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The Role of a Bankruptcy Judge

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The Role of a Bankruptcy Judge

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ARTICLE:The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity

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Text

[*1]

This Article will explore the reach of the implied authority of a bankruptcy judge. For purpose of this discussion, a bankruptcy judge includes a judge of the District Court of Guam, [1] the District Court of the Northern Mariana Islands [2] or the District Court of the United States Virgin Islands, [3] and an Article III judge, such as a United States District Court judge or Court of Appeals judge, who is acting as a trial judge solely under federal bankruptcy law. The focus here is on a bankruptcy judge's implied adjudicative power - the scope and forms of relief the judge may order in a proceeding in which the bankruptcy court has jurisdiction. [4]

Implied authority is distinguished from "statutory" authority found in the United States Constitution, Title 28 of the United States Code, the Bankruptcy Code, [5] the Federal Rules of Bankruptcy Procedure and the Federal Rules of Evidence, [6] and state laws. Implied authority arises from inherent powers, federal common law, implied rights of action and equitable power. This Article will show that a bankruptcy judge has scant prerogative to invoke inherent powers, formulate federal common law or imply private rights of action under the Bankruptcy Code, and no general equitable power. It will also show that a bankruptcy judge should not deny a party that asserts a **[*2]** legal cause of action the right to a trial by jury simply because the party filed a proof of claim, counterclaim, bankruptcy petition or the action itself in bankruptcy court. In addition, this Article will demonstrate that a bankruptcy judge should not invoke equitable principles when construing the Bankruptcy Code or

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[1] See *48 U.S.C. 1424*(b) (2000).

[2] See *48 U.S.C. 1822* (2000).

[3] See *48 U.S.C. 1612*(a) (2000).

[4] It is assumed that the bankruptcy judge has jurisdiction - the authority to entertain the proceeding between the parties before the judge. See *Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am. Hardwoods, Inc.), 885 F.2d 621, 624 (9th Cir. 1989).*

[5] The Bankruptcy Code is Title 11 of the United States Code.

[6] See ***Fed R. Evid. 1101(b)***.

Rules. In other words, a bankruptcy judge's powers stem virtually exclusively from statutes. A bankruptcy judge therefore acts as a statutory court of bankruptcy, not as a court of equity.

I. INHERENT POWERS

To the extent that the inherent powers of a federal court arise from Article III of the Constitution, a bankruptcy judge, as an Article I judge, has no such powers. [7]

Inherent powers are "powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." [8] Inherent powers are grounded first and foremost upon necessity; [9] a federal court may invoke its inherent powers only when necessary to protect its ability to function. [10] Inherent powers must be exercised with restraint and discretion. [11] And, a **[*3]** federal court may not take action under the guise of its inherent powers if the action would either contravene a statute or rule or unnecessarily enlarge the court's authority. [12]

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[7] See *In re Grabill Corp., 967 F.2d 1152, 1156 (7th Cir. 1992)* (bankruptcy courts "derive their authority solely from Congress, while district courts are accorded their inherent powers in Article III"); *In re Hessinger & Assocs., 192 B.R. 211, 215 (N.D. Cal. 1996)* ("Because the bankruptcy courts are creatures of Article I, they have no 'inherent' powers and their jurisdiction is limited to that expressly granted by Congress."); Thomas E. Plank, The Erie Doctrine and Bankruptcy, *79 Notre Dame L. Rev. 633, 668 (2004)* (bankruptcy courts only have those equitable powers that Congress can grant them pursuant to the Bankruptcy Clause of the United States Constitution); see also *Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1406 (5th Cir. 1993)* ("The Constitution itself confers this authority [certain implied powers] upon all Article III courts as an incident to 'The judicial Power.'") (citations omitted).

[8] See *United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812);* see also *Young v. United States, ex rel. Vuitton et Fils S.A., 481 U.S. 787, 819-20 (1987)* ("The holding of Hudson was against the existence of broad inherent powers in the federal courts. Its discussion recognized as inherent only those powers 'necessary to the exercise of all others,' that is, necessary to permit the courts to function … .") (Scalia, J. concurring opinion); *Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980)* ("The inherent powers of federal courts are those which 'are necessary to the exercise of all others.'"); *Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991)* ("It has long been understood that 'certain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'") (quoting United States v. Hudson and citing Roadway Express, Inc. v. Piper).

