Part III

RECENT DEVELOPMENTS

SECTION 105(A) OF THE BANKRUPTCY CODE

By Malhar S. Pagay, Esq.[*]

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, 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 2005.

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

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*Malhar S. Pagay is a Partner in the national bankruptcy boutique firm of Pachulski Stang Ziehl Young Jones & Weintraub LLP. The firm has offices in Los Angeles, San Francisco, Wilmington, Delaware, and New York. The author thanks Leslie Ann Forrester (Director of Legal Research, Pachulski Stang Ziehl Young Jones & Weintraub LLP) for her assistance in the preparation of this article.

of the Bankruptcy Code, but may only be used in furtherance of, and not in conflict with, such provisions.[3] However, a tension exists: to one court, acting in furtherance of a Bankruptcy Code provision may constitute an act beyond the scope of or in conflict with such provision in the eyes of another court.

For example, the United States Court of Appeals for the Second Circuit considered "a question of first impression," arising from a bankruptcy court's grant of standing to a creditors' committee and other unsecured creditors to settle an adversary proceeding over the debtor's objections.[4] The court recognized that "there is some disagreement among the circuit courts as to how broadly to construe the bankruptcy court's § 105(a) power to 'fill the gaps left by the statutory language,' § 105(a)'s equitable scope is plainly limited by the provisions of the [Bankruptcy] Code."[5] The bankruptcy rule governing settlement permits only a trustee or debtor-in-possession to move for court approval of such settlement.[6] Thus, the court found no basis to grant the creditors so-called "derivative standing" to resolve the litigation on behalf of the estate.

In *In re Coleman*,[7] a Chapter 11 individual debtor-in-possession commenced an adversary proceeding against her husband's prepetition lender in order to avoid security interests in the couple's real property located in Virginia and Tennessee, which they pledged to the bank prior to the commencement of the bankruptcy case. The Colemans were having difficulty paying prior income tax obligations and allegedly granted the security interests in the properties in order to frustrate the Internal Revenue Service's efforts to assert tax liens. The debtor's adversary proceeding sought the avoidance of the security interests as fraudulent transfers pursuant to section 544 of the Bankruptcy Code. The debtor proposed a plan that contemplated the sale of the properties and the use of the sale proceeds to pay creditors, if she were able to avoid the liens on the properties. The bankruptcy court confirmed the plan subject to the successful outcome of the adversary proceeding. Later, after trial, the court ruled that the security interests were avoidable fraudulent transfers, noting that the debtor and her husband intended to frustrate the IRS's collection efforts and the bank was aware of their intent. However, the court held that the security interests would be avoided "only to the extent necessary to pay the claims and administrative expenses of the estate."[8]

On appeal, the debtor argued that the bankruptcy court improperly limited the avoidance of the security interests to amounts necessary to pay creditors and holders of administrative expenses. The appellate court agreed, noting that section 544(b)(1) of the Bankruptcy Code provides, in relevant part, that a debtor-in-possession has the power to avoid "any transfer or an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding

an unsecured claim."[9] Among other arguments, the bank asserted that the bankruptcy court's equitable powers permitted the court to limit the avoidance of the security interests to prevent a windfall to the debtor. The appellate court disagreed, stating that a bankruptcy court's powers under section 105(a) of the Bankruptcy Code were limited by the provisions of the Bankruptcy Code itself and that limiting the debtor-in-possession's avoidance powers would conflict with the plain language of section 544, stating: "The ruling of the bankruptcy court that the deeds of trust remain in effect as between Debtor and the Bank clearly infringes Debtor's right, unambiguously conferred by the [Bankruptcy] Code, to nullify the grant of the deeds. We therefore hold that the bankruptcy court erred in limiting the Debtor's ability to avoid the deeds of trust."[10]

