CONTEMPT POWERS IN BANKRUPTCY: CAN THE JUDGE REALLY DO THAT?

> [During a trial in which Mae West was accused of indecency on stage]
>
> Judge: Miss West, are you trying to show contempt for this court?
>
> Mae West: On the contrary, your honor, I was doin' my best to conceal it.
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> * * * * *
>
> [W]hile it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory.
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> * * * * *
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> If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.

Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911).

Sanctioning and contempt powers are important to courts. They allow for efficient, just adjudication of debtors' cases. Generally, "contempt of court is the disregard of judicial authority." *Alternative Debt Portfolios, LP v. E-Z Pay Servs. (In re EZ Pay Servs., Inc.)*, 390 B.R. 445, 455 (Bankr. M.D. Fla. 2008) (citing *Popular Bank of Florida v. Banco Popular de Puerto Rico*, 180 F.R.D. 461, 465 (S.D. Fla. 1998). This article will explore what powers the bankruptcy courts have and when the various powers may be used.

I. Contempt

Courts' views of contempt powers of bankruptcy judges have ebbed and flowed over the years. At times, the powers have been interpreted as very broad. At other times, the powers have been viewed as more limited. It is important to know where in the history of contempt powers the case cited fits.

A. History

Under the Bankruptcy Act of 1898, "courts of bankruptcy" were able to "enforce obedience by bankrupts, officers, and other persons to all lawful orders by fine or imprisonment" and to "punish persons for contempts committed before referees." Act of July 1, 1898, ch. 541 at §1(7). Courts of bankruptcy were the district courts, so referees were required to certify the facts surrounding any contempt to the appropriate district court for entry of an enforceable order. *See* Barbara Gilmore, CONTEMPT AND SANCTION POWERS OF THE BANKRUPTCY COURT, 18 J. Bankr. L. & Prac. 6, Art. 1 595 (November 2009).

In 1978, the Bankruptcy Reform Act was enacted. The act intended to grant bankruptcy courts broader jurisdiction and power, since bankruptcy judges were to be Article III judges and could act accordingly. That jurisdiction included the ability to handle all civil and criminal contempt issues raised in bankruptcy cases under 28 U.S.C. § 1481, titled "powers of bankruptcy court." These powers were in addition to any other powers granted under 11 U.S.C. § 105. *Griffith v. Oles (Matter of Hipp)*, 895 F.2d 1503, 1516 (5th Cir.1990). In 1982, the U.S. Supreme Court decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) was issued. That decision, which held that the broad grant of powers and jurisdiction to bankruptcy courts was unconstitutional, cast doubt on many activities of bankruptcy judges, including their contempt power. Section 1481 of title 28 of the United States Code was repealed in the 1984 amendments to the Bankruptcy Code in response to the *Marathon* decision. Therefore, the broad grant of powers of equity, law, and admiralty courts was gone and the more limited jurisdiction under 28 U.S.C. §§ 157 and 1334 was the operative view.

The rules of bankruptcy procedure also changed over time. In 1973 the Bankruptcy Rules and Official Forms were first enacted. Rule 920 "permitted bankruptcy referees to summarily punish acts of contempt committed in their presence, the so-called 'direct contempt'." Barbara Gilmore, CONTEMPT AND SANCTION POWERS OF THE BANKRUPTCY COURT, 18 J. Bankr. L. & Prac. 6, Art. 1 595 (November 2009). "Misbehavior . . . [committed in the presence of the referee] may be punished summarily by the referee." *Id.* This type of contempt could be punished at the time of occurrence. It included actions in court as well as pleadings filed. Any other contempt required notice and a hearing. However, the matter did not need to be certified to the district court. The rule allowed a referee to impose limited criminal contempt sanctions. Fines of up to $250 could be levied. Any greater fine or incarceration required a district court order. Interestingly, Justice Douglas of the Supreme Court dissented from Congressional approval of the Rule. "[H]e believed that giving such power 'to administrative arms of the bankruptcy court is not consistent with the close confinement of the contempt power.'" *Id.* at 2 (quoting Order, Bankruptcy Rules and Official Forms, 411 U.S. 989, 994 (1973)).

Rule 9020, effective in 1980, gave a detailed description of how courts were to handle contempt proceedings. Contempt committed in the presence of the bankruptcy judge could be handled summarily. "Other contempt" required notice and a hearing. In 2001, the rule was

amended to simply state: "Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party in interest." The change was made because "the rule may have been unnecessarily restrictive in view of judicial decisions recognizing that bankruptcy judges have the power to hold parties in civil contempt." 2001 Advisory Committee Note to Rule 9020. Therefore, the rule now makes the decisions of the circuit courts and the U.S. Supreme Court clearly the governing authority, without a possibly conflicting rule.

Since *Marathon* and the repeal of section 1481, the bankruptcy courts are now wrestling with the decisions in *Stern v. Marshall*, __U.S.__, 131 S.Ct. 2594 (2011), *Executive Benefits Ins. Agency v. Arkison*, __ U.S. __, 134 S.Ct. 2165 (2014), and *Law v. Siegel*, __U.S.__, 134 S.Ct. 1188 (2014). With these cases, the bankruptcy court's contempt powers have been further clouded.

II. Civil v. Criminal Contempt

As stated in other sections of this paper, bankruptcy courts have at least some civil contempt powers, either inherently or statutorily. If they have any criminal contempt powers, the powers are probably more limited. It will be important to understand the difference between the two types of contempt when discussing bankruptcy courts' powers.

A. What is the difference between civil and criminal contempt?

It is not always easy to determine whether a contempt citation is civil or criminal in nature. The difference lies in the purpose of the proposed sanction. *In re Jove Eng'g, Inc.*, 92 F.3d 1539, 1557-58 (11th Cir. 1996). Civil contempt sanctions are to "(1) compensate the complainant for losses and expenses it incurred because of the contemptuous act; and (2) coerce the contemnor into complying with the court order." *Id.* at 1557. Criminal contempt sanctions are "punitive in nature and are imposed to vindicate the authority of the court." *Souther v. Tate (In re Tate)*, 2014 WL 1330567, *10 (Bankr. S.D. Ga. 2014) (quoting *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC,* 478 U.S. 421, 432 (1986)).

> The test to determine whether a sanction for contempt is coercive and not punitive has been said to be "(1) whether the award directly serves the complainant rather than the public interest; and (2) whether the contemnor may control the extent of the award."

Id. (quoting *In re Hardy*, 97 F.3d 1384, 1390 (11th Cir. 1996)).