[9] See *In re Novak, 932 F.2d 1397, 1406 (11th Cir. 1991);* see also *Natural Gas Pipeline, 2 F.3d at 1407, 1412* ("The inherent power springs from the well of necessity" and "The ultimate touchstone of inherent powers is necessity.").

[10] *In re Novak, 932 F.2d at 1406.* Similarly, to the extent that inherent powers are rooted in the English chancellor's equity powers, no such powers vest in a bankruptcy judge because the bankruptcy court is not a court of equity. See *ITT Cmty. Dev. Corp., v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978)* (stating that the inherent powers doctrine is rooted in the notion that a federal court sitting in equity possesses all of the equity tools of a Chancery Court, subject to congressional limitation, to process litigation to a just and equitable conclusion); *In re San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1012 n.2 (1st Cir. 1988)* (observing that district courts generally "have inherent powers, rooted in the chancellor's equity powers, 'to process litigation to a just and equitable conclusion'").

[11] *Chambers, 501 U.S. at 44* ("Because of their very potency, inherent powers must be exercised with restraint and discretion."); *Roadway Express, 447 U.S. at 764* ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion."); *Universal Bank v. Marvel (In re Marvel), 265 B.R. 605, 609 (N.D. Cal. 2001);* see also *Harris v. First City Bancorp. of Tex. Inc. (In re First City Bancorp. of Tex. Inc.), 282 F.3d 864, 867 (5th Cir. 2002)* (declaring a court should exercise restraint when considering using its inherent power to impose sanctions).

[12] See *In re Novak, 932 F.2d at 1406 n.17;* cf. *In re Rimsat, Ltd., 212 F.3d 1039, 1048 (7th Cir. 2000)* ("A sanctioning court should ordinarily rely on available authority conferred by statutes and procedural rules, rather than its inherent power, if the available sources of authority would be adequate to serve the court's purposes."); *Natural Gas Pipeline, 2 F.3d at 1407* (noting that a court may not do that which the Federal Rules of Civil Procedure forbid); *G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989)* (stating that the district court may not exercise its inherent authority in a manner inconsistent with rule or statute); see also *Carlisle v. United States, 517 U.S. 416, 426 (1996)* (declaring that inherent power "does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure.").

Several courts have found that *105(a) of the Bankruptcy Code* confers various inherent powers upon a bankruptcy judge. [13] But these inherent powers are not truly inherent if 105(a) confers these powers. Furthermore, to the extent that 105(a) furnishes authority for a bankruptcy judge to issue process, an order or a judgment, there is no need to rely on non-statutory inherent powers. Section 105(a) allows process, orders and judgments either appropriate or necessary to execute one or more provisions of the Code. [14] Inasmuch as an inherent power may be implied only if the power is necessary to the exercise of all other powers, the requisite necessity cannot be shown where the process, order or judgment carries out any provision of the Code. In this circumstance 105(a) provides adequate authority. Similarly, if the inherent power would neither be "necessary" nor "appropriate" to execute a **[*4]** provision of the Code, the power should not be implied because it would contravene 105(a).

Notwithstanding the foregoing, reported decisions have repeatedly noted that bankruptcy courts have inherent powers in a variety of situations. According to these cases a bankruptcy judge has inherent power to sanction parties, [15] enforce a settlement, [16] issue an injunction, [17] direct disbursement of registry funds, [18] set aside illegal assignments, [19] reconsider an interlocutory order, [20] review the actions of a state court and enjoin further proceedings, [21] punish an abuse of process, [22]