Other cases involve apparently misguided attempts to obtain relief in direct contravention to the provisions of the Bankruptcy Code. A complex sale order was the subject of a district court's decision in *In re Westpoint Stevens, Inc.*[11] The order, which authorized the sale of substantially all of the debtor's assets, also provided for the granting to the secured creditors of replacement liens in the sale proceeds, the distribution of cash and unregistered securities in the parent company of successor entities, and the valuation of secured creditors' claims as of the sale date to facilitate such distributions. Moreover, the order also contemplated the termination of secured creditors' liens on the sale proceeds and upon closing of the sale, termination of their liens in the replacement collateral. All of the relief in the sale order was to be effectuated without a Chapter 11 plan. The first position secured creditors objected to such treatment, taking issue with the conversion of their substantial secured claims against the debtors "into an illiquid minority equity interest."[12]

The district court found that the sale of assets free and clear of liens and the grant of replacement liens to the secured creditors were specifically authorized by section 363 of the Bankruptcy Code, but that the satisfaction of secured claims through the distributions contemplated in the sale order was not consistent with any particular provision of the Bankruptcy Code and violated the secured creditors' contractual right to insist on cash satisfaction of their claims. The court also held that section 105(a) of the Bankruptcy Code did not support the objectionable provisions of the sale order, remarking:

> This is a Chapter 11 case. Chapter 11 authorizes the alteration of objecting creditors' rights through the plan confirmation process.... [T]he [l]enders' insistence on cash satisfaction of their claim would have rendered the Debtors unable to confirm consensually a plan incorporating the challenged features of the... transaction. The Bankruptcy Court's utilization of... [§] 105(a) to overcome Appellants' anticipated objections to an attempt to cram down an equity-based plan of reorganization must be rejected.[13]

The district court reversed the bankruptcy court's approval of the objectionable distribution and lien invalidation provisions.

Improper distributions to creditors were also the subject of *In re Armstrong World Industries, Inc.*[14] In *Armstrong World*, the debtor faced thousands of asbestos claims and proposed a plan which included the negotiated consent of asbestos personal injury claimants to share a portion of their proposed distributions under the plan with the debtor's existing equity interest holders. Under the plan, general unsecured claimants would receive over 59% on account of their claims, while asbestos claimants would receive around 20% of their over $3 billion in claims. However, the plan also contemplated that if unsecured creditors rejected the plan, the asbestos claimants would "receive" warrants to buy new common stock in the debtor but would waive their rights to such distribution, resulting in the transfer of such warrants to the debtor's existing shareholders.[15] The court held that the plan violated the "absolute priority rule" of the Bankruptcy Code and that neither "legal creativity" nor "counsel's incantation to general notions of equity" pursuant to section 105(a) of the Bankruptcy Code "supports judicial rewriting of the Bankruptcy Code."[16] Thus, the court denied confirmation of the debtor's plan.

Additionally, litigants have "tested the waters" by seeking to use section 105(a) as a basis for a cause of action arising from the violation of other provisions of the Bankruptcy Code. *In re Joubert*[17] involved a class action filed in federal district court by a Chapter 13 debtor seeking damages and injunctive relief to address the alleged practice by her lender of charging debtors for postpetition attorney's fees without a court determination that such fees are reasonable pursuant to section 506(b) of the Bankruptcy Code.[18] The district court granted the lender's motion to dismiss. Noting that the case was one "of first impression in the federal courts of appeals," the United States Court of Appeals for the Third Circuit extrapolated the reasoning of courts that have refused to imply a private right of action based on section 105(a) to redress violations of the discharge injunction, and affirmed the district court's dismissal. The appellate court found that section 105(a) did not create a private right of action for violations of section 506(b).