B. What is the difference in bankruptcy courts' powers for each?

Bankruptcy judges have at least some civil contempt powers they can use without recourse to reporting and recommending action be taken by the district court. Criminal contempt, in most cases (some would say all) must be imposed by an order from a district court.

Civil contempt has been held to be a "core" proceeding under the Bankruptcy Code. It is core because it is a "matter . . . [ ] concerning the administration of the estate," 28 U.S.C. § 157 (b)(2)(A), or a "proceeding . . . [ ] affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship," 28 U.S.C. § 157(b)(2)(O). Also under the language of 28 U.S.C. § 157(b)(1), civil contempt "arises under" the bankruptcy laws and "arises in" a bankruptcy case. Whether under a Bankruptcy Code section, a statute, or inherent power, civil contempt is all about dealing with issues involved directly in the case. This is in contrast to contempt that covers more than one case. *In re Sheridan*, 362 F.3d 96 (1st Cir. 2004), held that an omnibus proceeding to sanction an attorney by suspending him from practice in the bankruptcy court of the district was NOT a "core proceeding."

> [T]he omnibus disciplinary proceeding initiated against Sheridan is essentially different, in that the ethical violations in which Sheridan allegedly engaged, for the most part, occurred during the course of numerous bankruptcy cases previously closed, rather than in a pending bankruptcy proceeding, thus cannot be said to have involved the sort of routine case "administration" described in § 157(b)(2).

Id. at 107. *See also Warren v. Calania Corp.*, 178 B.R. 279 (M.D. Fla. 1995).

However, cases where sanctions are being imposed in a single case, not an omnibus proceeding, support the fact that civil contempt is a core proceeding. *In re Mem'l Estates, Inc.*, 950 F.2d 1364 (7th Cir 1991); *In re Woodward*, 229 B.R. 468 (Bankr. N.D. Okla. 1999); *Volpert v. Volpert (In re Volpert)*, 186 B.R. 240 (N.D. Ill. 1995); *In re Seidel*, 443 B.R. 411 (Bankr. S.D. Ohio 2011).

Since civil contempt is a "core" proceeding, bankruptcy courts have authority to enter final judgments in such matters. 28 U.S.C. § 157(b)(1). ("Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, . . . and may enter appropriate orders and judgments").

Criminal contempt also may be a "core proceeding." *In re Ragar*, 3 F.3d 1174 (8th Cir. 1993). Punishment of inappropriate behavior may affect the administration of the estate. However, punishment by fine or jailing (not meant to be coercive) may be constitutionally outside a bankruptcy judge's power. Why? Because "'criminal contempt is a crime in the ordinary sense' and 'in every fundamental respect'; likewise, 'convictions for criminal contempt are indistinguishable from ordinary criminal convictions' and 'that criminal contempt proceedings are 'criminal in their nature has been constantly affirmed.'" *Matter of Hipp, Inc.*, 895 F.2d at 1509 (quoting *Bloom v. Illinois*, 391 U.S. 194 (1968)). Bankruptcy judges are not Article III judges with life tenure and therefore do not have authority to try such matters.

Therefore, if any criminal contempt sanction is to be levied, the matter should be dealt with pursuant to Fed. R. Bankr. P. 9033 or the issue certified to the District Court for consideration. *In re McDonald,* 497 B.R. 489 (Bankr. D.S.C. 2013) (certification to District Court). Punitive damages are by definition meant to punish and are not coercive or meant to cover actual damages. Therefore, they are more criminal than civil in nature. Under circuit case law cited, it would seem logical that punitive damage awards should only be done upon report and recommendation to the district court.

However, section 362(k) of the Bankruptcy Code specifically authorizes bankruptcy judges to award punitive damages. At least one bankruptcy court in the Eleventh Circuit has found that, because it is a specific bankruptcy judge power by statute, bankruptcy judges have authority to issue final judgments for stay violation punitive damages. *In re WVF Acquisition, LLC*, 420 B.R. 902 (Bankr. S.D. Fla. 2009). This case may not be correct if one follows the *Hipp* case rationale or *John Richards* case cited below, if the punitive damages are "serious."

"Most of the courts that have specifically considered the issue . . . have declined to recognize the bankruptcy court's power to punish for criminal contempt." William L. Norton III, NORTON BANKRUPTCY LAW AND PRACTICE 3D (2014), § 13:5 Contempt powers (citing cases including *Griffin v. Oles (Matter of Hipp, Inc.)*, 895 F.2d 1503 (5th Cir. 1990); *In re Terrebonne Fuel and Lube, Inc.*, 108 F.3d 609 (5th Cir. 1997); *Knupfer v. Lindblade (In re Dyer),* 322 F.3d 1178 (9th Cir. 2003)). This may even mean "serious" punitive damage awards are beyond the power of bankruptcy judges. The recent case of *Adell v. John Richards Homes Building Co., LLC (In re John Richards Homes Building Co., LLC)*, 552 Fed. Appx. 401 (6th Cir. 2013) held that bankruptcy courts could not impose "serious" noncompensatory punitive damages following the dismissal of an involuntary case. The bankruptcy judge had awarded $2.8 million in punitive damages under 11 U.S.C. § 303(i) against the parties who put the debtor in the involuntary bankruptcy. The amount was punitive damages for difficulties encountered in collecting the initial attorney's fees and costs judgment assessed in defending against the involuntary petition. Section 303(i) does not provide for such fees or punitive damages and so the Sixth Circuit reviewed the damages as having been imposed under the bankruptcy court's inherent powers. Not only were there due process concerns, there were "constitutional concerns with bankruptcy courts having broad inherent powers beyond those given to them by Congress. If Congress had wanted bankruptcy courts to have such broad power, it could have authorized it." *Id.* at 416.

III. Authority for Contempt Actions

There are several different theories that have been used by courts to invoke the contempt powers.

A. Section 105

Section 105(a) of the Bankruptcy Code 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.