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[13] *In re Collins, 250 B.R. 645, 657 (N.D. Ill. 2000);* see *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 284 (9th Cir. 1996)* (observing that inherent power to sanction vexatious conduct is recognized in 105(a); *Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd.), 40 F.3d 1084, 1089 (10th Cir. 1984)* (stating that 105 is intended to imbue the bankruptcy courts with the inherent power recognized by the Supreme Court in Chambers v. NASCO, Inc.); *In re Marvel, 265 B.R. at 609* (noting that a bankruptcy court's inherent power to sanction vexatious conduct is recognized in 105(a)); *Musslewhite v. O'Quinn (In re Musslewhite), 270 B.R. 72, 78 (S.D. Tex. 2000)* (concluding that a bankruptcy court has inherent power under 105 to hold parties in civil contempt for violation of the court's orders); *Johnson v. McDow (In re Johnson), 236 B.R. 510, 521 (D.D.C. 1999)* (finding that 105 specifically codifies what are traditionally called "inherent powers" to give bankruptcy courts the necessary ability to manage their dockets); *Utah State Credit Union v. Skinner (In re Skinner), 90 B.R. 470, 475 (D. Utah 1988)* (stating that 105(a) and *Fed. R. Bankr. P. 9020* recognize the inherent powers of a bankruptcy judge); *In re Venegas, 257 B.R. 41, 47 (Bankr. D. Idaho 2001)* (remarking that a bankruptcy court has inherent authority under 105(a) to enforce the statutory discharge injunction); *BNY Fin. Corp. v. Masterwear Corp. (In re Masterwear Corp.), 229 B.R. 301, 310 (Bankr. S.D.N.Y. 1999)* (concluding that a bankruptcy court has inherent power under 105 to hold parties in civil contempt for violation of the court's orders).

[14] See *11 U.S.C. 105*(a) (2000).

[15] *In re Rimsat, 212 F.3d at 1049; Pearson v. First NH Mortgage Corp., 200 F.3d 30, 42 (1st Cir. 1999); McGahren v. First Citizens Bank & Trust Co. (In re Weiss), 111 F.3d 1159, 1172 (4th Cir. 1997); Mapother & Mapother v. Cooper (In re Downs), 103 F.3d 472, 477 (6th Cir. 1996); FE & B v. Charter Techs., Inc., 57 F.3d 1215, 1218, 1228 (3d Cir. 1995); Glatter v. Mroz (In re Mroz), 65 F.3d 1567, 1576 (11th Cir. 1995); In re Courtesy Inns, 40 F.3d at 1090 (10th Cir. 1994); Citizens Bank & Trust Co. v. Case (In re Case), 937 F.2d 1014, 1023 (5th Cir. 1991); Franchise Tax Bd. v. Lapin (In re Lapin), 226 B.R. 637, 642 (B.A.P. 9th Cir. 1998).*

[16] *City Equities Anaheim, Ltd. v. Lincoln Plaza Dev. Co. (In re City Equities Anaheim, Ltd.), 22 F.3d 954, 958 (9th Cir. 1994).*

[17] *S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc. (In re S.I. Acquisition, Inc.), 817 F.2d 1142, 1146 n.3 (5th Cir. 1987); A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1003 (4th Cir. 1986); Kittay v. Landegger (In re Hagerstown Fiber Ltd. P'ship), 277 B.R. 181, 198 (Bankr. S.D.N.Y. 2002).*

[18] *United States v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.), 18 F.3d 208, 214 (3d Cir. 1994).*

[19] *Dalton Dev. Project v. Unsecured Creditors Comm. (In re Unioil), 948 F.2d 678, 682 (10th Cir. 1991).*

[20] See *Roumeliotis v. Popa (In re Popa), 214 B.R. 416, 420 (B.A.P. 1st Cir. 1997); Johnson v. Chetto (In re Chetto), 282 B.R. 215, 216 (Bankr. N.D. Ill. 2002).* The inherent power to reconsider a final order or judgment has been merged into *Fed. R. Civ. P. 60(b)* (*Fed. R. Bankr. P. 9024*). See *Gekas v. Pipin (In re Met-L-Wood Corp.), 861 F.2d 1012, 1018 (7th Cir. 1988); Missoula Fed. Credit Union v. Reinertson (In re Reinertson), 241 B.R. 451, 456 (B.A.P. 9th Cir. 1999)* (citing *Mulvania v. United States (In re Mulvania), 214 B.R. 1, 8-9 (B.A.P. 9th Cir. 1997)).*

