Part III

RECENT DEVELOPMENTS

SECTION 105(A) OF THE BANKRUPTCY CODE

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I. INTRODUCTION

Section 105(a) of the Bankruptcy Code permits a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."[1] Additionally, it states: "No provision of [the Bankruptcy Code] 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."[2] Seemingly boundless in its application, courts recently have invoked section 105(a) in order to sanction parties who abuse the bankruptcy process, punish creditors through the civil contempt remedy for violating the discharge injunction, expand the ambit of the automatic stay to protect third parties related to the bankruptcy process, issue injunctions against third party action to protect the bankruptcy estate, issue "channeling injunctions" to redirect claims away from parties willing to contribute funds towards a plan of reorganization, authorize payments to "critical vendors," provide for a partial discharge of student loans, and order a variety of relief sua sponte. This article highlights certain cases involving section 105(a) that were decided in 2004.

II. THE BOUNDARIES OF SECTION 105(A)

Notwithstanding the broad language of the provision, courts generally have held that section 105(a) of the Bankruptcy Code may not be used to expand the scope of judicial power beyond that granted in other sections of the Code but may only be used in furtherance of, and not in conflict with, such provisions. However, a tension exists: To one court, acting in furtherance of a Bankruptcy Code provision may constitute an act

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beyond the scope of or in conflict with such provision in the eyes of another court. In *In re Valenti*,[3] the Bankruptcy Appellate Panel of the Ninth Circuit upheld the dismissal of a complaint by creditors to revoke a chapter 13 debtor's discharge. Section 1330(a) of the Bankruptcy Code provides, in part, that "[o]n request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud."[4] After 180 days had passed since the confirmation, the creditors sought to allege fraud as the basis for the revocation of the debtor's discharge by invoking other sections of the Bankruptcy Code, including section 105(a), in order to effect an "end run" around section 1330(a). The court rejected the creditors' efforts, stating that "[s]ection 105(a) is not an independent basis for relief beyond the scope of the other sections in the Bankruptcy Code. Creditors would use Section 105(a) to evade the plain language of Section 1330(a). This is impermissible."[5]

A New York district court held that a bankruptcy court erred in employing section 105(a) to dismiss an involuntary bankruptcy case where other provisions of the Bankruptcy Code and other well-established legal principles provided definitive criteria for dismissal. In In re Globo Comunicacoes e Participacoes S.A.,[6] a case raising novel issues of bankruptcy jurisdiction over foreign debtors, creditors filed an involuntary chapter 11 petition against a Brazilian holding company that owned one of the largest television production centers in the world. The company—known colloquially as "Globopar"—had various subsidiaries, including certain general partnerships allegedly having offices and operations in Florida. Globopar moved to dismiss the involuntary petition, alleging lack of subject matter and personal jurisdiction, inappropriate venue, and forum non conveniens.[7] The bankruptcy court, at a hearing regarding Globopar's motion to dismiss, sua sponte determined that the involuntary petition constituted an abuse of process and dismissed the case pursuant to section 105(a) of the Bankruptcy Code on the grounds that the court had "never heard of a [sic] involuntary debtor in possession," it couldn't compel Globopar to act as a debtor in possession, and that jurisdiction would be ineffective since Globopar had few assets in the United States and Brazilian courts would not recognize any judgments or orders issued by the bankruptcy court.[8] The district court vacated the order of dismissal and remanded for further findings, stating that:

> Section 105(a) of the Bankruptcy Code is not intended to provide bankruptcy courts with unfettered discretion to dismiss case that are merely difficult to adjudicate or that may ultimately fail to provide full relief to creditors. The "abuse of process" provision of that statute has never been applied by a bankruptcy court to allow dismissal of a claim where the Petition appears, at least facially, to state a good-faith claim for relief under the

> Bankruptcy Code, and where a parallel provision o the Code, in this case, 11 U.S.C.A. § 305(a)(1) . . . as well as alternative established doctrines governing challenges to personal jurisdiction and assertions of forum non conveniens, would prescribe different procedures and different standards for dismissal of the petition.[9]

In *In re Ockerlund Construction Company,*[10] an Illinois bankruptcy court considered a debtor's motion for authorization to repay postpetition advances made to it by its president. The court found that the advance—allegedly obtained on an emergency basis in order to pay construction costs and premiums on employees' health and dental insurance policies – was neither obtained in the ordinary course of business nor with advance court approval as required by section 364 of the Bankruptcy Code.[11] The court then addressed whether section 105(a) could provide the debtor with the relief it requested, noting a split among the courts:

> If a debtor fails to establish that postpetition financing occurred in the ordinary course of business under § 364(a), some courts find that retroactive approval (a "nunc pro tunc" order) under § 364(b) and § 105(a) is possible but should be reserved for truly extraordinary and unusual circumstances, although other courts go so far as to say that the case law under the 1898 Bankruptcy Act countenancing retroactive approval on equitable grounds has been eviscerated under the current Bankruptcy Code. The latter view is more in tune with controlling authority for this district. The Bankruptcy Court's equitable powers under 11 U.S.C.A. § 105(a) do not override specific Bankruptcy Code provisions; they supplement those provisions and fill in gaps and ambiguities. . . As to gaps and ambiguities in § 364 itself, the scheme Congress envisioned as a whole covers all postpetition financing situations (i.e., those in and out of the ordinary course of business) and would be incapacitated by retroactive approval of the ones demanding prior approval and notice to creditors; notice after a debtor has already taken action is generally not meaningful.[12]

The court concluded that section 105(a) could not be used to override the plain language of section 364(b), which, in the court's view, did not contemplate retroactive approval and denied the debtor's motion.[13]

A Kansas bankruptcy court considered the request of a debtor to equitably discharge her tax obligations that were otherwise nondischargeable pursuant to section 523(a)(1) of the Bankruptcy Code.[14] Again, the plain language of a provision of the Bankruptcy Code trumped the court's ability to fashion equitable relief. Citing the law of the Tenth Circuit—that "a court's equitable powers under § 105(a) 'may not be exercised in a manner that is inconsistent with the other, more specific provisions of the. . . Code"—the court rejected the debtor's efforts to analogize the requested equitable dischargeability of her nondischargeable taxes to the partial discharge of nondischargeable student loan

debts where such debts posed an "undue hardship" for the debtor.[15] While the *Carlin* court could accept that the concept of "undue hardship" presented sufficient flexibility for bankruptcy courts to employ section 105(a) to discharge that portion of a debtor's student loan debt that posed such hardship, it could find no reason to bend the rigid deadlines and other criteria set forth in section 523(a)(1).[16] Accordingly, the court held the debtor's taxes to be nondischargeable.