Many courts have used § 105 as the basis for a contempt citation. *E.g., DeVille v. Cardinale (In re Deville)*, 280 B.R. 483 (B.A.P. 9th Cir. 2002), *aff'd sub nom. Miller v. Cardinale (In re DeVille)*, 361 F.3d 539 (9th Cir. 2004); *Karsch v. LaBarge (In re Clark),* 223 F.3d 859 (8th Cir. 2000); *In re Volpert*, 110 F.3d 494 (7th Cir. 1997); *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc).*, 77 F.3d 278 (9th Cir. 1996); *McLean v. Greenpoint Credit LLC*, 515 B.R. 841 (M.D. Ala. 2014): *In re Plummer*, 513 B.R. 135 (Bankr. M.D. Fla. 2014); *Mele v. Bank of America Home Loans, (In re Mele)*, 486 B.R. 546 (Bankr. N.D. Ga. 2013); *Brannan v. Wells Fargo Home Mortgage, Inc. (In re Brannan)*, 485 B.R. 443 (Bankr. S.D. Ala. 2013); *Rosenberg v. DVI Receivables, XIV, LLC (In re Rosenberg)*, 471 B.R. 307 (Bankr. S.D. Fla. 2012); *Clower v. Le Jardin at Baytowne Wharf Condo, Ass'n, Inc. (In re Clower)*, 463 B.R. 573 (Bankr. N.D. Ga. 2011). For instance, in *Jones v. Bank of Santa Fe (In re Courtesy Inns, Inc.),* 40 F.3d 1084 (10th Cir. 1994), the Tenth Circuit held that a bankruptcy court had authority to sanction under § 105. This Circuit, as well as the Seventh, Eighth, and Ninth Circuits, recognizes that § 105 essentially codifies the inherent power to sanction.

> We believe, and hold, that 105 intended to imbue the bankruptcy courts with the inherent power recognized by the Supreme Court in *Chambers*. The power to maintain order and confine improper behavior in its own proceedings seems a necessary adjunct to any tribunal charged by law with the adjudication of disputes.

Id. at 1089.

Also in *Karsch v. La Barge (In re Clark),* 223 F.3d 859 (8th Cir. 2000), the Court stated

> Section 105 gives to bankruptcy courts the broad power to implement the provisions of the bankruptcy code and to prevent an abuse of the bankruptcy process, which includes the power to sanction counsel. This provision has been interpreted as supporting the inherent authority of the bankruptcy courts to impose civil sanctions for abuses of the bankruptcy process.

Id. at 864 (citing *In re Volpert,* 110 F.3d 494 (7th Cir. 1997); *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.)*, 77 F.3d 278 (9th Cir. 1996); and *Jones v. Bank of Santa Fe (In re Courtesy Inns Ltd, Inc.),* 40 F.3d 1084 (10th Cir. 1994)).

However, criminal contempt is different. The *Matter of Hipp* case, 895 F.2d 1503 (5th Cir. 1990) also stated that § 105 could not ever purport to cover criminal contempt. Criminal contempt is not necessary to a case's administration.

> [S]ection 105 does not purport to authorize bankruptcy courts to punish for criminal contempts. . . . Criminal contempt is not "necessary or appropriate to enforce or implement" the court's rules or orders, but is instead intended to vindicate the authority of the court.

Id. at 1515.

B. 18 U.S.C. § 401

Section 401 provides

> A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as –
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Can a bankruptcy court exercise this power? Most courts say no. Several cases have specifically ruled that a bankruptcy court is not a "court of the United States" under § 401. Therefore, bankruptcy judges do not have criminal contempt powers. Bankruptcy judges do not have life tenure and protection against diminished compensation, which Article III judges have so that they can fearlessly and fairly exercise the "judicial Power of the United States." In *Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd.),* 40 F.3d 1084 (10th Cir. 1994), the Tenth Circuit found bankruptcy courts were not courts of the United States. So did the Fifth Circuit in *Griffin v. Oles (Matter of Hipp)*, 895 F.2d 1503 (5th Cir. 1990). As it stated, to the extent bankruptcy judges want to exercise criminal contempt power, they cannot do so under this U.S. Code authority.

> [C]riminal contempts . . . are separate and independent proceedings (with different parties) from that in which the violated order was issued, the validity of that order . . . is not in question in the

> contempt proceeding, and the contempt can be prosecuted even after the underlying proceeding is wholly terminated.

Matter of Hipp, Inc., 895 F.2d 1504, 1517-1518.

The Seventh Circuit discussed the issue in *In re Volpert*, 110 F.3d 494 (7th Cir. 1997) but did not decide the issue.

Other courts have found that bankruptcy courts are courts of the United States because they are units of the district court and, therefore, able to act. *Stone v. Casiello (In re Casiello)*, 333 B.R. 571 (Bankr. D. Mass. 2005); *In re Brooks*, 175 B.R. 409 (Bankr. S.D. Ala. 1994).

C. Bankruptcy Rule 7037

This rule, which is part of the adversary proceedings rules, incorporates Fed. R. Civ. P. 37 into the Bankruptcy Rules. Titled "Failure to Make Discovery; Sanctions," it allows courts to fashion relief for discovery failures or abuses, including orders to compel, payment of expenses, protective orders, and orders striking, staying or dismissing matters. In Rule 37(b)(2)(A), a court may treat "as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination."

Bankruptcy courts have routinely used this sanction power. *Pansier v. Wisconsin Dep't of Revenue*, 2010 WL 4025884 (E.D. Wis. 2010); *Jet Networks FC Holding Corp. v. Goldberg*, 2009 WL 1616375 (S.D. Fla. 2009); *In re Boccia*, 2010 WL 2771847 (Bankr. E.D.N.Y. 2010); *Goldberg v. Lawrence (In re Lawrence)*, 227 B.R. 907 (Bankr. S.D. Fla. 1998); *In re BBL Group Inc.*, 205 B.R. 625 (Bankr. N.D. Ala. 1996). Courts have not done reports and recommendations when doing these orders, probably because the statute specifically allows the action and any damages would likely be civil contempt damages. If a "serious" penalty were being levied and/or the relief was not meant to coerce compliance, there might be an issue as to the nature of the contempt and the need for a report and recommendation. *In re Lickman*, 288 B.R. 291 (Bankr. M.D. Fla. 2003). Judge Kimball might argue with that rational based upon his ruling in *In re WVF Acquisition, LLC*, 420 B.R. 902 (Bankr. S.D. Fla. 2009).

D. Inherent Power

As stated above, courts have oftentimes stated that § 105 is the statutory codification of the inherent contempt power of bankruptcy courts. Does the power exist outside of § 105?

Since the early days of the United States, courts have held that "certain implied powers must necessarily result to our Courts of justice from the nature of their institution." *U.S. v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812). The contempt power derives "not [from] rule or statute but [from] the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962). As to contempt, this inherent power extends to actions taken in court and outside

of court. "[T]he underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary regardless of whether such disobedience interfered with the conduct of trial." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798 (1987).