[21] *Watson v. Shandell (In re Watson), 192 B.R. 739, 746 (B.A.P. 9th Cir. 1996); Fernandez-Lopez v. Fernandez-Lopez (In re Fernandez-Lopez), 37 B.R. 664, 669 (B.A.P. 9th Cir. 1984).*

dismiss a case, [23] correct mistakes and errors, [24] hold a party in contempt, [25] suspend or disbar attorneys, [26] control the court's **[*5]** dockets, preserve the court's integrity and insure that the court accomplishes its legislative purpose, [27] and deny compensation to attorneys employed during a bankruptcy case. [28] But in each of these instances either a statutory provision or a rule affords adequate grounds for the bankruptcy judge's ruling. For example, *Bankruptcy Code 105(a)* sanctions each of these actions. [29] **[*6]** Moreover, *Bankruptcy Code 326*- *330* [30] authorize the bankruptcy court to deny compensation to

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[22] *McCrary v. Barrack (In re Barrack), 217 B.R. 598, 608 (B.A.P. 9th Cir. 1998);* see also *Monroe Bank & Trust v. Nowatzke (In re Nowatzke), 318 B.R. 400, 403-05 (Bankr. E.D. Mich. 2004)* (finding that court had inherent power to grant attorney fees to debtor that ultimately prevailed in a nondischargeability action where creditor's attorney demonstrated bad faith in pressuring and misleading creditor's employee to give false testimony resulting in an abuse of court processes); *In re Pakuris, 262 B.R. 330, 334 (Bankr. S.D. Pa. 2001)* ("All courts possess inherent power to protect their jurisdiction and process from abuse.") (citation omitted).

[23] See *Marino v. Classic Auto Refinishing, Inc. (In re Marino), 213 B.R. 846, 851 (B.A.P. 9th Cir. 1997); Tenorio v. Osinga (In re Osinga), 91 B.R. 893, 894 (B.A.P. 9th Cir. 1988).*

[24] *Canino v. Bleau (In re Canino), 185 B.R. 584, 592 (B.A.P. 9th Cir. 1995);* see also *Francis v. Riso (In re Riso), 57 B.R. 789, 793 (D.N.H. 1986)* (stating a bankruptcy court has inherent equitable power to correct its own mistake to prevent an injustice); In re Scott, No. 01-54859-MM, 2002 WL 1459889, at 2 (Bankr. N.D. Cal. Apr. 23, 2002) ("A bankruptcy court has the inherent equitable power to sua sponte vacate an order to correct a mistake"); *Ford v. Ford (In re Ford), 159 B.R. 590, 593 (Bankr. D. Or. 1993)* (reading another case "as a reaffirmation of a court's inherent power to correct its own clerical errors").

[25] *Franchise Tax Bd. v. Lapin (In re Lapin), 226 B.R. 637, 642 (B.A.P. 9th Cir. 1998); In re Conrad, 279 B.R. 320, 324 (Bankr. M.D. Fla. 2002); In re Walker, 257 B.R. 493, 496 (Bankr. N.D. Ohio 2001)* (noting that a bankruptcy court's contempt powers flow from inherent power of a court to enforce compliance with its lawful orders and from *Bankruptcy Code 105(a)*); see also *Ex Parte Robinson, 86 U.S. 505, 510 (1873)* ("The power to punish for contempts is inherent in all courts ..."); *Jove Eng'g, Inc. v. I.R.S., 92 F.3d 1539, 1553 (11th Cir. 1996)* ("Section 105 aside, courts have inherent contempt powers in all proceedings, including bankruptcy … "); *Eskanos & Adler v. Roman (In re Roman), 283 B.R. 1, 13 (B.A.P. 9th Cir. 2002)* (finding that civil contempt power is included in the court's inherent powers); *In re A-1 Specialty Gasolines, Inc., 246 B.R. 445, 450 (Bankr. S.D. Fla. 2000)* ("Bankruptcy courts have inherent power to hold parties in contempt … ."); *In re Kennedy, 80 B.R. 673, 673 (Bankr. D. Del. 1987)* ("All courts have inherent contempt powers to enforce compliance with their lawful orders and no specific statute is required to give a court that civil contempt power."). But see *Tele-Wire Supply Corp. v. Presidential Fin. Corp. (In re Indus. Tool Distribs., Inc.), 55 B.R. 746, 751 n.10 (N.D. Ga. 1985)* (not believing that bankruptcy court has inherent contempt powers).