In *In re 1900 M Restaurant Associates, Inc.*,[19] the debtor sought an order of the bankruptcy court compelling the Internal Revenue Service to consider the debtor's offer-in-compromise, which proposed a payment plan for the satisfaction of the debtor's obligations to the IRS at a reduced amount. The bankruptcy court was unconvinced that section 105(a) was a proper vehicle to achieve the debtor's goals:

> … § 105(a) does not confer on a bankruptcy court a license to impose on a creditor restrictions regarding how that creditor shall address its rights in

> a bankruptcy case according to the bankruptcy court's views of the "common sense realities of bankruptcy reorganization."… To restrict a creditor in how it addresses the treatment of its claim which will be the subject of a plan, would not be "to carry out the provisions of [the Bankruptcy Code" but the exact opposite by depriving that creditor of opportunities afforded it by the Bankruptcy Code.[20]

Finally, one Chapter 11 debtor sought to employ section 105(a) of the Bankruptcy Code to extend a state court redemption period. In *In re 210 Roebling, LLC*,[21] the debtor owned a single asset—a residential apartment building in the City of New York—that was the subject of a foreclosure action prior to the commencement of the bankruptcy case. New York City law provided that any party claiming an interest in foreclosed property may redeem such property by paying all taxes and other charges due, plus interest and penalties, within four months of the foreclosure. Two days before the redemption period was to expire, the debtor commenced its bankruptcy case. Section 108(b) of the Bankruptcy Code automatically extends any redemption period to the later of the redemption period and 60 days after the commencement of the bankruptcy case. Prior to the expiration to the redemption period, as extended, the debtor filed a motion with the bankruptcy court pursuant to sections 105(a) and 108(b) of the Bankruptcy Code, seeking a further 120-day extension of the redemption period.

The bankruptcy court recognized two distinct lines of authority with respect to a court's ability to further extend redemption periods pursuant to section 105(a) of the Bankruptcy Code—a minority position that promoted the additional tolling of a redemption period under certain circumstances, and a majority position which, absent "extraordinary circumstances," precluded the further extension of redemption periods.[22] The court favored the majority view, stating:

> To extend the time limitation to redeem set forth in the New York City Administrative Code or allowed by § 108(b) would constitute an impermissible enlargement of a debtor's property rights.… Thus, while a bankruptcy court's equitable powers under § 105(a) may be broad, they cannot be invoked to alter substantive rights under nonbankruptcy law, absent exceptional circumstances… [such as] "fraud, mistake, accident, or erroneous conduct on the part of the foreclosing officer."[23]

The court denied the debtor's motion.

III. SANCTIONS AND CONTEMPT

The plain language of section 105(a) states that bankruptcy courts may employ the powers granted under the provision to enforce of implement rules or prevent "abuse of process."[24] To that end, courts have invoked section 105(a) to issue contempt orders and to sanction conduct, pro-

vided that adequate and particularized notice is given to the party to be sanctioned.[25] For example, conduct that frustrates the administration of the estate or the bankruptcy process has given rise to the imposition of sanctions or the entry of a contempt order. Courts have also used the sanction power as a mechanism for regulating the conduct of counsel and "bankruptcy petition preparers"—non-attorneys who assist debtors in preparing bankruptcy paperwork for a fee.[26]

One interesting example is *In re Rivera Torres*,[27] in which Chapter 7 debtors sought the imposition of a contempt citation against the Internal Revenue Service and the award of emotional distress damages arising from the IRS's violation of the discharge injunction. Due to a technician's input error, the IRS engaged in collection activity against the debtors with respect to taxes discharged in the debtors' bankruptcy case. The bankruptcy court awarded, and on appeal, the Bankruptcy Appellate Panel affirmed the award of, emotional distress damages. The issue for the appellate court—described as one of "first impression"—was whether the award of such damages was permitted under the federal government's waiver of sovereign immunity pursuant to section 106 of the Bankruptcy Code.[28] Although the court acknowledged that violations of the section 524 discharge injunction could be punished pursuant to section 105(a) through the award of damages, the court was unwilling to extend the bankruptcy court's civil contempt powers to include emotional distress damages, even though section 105 is specifically mentioned in the sovereign immunity waiver provisions of section 106 of the Bankruptcy Code.