Other courts have been more willing to invoke the power of section 105(a) to enforce the letter or spirit of other provisions of the Bankruptcy Code. *In re Harris*[17] involved a class action commenced by two chapter 13 debtors against Washington Mutual Home Loans, Inc., predicated on Washington Mutual's alleged unlawful assessment of late fees imposed on "cure" payments made by debtors under the terms of their confirmed plan. The plaintiffs asserted that Washington Mutual's practice had violated section 1322(b)(5) of the Bankruptcy Code, which provides, in part: "[A] plan may provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due."[18] The defendant moved to dismiss, which motion was denied by the bankruptcy court. On appeal, Washington Mutual contended that any alleged violation of section 1322(b)(5) did not give rise to a private right of action pursuant to section 105(a). The district court disagreed, relying on authority from the First and Fifth Circuit Courts of Appeals to uphold the bankruptcy court's denial of dismissal:"[S]ection 105(a) empowers the bankruptcy court to exercise its equitable powers—where 'necessary' or 'appropriate'—to facilitate the implementation of other Bankruptcy Code provisions. In addition, the Fifth Circuit has held that: [t]he language of this provision . . . is unambiguous. Reading it under its plain meaning, we conclude that a bankruptcy court can issue any order,. . . necessary or appropriate to carry out the provisions of the bankruptcy code."[19]

In a case of apparent first impression, a New Jersey district court considered a bankruptcy court's use of section 105(a) to award the recipient of an avoidable postpetition transfer an "equitable credit" in the amount of the transfer where the amount of the transfer had already been paid back to the estate in the form of financing advances.[20] In *In re Cybridge Corp.*, the debtor was party to a prepetition factoring arrangement with Presidential Financial Corporation, pursuant to which Presidential would advance Cybridge funds in an amount up to 80 percent of Cybridge's accounts receivable. Cybridge's account debtors would then pay Presidential directly. Cybridge's obligations to Presidential were secured by a security interest in Cybridge's accounts receivable.

Cybridge commenced a voluntary chapter 11 case but failed to give notice to Presidential. Consequently, Presidential continued to lend to Cybridge and collect Cybridge's accounts receivable. The case was converted to chapter 7 of the Bankruptcy Code and Presidential received its first notice of Cybridge's bankruptcy case from the chapter 7 trustee. The trustee sued Presidential, alleging that Presidential had received $163,847 from Cybridge's customers, which amount constituted an impermissible postpetition transfer of estate property recoverable by the estate under section 550 of the Bankruptcy Code.[21] The bankruptcy court found that Presidential's postpetition security interest in Cybridge's accounts receivable did constitute an avoidable postpetition transfer. But the court also held that, since Presidential had loaned Cybridge $192,000 postpetition, Presidential was entitled to a credit resulting in no recovery for the trustee. The district court agreed with the bankruptcy court, upholding its ruling on section 105(a) grounds, among others, and determined that, in the absence of a credit, the estate would receive a double recovery on account of the avoidable transfer:

> Section 105(a) . . . allows bankruptcy courts to do equity so long as the exercise thereof does not conflict with any specific provisions of the Code.
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> We . . . find that the Bankruptcy Court's exercise of its Section 105(a) powers, rather than conflicting with the Code, actually furthers its aims. "It is not the objective of the bankruptcy laws to confer windfalls on debtors." Rather, the purpose of the recovery scheme mandated in Section 550 is to put the estate in the same position it would have been but for the avoided transfer. . . [D]enying the trustee any further recovery from Presidential achieves Section 550's goal, and avoids conferring a windfall on the estate.
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> Granting Presidential an equitable credit fulfilled the aims of the Code. Further, it avoided the injustice that would have resulted had Presidential been forced to pay the Trustee $163,847.00. Presidential was deceived into continuing its relationship with the Debtor postpetition. It advanced the then-Debtor-in-Possession $192,200.00 in loans, $28,353.00 of which it will likely never recoup. . . Under these circumstances, we cannot say the Bankruptcy Court abused its discretion in using its Section 105(a) powers to grant Presidential an equitable credit.[22]

Finally, in an interesting twist, the debtor in *In re Barnes* requested that the bankruptcy court employ section 105(a) to reverse relief invoked under a provision of the Bankruptcy Code.[23] George William Barnes, a chapter 11 debtor, elected in his petition to be treated as a "small business" in order to avail himself of the various provisions in the Bankruptcy Code applicable only to small business debtors, such as the ability, in some circumstances, to proceed in chapter 11 without the involvement of a creditors committee, to obtain conditional approval of a

disclosure statement, and to enjoy the efficiencies of a combined disclosure statement approval and plan confirmation hearing.[24] The quid pro quo to such benefits includes certain burdens, such as a 160-day deadline for the filing of a plan.[25] Barnes missed the plan filing deadline and shortly thereafter asked that the court to permit him to withdraw his small business election. Rejecting case law that propounded conversion or dismissal as the only appropriate consequences for missing the small business plan deadline, the court employed section 105(a) to offer a third alternative—withdrawal of the small business election as requested by the debtor—supported by the "balance of equities."[26]

III. SANCTIONS AND CONTEMPT

The plain language of section 105(a) states that a bankruptcy court may employ the powers granted under the provision to enforce or implement rules or prevent "abuse of process."[27] To that end, courts have invoked section 105(a) to sanction conduct and to issue contempt orders. For example, conduct that frustrates the administration of the estate, such as the debtor's or a third party's refusal to provide estate property to the bankruptcy trustee, has given rise to the imposition of sanctions[28] or the entry of a contempt order.[29] Courts have also used the sanction power as a mechanism for regulating "bankruptcy petition preparers"—nonattorneys who assist debtors in preparing bankruptcy paperwork for a fee.[30]

One of the most common abuses of the bankruptcy process involves the use of multiple bankruptcy case filings and the consequential repeated imposition of the automatic stay to prevent the foreclosure of or eviction from real property. Typically, the interest in real property is transferred from debtor to debtor as the secured creditor or lessor obtains relief from the automatic stay in each case or is transferred fractionally to multiple debtors. In some cases, the debtors may be fictitious individuals or real persons who have been victimized by identity theft; or the debtors may be entities having no operations, employees, or other bona fide business purpose created specifically to "hold" the property while a debtor in bankruptcy—so-called "new debtor syndrome." Courts have invoked section 105(a) in an effort to address such abuses.[31]

For example, in *In re Stephen's 350 East 116th St.*,[32] the court considered a motion for sanctions filed by a creditor whose execution sales of real property (pursuant to judgment liens) were repeatedly thwarted by secret transfers of property to multiple debtors. In a classic case of "new debtor syndrome," the debtors (i) had no other assets other than the transferred properties; (ii) had no operations, debt, or income; (iii) were incapable of paying any expenses related to the properties; and (iv) consequently had no ability or basis on which to reorganize under chapter

11. The creditor sought the imposition of sanctions against the attorney who had commenced the chapter 11 cases on behalf of such debtors. The court cited section 105(a) as one of three independent bases that would "permit the imposition of sanctions, on appropriate notice . . . for certain types of wrongful conduct, including the bad faith filing of a bankruptcy petition and the bad faith prosecution of a bankruptcy case."[33] The court ordered that the debtor's attorney pay the creditor's attorneys' fees as sanctions for his conduct.

