor owned director and officer insurance policies (D&O insurance) available to the debtor and/or the directors and officers. If the directors or officers are able to use the insurance funds for their criminal defense, the debtor and its creditors will not be able to collect the funds for any improprieties of the directors and officers.[7]

A North Carolina debtor sought to enjoin a Nevada district attorney and a Nevada casino from extraditing him and prosecuting him for gambling debts.[8] The Nevada authorities and casino never participated in the bankruptcy. They relied on the fact that the criminal proceedings were exempt from the automatic stay.[9] The Bankruptcy Court found that the criminal

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[5] *In re* United Health Care Organization, 210 B.R. 228 (S.D.N.Y. 1997); Archambault v. Hershman (*In re* Archambault), 174 B.R. 923 (Bankr. W.D. Mich. 1994).

[6] *In the* Matter of Eagle Enterprises, Inc., 265 B.R. 671 (E.D.Pa. 2001).

[7] *In re* Adelphia Communications Corp., 2003 WL 22945634 (Bankr. S.D.N.Y. 2003); *In re* Mirant Corp., 299 B.R. 152 (Bankr. N.D. Tex. 2003).

[8] *In re* Simonini, 282 B.R. 604 (Bankr. W.D.N.C. 2002), *rev'd*, 2003 WL 21500197 (4th Cir. 2003); *see also* Elizabeth Warren & Jay Westbrook, *Go Directly to Jail; Do Not Collect $200*, A.B.I. J. 44 (December/January 2004).

[9] 11 U.S.C. § 362(b)(1).

prosecution was not subject to the automatic stay, but "a 105 injunction is necessary to preserve federal intent because the criminal prosecution in the instant matter is obviously a debt collection action."[10] The Nevada authorities' actions frustrate federal purpose because the result of the Nevada prosecution is the collection of the casino's presumably dischargeable debt. The Fourth Circuit, however, vacated the decision.[11] The Court held that

> an injunction barring a Nevada state criminal proceeding is not necessary or appropriate to carry out the provisions of the Bankruptcy Code or to prevent an abuse of the process. In fact, allowing an injunction of a state criminal proceeding would achieve ends contrary to § 362(b) and would disregard the clear language and meaning of other bankruptcy rules.[12]

A bankruptcy court in Georgia used section 105 to reduce a debtor's student loan debt and extend repayment terms even though the court found the debtor did not meet the requirements of section 523(a)(8) to have the student loan discharged as an undue hardship. The Eleventh Circuit reversed the decision holding that

> to allow the bankruptcy court, through principles of equity, to grant any more or less than what the clear language of § 523(a)(8) mandates would be "tantamount to judicial legislation and is something that should be left to Congress, not the courts." In re Mallinckrodt, 260 B.R. 892, 904 (Bankr. S.D. Fla. 2001), rev'd, 274 B.R. 560 (S.D. Fla. 2002).[13]

In another case[14], the court entered an order pursuant to its equity power under section 105, requiring all creditors to file claims in the debtor's chapter 11 case. This is contrary to what

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[10]*Simonini*, 284 B.R. at p.610.

[11]*In re* Simonini, 2003 WL 21500197 (4th Cir. 2003).

[12]*Id.* at **2.

[13]Hemar Insurance Corp. of America v. Cox (*In re* Cox), 338 F.3d 1238 (11th Cir. 2003).

[14]*In re* ATD Corp., 2003 WL 22962067 (6th Cir. 2003).

would be the law without the order. The debtor had not scheduled the claims as disputed, contingent or unliquidated. Therefore, the ATD creditors did not need to file a proof of claim in order to be paid. The Sixth Circuit held that the notice given to creditors of the need to file a proof of claim was deficient, so creditors did not have to file a claim to be paid. However, the Sixth Circuit appeared to dislike the "tactic." It held that the one case that had upheld the practice[15] had relied on pre-Code authority. Again, a circuit court appeared concerned about a bankruptcy court establishing requirements contrary to the Code.

A very important use of section 105 has been in allowance of nondebtor releases and/or permanent injunctions in plans of reorganization.[16] The majority view is that section 105 can be used to provide for such releases and injunctions. This is the position of the Second, Third, Fourth, Sixth and Seventh Circuits.[17] The courts look at the following factors:

1. The identity of interests between debtor and third party, such as an indemnity relationship, are such that a suit against the third party is in essence a suit against the debtor or will deplete the assets of the estate;

2. The non-debtor has contributed substantial assets to the reorganization;

3. The injunction is essential to reorganization to permit the debtor to be free from indirect suits that would cause indemnitor contribution claims against the debtor;

4. The impacted creditors overwhelmingly voted to accept the plan;

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[15]*In re* McLean Enterprises, Inc., 98 B.R. 485 (Bankr. W.D. Mo. 1989).