The debtor in *In re Gurrola*[29] failed to advise a creditor pursuing the collection of a prepetition debt against the debtor subsequent to the debtor's discharge that he had filed for bankruptcy protection and received a discharge. The creditor argued that because the debtor had failed to advise it previously of the existence of the bankruptcy case and the discharge, the debtor was estopped from interposing the discharge in connection with the creditor's efforts to assert its claim. The court rejected the creditor's estoppel argument and held that "[t]o the extent [that the creditor's] violation of the discharge injunction occurred with notice of the discharge injunction, it is subject to a contempt remedy via 11 U.S.C. § 105(a)."[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 is in bankruptcy—so-called "new debtor syndrome." Courts have invoked section 105(a) in an effort to address such abuses. For example, in *In re Grischkan*,[31] a mortgagee moved for the dismissal of a Chapter 13 debtor's case with the dismissal order to contain an injunction against a refiling of the case for 180 days. The case was the fourth in a series of bankruptcy cases filed by the debtor's husband to stop sheriff's sales of the debtor's house. Noting that "[b]ankruptcy courts have broad equitable authority to deal with debtor misconduct" and that "[s]ection 105 is an appropriate statutory basis for imposing a bar as to a debtor's re-filing to protect the bankruptcy process,"[32] the court granted the motion to dismiss and ordered that the debtor be precluded from filing any bankruptcy case for a period of 180 days.

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, although courts appear to differ as to whether the party seeking protection must meet the difficult burden of justifying injunctive relief in the nonbankruptcy, civil context. For example, in *In re Metromedia Fiber Network, Inc.*,[33] the United States Court of Appeals for the Second Circuit considered an appeal from the confirmation of a debtor's Chapter 11 plan. The plan included provisions releasing parties other than the debtor, including a release for a creditor that entered into a settlement with the debtor resulting in the forgiveness of unsecured debt, the conversion of certain secured debt to equity, investment in the debtor and the purchase of common stock in exchange for the award of more stock, and a broad release of any claims relating to the debtor. The court noted a "reluctance" to grant releases to nondebtors, due in part to the constraints on section 105(a) of the Bankruptcy Code preventing a court from creating "substantive rights that are otherwise unavailable under applicable law."[34] Because the record did not reflect that the circumstances giving rise to the releases were "unique," the appellate court questioned the validity of the releases. However, the court refused to disturb the confirmation order since the plan had been substantially confirmed, rendering the appeal equitably moot.

In re Crown Vantage, Inc.[35] involved an injunction obtained by a California liquidating trustee appointed pursuant to a confirmed Chapter 11 plan. The injunction entered by the bankruptcy court enjoined litigation

in Delaware Chancery Court being pursued by the debtor's corporate parent and its counsel to invalidate certain actions taken by the trustee in alleged contravention to a settlement agreement arising from the corporate parent's prepetition asset "spin off" transaction. On appeal, the district court vacated the injunction on the grounds that the liquidating trustee failed to establish irreparable harm as a prerequisite for injunctive relief. The United States Court of Appeals for the Ninth Circuit upheld the validity of the injunction, charging that the parent company and its counsel should have first obtained leave of the bankruptcy court before commencing litigation against the trustee regarding actions taken in the trustee's official capacity. The court added that with respect to the district court's vacation of the injunction:

> In the usual federal civil case, "[t]he standard for granting a preliminary injunction balances the… likelihood of success against the relative hardship of the parties." However, our usual preliminary injunction standard does not apply to injunctions issued by the bankruptcy court pursuant to 11 U.S.C. § 105.… The only requirement for the issuance of an injunction under § 105 is that the remedy conform to the objectives of the Bankruptcy Code.[36]

As to the overall propriety of the injunction, the court remarked: "This is exactly that type of multiple litigation and resulting conflict that the bankruptcy process is designed to avoid. The bankruptcy court was entirely justified in issuing a § 105(a) injunction."[37]