Another court held a debtor in criminal contempt when she filed her 10th bankruptcy petition within a five-year period after the dismissal order from her ninth bankruptcy case prohibited further filings.[34]

Other courts have gone further in employing section 105(a) to curb abuses of the bankruptcy system. A California bankruptcy court considered a motion by the County of Fresno for relief from the automatic stay relating to a property for which back taxes had been owed for over 14 years.[35] Over a period of several years, the property had been transferred to a variety of entities (all of which allegedly shared the same principal), each of which commenced bankruptcy cases in order to thwart tax sales of the property. Due to the pattern of abuse, the County sought in rem relief, that is, relief from the automatic stay in the debtor's bankruptcy case and in any other subsequent bankruptcy case which involved the property, such that continued filings would have no impact on the County's ability to conduct its tax sale. Accordingly, to provide the County with relief, the court turned to section 105(a), noting some tension in its application:

> The prescription of "any order . . . that is necessary" is not without limitation. . . "Bankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides." The bankruptcy court may not "ignore specific statutory mandates" in the exercise of its equitable powers. Nor may the court apply equitable principles in a "freewheeling fashion." On the other hand, the bankruptcy court is a court of equity and such should refuse to invoke equitable principles and doctrines "only where their application would be 'inconsistent' with the Bankruptcy Code."
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> The accepted response to abuse of process or bad faith is to dismiss the case, however, when the petitioner's goal is to serially invoke the automatic stay to prevent some action by a creditor, mere dismissal will not be sufficient. In these extraordinary circumstances, it is appropriate for the court to "implement an appropriate order to prevent the continuing abuse of the bankruptcy process: pursuant to 11 U.S.C.A. § 105(a).[36]

The court granted the County's request and ordered that the automatic stay would be modified in the case before it "and bind all subsequent

transferees of the Property for a limited time"[37] in order to ensure the County continuing relief in any future bankruptcy cases.[38]

Other courts are less willing to give latitude to a bankruptcy court to order extraordinary relief that may impact future bankruptcy cases. The United States Court of Appeals for the Ninth Circuit considered an Arizona bankruptcy court's order sanctioning James Hansbrough, the debtor's principal, for failing to turn over exercise equipment owned by the debtor after being ordered to do so.[39] The bankruptcy court sanctioned Hansbrough $20,883, the approximate fees and costs incurred by the bankruptcy trustee as a consequence of Hansbrough's refusal to return estate property, and ordered that the sanction would not be dischargeable in any future bankruptcy case Hansbrough (not the debtor) might file in the future. The district court affirmed and Hansbrough appealed. The appellate court confirmed the bankruptcy court's civil contempt power to coerce compliance of its turnover order. However, with respect to the bankruptcy court's order rendering its sanction nondischargeable, the court "agree[d] with the Fifth Circuit that a bankruptcy court may not finally adjudicate the subsequent dischargeability of a sanction properly imposed on a nonparty participant in a bankruptcy proceeding. A bankruptcy court may adjudicate only the dischargeability of debts owed by the debtor. . .. For this reason, the portion of the bankruptcy court's order purporting to make the sanction against Hansbrough nondischargeable in the event of a future bankruptcy filing must be vacated."

As was the case with Hansbrough, other courts similarly have not limited the use of their contempt and sanction powers to the punishment of abusive debtors.[40] In *In re Rivera Torres*,[41] chapter 7 debtors sought and obtained from the bankruptcy court an order of contempt against the Internal Revenue Service for allegedly violating their discharge. The debtors sought the award of compensatory damages, attorneys' fees, emotional distress, and punitive damages. The IRS filed a proof of claim in the debtors' bankruptcy case, asserting both general unsecured and priority claims for unpaid self-employment income taxes. Three years after entry of the debtors' discharge order, the IRS resumed sending collection notices and began telephoning the debtors requesting payment of its general unsecured claim. The IRS then offset a postdischarge refund due to the debtors against such claim and sent a notice of levy to the debtors. In defense to the debtors' contempt motion, the IRS first conceded that it had violated the discharge injunction but argued that the discharge provision of the Bankruptcy Code did not contemplate the award of damages; the IRS later adopted the position that it was liable for compensatory damages only and not emotional damages. The IRS appealed the bankruptcy court's decision to the Bankruptcy Appellate Panel of the First Circuit.

The panel, relying on First Circuit authority, held that section 105(a) created an effective substitute for a private right of action to seek broad damages for violations of the discharge injunction:

> [Section] 105 does not itself create a private right of action, but a court may invoke § 105(a) if the equitable remedy utilized is demonstrably necessary to preserve a right elsewhere provided in the Code. . . The statutory contempt powers given to a bankruptcy court under § 105(a) complement the inherent powers of a federal court to enforce its own orders. . . There is no express inclusion or exclusion of emotional damages in *Bessette [v. Avco Fin. Serv., Inc.*, 230 F.3d 439 (1st Cir. 2000), cert. denied, 532 U.S. 1048, 121 S.Ct. 2016, 149 L. Ed. 2d 1018 (2001)]; nonetheless, we are satisfied that the sweep given § 105(a) by the First Circuit in that case is broad enough to include such damages within the ambit of actual damages for a violation of § 524, if the merits so require.[42]

Thus the panel upheld the bankruptcy court's award of emotional damages against the IRS pursuant to section 105(a) of the Bankruptcy Code.

IV. PROTECTION OF THIRD PARTIES AND OTHER INJUNCTIVE RELIEF

Courts have sometimes used section 105(a) to protect the debtor and third parties from litigation and other activity that may directly or indirectly threaten the administration of the bankruptcy estate,[43] provided the party seeking protection meets the difficult burden of justifying injunctive relief. For example, in *In re Yukos Oil Company,*[44] the chapter 11 debtor, a Russian company, sought an injunction from the bankruptcy court enjoining the tax sale by Russian government agencies of the debtor's stock in YNG, an entity responsible for 60 percent of the debtor's oil and gas production. Apparently, the Russian agencies also had orchestrated the bidding process such that an entity partially owned by the Russian government would submit a low bid to acquire the stock. The bankruptcy court determined that application of section 105(a) to impose the relief requested demanded an evaluation of the traditional factors that would support a preliminary injunction. Because the debtor disputed the tax obligation, the sale process appeared to be irregular under Russian law, and the sale of such significant assets would result in irreparable harm to the debtor, the court granted the injunction (except as to the Russian government, due to sovereign immunity issues).