[16]Deborah A.Crabbe, *Are Non-Debtor Releases/Permanent Injunctions Authorized Under the Bankruptcy Code?*, XXII, No. 4 A.B.I. J. 34 (May 2003).

[17]*Id.; In* re Dow Corning Corp., 280 F. 3d 648 (6th Cir. 2002); *In re* Continental Airlines, 203 F. 3d 203 (3rd Cir. 2000); *In re* Specialty Equipment Co. Inc., 3 F. 3d 1043 (7th Cir. 1993); *In re* Drexel Burnham Lambert Group Inc., 960 F. 2d 285 (2nd Cir. 1992); *In re* A.H. Robins Co. Inc., 880 F. 2d 694 (4th Cir. 1989).

5. The plan provides a method to pay creditors affected by the injunction;

6. The plan provides payment in full to those creditors who choose not to settle; and

7. The bankruptcy court's records support the injunction or release.[18]

The minority view holds section 105 cannot authorize relief inconsistent with the Code and therefore rejects injunctions and releases. This is the view of the Fifth, Ninth and Tenth Circuits.[19]

On a procedural note, the cases also disagree about what proof is required to obtain a section 105 injunction. In at least one case, a party argued that the high standard of proof required for the All Writs Act should be shown to allow injunctive relief.[20] This standard of proof requires that (1) the movant has not other adequate means to attain relief; (2) the movant would be damaged or prejudiced in a way that could not be corrected on appeal; (3) a prior order of the court is clearly erroneous as a matter of law; (4) the order shows a pattern of disregard for the federal rules; and (5) the order raises new and important issues. The Mirant court found that these standards applied only to enjoining implementation of court orders.[21] Some courts apply the

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[18]Crabbe, supra note 16.

[19]*In re* Lowenschuss, 67 F. 3d 1394 (9th Cir. 1995); In re Zale Corp., 62 F. 3d 746 (5th Cir. 1995); *In re* Western Real Estate Fund Inc., 922 F. 2d 592 (10th Cir. 1990). However the Ninth Circuit Bankruptcy Appellate Panel has allowed a collection injunction in a chapter 11 plan under the authority of section 105. Computer Taks Group, Inc. v. Brotby (*In re* Brotby), 2003 WL 23021926, *10 (9th Cir. B.A.P. 2003).

[20]*In re* Mirant Corp., 299 B.R. 152, 163-64, footnote 22 (Bankr. N.D. Tex. 2003) (rejecting the standard).

[21]*Id.*

normal requirements of Fed. R. Bankr. P. 7065 and Fed. R. Civ. P. 65.[22] This test requires proof that (1) the relief is necessary to prevent irreparable harm to the plaintiff; (2) the plaintiff is likely to prevail on the merits; (3) the potential harm to the plaintiff outweighs the harm relief may cause the defendant (the balancing of the harms test); and (4) relief is consistent with public policy.[23] Still other courts require a less stringent showing for a preliminary injunction in bankruptcy cases.[24] This standard reflects the unique nature of bankruptcy proceedings.

> Because the "basic purpose of [§ 105(a)] is to enable the court to do whatever necessary to aid its jurisdiction, *i.e.*, anything arising in or relating to a bankruptcy case." In re Neuman, 71 B.R. at 571 (quoting 2 Collier on Bankruptcy ¶105.02 at 105-3 (15th ed. Supp. 1986)), the Second Circuit, courts in this District, and courts in other circuits have "construed [§ 105] liberally to enjoin suits that might impede the reorganization process," Johns-Mansville, 837 F.2d at 93, and embraced the use of § 105 without proof of all four factors normally required for injunctions, such as inadequate remedy of law or irreparable harm.[25]

This standard is obviously used most in chapter 11 cases.

PART II

Similarities and Differences between sections 362 and 105

Both sections 105 and 362 of the Bankruptcy Code are used to obtain relief when a creditor violates the automatic stay. This paper catalogues seven differences between the

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[22] *Id.*

[23] *Id.* at 299 B.R. 164.

[24] Adelphia Communications Corp. v. Associated Electric & Gas Insurance Services, Ltd (*In re* Adelphia Communications Corp.), 2003 WL 22945634 (Bankr. S.D.N.Y. 2003).