Probably the most cited Supreme Court case on contempt is *Chambers v Nasco, Inc.*, 501 U.S. 32 (1991), which held that the contempt power is inherent in courts. It is not supplanted by statutes or rules.

> There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or Rules. . . Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statue nor the Rules are up to the task, the court may safely rely on its inherent power.

Id. at 50.

The bankruptcy courts in the Eleventh Circuit and courts reviewing bankruptcy court opinions utilizing inherent powers have allowed its use on numerous occasions. Cases include *In re Plummer*, 513 B.R. 135 (Bankr. M.D. Fla. 2014); *In re New River Dry Dock, Inc.*, 497 B.R. 359 (Bankr. S.D. Fla. 2013); *Alderwoods Group, Inc. v. Garcia*, 682 F.3d 958 (11th Cir. 2012); *In re Wassem*, 456 B.R. 566 (Bankr. M.D. Fla. 2009); *In re Shortsleeve*, 349 B.R. 297 (Bankr. M.D. Ala. 2006); *In re Rucker*, 278 B.R. 262 (Bankr. M.D. Ga. 2001); *In re Burke,* 285 B.R. 534 (Bankr. S.D. Ga. 2001); *In re Poole*, 242 B.R. 104 (Bankr. N.D. Ga. 1999); *In re Faust*, 270 B.R. 310 (Bankr. M.D. Ga. 1998). Based on this case law, inherent power appears to be an appropriate remedy.

E. Other Sources

Although not specifically contempt power sources, bankruptcy judges have other statutory or rule-based sanction powers. These powers include:

1. Section 362(k). This section allows bankruptcy judges to order payment of "actual damages, including costs and attorneys' fees, and, in appropriate circumstances . . . punitive damages."

In *In re WVF Acquisition, LLC*, 420 B.R. 902 (Bankr. S.D. Fla. 2009), the judge held that the power to award punitive damages is a criminal contempt power and normally not a power that the bankruptcy court has. However, where a Bankruptcy Code section, § 362(k), authorizes it, "[s]ection 105 constitutes express authority to award punitive damages for contempt to the extent necessary or appropriate to carry out the provisions of the Bankruptcy Code.. . .

So long as the criminal contempt sanction is necessary or appropriate, a bankruptcy court has the statutory power to impose criminal sanctions." *Id.* at 914 (quoting *In re Dynamic Tours & Transp., Inc.*, 359 B.R. 336, 342-43 (Bankr. M.D. Fla. 2006)).

2. 28 U.S.C. § 1927

This statute states:

> Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

This U.S. Code section was, of course, passed to prevent needlessly prolonged litigation by sanctioning attorneys who cause delays. It would be very helpful to bankruptcy judges to have this power.

However, as was discussed in conjunction with 28 U.S.C. § 1481, the question of its applicability to bankruptcy courts hinges on whether bankruptcy courts are "courts of the United States." In *Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd.)*, 40 F.3d 1084 (10th Cir. 1994), the Tenth Circuit found bankruptcy courts were not courts of the United States. So did the Fifth Circuit in *Griffin v. Oles (Matter of Hipp)*, 895 F.2d 1503 (5th Cir. 1990). The Seventh Circuit discussed the issue in *In re Volpert*, 110 F.3d 494 (7th Cir. 1997) but did not decide the issue.

Other courts have found that bankruptcy courts are courts of the United States because they are units of the district court and, therefore, able to act. *Stone v. Casiello (In re Casiello)*, 333 B.R. 571 (Bankr. D. Mass. 2005); *In re Brooks*, 175 B.R. 409 (Bankr. S.D. Ala. 1994).

Still other courts have used § 1927 without any discussion of the "court of the United States" issue. *Baker v. Latham Sparrowbush Assocs. (In re Cohoes Indus. Terminal, Inc.)*, 931 F.2d 222 (2d Cir. 1991).

3. Rule 9011

Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers.

* * * * * *

> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (v) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

Rule 9011 "is intended to discourage the filing of pleadings in the bankruptcy practice that are frivolous, legally unreasonable, or without factual foundation." *Crawford Square Cmty. v. Turner (In re Turner)*, 326 B.R. 328, 330 (Bankr. W.D. Penn. 2005). The Eleventh Circuit in an en banc ruling has stated what Rule 11 is not meant to do:

> Some cautions are in order. Rule 11 does not change the liberal notice pleading regime of the federal courts or the requirement of Fed. R. Civ. P. 8, which demands only a "short and plain statement of the claim." The rule does not require that pleadings allege all material facts or the exact articulation of the legal theories upon which the case will be based. The reasonable inquiry standard of Rule 11 does not preclude plaintiffs from establishing the merits of claims through discovery. Nor is Rule 11 intended to chill innovative theories and vigorous advocacy that bring about vital and positive changes in the law. The rule should not be used to deter potentially controversial or unpopular suits. It does not mean the end of doctrinal development, novel legal arguments, or cases of first impression. The Advisory Committee Note specifies that the rule "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Nor does Rule 11 impinge upon . . . counsel's obligation to represent the client to the best of his or her abilities.

Donaldson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1987) (en banc).

Rule 11 requires that any sanctions be imposed only on the attorneys or parties who violate the rule. *Isaacson v. Manty*, 721 F.3d 533 (8th Cir. 2013). An officer of a corporate debtor could not be sanctioned under Rule 9011. Rule 9011 sanctions can include "an order to pay a penalty into court." Fed. R. Bankr. P. 9011(c)(2). Is this criminal in nature? The cases

say no. *Donaldson v. Clark, supra*; *Isaacson v. Manty, supra.* "A violation of Rule 11 is fundamentally different from an infraction of criminal contempt." *Donaldson,* 819 F.2d at 1559. *Miller v. Cardinale (In re DeVille)*, 361 F.3d 539 (9th Cir. 2004); *Eisenberg v. Univ. of N.M.,* 936 F.2d 1131 (10th Cir. 1991); *Wayland v. McVay (In re TByrd Enters., LLC)*, 354 Fed. Appx. 837 (5th Cir. 2009).

IV. Procedure

Civil and criminal contempt are handled differently. Civil contempt matters can be handled by a bankruptcy court in most instances. Criminal cannot. The two types will be discussed separately.