The relationship between the injunction and the bankruptcy estate is more indirect in *In re Ames Department Stores, Inc.*[45] In *Ames*, an assignee of one of the debtor's commercial leases sought an injunction from the bankruptcy court against its (and the debtor's former) landlord who sought to terminate the assigned lease in an effort to capture the value of the leasehold for its own benefit. The landlord declared a default under the lease arising from the assignee's renovation work to the pre-

mises, which work was specifically permitted by the bankruptcy court pursuant to a prior order approving the sale of the debtor's designation rights in its former store leases. The court, in basing its injunctive powers on section 105(a), indicated that, where the prior orders of the court are at issue, proof of the normal injunctive relief requirement of "irreparable harm" becomes unnecessary:

> This Court, like most bankruptcy courts, invokes section 105(a) with restraint, and never inconsistently with, or to circumvent, other provisions of the Code. But it is manifestly proper, in this Court's view, to invoke section 105(a) "to enforce and implement" the Court's earlier orders, and to prevent abuses of process. Exercise of the Court's section 105(a) authority in this manner, and for this purpose, vindicates the interests of the Court, as much as (and perhaps more than) it vindicates the interest of an individual litigant. Particularly in such a situation, it is not surprising that the usual grounds for injunctive relief, such as irreparable injury, need not be shown in a proceeding for an injunction under section 105(a).[46]

In addition to preliminarily enjoining any further efforts by the landlord to terminate the lease as a consequence of the assignee's renovations, the court took the further, unusual step of requiring the landlord to first obtain leave of the court before declaring any future defaults in respect of the assigned lease.[47]

A bankruptcy court can go too far in employing injunctions to support relief contemplated under the Bankruptcy Code. In *In re Mirant Corp.*,[48] the United States Court of Appeals for the Fifth Circuit considered injunctive relief ordered in connection with a rejected power purchase agreement between the debtor, one of the largest public utilities in the United States, and Potomac Electric Power Company (PEPCO). Pursuant to section 105(a) of the Bankruptcy Code, the lower court had issued injunctions to stop PEPCO's enforcement of, and the regulatory activity of the Federal Energy Regulatory Commission over, the rejected contract and provided that (i) FERC and PEPCO were prohibited from taking any action to require the debtor to abide by the terms of the rejected contract; and (ii) FERC was required to give the debtor 10 days' notice if it contemplated taking any action to require the debtor to adhere to the terms of any contract under FERC jurisdiction. The appellate court, noting that "[t]he Bankruptcy Code clearly anticipates ongoing governmental regulatory jurisdiction while a bankruptcy proceeding is pending," held that the bankruptcy court went too far by, among other things, implicating FERC's authority over all contracts with the debtor in imposing the 10-day waiting period before FERC was permitted to take any action against the debtor.[49] Because the lower court's injunctions were overly broad, the appellate court vacated such relief.

In *In re Trans-Service Logistics, Inc.*,[50] Marie Courtright, a former employee of the debtor, commenced an action against her employer, alleging gender discrimination and other employment-related causes of action. The employer commenced a chapter 11 bankruptcy case. Thereafter, the federal district court to which Ms. Courtright's litigation was removed directed the parties to seek a determination from the bankruptcy court as to whether the automatic stay should be extended to protect the debtor's president/CEO and its general manager. The bankruptcy court articulated the criteria under which such relief would be considered:

> A review of the case law indicates that this Court has the authority to extend the automatic stay to non bankruptcy parties, under limited circumstances. 11 U.S.C.A. § 105(a). Typically, courts have balanced the four factors considered for the issuance of injunctions, i.e., the movant's likelihood of success, whether the movant will suffer irreparable harm without an injunction, the relative harm to others, and the public interest. Essentially, however, it is incumbent upon the non bankrupt party to establish that there is a unity of interest with the debtor so that the reorganization efforts of the debtor would be irreparably harmed by continuation of the litigation.[51]

Applying the factors, the bankruptcy court found that the participation of the two executives in the litigation was not likely to significantly disrupt the reorganization process and drew distinctions between the single piece of litigation at issue and the threat posed in other cases, for example, by thousands of tort claims. The court held that the executives failed to meet their burden and no cause existed to extend the automatic stay to the nondebtor parties.

The use of section 105(a) to expand the ambit of the automatic stay to include nondebtor parties or to issue preliminary injunctions results in the imposition of a temporary injunction during the pendency of the bankruptcy case. However, courts have acted under the authority of section 105(a) to issue other types of injunctive relief as well, sometimes permanent in nature. One mechanism employing section 105(a) as the basis for permanent injunctive relief is the "channeling injunction," commonly seen in chapter 11 plans involving debtors against which mass tort claims have been asserted.[52] In 2004, the vitality of channeling injunctions was challenged by the United States Court of Appeals for the Third Circuit in connection with the plan confirmation proceedings of Combustion Engineering, Inc.[53] Combustion Engineering was forced into chapter 11 after over 40 years of litigation of asbestos-related claims. It proposed a prepackaged plan of liquidation which contemplated the formation of a postconfirmation trust partially funded by nondebtor affiliates. The plan featured a channeling injunction created pursuant to section 524(g) of the Bankruptcy Code—a specialized provision added by Congress to specifically address asbestos-related claims—whereby

asbestos-related claims against the debtor would be routed to the post-confirmation trust. Pursuant to section 105(a), the channeling injunction also extended to the two nondebtor affiliates that also had contributed funds to the trust. The bankruptcy court recommended and the district court ordered confirmation of the plan. Certain insurance companies and claimants appealed. The appellate court, mindful of the restriction that section 105(a) "cannot trump specific provisions of the Bankruptcy Code, and must be exercised within the parameters of the Code itself," noted that the Bankruptcy Code's asbestos provision—section 524(g)—already contemplated the application of channeling injunctions to third parties.[54] Specifically, "[section] 524(g) limits the situations where a channeling injunction may enjoin actions against third parties to those where a third party has derivative liability for the claims against the debtor."[55] The provision of criteria in section 524(g) for the extension of channeling injunctions to nondebtors therefore prevented the lower court from employing section 105(a) to fashion non-ebtor injunctive relief inconsistent with that section of the Bankruptcy Code:

> [Section] 524(g) provides no specific authority to extend a channeling injunction to include third-party actions against non-debtors where the liability alleged is not derivative of the debtor. Because § 524(g) expressly contemplates the inclusion of third parties' liability within the scope of a channeling injunction—and sets out the specific requirements that must be met in order to permit inclusion—the general powers of § 105(a) cannot be used to achieve a result not contemplated by the more specific provisions of § 524(g).[56]

Thus the appellate court reversed, denying confirmation.