Another appellate court, the United States Court of Appeals for the Sixth Circuit, has a different view of the prerequisites for an injunction predicated on section 105(a) of the Bankruptcy Code. In *In re National Century Financial Enterprises, Inc.*,[38] the appellate court addressed a creditor's efforts through a state court lawsuit to seize accounts receivable held in a bank collection account in the name of one of the debtor's subsidiaries (which also was a debtor) and the responsive motion to enjoin the creditor's activities as violative of the automatic stay. The creditor argued that the debtor's efforts to enjoin the state lawsuit were procedurally deficient on the grounds

> (1) that NCFE [the debtor] failed to initiate an adversary proceeding in order to request a preliminary injunction, and that the enforcement of the automatic stay was invalid because of this procedural error; (2) that the bankruptcy court failed to consider the four factors determining whether a preliminary injunction is appropriate; and (3) that the bankruptcy court improperly imposed a preponderance-of-the-evidence burden of proof of NCFE, rather than a clear-and-convincing-evidence burden of proof.[39]

Although the appellate court ruled that the creditor forfeited the right to assert such arguments by failing to raise them with the district court, it ruled that each was without merit since the underpinning of the bank-

ruptcy court's injunction was the enforcement of the automatic stay pursuant to section 362(a)(3) of the Bankruptcy Code, not section 105(a). Interestingly, the court did note that (i) "[n]ormally, a debtor initiates an adversary proceeding in order to request a § 105(a) preliminary injunction"; (ii) "a debtor is not required to initiate an adversary proceeding in order to move the bankruptcy court to enforce the automatic stay"; and (iii) "only when the bankruptcy court enjoins an action under § 105(a) must it consider the four preliminary injunction factors, and apply a standard of clear and convincing evidence."[40]

V. 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.[41]

While some 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" as required by the statute, the growing trend, as confirmed by the cases decided in 2005, is to grant a "partial discharge" only when undue hardship has been shown.[42]

In *In re Tirch*,[43] the United States Court of Appeals for the Sixth Circuit considered a creditor's appeal from a bankruptcy court's order granting a Chapter 7 debtor a partial discharge of over $84,000 in student loan debt, due to the debtor's alleged long-term medical and emotional problems, including digestive problems, post-surgery loss of her sense of taste, and claims of work-related stress. The bankruptcy court determined that it would pose an "undue hardship" for the debtor to pay amounts in excess of $200 per month once the debtor returned to work and earned a salary of at least $20,000 per year.[44] The student loan servicer—the Pennsylvania Higher Education Assistance Agency (PHEAA)—appealed to the Bankruptcy Appellate Panel, which affirmed, and PHEAA again appealed.

The appellate court noted that in the Sixth Circuit, "[d]espite the fact that 11 U.S.C. § 523(a)(8) makes no mention of partial discharges, we have held that the bankruptcy court may grant a partial discharge of such a debt pursuant to the equitable powers enumerated in 11 U.S.C. § 105(a)," but cautioned that "the requirement of undue hardship must always apply to the discharge of student loans in bankruptcy—regardless

of whether a court is discharging a debtor's student loans in full or only partially."[45] The court considered the debtor's predicament in light of the three-part analysis for "undue hardship" articulated by the United States Court of Appeals for the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*,[46] which requires a debtor to show to obtain a partial discharge:

(1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;

(2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and

(3) that the debtor has made good faith efforts to repay the loans.[47]

PHEAA conceded the first prong of the *Brunner* analysis; as such, the court focused on the debtor's evidence in support of the second and third elements. The appellate court found that the debtor failed to demonstrate how her loss of sense of taste, digestive problems, and work-related stress prevented her from current or future employment. The court also was not convinced that the debtor had made a good faith effort to repay her student loan debt, noting that in 20 years, the debtor had only paid $4,093.52 of her student loan debt (including a charitable payment by her alma mater of $1,850.77) and that she had not availed herself of reduced payments available through the federal government's Income Contingent Repayment Program, although she was aware of the program.[48] Accordingly, the appellate court reversed the debtor's partial discharge of her student loan obligations.