[26] *Peugeot v. United States Trustee (In re Crayton), 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996);* see also *Kaiser Group Int'l, Inc. v. Nova Hut (In re Kaiser Group Int'l, Inc.), 272 B.R. 846, 850 (Bankr. D. Del. 2002)* ("The court's power to disqualify an attorney stems from the inherent authority to supervise the attorneys appearing before it."); *In re Powell, 266 B.R. 450, 452 (Bankr. N.D. Cal. 2001)* (concluding that a federal court has inherent authority to regulate the conduct of all who practice in it).

[27] *In re Moog, 774 F. 2d 1073, 1076 (11th Cir. 1995);* see also *Highland Fed. Bank v. Maynard (In re Maynard), 264 B.R. 209, 213 (B.A.P. 9th Cir. 2001)* ("Trial courts have inherent power to control their dockets as long as exercise of that discretion does not nullify the procedural choices reserved to parties under the applicable rules of procedure."); *Fisher v. Prime Table Rest. & Lounge, Inc. (In re Lake States Commodities, Inc.), 271 B.R. 575, 588 (Bankr. N.D. Ill. 2002)* ("Courts have inherent powers to sua sponte enter orders in the interest of promoting judicial efficiency and managing their dockets."); *Carroll v. Unicom AP Chem. Corp. (In re MGL Corp.), 262 B.R. 324, 327 (Bankr. E.D. Pa. 2001)* (stating that a stay of a civil proceeding during the pendency of a criminal proceeding may be granted as incidental to the power inherent in every court to control the disposition of the causes on its docket).

[28] See *Law Offices of Nicholas A. Franke v. Tiffany (In re Lewis), 113 F.3d 1040, 1045 (9th Cir. 1997)* (concluding that a bankruptcy court has broad and inherent authority to deny compensation when an attorney fails to meet the requirements of *Bankruptcy Code 327*, *329*, *330* and *331*); *In re Redding, 251 B.R. 547, 552 (Bankr. W.D. Mo. 2000)* (same); see also *In re Mariner Post-Acute Network, Inc., 257 B.R. 723, 730 (Bankr. D. Del. 2000)* (finding that a bankruptcy court has inherent authority to order disgorgement of professional fees paid under *Bankruptcy Code 328*, *330* or *331*).

[29] See, e.g., *Sheridan v. Michels, 282 B.R. at 86* ("Section 105(a) empowers a bankruptcy court to sanction and otherwise discipline attorneys who appear before it … ."). See also *Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1189-90, 1192 (9th Cir. 2003)* (stating that 105(a) authorizes the remedy of civil contempt); *Bessette v. Avco Fin. Servs., Inc., 230 F.3d 439, 445 (1st Cir. 2000)* ("The parties agree, that 105

attorneys, Fed. R. Bankr. P. 9023 and 9024 authorize the bankruptcy court to reconsider orders and to correct mistakes and errors, Fed. R. Bankr. P. 9029(b) authorizes a bankruptcy judge to regulate practice, Fed. R. Bankr. P. 7041 authorizes the bankruptcy court to dismiss an action, and Fed. R. Bankr. P. 9011 and 1927 of Title 28 authorize the bankruptcy court to issue sanctions.

Given all of the provisions of (1) the Bankruptcy Code (including the expansive scope of 105(a)), (2) the Federal Rules of Bankruptcy Procedure, and (3) local bankruptcy rules, it would only be necessary for a bankruptcy judge to invoke inherent powers where the bankruptcy court is not carrying out the provision(s) of the Code or these rules. Consequently, if a bankruptcy judge is called upon to apply nonbankruptcy law in a situation in which the proceeding cannot reasonably be characterized as carrying out one or more provisions of the Bankruptcy Code or these rules, the judge may have discretion to invoke her inherent powers. Nevertheless, as long as a bankruptcy judge acts within her statutorily granted jurisdiction, virtually always her rulings will be pursuant to or further a provision of the Bankruptcy Code.