V. THE "DOCTRINE OF NECESSITY"

In general, the chapter 11 reorganization process contemplates the equal treatment of similar types of claims through a plan. Accordingly, holders of prepetition general unsecured claims must await confirmation of a plan in order to receive payment, usually in a discounted amount after more senior classes of debt are satisfied first. However, it is common in business reorganizations for a debtor to request that certain holders of unsecured claims—usually the debtor's employees, as well as suppliers, vendors, and other service providers who furnish products and services central to the debtor's business—who have no obligation to continue to do business with the debtor, be paid in full immediately on account of their prepetition claims.[57] Bankruptcy courts routinely approve such payments to so-called "critical vendors" as part of "first-day" motions filed by the debtor upon the commencement of the case. As authority for the release of such payments, courts have looked to section 105(a) of the Bankruptcy Code and a doctrine of developed case law known as the "doctrine of necessity."

One of the most high-profile cases involving the "doctrine of necessity" was decided in 2004. In *In re Kmart Corp.*,[58] the United States Court of Appeals for the Seventh Circuit upheld the district court's reversal of a bankruptcy court's order permitting the debtor to pay critical vendors. The court criticized that the critical vendor order was tantamount to "open-ended permission to pay any debt to any vendor it deemed 'critical' in the exercise of unilateral discretion, provided that the vendor agreed to furnish goods on 'customary trade terms' for the next two years."[59] Over 2,000 critical vendors received full payment on account of their claims, while the balance of unsecured claimants received stock in the reorganized debtor valued at approximately 10 cents on the dollar.[60] A creditor (obviously, not a critical vendor) appealed the critical vendor order to the district court, which held that neither section 105(a) nor the "doctrine of necessity" supported such payments.[61] The appellate court agreed:

> Section 105(a) allows a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Code. This does not create discretion to set aside the Code's rules about priority and distribution; the power conferred by § 105(a) is one to implement rather than override. Every circuit that has considered the question has held that this statute does not allow a bankruptcy judge to authorize full payment of any unsecured debt, unless all unsecured creditors in the class are paid in full. We agree with this view of § 105. "The fact that a [bankruptcy] proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be.. . . A "doctrine of necessity" is just a fancy name for a power to depart from the Code.[62]

The court rejected the debtor's efforts to link authorization to pay critical vendors pursuant to section 105(a) to Bankruptcy Code provisions regarding financing and the allowance of administrative claims.[63] However, the appellate court did leave open the possibility that section 363(b)(1) of the Bankruptcy Code—regarding the use, sale or leasing of estate property outside the ordinary course of business[64]—might form the basis for critical vendor payment authority "if the record shows the prospect of benefit to the other creditors" but declined to do so with respect to the specific order entered by the bankruptcy court.[65]

VI. PARTIAL DISCHARGE OF STUDENT LOANS

Section 523(a)(8) of the Bankruptcy Code excepts from discharge a debt "for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's

dependents."[66] Courts have invoked section 105(a) in this context to apportion a debtor's student loan debt into dischargeable and nondischargeable amounts in cases where a debtor is not able to demonstrate "undue hardship". For example, in *In re Votruba*,[67] the debtor sought the discharge of educational loans obtained for the benefit of his children—so-called PLUS (Parent Loan for Undergraduate Students) loans. The bankruptcy court determined that, although the debtor had no present ability to repay the loans since he was recently unemployed and subsisting at a "near poverty level," his employment prospects were good and, as such, he could not make a showing of "undue hardship."[68] However, the court stated:

> In cases where the debtors have not established an entitlement to an undue hardship discharge, the Court can utilize its authority under § 1059a) of the Bankruptcy Code to fashion an equitable remedy that will give the Debtor the kind of relief he needs to obtain the fresh start that filing for bankruptcy entitles him to. . .
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> This Debtor has very substantial PLUS loan debts that threaten his ability to make a fresh start. They account for 51% of his total debt. . . The Debtor did not file bankruptcy simply to have his student loans discharged. . . While the Debtor's situation is likely to improve somewhat in the near future, it is unlikely that the Debtor will ever be able to achieve the earnings that he did . . . The Debtor demonstrated his good faith by timely repaying his student loan obligations during the periods of time when he was employed. . .
>
> The Debtor has established an undue hardship, that [a]ffects [sic] him and his dependent wife, to an extent sufficient to warrant a partial discharge. In granting this partial discharge, the Court attempts to balance the Bankruptcy Code's goal of providing the Debtor a fresh start, with the Congress's concomitant goal of preventing abuse of the student loan system.[69]

The court awarded the debtor a 65 percent discharge of his student loan debt. The remaining 35 percent of the debt was held to be nondischargeable.

Other courts disagree with this approach. The United States Court of Appeals for the Sixth Circuit, in *In re Miller*,[70] considered a bankruptcy court's partial discharge of the majority of a debtor's student loan debt. The appellate court noted that the bankruptcy court seemed to fashion its own "test" for determining whether it would use its equitable powers to partially discharge the debtor's debt. The court of appeals rejected such a loose approach to applying section 105(a) in this context:

> In so doing, the bankruptcy court impermissibly used its equitable authority. Section 523(a)(8) permits the discharge of student loans only upon a finding that denying such discharge would impose undue hardship on the debtor. Relying on § 105 to discharge student loan indebtedness for reasons other than undue hardship impermissibly contravenes the express language of the bankruptcy code. . . [W]e believe that § 523(a)(8) must apply to

> all discharges of student loan debt [and] we remand this case so that the bankruptcy court can determine if [the debtor] has shown undue hardship with respect to the portion of her educational loans that were discharged.[71]

Thus the appellate court remanded the matter to allow the bankruptcy court to consider partial discharge only within the context of a showing of "undue hardship."[72]

VII. SUA SPONTE ACTIONS

Section 105(a) of the Bankruptcy Code states: "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."[73] Despite the apparent broad powers granted by the provision, some courts have cautioned that a court acting sua sponte must still abide by the procedural safeguards afforded litigants, as if relief were being sought by a party, instead of by the court. Thus, in *In re Casual Male Corp.*,[74] the court considered a dispute over the removal of a state court breach-of-contract action against the seller of a claim against a chapter 11 debtor. The seller sought mandatory removal of the proceeding. The bankruptcy court, sua sponte, raised the issue of equitable remand but was careful to note that due process was served since "the parties were given the opportunity to brief the issues in letter briefs submitted to the district court prior to the referral to this court."[75] Ultimately, equitable remand served as the basis for the court's decision to return the matter to state court.