The *Brunner* test also was applied by the United States Court of Appeals for the Tenth Circuit in *In re Alderette*,[49] which considered a request by a New Mexico couple seeking a discharge of debts related to associate degrees in visual communications both received from the Colorado Institute of Art. The bankruptcy court determined that the debtors—both of whom were gainfully employed—did not establish that their student loans posed an undue hardship but nevertheless granted them a partial discharge of such loans. On appeal, the Bankruptcy Appellate Panel affirmed the partial discharge on the grounds that the lower court erred in holding that undue hardship had not been shown. On further appeal, the appellate court held that there was no impediment to the debtors' future earning potential and that they had made only minimal payments on their student loans. Like the court in *Tirch*, above, the court of appeals also considered (although this factor was not dispositive) that the debtors did not consider applying for the government's Income Contingent Repayment Program. As to the bankruptcy court's grant of a par-

tial discharge notwithstanding the debtors' failure to make the requisite showing of undue hardship, the court noted that "[b]ecause § 105(a) only grants the power to 'carry out the provisions' of the Bankruptcy Code,… bankruptcy courts can only grant partial discharges when the terms of § 523(a)(8) have been met."[50] Accordingly, the appellate court reversed the grant of a partial discharge.

One bankruptcy court has employed a novel analysis to determine the parameters of a partial discharge. A Massachusetts bankruptcy court in *In re Smith*[51] considered two debtors' request to discharge each of their student loans. Finding that the debtors would suffer undue hardship if they were required to pay their entire student loan debt, the court then considered the extent of a partial discharge:

> I do not agree that "a bankruptcy court may exercise its equitable authority to partially discharge student debt" under its § 105(a) powers. I find that the "such debt" language in 523(a)(8) is clear in speaking to a single debt. Therefore, I do not believe § 105(a) can be interpreted to expand the limits of this section to include partial discharge of a single debt.…
>
> I find the superior approach to be the "hybrid" approach, whereby the Court will examine Debtors ability to pay back their student loans on a loan-by-loan basis.[52]

Accordingly, based on its loan-by-loan analysis, the court granted a discharge of the wife-debtor's loans but held that the husband-debtor's obligations would remain nondischargeable.

VI. 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."[53] 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.

In *In re Donald*,[54] the debtor appealed from a sua sponte order transferring the venue of a Chapter 13 debtor's bankruptcy case from California to Georgia. Among other grounds, the debtor argued that the court's issuance of such an order in the absence of a motion by a party in interest violated Rule 1014(a) of the Federal Rules of Bankruptcy Procedure, which contemplates the transfer of venue only upon a "timely motion of a party in interest."[55] The appellate panel disagreed, citing section 105(a) of the Bankruptcy Code,[56] stating: "When § 105(a) is employed by a

court, the critical question is whether the process utilized fairly placed appellant on notice of what was at stake and afforded an opportunity to respond. That requirement was plainly satisfied in this instance."[57]

Research References:

Bankr. Serv., L Ed §§ 13:3, 13:6, 13:55, 13:58; Bankr. Desk Guide §§ 7:148 to 7:181; Norton Bankr. L. & Prac. 2d §§ 4:4, 13:1 to 13:8; 8 Norton Bankr. L. & Prac. 2d 11 U.S.C. §§ 105

West's Key Number Digest, Bankruptcy ⚿ 2124 to 2126

1. 11 U.S.C.A. § 105(a).

2. 11 U.S.C.A. § 105(a).

3. See, e.g., In re Women First Healthcare, Inc., 332 B.R. 115, 45 Bankr. Ct. Dec. (CRR) 161 (Bankr. D. Del. 2005) (bankruptcy court cannot use section 105(a) to grant administrative expense that otherwise does not qualify for such treatment pursuant to section 503 of the Bankruptcy Code); In re Silvus, 329 B.R. 193 (Bankr. E.D. Va. 2005) (section 105(a) cannot override Bankruptcy Code provision limiting compensation of Chapter 7 trustee to percentage of amounts actually distributed to creditors); In re Carlin, 328 B.R. 221, 227, 96 A.F.T.R.2d 2005-5386 (B.A.P. 10th Cir. 2005) (court cannot discharge tax obligations pursuant to section 105(a) of the Bankruptcy Code where specific provision of Bankruptcy Code renders such taxes nondischargeable).