The only situation in which a bankruptcy judge might be compelled to rely on inherent powers is in the functioning of the court itself. She must have authority to uphold the dignity and integrity of the judicial process. To resolve disputes consistent with due process a bankruptcy judge must be able to perform research, and to conduct conferences, hearings and trials, including taking evidence and listening to arguments while maintaining respect and decorum in the courtroom. [31] A bankruptcy judge must also be able to manage her caseload. While all of these activities may not fall within the ambit of the first sentence of Bankruptcy Code 105(a) because no order or process is issued, they may be embraced by the second sentence thereof which appears to authorize taking actions or making determinations to, among other things, **[*7]** prevent an abuse of process. [32] These activities may also be within the scope of another provision of the Bankruptcy Code, or of the Federal Rules of Bankruptcy Procedure: Bankruptcy Code 105(d) [33] authorizes status conferences, Fed. R. Bankr. P. 7016 [34] authorizes pre-trial conferences, and Fed. R. Bankr. P. 9029(b) [35] authorizes a bankruptcy judge to regulate practice in any manner consistent with federal law, the Federal Rules of Bankruptcy Procedure, Official Forms and the local bankruptcy rules of the district.

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provides a bankruptcy court with statutory contempt powers … ."); Placid Ref. Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.), 108 F.3d 609, 614 (5th Cir. 1997) (noting that a bankruptcy court's power to conduct civil contempt proceedings lies in 105); Hardy v. United States (In re Hardy), 97 F.3d 1384, 1389 (11th Cir. 1996) ("Section 105 grants statutory contempt powers in the bankruptcy context … ."); Graham v. United States (In re Graham), 981 F.2d 1135, 1140 (10th Cir. 1992) ("Bankruptcy courts have the power to sanction a party for contempt under 11 U.S.C. 105(a) … .").

However, a bankruptcy court's contempt power is limited to civil contempt; it has no general criminal contempt power. See In re Dyer, 322 F.3d at 1193 ("criminal contempt sanctions are not available under 105(a)"); Griffith v. Oles (In re Hipp, Inc.), 895 F.2d 1503, 1509 (5th Cir. 1990) (concluding that the bankruptcy court lacks the power to hear and determine criminal contempts, at least as to contempts not committed in (or near) its presence); see also 28 U.S.C. 157, 1334 (2000) (stating that the only matters referred to the bankruptcy judges by the district court are bankruptcy cases and civil proceedings arising under the Bankruptcy Code or arising in or related to bankruptcy cases) (emphasis added). On the other hand, because the judges of the territorial courts - the district courts of Guam, the Northern Mariana Islands and the United States Virgin Islands - have jurisdiction over certain criminal matters, they may have criminal contempt power as well. See 48 U.S.C. 1424, 1424-4, 1612, 1821(c), 1822, 1824, 1934 (2000).

[30] 11 U.S.C. 326-330 (2000).

[31] See Johnson v. McDow (In re Johnson), 236 B.R. 510, 521 (D.D.C. 1999) ("It is imperative that [bankruptcy] courts have the necessary authority to manage the arguments and conduct of parties to ensure judicial efficiency and to do justice.").

[32] See Hearings on Additional Bankruptcy Judgeships H.R. 4128 and H.R. 4140 Before the House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 99th Cong., 2d Sess. 25-27, 46 (1986) ("Section 105 of Title 11 would be amended to recognize judges' inherent authority to control their dockets and manage cases pending before them.") (previously prepared statement of Hon. T. Glover Roberts adopted by Hon. G. William Brown at the July 23, 1986 hearing).

[33] See 11 U.S.C. 105(d) (2000).

[34] See Fed. R. Bankr. P. 7016.

[35] See Fed. R. Bankr. P. 9029(b).