A. Civil Contempt

A civil contempt motion is filed as any other motion. Care must be taken to properly notice the motion. Notice must make the alleged contemnor aware of the possibility that sanctions may be imposed, the conduct that is allegedly sanctionable, and the grounds on which the sanctions are being imposed. *In re Rimsat, Ltd.*, 212 F.3d 1039 (7th Cir. 2000). A movant must allege improper conduct by the party or attorney. For inherent contempt power use, the conduct should be "egregious." *Martin v. Brown,* 63 F.3d 1252, 1265 (3d Cir. 1995). Negligence is not a sufficient ground. There must be a finding of bad faith for invocation of the inherent contempt power. *Glatter v. Mroz (In re Mroz)*, 65 F.3d 1567 (11th Cir. 1995). For contempt under § 105, the standard is different. "The language of § 105 encompasses 'any type of order, whether injunctive, compensative, or punitive,' as long as it is 'necessary or appropriate to carry out the provisions of the Bankruptcy Code.'" *In re Hardy*, 97 F.3d 1384, 1389 (11th Cir. 1996) (quoting *In re Jove Eng'g, Inc.*, 92 F.3d 1539, 1553-54 (11th Cir. 1996)).

The standard is slightly different when seeking contempt under § 362(k) for a violation of the stay. The movant must prove by clear and convincing evidence that a valid order or stay was in place, the attorney or party knew of it and acted anyway. No willfulness or bad faith is required. *Patti v. Fred Ehrlich, P.C.,* 304 B.R. 182 (E.D. Pa. 2003); *Robin Woods, Inc. v. Woods,* 28 F.3d 396 (3d Cir. 1994).

The standard for imposing sanctions is extremely high. *See In re Stomberg*, 487 B.R. 775 (Bankr. S.D. Tex. 2013) for an example of how egregious misconduct can get before a court imposes sanctions. Factors to be considered are "(1) the precise conduct being punished; (2) the precise expenses caused by the violation; (3) the reasonableness of the fees imposed; and (4) the least severe sanction adequate to achieve the purpose of the rule relied upon to impose the sanction." *In re Cochener,* 382 B.R. 311 (S.D. Tex. 2007), *rev'd on other grounds*, 297 Fed. Appx. 382 (5th Cir. 2008).

B. Criminal Contempt

Based on almost all of the case law, true criminal contempt should be heard in the district court. If it is a contempt committed in an open bankruptcy case, the motion should be filed in the bankruptcy case, but the movant or judge should ask to have the matter withdrawn to the district court for hearing. Two exceptions may be Rule 9011(c)(2) sanctions or contempt committed in the judge's presence. *Matter of Hipp, Inc.*, 895 F.2d 1503 (5th Cir. 1990). Also Judge Kimball has found that a bankruptcy judge can impose punitive damages under § 362(k). *In re WVF Acquisition, LLC*, 420 B.R. 902 (Bankr. S.D. Fla. 2009).

The *Ragar* case affirmed a ruling made by a bankruptcy judge as to criminal contempt where the order had no immediate effect and the order provided that if the contemnor disagreed with the order he could file objections within 10 days and the order would be reviewed de novo by the district court pursuant to Fed. R. Bank. P. 9033. *In re Ragar,* 3 F.3d 1174 (8th Cir. 1993).

In the Fifth Circuit, the District Court for the Western District of Texas actually laid out the procedure to be followed by bankruptcy courts in certifying criminal contempt matters to the district court. *In re Rodriguez*, 2007 WL 593582 (W.D. Tex. 2007). It cited to the *In re Lickman* case from Judge Corcoran, 288 B.R. 291 (Bankr. M.D. Fla. 2003). Judge Corcoran determined the request for sanctions for discovery abuses was a request for criminal sanctions. He then directed the Clerk of Bankruptcy Court to "transmit promptly this matter to the district court for its consideration of the issues raised." *Id.* at 293.

Some bankruptcy courts may have local rules that govern how civil or criminal contempt proceedings are to be handled. *See In re Skinner,* 90 B.R. 470 (D. Utah. 1988).

C. Jury Trials

Criminal contempt in district courts is governed by Fed. R. Crim. P. 42 and 28 U.S.C. § 401. *In re Smothers*, 322 F.3d 438 (6th Cir. 2003).

The Eleventh Circuit has stated that "[a] punitive or criminal contempt sanction may only be fashioned after many of the due process safeguards afforded to defendants in criminal proceedings—the right to counsel, the presumption of innocence, and the right to a jury trial in serious cases—are provided to an alleged contemnor." *U.S. v. City of Miami,* 195 F.3d 1292 (11th Cir. 1999). *See also Adell v. John Richards Homes Building Co., LLC (In re John Richards Homes Building Co., LLC)*, 552 Fed. Appx. 401 (6th Cir. 2013); *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178 (9th Cir. 2002).

V. Types of Sanctions

There have been many types of sanctions imposed by courts, bankruptcy and district, for contemptuous acts of litigants or their counsel. Some of them are listed below.

A. Compensatory

1. Actual Damages

In re Poole, 242 B.R. 104 (Bankr. N.D. Ga. 1999) (sanctions for actual damages were awarded for vehicle leasing company's willful violation of the discharge injunction).

In re Tarrant, 190 B.R. 704 (Bankr. S.D. Ga. 1995) (debtor was entitled to actual damages suffered from utility's failure to reinstate service in violation of the automatic stay).

In re Williams, 191 B.R. 497 (Bankr. M.D. Ga. 1996) (Chapter 7 debtors were sanctioned for using rental income to finance store without permission from the court. They were required to repay creditors the full amount of misappropriated funds.)

In re Matthews, 184 B.R. 594 (Bankr. S.D. Ala. 1995) (awarding compensatory damages for mental anguish against the IRS and discussing sanctions against the IRS at length).

2. Attorneys' Fees

In re Poole, 242 B.R. 104 (Bankr. N.D. Ga. 1999) (attorneys' fees were awarded for willful violation of the discharge injunction.)

In re Tarrant, 190 B.R. 704 (Bankr. S.D. Ga. 1995) (stating "The complete absence of any legal authority to support the legal positions taken by the City in documents submitted to the Court and subsequently at trial places the City in violation of Fed. R. Bankr. P. 9011. The City will be held liable for Debtor's actual damages incurred as a result of his loss of power, reasonable attorney's fees incurred in bringing this adversary proceeding and punitive damages pursuant to 11 U.S.C. § 362(h).")

In re Williams, 191 B.R. 497 (Bankr. M.D. Ga. 1996) (Chapter 7 debtors were sanctioned for using rental income to finance store with permission from the court. The court awarded attorneys' fees and $2,500 in punitive damages to each moving creditor.)