In *In re Tennant*, the debtor appealed from the bankruptcy court's order dismissing his case due to the debtor's failure to file a statement of financial affairs within 15 days of the petition date.[76] The debtor argued, among other things, that the court lacked the power to spontaneously dismiss his case when section 1307(c)(9) of the Bankruptcy Code specified that dismissal could occur only "on request of a party in interest or the United States trustee," and Federal Rule of Bankruptcy Procedure 1017(c) allowed "[t]he court [to] . . . dismiss a voluntary chapter . . . 13 case under. . . § 1307(c)(9) after a hearing on notice served by the United States trustee on the debtor, the trustee, and any other entities as the court directs" and neither the Code section nor rule had been satisfied.[77] The bankruptcy appellate panel found that the plain language of section 105(a), which permitted the court to raise any issue on its own, was intended to trump any provision that specified that only certain parties could seek relief.[78] The panel also rejected the debtor's assertion that the court's dismissal violated the bankruptcy rule on the technical grounds that the notice and hearing requirement only applied where a motion under section 1307(c)(9) had been filed, not when the court dismisses the

case under the same provision.[79] As to the debtor's due process rights, the court justified its actions without having conducted a hearing: "A dismissal without notice and an opportunity to be heard would not be appropriate where substantive issues are to be determined, but if a case involves only very narrow procedural aspects, a court can dismiss a Chapter 13 case without further notice and a hearing if the debtor was provided 'with notice of the requirements to be met.'"[80] Because the debtor had notice of the requirement to file his statement of financial affairs within a specified period of time, immediate dismissal was warranted in the absence of further procedural safeguards.[81]

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1. 11 U.S.C.A. § 105(a).

2. 11 U.S.C.A. § 105(a).

3. In re Valenti, 310 B.R. 138, 52 Collier Bankr. Cas. 2d (MB) 403 (B.A.P. 9th Cir. 2004).

4. 11 U.S.C.A. § 1330(a).

5. In re Valenti, 310 B.R. 138, 145, 52 Collier Bankr. Cas. 2d (MB) 403 (B.A.P. 9th Cir. 2004).

6. In re Globo Comunicacoes e Participacoes S.A., 317 B.R. 235 (S.D. N.Y. 2004).

7. In re Globo Comunicacoes e Participacoes S.A., 317 B.R. 235, 243 (S.D. N.Y. 2004).

8. In re Globo Comunicacoes e Participacoes S.A., 317 B.R. 235, 244 (S.D. N.Y. 2004).

9. In re Globo Comunicacoes e Participacoes S.A., 317 B.R. 235, 247 (S.D. N.Y. 2004). Section 305(a)(1) of the Bankruptcy Code permits a bankruptcy court to dismiss or suspend any bankruptcy case if "the interests of creditors and the debtor would be better served by such dismissal or suspension . . .." 11 U.S.C.A. § 305(a)(1).

10. In re Ockerlund Const. Co., 308 B.R. 325, 43 Bankr. Ct. Dec. (CRR) 11 (Bankr. N.D. Ill. 2004).

11. Section 364 provides, in relevant part:

(a)If the trustee is authorized to operate the business of the debtor . . . unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.

(b)The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.

11 U.S.C.A. § 364(a), (b).

12. In re Ockerlund Const. Co., 308 B.R. 325, 329-330, 43 Bankr. Ct. Dec. (CRR) 11 (Bankr. N.D. Ill. 2004) (citations omitted).

13. Cf. In re At Home Corp., 392 F.3d 1064, 44 Bankr. Ct. Dec. (CRR) 15, Bankr. L. Rep. (CCH) P 80217 (9th Cir. 2004), petition for cert. filed, 73 U.S.L.W. 3673 (U.S. May 3, 2005) (bankruptcy court could authorize retroactive rejection of lease pursuant to section 105(a)).

14. In re Carlin, 318 B.R. 556, 2005-1 U.S. Tax Cas. (CCH) P 50215, 95 A.F.T.R.2d 2005-342 (Bankr. D. Kan. 2004), aff'd, 2005 WL 1773620 (B.A.P. 10th Cir. 2005). Section 523(a)(1) of the Bankruptcy Code excepts from discharge (i) tax claims having priority under section 507(a)(8) of the Bankruptcy Code; (ii) certain taxes for which a return was not filed or filed late; (iii) taxes attributable to a fraudulent tax return or for which the debtor sought to

evade or defeat such tax; and (iv) punitive (non-pecuniary) tax penalties. See 11 U.S.C.A. § 523(a)(1).

15. Section 523(a)(8) of the Bankruptcy Code excepts from discharge a debt "for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C.A. § 523(a)(8).

16. See In re Carlin, 318 B.R. 556, 2005-1 U.S. Tax Cas. (CCH) P 50215, 95 A.F.T.R.2d 2005-342 (Bankr. D. Kan. 2004), aff'd, 2005 WL 1773620 (B.A.P. 10th Cir. 2005).

17. In re Harris, 312 B.R. 591 (N.D. Miss. 2004).

18. 11 U.S.C.A. § 1322(b)(5).

19. In re Harris, 312 B.R. 591, 597 (N.D. Miss. 2004) (citations omitted).

20. In re Cybridge Corp., 312 B.R. 262, 43 Bankr. Ct. Dec. (CRR) 81, 52 Collier Bankr. Cas. 2d (MB) 615 (D.N.J. 2004).

21. See 11 U.S.C.A. § 549. Section 550 of the Bankruptcy Code provides, in relevant part: "(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section . . . 549 of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property. . . (d) The trustee is entitled to only a single satisfaction under subsection (a) of this section." 11 U.S.C.A. § 550(a), (d).

22. In re Cybridge Corp., 312 B.R. 262, 273, 43 Bankr. Ct. Dec. (CRR) 81, 52 Collier Bankr. Cas. 2d (MB) 615 (D.N.J. 2004) (citation omitted).

23. In re Barnes, 310 B.R. 209, 43 Bankr. Ct. Dec. (CRR) 33 (Bankr. D. Colo. 2004).

24. See 11 U.S.C.A. §§ 1102(a)(3), 1125(f).

25. See 11 U.S.C.A. § 1121(e). Section 1121(e) does not specify the repercussions if the debtor misses the plan filing deadline.