Consequently, there is little, if any, necessity for a bankruptcy judge to assert inherent powers to perform her judicial functions. This means that a bankruptcy judge should have virtually no inherent powers.

II. FEDERAL COMMON LAW

Another source of implied authority for a bankruptcy judge is the ability to formulate federal common law. As a judicial officer of the district court, [36] a bankruptcy judge ought to have the power to make federal common law in an appropriate case. Federal common law "falls into essentially two categories: those in which a federal rule or decision is 'necessary to protect uniquely federal interests,' … and those in which Congress has given the courts the power to develop substantive law." [37] Normally, a precondition for fashioning federal common law is a showing that there is a "significant conflict between some federal policy or interest and the use of state law." [38] The instances in which the Supreme Court has recognized the need and authority to create federal common law are "few and restricted." [39] It has noted that:

Absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations and admiralty cases. [40]

[*8] In bankruptcy cases federal common law governs privileges, [41] the requirement that someone wanting to sue a trustee concerning actions taken in the course of administering a bankruptcy case must obtain permission of the bankruptcy court, [42] whether a constructive trust arises under *Bankruptcy Code 541(d)*, [43] and choice of law. [44] Federal common law has also been applied in bankruptcy cases to the federal government's setoff rights, [45] to "top hat" pension plans under the Employee Retirement Income Security Act of 1974 ("ERISA"), [46] and to recognize an equitable lien under ERISA. [47]

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[36] *28 U.S.C. 151,* 152(a)(1) (2000).

[37] *Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)* (citations omitted).

[38] *O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994)* (quoting *Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966));* see *Atherton v. FDIC, 519 U.S. 213, 218 (1997).*

[39] *Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963).*

[40] *Tex. Indus., 451 U.S. at 641* (citations omitted).

[41] See *Foster v. Hill (In re Foster), 188 F.3d 1259, 1264-65 (10th Cir. 1999)* ("Federal common law governs control of a debtor's privilege.") (citation omitted); *Am. Metrocomm Corp. v. Morris (In re Am. Metrocomm Corp.), 274 B.R. 641, 653 (Bankr. D. Del. 2002)* (" ***Federal Rule of Evidence 501*** provides that, except where state law provides the governing rule in civil proceedings, control of a debtor's privileges is governed by federal common law.") (citation omitted); fed. r. evid. 501; *Ramette v. Bame (In re Bame), 251 B.R. 367, 372 (Bankr. D. Minn. 2000)* (same); *In re Fed. Copper of Tenn., Inc. 19 B.R. 177, 180 (Bankr. M.D. Tenn. 1982)* (concluding that any applicable privilege is governed by federal common law) (citations omitted).

[42] See *Carter v. Rodgers, 220 F.3d 1249, 1252 (11th Cir. 2000).*

[43] See *Official Comm. of Unsecured Creditors v. Columbia Gas Sys. Inc. (In re Columbia Gas Sys. Inc.), 997 F.2d 1039, 1055-62 (3d Cir. 1993); United States v. McConnell (In re Flying Boat, Inc.), 258 B.R. 869, 871-74 (N.D. Tex. 2001); EBS Pension L.L.C. v. Edison Bros. Stores, Inc. (In re Edison Bros., Inc.), 243 B.R. 231, 235-39 (Bankr. D. Del. 2000).*

[44] *Bianco v. Erkins (In re Gaston & Snow), 243 F.3d 599, 601 (2d Cir. 2001)* ("federal choice of law rules are a type of federal common law"); *Andre Emmench Gallery, Inc. v. Segretario (In re Segretario), 258 B.R. 541, 544 (Bankr. D. Conn. 2001)* ("Bankruptcy court should employ its power to apply and create federal common law by exercising an independent judgment as to choice of law.") (citations omitted) (emphasis in original).