[25] *Id.* at p.*8 (quoting U.S. District Court remand instructions).

sections. Both sections deal with injunctive powers of the bankruptcy courts and how and when those powers can be used.

1. Procedure for Implementation of the Stay. Section 362 requires no direct action by the courts other than acceptance of the petition for filing. The stay is "automatic" and imposed immediately upon the act of the filing of the petition.[26] An injunction requires the commencement of an adversary proceeding.[27] An adversary proceeding is subject to all of the requirements of Part VII of the Federal Rules of Bankruptcy Procedure.

2. Proper Defendants. There is a split of opinion as to who can be the subject of a section 362(h) violation of the stay action. The section states "An **individual** injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." The circuits disagree about who is an individual. Two circuits, the Third and the Fourth, hold that an "individual" includes a corporation.[28] Five circuits, the First, Second, Eighth, Ninth and Eleventh, hold that it does not.[29]

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[26]Section 362(a) provides: "[A] petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities."

[27]Fed.R.Bankr. P. 7001 provides: "An adversary proceeding is governed by the rules of this Part VII [of the rules]. The following are adversary proceedings:

. . . . .

> (7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter12, or chapter 13 plan provides for the relief."

[28]*In re* Atlantic Bus. and Cmty. Corp., 901 F.2d 325, 328-29 (3rd. Cir. 1990); Budget Serv. Co. v. Better Homes of Va., Inc., 804 F.2d 289, 292 (4th Cir. 1986).

[29]*In re* Spookyworld, Inc., 346 F.3d 1 (1st Cir. 2003); *In re* Just Brakes Corp. Sys., 198 F.3d 881, 884-85 (8th Cir. 1997); *In re* Jove Eng'g, Inc., 92 F.3d 1539, 1549-53 (11th Cir. 1996);

3. Standard of Proof. For section 362(h) violations, the standard of proof required of the movant is a preponderance of the evidence.[30] For contempt citations under section 105, the standard of proof is clear and convincing evidence.[31]

4. Burden of Proof. For contempt, a party must prove that (1) the alleged contemnor was aware of the automatic stay or other requirement imposed upon it and (2) the alleged contemnor acted intentionally in violation of the stay or requirement.[32] For section 362 purposes, a party must prove that the stay violator acted "willfully".[33] A willful violation of the stay does not require a specific intent to violate the automatic stay. The creditor must simply know there is a stay and act intentionally.[34]

As to contempt found under a court's inherent contempt authority, the standard is higher yet.

> [For civil contempt purposes,] "willful misconduct" carries a different meaning than the meaning employed in the context of determining whether an individual is entitled to damages under § 362(h) or a contempt judgment under § 105(a) for an automatic stay violation. With regard to the inherent sanction authority, bad faith or willful misconduct consists of something more egregious than mere negligence

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Goodman v. Knight, 991 F.2d 613, 618-20 (9th Cir. 1993); *In re* Chateaugay Corp., 920 F.2d 183, 184-87 (2nd Cir. 1990).

[30]*In re* Sharon, 200 B.R. 181, 199-200 (Bankr. S.D.Ohio 1996), *affirmed, In re* Sharon, 234 B.R. 676 (6th Cir. B.A.P. 1999).

[31]Knupfer v. Lindblade (*In re* Dyer), 322 F.3d 1178, 1190-91 (9th Cir. 2003); Renwick v. Bennett (*In re* Bennett), 298 F.3d 1059 (9th Cir. 2002); *In re* Ware, 2003 WL 1960454, *4 (Bankr. M.D.N.C. 2003).

[32]*In re* Sharon, supra note 30; *In re* Dyer, supra note 31.

[33]In re Soto, 2003 WL 23002552 (Bankr. D.N.H. 2003); Flynn v. IRS (In re Flynn), 169 B.R. 1007 (Bankr. S.D.Ga. 1994).

[34]Eskanos & Adler v. Roman (*In re* Roman), 283 B.R. 1, 7-8 (9th Cir. B.A.P. 2002).

or recklessness. . . . although "specific intent to violate the automatic stay" may not be required in the contempt context, ...such specific intent or other conduct in "bad faith or conduct tantamount to bad faith," . . . . is necessary to impose sanctions under the bankruptcy court's inherent power."[35]

5. Permissive vs. Mandatory. Section 362(h) states that actual damages "shall" be awarded to the debtor if a party violates the stay.[36] Some courts have taken this requirement very literally and assessed damages, even if very minimal.[37] Damages under section 105 are permissive.[38] Courts have not always assessed damages if the violation of the stay is de minimis.[39]

6. Damages. Punitive damages may be awarded to individual, in appropriate circumstances, under section 362(h). This is due to the actual grant of authority in the statute.[40] Civil contempt does not contemplate the granting of punitive sanctions.[41] As discussed below, most courts conclude that the bankruptcy courts do not have criminal contempt power and, therefore, outside of the authority of section 362(h), cannot award punitive damages.