26. In re Barnes, 310 B.R. 209, 212-13, 43 Bankr. Ct. Dec. (CRR) 33 (Bankr. D. Colo. 2004).

27. See 11 U.S.C.A. § 105(a); In re Armstrong, 309 B.R. 799, 805 (B.A.P. 10th Cir. 2004) ("Bankruptcy courts have inherent powers to control the course of litigation before them. That power is supplemented by . . . 11 U.S.C.A. § 105(a).").

28. See In re Ambotiene, 316 B.R. 25 (Bankr. E.D. N.Y. 2004) (Bankr. E.D. N.Y. 2004) (debtor's landlord, who refused to give chapter 7 trustee access to premises where debtor operated restaurant in order for trustee to assess equipment value, ordered to pay trustee's legal fees and costs as sanctions); In re Karl, 313 B.R. 827 (Bankr. W.D. Mo. 2004) (court ordered that debtor's homestead exemption would be surcharged in the amount of trustee's attorneys' fees and costs where debtor refused to surrender or cooperate with trustee regarding recovery of vehicle).

29. See In re Kerlo, 311 B.R. 256, 51 Collier Bankr. Cas. 2d (MB) 1702 (Bankr. C.D. Cal. 2004) (Bankr. C.D. Cal. 2004) (debtor's failure to heed two orders compelling turn over of real property to trustee resulted in finding of civil contempt).

30. See In re Rose, 314 B.R. 663 (Bankr. E.D. Tenn. 2004) (Bankr. E.D. Tenn. 2004) (operator of bankruptcy petition preparation service provider sanctioned and ordered to disgorge fees for failing to meet Bankruptcy Code requirements, unfair and deceptive acts, charging unreasonably high fees).

31. See In re Archibald, 314 B.R. 876, 879-880 (Bankr. S.D. Ga. 2004) (debtors' chapter 13 filing on eve of foreclosure, when debtors did not qualify under chapter's debt limits and misrepresented value of assets in schedules, constituted "bad faith" filing and court dis-

missed case with injunction against refiling bankruptcy case for 180 days pursuant to section 105(a)).

32. In re St. Stephen's 350 East 116th St., 313 B.R. 161 (Bankr. S.D. N.Y. 2004).

33. In re St. Stephen's 350 East 116th St., 313 B.R. 161, 170 (Bankr. S.D. N.Y. 2004) (citations omitted).

34. In re Webb, 308 B.R. 357, 51 Collier Bankr. Cas. 2d (MB) 1934 (Bankr. E.D. Ark. 2004).

35. In re Golden State Capital Corp., 317 B.R. 144, 43 Bankr. Ct. Dec. (CRR) 259 (Bankr. E.D. Cal. 2004).

36. In re Golden State Capital Corp., 317 B.R. 144, 149, 43 Bankr. Ct. Dec. (CRR) 259 (Bankr. E.D. Cal. 2004) (citations omitted).

37. In re Golden State Capital Corp., 317 B.R. 144, 150, 43 Bankr. Ct. Dec. (CRR) 259 (Bankr. E.D. Cal. 2004).

38. See also In re Amey, 314 B.R. 864 (Bankr. N.D. Ga. 2004) (granting in rem relief and barring any filing by any owner of property for 180 days where debtor had filed four chapter 13 cases in two years to thwart foreclosure sale).

39. In re Hercules Enterprises, Inc., 387 F.3d 1024, 43 Bankr. Ct. Dec. (CRR) 228, Bankr. L. Rep. (CCH) P 80183 (9th Cir. 2004).

40. See, e.g., In re Fas Mart Convenience Stores, Inc., 318 B.R. 370 (Bankr. E.D. Va. 2004) (chapter 11 trustee permitted to continue action against secured creditor and principal for alleged willful violation of automatic stay).

41. In re Rivera Torres, 309 B.R. 643, 52 Collier Bankr. Cas. 2d (MB) 120, Bankr. L. Rep. (CCH) P 80130, 2004-2 U.S. Tax Cas. (CCH) P 50379, 93 A.F.T.R.2d 2004-2428 (B.A.P. 1st Cir. 2004).

42. In re Rivera Torres, 309 B.R. 643, 647-48, 52 Collier Bankr. Cas. 2d (MB) 120, Bankr. L. Rep. (CCH) P 80130, 2004-2 U.S. Tax Cas. (CCH) P 50379, 93 A.F.T.R.2d 2004-2428 (B.A.P. 1st Cir. 2004) (citations and quotations omitted).

43. See, e.g., In re CEI Roofing, Inc., 315 B.R. 61 (Bankr. N.D. Tex. 2004), opinion issued, (Aug. 2, 2004) (bankruptcy court has power to temporarily enjoin debtor's former president and competitor from violating covenants and confidentiality provisions of former president's employment agreement).

44. In re Yukos Oil Co., 320 B.R. 130, 43 Bankr. Ct. Dec. (CRR) 278 (Bankr. S.D. Tex. 2004).

45. In re Ames Dept. Stores, Inc., 317 B.R. 260 (Bankr. S.D. N.Y. 2004).

46. In re Ames Dept. Stores, Inc., 317 B.R. 260, 273-74 (Bankr. S.D. N.Y. 2004).

47. In re Ames Dept. Stores, Inc., 317 B.R. 260, 275 (Bankr. S.D. N.Y. 2004).

48. In re Mirant Corp., 378 F.3d 511, 43 Bankr. Ct. Dec. (CRR) 111, Bankr. L. Rep. (CCH) P 80139 (5th Cir. 2004).

49. In re Mirant Corp., 378 F.3d 511, 523, 43 Bankr. Ct. Dec. (CRR) 111, Bankr. L. Rep. (CCH) P 80139 (5th Cir. 2004).

50. In re Trans-Service Logistics, Inc., 304 B.R. 805, 42 Bankr. Ct. Dec. (CRR) 154, 51 Collier Bankr. Cas. 2d (MB) 1290 (Bankr. S.D. Ohio 2004).

51. In re Trans-Service Logistics, Inc., 304 B.R. 805, 807, 42 Bankr. Ct. Dec. (CRR) 154, 51 Collier Bankr. Cas. 2d (MB) 1290 (Bankr. S.D. Ohio 2004) (citations omitted).

52. The moniker arises from the injunction's effect of "channeling" claims towards a trust or other entity administering a pool of funds from which all existing and future claims will be satisfied, and away from the debtor, potential insurers and other related parties.

53. In re Combustion Engineering, Inc., 391 F.3d 190, 43 Bankr. Ct. Dec. (CRR) 271, Bankr. L. Rep. (CCH) P 80206 (3d Cir. 2004), as amended, (Feb. 23, 2005).