In re Smith, 180 B.R. 311 (Bankr. N.D. Ga. 1995) (While the *Smith* court did not break down its sanction, it is clear that a portion of it was awarded to cover attorneys' fees. The court stated, "Evidence was presented to show Debtor's damages as a result of Mitchell's willful violation of the automatic stay. Debtor was subjected to the indignity of a 29 hour incarceration. Debtor's business was disrupted and his reputation may have been damaged. Debtor incurred attorney's fees to file and prosecute the motion to vacate the Contempt Order. Debtor incurred more attorney fees to file and prosecute the motion for sanctions. As discussed above, however, the damages Debtor has suffered could have been avoided entirely by diligent action by Debtor and diligent professional action by Debtor's attorney. Sanctions in the amount of $5,000.00 are appropriate.")

In re Century Plaza Assocs., 154 B.R. 349 (Bankr. S.D. Fla. 1992) (court refused to approve attorney's final fee application because attorney failed to timely and properly disclose payments he had received from the debtor).

In re Alamo, 239 B.R. 623 (Bankr. M.D. Fla. 1999) (Defendants were held in contempt for willfully violating the court's permanent injunction, and the court imposed costs necessary to enforce the injunction and attorneys' fees).

3. Fines

In re Baugh, 416 B.R. 905 (Bankr. M.D. Ga. 2009) (Bankruptcy petition preparer's engagement in the unauthorized practice of law and her failure to provide certain information on documents warranted the imposition of fines. Further, the court enjoined her from preparing documents for bankruptcy filings.)

In re Williams, 213 B.R. 189 (Bankr. M.D. Ga. 1997) (Court gave the debtor a period of time to comply with its order and imposed a $50/day fine for each day that the debtor was late in complying with the order. Further, the court awarded attorneys' fees. The opinion contains a thorough analysis of the bankruptcy court's authority to impose civil and criminal contempt.)

4. Attorney Discipline

In re Smith, 180 B.R. 311 (Bankr. N.D. Ga. 1995) (Court imposed sanctions on creditor and creditor's attorney jointly and severally for willful violation of the automatic stay stating "Both the attorneys—for Debtor and for Mitchell—acted unprofessionally and created a dispute which never should have come before this court. Debtor was subjected to the indignity of incarceration because the attorneys were too careless, too neglectful, too intransigent and too busy to take action which would have prevented that occurrence. The duty to act was upon Mitchell and Mitchell's attorney and the failure to act subjects them to sanctions for willful violation of the automatic stay. The repeated failures of Debtor and Debtor's attorney, however, provide grounds for imposing lesser sanctions than would be appropriate if Debtor and Debtor's attorney had diligently performed their duties.")

B. Punitive/Coercive

In re Tarrant, 190 B.R. 704 (Bankr. S.D. Ga. 1995) (stating "The complete absence of any legal authority to support the legal positions taken by the City in documents submitted to the Court and subsequently at trial places the City in violation of Fed. R. Bankr. P. 9011. The City will be held liable for Debtor's actual damages incurred as a result of his loss of power, reasonable attorney's fees incurred in bringing this adversary proceeding and punitive damages pursuant to 11 U.S.C. § 362(h).")

1. Incarceration

In re Falck, 513 B.R. 617 (Bankr. S.D. Fla. 2014) (finding that based upon the debtor's sworn statements to the court, he had the ability to pay sanctions but was choosing not to and stating "The entire purpose of Mr. Diaz's incarceration is to coerce him to pay the amounts he owes under the Sanctions Order, and not to punish him. While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's willingness to [comply]." (internal citations omitted)).

In re Fasano, 85 B.R. 639 (Bankr. S.D. Fla. 1988) (finding debtors in civil contempt and suggesting that they were also in criminal contempt, the court held that if they did not comply with an order to vacate unlawfully occupied premises, they would be incarcerated for an indeterminate period of time; further, debtors' counsel was ordered to take remedial actions or face incarceration for civil contempt).

Matter of Miami General Hosp., Inc., 77 B.R. 950 (Bankr. S.D. Fla. 1987) (creditors were found to be in willful violation of the automatic stay, fined $25,000, and sentenced to 10 days incarceration as punishment; however, the court allowed the creditors to "purge" themselves of the contempt by returning the van that they had repossessed in violation of the stay).

2. "Serious" Fines

In re Williams, 191 B.R. 497 (Bankr. M.D. Ga. 1996) (Chapter 7 debtors were sanctioned for using rental income to finance store without permission from the court. The court awarded attorneys' fees and $2,500 in punitive damages to each moving creditor.)

In re Holland, 77 B.R. 954 (Bankr. S.D. Fla. 1987) (IRS was held in civil contempt for violation of the discharge injunction and fined $1,000,000, but the court allowed the IRS to "purge" the fine and contempt by issuing a satisfaction of tax).

Matter of Arnold, 206 B.R. 560 (Bankr. N.D. Ala. 1997) (court awarded compensatory and punitive damages for credit union's willful and malicious violation of the discharge injunction, finding that the debtor's repayment of a discharged debt was not "voluntary" within the meaning of § 524(f) but was coerced).

Matter of Toll, 175 B.R. 406 (Bankr. N.D. Ala. 1994) (Court fined creditor $5,000 in compensatory, $650 in attorney fees, and $10,000 in punitive damages for creditor's willful violation of the automatic stay. With knowledge of the debtors' bankruptcy, the creditor chose to unlawfully break into the debtors' home to repossess their personal property, including their refrigerator, washer and dryer, beds, and other furniture. Incident to the repossession, debtors' food was left out to spoil, they were forced to sleep on the floor, and their clothes—which were in the washer and dryer—and their daughter's Mickey Mouse watch were taken.).

In re Smith, 296 B.R. 46 (Bankr. M.D. Ala. 2003) (court awarded $25,000 in punitive damages as well as substantial actual damages for creditor's egregious conduct in repossessing the debtor's mobile home in violation of the automatic stay while the debtor was actually inside the home).

3. Attorney Discipline

In re Harmon, 435 B.R. 758 (Bankr. N.D. Ga. 2010) (From the Westlaw synopsis of the case: "As sanction for law firm's widespread practice of having clients sign bankruptcy petitions and bankruptcy schedules and statements early on in course of representation, only to modify documents, such as by changing valuations of assets, the amount or security status of creditor claims, the "means test" calculation, or terms of proposed plan, without having clients review and sign off on changes, and for one instance in which documents were electronically filed with electronic signatures of debtors that firm represented even though firm lacked any signed originals in its files, bankruptcy court would impose $5,000 fine on firm, require firm to file "action plan" with court to address deficiencies noted by court, and require attorneys involved in violations to attend legal education classes. Fed. R. Bankr. Pro. 9011, 11 U.S.C.A.")