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[35]Knupfer v. Lindblade (*In re* Dyer), 322 F.3d 1178, 1196 (9th Cir. 2003) (citations omitted).

[36]*Id.* at 283 B.R. 7.

[37]Stinson v. Bi-Rite Restaurant Supply Inc. (*In re* Stinson), 295 B.R. 109 (9th Cir. B.A.P. 2003); Walsh v. Beard (*In re* Walsh), 219 B.R. 873 (9th Cir. B.A.P. 1998); *In re* Carrigan, 109 B.R. 167 (Bankr. W.D.N.C. 1989).

[38]*Id.* at 283 B.R. 14, footnote 11.

[39]*In re* Martinez, 281 B.R. 883 (Bankr. W.D.Tex. 2002); Siskin v. Complete Aircraft Services, Inc. (In re Siskin), 231 B.R. 514 (Bankr. E.D.N.C. 1999).

[40]*Id.*

[41]*In re* Riser, 298 B.R. 469 (Bankr. M.D.Fla. 2003) (citing Hardy v. U.S. (*In re* Hardy), 97 F.3d 1384, 1390 (11th Cir. 1996)).

7. Private right of action. Section 362(h) gives a party who can utilize the provision a private right of action. A debtor can bring a motion against an alleged stay violator and seek actual and punitive damages based directly upon the words of the statute. Section 105 also gives parties a private right of action for contempt and abuse of process due to the actual words of that statute. ("No provision of this title . . . shall be construed to preclude the court from . . . . taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.")

But what if a party violates a section of the Bankruptcy Code that contains no provision for damages such as section 524, the discharge injunction, or section 502, the claim filing and allowance provision? Some courts conclude that section 105 provides a private right of action to individuals who have been wronged by violations of these types of Code provisions.[42] Sections 524 and 502 are enforceable through section 105. Other courts have concluded that there is not a private right of action under section 105 for violations of 524 or 502.[43] When section 362 was amended to include a private right of action in section 362(h), section 524 and other sections were not amended to include language similar to that in section 362(h). Therefore, these courts hold that the only remedy for a violation of section 524 or 502 is an individual contempt action in the case in which the violation occurred.

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[42]Bessette v. Avco Financial Services, Inc., 279 B.R. 442 (D.R.I. 2002); Barrett v. Avco Financial Servs. Mgmt. Co., 292 B.R. 1 (D. Mass. 2003) (class of Massachusetts debtors only).

[43]Kerney v. Capital One Financial Corp. (*In re* Sims), 278 B.R. 457 (Bankr. E.D.Tenn. 2002); Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th Cir. 2002); Pertuso v. Ford Motor Credit Co., 233 F.3d 417,425 (6th Cir. 2000); Holloway v. Household Automotive Finance Corp., 227 B.R. 501 (N.D. Ill. 1998).

PART III

Contempt Powers

There are two kinds of contempt powers--civil and criminal. The differences arise from the purpose of the action.

Civil contempt is "a refusal to do an act the court has ordered for the benefit of a party: the sanction or sentence is remedial."[44] One purpose of a civil contempt order is to coerce a party to do an act or to refrain from doing an act.[45] Another purpose of a civil contempt order is to compensate a party harmed by a contemnor's contempt.[46] A contemnor can always purge herself of civil contempt by compliance with the court's order.

Criminal contempt is "a completed act of disobedience: the sentence is punitive, to vindicate the authority of the court."[47] Criminal contempt proceedings are between the court and the contemnor whereas civil contempt proceedings are between two parties and are part of the original case with which they are associated.[48]

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[44]Belinda K.Orem, *The Impenitent Contemnor: The Power of the Bankruptcy Courts to Imprison*, 25 Cal. Bankr. J. 222, 239 (2000).

[45]*E.g.*, *In re* BKS Properties, Inc. v. Shumate, 271 B.R. 794 (N.D.Tex. 2002) (ordering Shumate to refrain from filing litigation involving the administration of the bankruptcy estate in any district except the Western District of Texas); SEC v. Bilzerian, 131 F.Supp.2d 10 (D.C. 2001) (requiring disgorgement of funds); Lawrence v. Chapter 7 Trustee (In re Lawrence), 251 B.R. 630 (S.D.Fla. 2000) (same); *In re* Williams, 213 B.R. 189 (Bankr. M.D.Ga. 1997) (same).