4. In re Smart World Technologies, LLC, 423 F.3d 166, 45 Bankr. Ct. Dec. (CRR) 78, 54 Collier Bankr. Cas. 2d (MB) 1709, Bankr. L. Rep. (CCH) P 80353 (2d Cir. 2005).

5. Smart World, 423 F.3d at 183-4 (citation omitted).

6. See Fed. R. Bankr. P. 9019(a) ("On motion by the trustee and after notice and a hearing, the court may approve a compromise or a settlement."); see also 11 U.S.C.A. § 1107.

7. In re Coleman, 426 F.3d 719, 45 Bankr. Ct. Dec. (CRR) 144, 54 Collier Bankr. Cas. 2d (MB) 1625, Bankr. L. Rep. (CCH) P 80377, 96 A.F.T.R.2d 2005-6641 (4th Cir. 2005).

8. Coleman, 426 F.3d at 724.

9. 11 U.S.C.A. § 544(b)(1).

10. Coleman, 426 F.3d at 726-27.

11. In re WestPoint Stevens, Inc., 333 B.R. 30 (S.D. N.Y. 2005).

12. WestPoint, 333 B.R. at 34.

13. WestPoint, 333 B.R. at 54.

14. In re Armstrong World Industries, Inc., 320 B.R. 523, 53 Collier Bankr. Cas. 2d (MB) 1407 (D. Del. 2005), aff'd, 432 F.3d 507, 45 Bankr. Ct. Dec. (CRR) 222, Bankr. L. Rep. (CCH) P 80434 (3d Cir. 2005).

15. Armstrong World, 320 B.R. at 526.

16. Armstrong World, 320 B.R. at 540; see 11 U.S.C.A. §§ 105(a), 1129(b)(2)(B)(ii).

17. In re Joubert, 411 F.3d 452, Bankr. L. Rep. (CCH) P 80302 (3d Cir. 2005).

18. Section 506(b) of the Bankruptcy Code provides, in relevant part, that an oversecured creditor may be allowed "interest on such [creditor's secured] claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." 11 U.S.C.A. § 506(b).

19. In re 1900 M Restaurant Associates, Inc., 319 B.R. 302, 44 Bankr. Ct. Dec. (CRR) 58, 53 Collier Bankr. Cas. 2d (MB) 947, Bankr. L. Rep. (CCH) P 80301, 2005-1 U.S. Tax Cas. (CCH) P 50313, 95 A.F.T.R.2d 2005-684 (Bankr. D. D.C. 2005).

20. 1900 M, 319 B.R. at 314-15.

21. In re 210 Roebling, LLC, 336 B.R. 172, 45 Bankr. Ct. Dec. (CRR) 215 (Bankr. E.D. N.Y. 2005).

22. 210 Roebling, 336 B.R. at 175.

23. 210 Roebling, 336 B.R. at 176.

24. See 11 U.S.C.A. § 105(a).

25. See In re Glasco, 321 B.R. 695, 701 (W.D. N.C. 2005).

26. See, e.g., In re Lehtinen, 332 B.R. 404, 412 (B.A.P. 9th Cir. 2005) ("We have observed that the bankruptcy court's inherent authority includes the power to suspend or disbar attorneys before who appear before it").

27. In re Rivera Torres, 432 F.3d 20, Bankr. L. Rep. (CCH) P 80421, 2006-1 U.S. Tax Cas. (CCH) P 50112, 96 A.F.T.R.2d 2005-7398 (1st Cir. 2005).