In re Poole, 242 B.R. 104 (Bankr. N.D. Ga. 1999) (stating "BSBP's [a law firm] opposition to Debtor's Motion to Set Aside . . . was completely unsupported by the facts or the law. The logical inference is that BSBP employed its opposition to the Motion to Set Aside as a tool to coerce Debtor into dismissing or abandoning the counterclaim. That motive is supported by testimony of the BSBP attorney who handled the opposition to the Motion to Set Aside and who admitted that he made such an offer. Such conduct constitutes bad faith and subjects BSBP to punitive damages.")

In re Smith, 306 B.R. 5 (Bankr. M.D. Ala. 2004) (attorney was sanctioned for falsely representing to opposing counsel that his client was in bankruptcy in an effort to frustrate opposing counsel's postjudgment collection efforts).

VI. Implications of Recent Supreme Court Decisions on Contempt and Sanction Powers of Bankruptcy Judges

Three Supreme Court cases in 2011 and 2014 have further complicated the picture for contempt powers.

1. *Stern v. Marshall*, __ U.S. __, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), put limits on the core jurisdiction of the bankruptcy courts. Core proceedings include but are not limited to "16 different types of matters including 'counterclaims by [a debtor's] estate against persons filing claims against the estate." 28 U.S.C. § 157(b)(2)(c). *Id.* at 2603. In the Eleventh Circuit, courts have stated this means that "because bankruptcy judges are not appointed pursuant to Article III of the Constitution, they may not enter final judgment on [a] . . . claim if it arises from

'the common law, or in equity, or admiralty." *In re Alpha Protective Servs., Inc.*, 2014 WL 4794183 (M.D. Ga. 2014) (quoting *Stern v. Marshall*, __ U.S. __, 131 S. Ct. 2594, 2608-09.)

In *In re Tyler*, 493 B.R. 905 (Bankr. N.D. Ga. 2013), Judge Sacca defined a core proceeding as follows:

> Congress did not explicitly define "core." So what does it mean to be a "core proceeding?" The simplest way to define an adjective is by looking to the effect it has on the noun it modifies. Congress did provide that in core proceedings, the court may enter final orders and judgments. 28 U.S.C. § 157(b)(1); *Stern*, 131 S.Ct. at 2603. Also, the legislative history indicates that Congress intended for "core" to be interpreted broadly, near or at constitutional limits. *Arnold Print Works v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165, 168 (1st Cir. 1987) (citing Cong. Rec. E1108-E1110) (daily ed. March 20, 1084) and *id.* at H1848, H1850 (daily ed. March 21, 1984)). Therefore, the simplest definition of a core proceeding is one in which a bankruptcy court may constitutionally enter final orders and judgments. *Id.* at 912.

In a lengthy opinion on fraudulent transfer claims, he concluded that the claims were core proceedings. He read the *Stern v. Marshall* opinion narrowly. "Had the *Stern* majority intended to make a sweeping proclamation striking down a broad swath of bankruptcy court authority, it would have done so explicitly." *Id.* at 918.

The question is, after *Stern*, is there any reason to doubt that civil contempt powers are "core proceedings?" Core proceedings include "matters concerning the administration of the estate, 289 U.S.C. § 157(b)(2)(A), and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or equity security holder relationship," 28 U.S.C. § 157(b)(2)(O). These two provisions appear broad enough to cover actions to discipline attorneys and debtors and other parties involved in bankruptcy cases. The specific provisions of 28 U.S.C. §157(b)(2) also incorporate the right to sanction in certain instances, e.g., 28 U.S.C. § 157(b)(2)(G) relating to motions for relief from stay. This section, section 362(k) includes sanction remedies.

The one area that might be beyond "core" status would be the imposition of serious fines or punitive incarceration as penalties. These remedies are criminal in nature. Therefore, although arguably "core," constitutionally they are not.

Punitive incarceration is incarceration for a set term, regardless of what the contemnor does to right his or her situation. What is a "serious" fine? That is not clear. One court states:

> [B]ankruptcy courts do not have a general statutory power to impose serious noncompensatory punitive damages. While § 105(a) establishes some punitive sanction power, that power is limited to sanctions that are necessary or appropriate to enforce the Bankruptcy Code. . . . [W]hile § 105(a) grants bankruptcy courts the authority to award mild noncompensatory punitive damages, it does not provide a basis for awarding serious noncompensatory punitive damages.
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> * * * *
>
> Likewise, no other circuit has found that bankruptcy courts have a broad, inherent power to impose substantial noncompensatory punitive sanctions. Bankruptcy courts' inherent powers are limited, in part, because they are not Article III courts.
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> * * * *
>
> The exercise of certain powers requires greater procedural protections than others. . . . Serious noncompensatory punitive damages require greater procedural protections than mild noncompensatory punitive damages because, by their nature, they carry greater risk of abuse. . . . Courts have found that "the imposition of a sufficiently substantial punitive sanction requires that the person sanctioned receive the procedural protections appropriate to a criminal case." *Mackler Prods., Inc. v. Cohen,* 146 F.3d 126,130 (2d Cir. 1998) (internal citations omitted); *U.S. v. City of Miami*, 195 F.3d 1292, 1298 (11th Cir. 1999).

Adell v. John Richards Homes Building Co., LLC, 552 Fed. Appx. 401 (6th Cir. 2013) (holding that $2.8 million punitive damage award for § 303(i) award was "serious noncompensatory sanction.")

So *Stern's* holding may not have eroded the court's inherent powers or statutory powers to civilly sanction because these are still core proceedings. However, it is questionable if serious punitive sanctions or incarceration are core proceedings.

What about incarceration as a civil contempt penalty? Can bankruptcy judges order jailing of parties without reporting and recommending the action to the district court for a final order? A recent case from the Southern District of Georgia says "yes." *Souther v. Tate (In re Tate)*, 2014 WL 5320570 (Bankr. S.D. Ga. 2014). Mr. Tate failed to comply with a turnover order and order compelling him to give information about his assets. The court held that *Stern v. Marshall* did not limit the court's power because a statutory contempt sanction is a core

proceeding. *Id.* at *14. Judge Olson, on his own final order, also jailed a debtor for failure to pay sanctions. *In re Falck*, 513 B.R. 617 (Bankr. S.D. Fla. 2014). However, Judge Lamar Davis recommended to the district court that it order a debtor incarcerated because "[it] is unclear whether this Court, as an Article I court, has the *Constitutional authority* to impose non-monetary sanctions—such as arrest and incarceration—which result in the deprivation of personal liberty." *Bailey v. Hako-Med USA, Inc. (In re Bailey)*, 2011 WL 7702799 (Bankr. S.D. Ga. 2011) (italics in original).