[46]Crystal Palace Gambling Hall v. Mark Twain Industries, Inc. (*In re* Crystal Palace Gambling Hall), 817 F.2d 1361 (9th Cir. 1987); *In re* Reno, 299 B.R. 823 (Bankr. N.D.Tex. 2003).

[47]Orem, supra note 44, at 239.

[48]Roe v. Operation Rescue, 919 F.2d 857 (3rd Cir. 1990).

All of the circuits that have considered the issue have found that bankruptcy courts have civil contempt powers pursuant to section 105.[49] The Circuit Courts are split as to whether bankruptcy courts have criminal contempt powers. The Eighth Circuit has held that bankruptcy judges do have criminal contempt power.[50] The Fifth Circuit has held that bankruptcy courts may not have criminal contempt powers.[51] The Eighth Circuit held that judges had to have such authority to vindicate the court's authority. Such power was a necessary and appropriate adjunct to the authority to enter orders in the first place. The Fifth Circuit felt that due to uncertainty about bankruptcy courts jurisdiction to hear criminal matters, it was best to have criminal contempt matters not committed in the judge's presence certified to the district court.

The issue as to bankruptcy court's statutory criminal contempt powers stems from the Marathon decision questioning bankruptcy court jurisdiction.[52] After that decision, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 to deal with the issues the case raised. The new law at section 105(a) authorized bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [title 11]." This is the provision that courts assert give them criminal and civil contempt power. Fed.Bankr.

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[49]Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. (*In re* Terrebonne Fuel & Lube, Inc.), 108 F.3d 609,612-13 (5th Cir. 1997); Hardy v. U.S. (*In re* Hardy), 97 F.3d 1384, 1389 (11th Cir. 1996); Caldwell v. Unified Capital Corp. (*In re* Rainbow Magazine, Inc.), 77 F.3d 278, 284 (9th Cir. 1996); Brown v. Ramsey (*In re* Ragar), 3 F.3d 1174, 1180 (8th Cir. 1993); Eck v. Dodge (*In re* Power Recovery Sys., Inc.), 950 F.2d 798, 802 (1st Cir. 1991); Mountain Am. Credit Union v. Skinner (*In re* Skinner, 917 F.2d 444, 447 (10th Cir. 1990); Burd v. Walters (*In re* Walters, 868 F.2d 665, 669-70 (4th Cir. 1989).

[50]*In re* Ragar, 3 F.3d 1174 (8th Cir. 1993).

[51]Griffith v. Oles (*In re* Hipp, Inc.), 895 F.2d 1503,1510 (5th Cir. 1990).

[52]Northern Pipeline Constr. Co. v. Marathon Oil Pipe Line Co., 458 U.S. 50 (1982).

P. 9020 sets forth a procedure for bankruptcy judges to use in hearing contempt matters. However, the Advisory Committee Note to the Rule indicates that "the bankruptcy judges may not have the power to punish contempt."[53]

Courts also have inherent, as opposed to statutory, powers of contempt. The U.S. Supreme Court has recognized this power.[54] The Supreme Court stated:

> [C]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum; in their presence, and submission to their lawful mandates. . . .[Such powers are] governed not by rule or statute but by the control necessarily vested in courts to manage their won affairs so as to achieve the orderly and expeditious disposition of cases.[55]

All of the circuit courts that have considered the issue have found that bankruptcy courts have inherent contempt power.[56]

CONCLUSION

Section 105 of the Bankruptcy Code has been and will continue to be used for varied purposes. Depending upon the circuit at issue, practitioners may be more or less constrained in their ability to achieve certain results in plans and cases based upon the circuit's view of the strength of the section 105 powers.

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[53]Fed.R.Banrk.P. 9020 advisory committee's note, 2001 Amendment (West 2003).

[54]Chambers v. NASCO, Inc., 501 U.S. 32 (1990).

[55]*Id.* at 501 U.S. 43.

[56]Plastrias v. Idell (*In re* Sequoia Auto Brokers, Ltd.), 827 F.2d 1281 (9th Cir. 1987) (holding bankruptcy courts had no inherent authority to sanction); Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 284 (9th Cir. 1996) (reconsidering Sequoia case and finding inherent contempt authority); Jones v. Bank of Santa Fe (*In re* Courtesy Inns, Ltd.), 40 F. 3d 1084,1089 (10th Cir. 1994).