28. Rivera Torres, 432 F.3d at 23. Section 106 of the Bankruptcy Code states, in relevant part, that:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections 105, 106,…. 524,… of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a monetary recovery, but not including an award of punitive damages….
>
> (5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

11 U.S.C.A. § 106(a).

29. In re Gurrola, 328 B.R. 158 (B.A.P. 9th Cir. 2005).

30. Gurrola, 328 B.R. at 171.

31. In re Grischkan, 320 B.R. 654 (Bankr. N.D. Ohio 2005).

32. Grischkan, 320 B.R. at 660.

33. In re Metromedia Fiber Network, Inc., 416 F.3d 136, 44 Bankr. Ct. Dec. (CRR) 276, 54 Collier Bankr. Cas. 2d (MB) 1033, Bankr. L. Rep. (CCH) P 80397 (2d Cir. 2005).

34. Metromedia Fiber, 416 F.3d at 142 (citation omitted).

35. In re Crown Vantage, Inc., 421 F.3d 963, 45 Bankr. Ct. Dec. (CRR) 69, 54 Collier Bankr. Cas. 2d (MB) 1479, Bankr. L. Rep. (CCH) P 80345 (9th Cir. 2005).

36. Crown Vantage, 421 F.3d at 975 (citation omitted).

37. Crown Vantage, 421 F.3d at 977.

38. In re Nat. Century Financial Enterprises, Inc., 423 F.3d 567, 45 Bankr. Ct. Dec. (CRR) 79, Bankr. L. Rep. (CCH) P 80358, 2005 FED App. 0388P (6th Cir. 2005).

39. Nat. Century Financial, 423 F.3d at 578-79.

40. Nat. Century Financial, 423 F.3d at 579.

41. 11 U.S.C.A. § 523(a)(8).

42. See, e.g., In re Fields, 326 B.R. 676, 53 Collier Bankr. Cas. 2d (MB) 1780, 199 Ed. Law Rep. 865, Bankr. L. Rep. (CCH) P 80272, 2005 FED App. 0003P (B.A.P. 6th Cir. 2005).

43. In re Tirch, 409 F.3d 677, 198 Ed. Law Rep. 436, Bankr. L. Rep. (CCH) P 80296, 2005 FED App. 0242P (6th Cir. 2005).

44. Tirch, 409 F.3d at 680.

45. Tirch, 409 F.3d at 680 (quoting In re Miller, 377 F.3d 616, 622, 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))).

46. Brunner v. New York State Higher Educ. Services Corp., 831 F.2d 395, 42 Ed. Law Rep. 535, Bankr. L. Rep. (CCH) P 72025 (2d Cir. 1987) (rejected by, In re Healey, 1993 WL 13000569 (Bankr. E.D. Mich. 1993)).

47. Tirch, 409 F.3d at 680 (citing Brunner, 831 F.2d at 396).

48. "In cases involving a partial discharge of student loans, 'it is a difficult, although not necessarily an insurmountable burden for a debtor who is offered, but then declines the government's income contingent repayment program, to come to this Court and seek an equitable adjustment of their student loan debt." Tirch, 409 F.3d at 683 (quoting In re Swinney, 266 B.R. 800, 806-7, 157 Ed. Law Rep. 205 (Bankr. N.D. Ohio 2001)).

49. In re Alderete, 412 F.3d 1200, Bankr. L. Rep. (CCH) P 80313 (10th Cir. 2005).

50. Alderete, 412 F.3d at 1207.

51. In re Smith, 324 B.R. 16, 53 Collier Bankr. Cas. 2d (MB) 1889 (Bankr. D. Mass. 2005), rev'd and remanded, 328 B.R. 605, 201 Ed. Law Rep. 218 (B.A.P. 1st Cir. 2005).

52. Smith, 324 B.R. at 19-20.

53. 11 U.S.C.A. § 105(a).

54. In re Donald, 328 B.R. 192 (B.A.P. 9th Cir. 2005).

55. Fed. R. Bankr. P. 1014(a).

56. 11 U.S.C.A. § 105(a) ("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.").

57. Donald, 328 B.R. at 199.