2. *Executive Benefits Insurance Agency v. Arkison*, __ U.S. __, 134 S.Ct. 2165, 189 L.Ed.2d 83 (2014), held that a bankruptcy court can make proposed findings of fact and conclusions of law on non-core claims as defined under *Stern v. Marshall*. A report and recommendation can then be reviewed de novo by the district court. This opinion did not decide the issue of whether consent by a litigant to trial by a bankruptcy judge of a non-core matter might allow the bankruptcy court to enter a final judgment.

The issue raised is whether contempt actions, to the extent they are non-core (but not beyond bankruptcy judges' constitutional powers), must be tried as report and recommendation matters or whether the bankruptcy court can enter a final order. Since the court did not decide the issue, there is really no definitive answer. However, courts and attorneys might be well advised to structure any questionably core matters as reports and recommendations to prevent a problem. This would clearly be true for any serious noncompensatory punitive damages or incarceration.

The Supreme Court has granted certiorari on a case to be argued in the 2014-2015 term which may answer this question. *Wellness Int'l Network, Ltd., et al. v. Richard Sharif*, 727 F.3d 751 (7th Cir. 2013), *cert. granted*, 134 S.Ct. 2901 (U.S. July 1, 2014).

3. *Law v. Siegel*, -- U.S. --, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014) is the Court's most recent case that may impact contempt proceedings. That case held that a bankruptcy trustee could not surcharge the debtor's homestead exemption to pay a trustee's attorneys' fees incurred in overcoming the debtor's fraudulent representations about liens on his home. The trustee relied on § 105 of the Bankruptcy Code as his basis for the power to surcharge. All parties agreed that there was no statutory basis for such a charge. The court held that § 105 could not be used "to override explicit mandates of other sections of the Bankruptcy Code." *Id.* at 1194 (citing 2 COLLIER ON BANKRUPTCY, ¶ 105.01[2], p. 105-06 (16th ed. 2013). The court cited its earlier decision in *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197 (1988), which stated that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."

The court indicated the bankruptcy courts "*may* . . . possess 'inherent power . . . to sanction abusive litigation practices.'" *Id.* at 1194 (citing *Marama v. Citizens Bank of Mass.*, 549 U.S. 365, 375-376 (2007)). In conjunction with that, bankruptcy courts have "essential

'authority to respond to debtor misconduct' with meaningful sanctions.'" *Id.* at 1998 (citing Brief for U.S. as Amicus Curiae 17.) The court cited powers such as denial of discharge under § 727, Fed.R.Bankr.P. 9011, or referral of the debtor for prosecution for bankruptcy crimes.

The Court's statements about the power of § 105 not being as expansive as some courts held it to be are important, and Court opinions since then have shown the strength of the statements.

In *In re Kutumian*, 2014 WL 2024789 (Bankr. E.D. Cal. 2014), the court was faced with what attorneys' fees it could award to a debtor's attorney for work involved in contesting a violation of the stay. Were attorneys' fees to prosecute the stay violation adversary case an appropriate sanction, or were fees limited to the fees necessary to enforce the stay and remedy the stay violation? Section 362(k)(1) is unclear. All courts allow use of that section for award of fees necessary to enforce the stay. However, the *Kutumian* court ruled that attorneys' fees incurred after the stay violation was rectified were not § 362(k)(1) damages. Therefore the only way they could be awarded to debtors' counsel were as civil contempt sanctions. "The civil contempt remedy is not based on a specific statutory predicate like the damages remedy provided in § 362(k)(1). In the absence of a statutory basis for awarding additional attorneys' fees to the Debtor, he is essentially asking the court to exercise its general equitable powers under § 105(a), which states, in pertinent part, 'The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.'" *Id.* at *7. The court held that a civil contempt remedy was not available after *Law v. Siegel.*

> Although § 362(k)(1) and § 105 may appear to offer two distinct remedies, the limitations of § 362(k)(1) must nevertheless guide what can be awarded under § 105(a). This is because "the language of § 105(a) authorizes only those remedies 'necessary' to enforce the bankruptcy code." *Dyer*, 322 F.3d at 1193. Yet, allowing an individual to circumvent § 362(k)(1) and recover more than he or she can otherwise recover under that statute can hardly be considered a "necessary" exercise of § 105(1). As the Ninth Circuit has stated, "[I]t is not up to [the courts] to read other remedies into the carefully articulated set of rights and remedies set out in the Bankruptcy Code." *Walls*, 276 F.3d at 507. Here, the set of remedies has been articulated by § 362(k)(1), which has prohibited the recovery of certain attorney's fees.
>
> It follows that § 105(a), if used in the way suggested by the Debtor, would be "exercised in contravention of the Code." *Law*, 134 S.Ct. at 1195. As a result, this court is not persuaded that § 105(a)'s civil contempt authority is available to an individual who

> seeks to recover the attorney's fees and costs that are expressly unavailable under § 362(k)(1) and *Sternberg*.

Kutumian at *11.

In *In re Criscuolo*, 2014 WL 1910078 (Bankr. E.D. Va. 2014), the court held that a court could dismiss a debtor's case with conditions and an injunction. However, under *Law v. Siegel*, the court could not require the payment to creditors of funds the trustee was holding pending confirmation of an amended chapter 13 plan. Section 1326(a)(2) only allows such funds to be returned to the debtor. "[T]he court finds that there is no provision of the Bankruptcy Code that specifically would allow the Court to order that the Trustee pay this money to anyone other than the debtor." *Id.* at *7.

In *In re Pasley*, 507 B.R. 312 (Bankr. E.D. Cal. 2014), the court held that below-median-income debtors could not be required to remain in a 60-month plan after modification of their mortgage postconfirmation on "good faith" grounds. The court held that the trustee's argument for "fairness" is not statutory. The court cannot exercise equitable powers without a statutory basis under § 105.

CONCLUSION

The power of bankruptcy judges to punish contempt has changed over time. As the U.S. Supreme Court decides more bankruptcy cases, the courts will gain insight into the Justices views of the limits of bankruptcy court jurisdiction and authority to manage their own dockets. It will be interesting.