54. In re Combustion Engineering, Inc., 391 F.3d 190, 236, 43 Bankr. Ct. Dec. (CRR) 271, Bankr. L. Rep. (CCH) P 80206 (3d Cir. 2004), as amended, (Feb. 23, 2005) (citation omitted).

55. In re Combustion Engineering, Inc., 391 F.3d 190, 234, 43 Bankr. Ct. Dec. (CRR) 271, Bankr. L. Rep. (CCH) P 80206 (3d Cir. 2004), as amended, (Feb. 23, 2005).

56. In re Combustion Engineering, Inc., 391 F.3d 190, 236-37, 43 Bankr. Ct. Dec. (CRR) 271, Bankr. L. Rep. (CCH) P 80206 (3d Cir. 2004), as amended, (Feb. 23, 2005).

57. See, e.g., In re CEI Roofing, Inc., 315 B.R. 50 (Bankr. N.D. Tex. 2004), opinion issued, (July 7, 2004) (debtor may pay priority employee wage and benefits in advance of plan confirmation pursuant to section 105(a) in aid of provisions specifying priority for such claims, sections 507(a)(3) and (4) of Bankruptcy Code).

58. In re Kmart Corp., 359 F.3d 866, 42 Bankr. Ct. Dec. (CRR) 166, 51 Collier Bankr. Cas. 2d (MB) 1076, Bankr. L. Rep. (CCH) P 80054 (7th Cir. 2004), cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 370 (U.S. 2004) and cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 385 (U.S. 2004) and cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 370 (U.S. 2004).

59. In re Kmart Corp., 359 F.3d 866, 868-69, 42 Bankr. Ct. Dec. (CRR) 166, 51 Collier Bankr. Cas. 2d (MB) 1076, Bankr. L. Rep. (CCH) P 80054 (7th Cir. 2004), cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 370 (U.S. 2004) and cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 385 (U.S. 2004) and cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 370 (U.S. 2004).

60. In re Kmart Corp., 359 F.3d 866, 869, 42 Bankr. Ct. Dec. (CRR) 166, 51 Collier Bankr. Cas. 2d (MB) 1076, Bankr. L. Rep. (CCH) P 80054 (7th Cir. 2004), cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 370 (U.S. 2004) and cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 385 (U.S. 2004) and cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 370 (U.S. 2004).

61. The lower court decisions were discussed in the 2004 edition of this article.

62. In re Kmart Corp., 359 F.3d 866, 871, 42 Bankr. Ct. Dec. (CRR) 166, 51 Collier Bankr. Cas. 2d (MB) 1076, Bankr. L. Rep. (CCH) P 80054 (7th Cir. 2004), cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 370 (U.S. 2004) and cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 385 (U.S. 2004) and cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 370 (U.S. 2004) (citations omitted).

63. See 11 U.S.C.A. §§ 364(b), 503; In re Kmart Corp., 359 F.3d 866, 872, 42 Bankr. Ct. Dec. (CRR) 166, 51 Collier Bankr. Cas. 2d (MB) 1076, Bankr. L. Rep. (CCH) P 80054 (7th Cir. 2004), cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 370 (U.S. 2004) and cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 385 (U.S. 2004) and cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 370 (U.S. 2004).

64. Section 363(b)(1) states: "The trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C.A. § 363(b)(1).

65. In re Kmart Corp., 359 F.3d 866, 874, 42 Bankr. Ct. Dec. (CRR) 166, 51 Collier Bankr. Cas. 2d (MB) 1076, Bankr. L. Rep. (CCH) P 80054 (7th Cir. 2004), cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 370 (U.S. 2004) and cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 385 (U.S. 2004) and cert. denied, 125 S. Ct. 495, 160 L. Ed. 2d 370 (U.S. 2004).

66. 11 U.S.C.A. § 523(a)(8).

67. In re Votruba, 310 B.R. 698, 188 Ed. Law Rep. 861 (Bankr. N.D. Ohio 2004).

68. In re Votruba, 310 B.R. 698, 707, 188 Ed. Law Rep. 861 (Bankr. N.D. Ohio 2004).

69. In re Votruba, 310 B.R. 698, 709-10, 188 Ed. Law Rep. 861 (Bankr. N.D. Ohio 2004).

70. In re Miller, 377 F.3d 616, 52 Collier Bankr. Cas. 2d (MB) 988, Bankr. L. Rep. (CCH) P 80135, 2004 FED App. 0246P (6th Cir. 2004) (holding modified by, In re Oyler, 397 F.3d 382, Bankr. L. Rep. (CCH) P 80234, 2005 FED App. 0048P (6th Cir. 2005)).

71. In re Miller, 377 F.3d 616, 624, 52 Collier Bankr. Cas. 2d (MB) 988, Bankr. L. Rep. (CCH) P 80135, 2004 FED App. 0246P (6th Cir. 2004) (holding modified by, In re Oyler, 397 F.3d 382, Bankr. L. Rep. (CCH) P 80234, 2005 FED App. 0048P (6th Cir. 2005)).

72. See In re Bard-Prinzing, 311 B.R. 219, 229, 189 Ed. Law Rep. 243 (Bankr. N.D. Ill. 2004) (bankruptcy court cannot invoke equitable powers under section 105(a) if "undue hardship" standard not met); In re Matthews, 324 B.R. 319 (Bankr. N.D. Ohio 2004) (Bankr. N.D. Ohio Dec. 14, 2004) (citing *Miller*, the bankruptcy court could not effect partial discharge absent showing of "undue hardship").

73. 11 U.S.C.A. § 105(a).

74. In re Casual Male Corp., 317 B.R. 472 (Bankr. S.D. N.Y. 2004).

75. In re Casual Male Corp., 317 B.R. 472, 474 n. 1 (Bankr. S.D. N.Y. 2004).

76. In re Tennant, 318 B.R. 860 (B.A.P. 9th Cir. 2004).

77. In re Tennant, 318 B.R. 860, 869-870 (B.A.P. 9th Cir. 2004) (quotation omitted).

78. In re Tennant, 318 B.R. 860, 869 (B.A.P. 9th Cir. 2004).

79. In re Tennant, 318 B.R. 860, 870 (B.A.P. 9th Cir. 2004).

80. In re Tennant, 318 B.R. 860, 870 (B.A.P. 9th Cir. 2004).

81. See In re Michaelesco, 312 B.R. 466, 469 (Bankr. D. Conn. 2004) ("Although § 1307 does not explicitly provide that the court may act sua sponte, the court has that authority under § 105(a).").