[45] *United States v. Fleet Bank of Mass. (In re Calore Express Co.), 288 F.3d 22, 43 (1st Cir. 2002).*

The Supreme Court would not formulate federal common law "to supplement a federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." [48] When Congress enacted the Bankruptcy Code it created a comprehensive legislative program, [49] but it has not authorized bankruptcy judges to formulate substantive rules of decision. Bankruptcy cases seldom involve the rights and obligations of the United States or interstate or international disputes that implicate conflicting rights of states or the United States' relations with foreign nations or admiralty cases. Consequently, only in rare instances should a bankruptcy judge formulate new federal common law under the Bankruptcy Code. [50]

[*9]

III. IMPLIED RIGHTS OF ACTION UNDER THE BANKRUPTCY CODE

A bankruptcy judge may also have the ability to imply a private right of action from a provision of the Bankruptcy Code. But all private rights of action to enforce federal law must be created by Congress. [51] In this regard, the task of a bankruptcy judge is to interpret the Bankruptcy Code to determine whether it displays an intent to create not merely a private right but also a private remedy. [52] "Statutory intent on this latter point is determinative… Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." [53] The "interpretive inquiry begins with the text and structure of the statute … and ends once it has become clear that Congress did not provide a cause of action." [54] And, "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." [55] Furthermore, "the Bankruptcy Code is a highly intricate and reticulated statutory scheme that does not easily lend itself to the creation of new rights and remedies on the part of private parties." [56]

Recall that *Bankruptcy Code 105(a)* authorizes a bankruptcy judge to issue any necessary or appropriate order. [57] But this section does not "give the court the power to create substantive rights that would otherwise be unavailable under the Code." [58] Since a private right of action is a substantive right, a bankruptcy judge cannot imply a private right of action under 105(a). [59]

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[46] *Senior Executive Benefit Plan v. New Valley Corp. (In re New Valley Corp.), 89 F.3d 143, 149 (3d Cir. 1996).*

[47] *Wal-Mart Stores, Inc. v. Carpenter (In re Carpenter) 252 B.R. 905, 910 (E.D. Va. 2000),* aff'd, *36 Fed. Appx. 80 (4th Cir. 2002).*

[48] *O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994)* (citations omitted).

[49] *Wieboldt Stores, Inc. v. Schottenstein, 111 B.R. 162, 168 (N.D. Ill. 1990).*

[50] Cf. Plank, supra note 7, at 639 ("federal courts may not create federal common law and must find and follow state law when confronted with a legal issue that is beyond the scope of the Bankruptcy Clause [of the Constitution]").

[51] *Alexander v. Sandoval, 532 U.S. 275, 286 (2001)* (emphasis added).

[52] Id.

[53] *Id. at 286-87.*

[54] *Id. at 289 n.7.*

[55] *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 19 (1979).*

[56] *Clayton v. Raleigh Fed. Sav. Bank, 194 B.R. 793, 796 (M.D.N.C. 1996);* see also *Walker v. Cadle Co. (In re Walker), 51 F.3d 562, 567 (5th Cir. 1995)* ("Simply put, bankruptcy is not an area where the courts have wide discretion to fashion new causes of action.").

[57] *11 U.S.C. 105*(a) (2000).

[58] *United States v. Pepperman, 976 F.2d 123, 131 (3d Cir. 1992)* (quoting *In re Morristown & Erie R.R. Co., 885 F.2d 98, 100 (3d Cir. 1989)).*

If 105(a) - which expressly authorizes a bankruptcy judge to issue any appropriate or necessary order - cannot be invoked to provide a private right of action, should a bankruptcy judge imply a private right of action under a different section of the Bankruptcy Code that does not contain such explicit authority? The answer is that a bankruptcy judge should not.

It is not surprising, then, that the courts have been loathe to imply private rights of action from the Bankruptcy Code. No reported case has found **[*10]** an implied private right of contribution [60] or indemnity. [61] The courts have refused to imply a private right of action under Code 105, [62] 363, [63] 502, [64] 506(b), [65] 506(c), [66] 521, [67] 525(c) [68] and 1322. [69]

A few courts have implied private rights of action for violation of the *Bankruptcy Code 524* discharge injunction [70] or reaffirmation requirements, [71] **[*11]** but all but one of these opinions have been effectively overruled [72] and every reported Circuit Court of Appeals decision has refused to imply a private right of action under 524. [73]

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[59] See infra note 62 and cases cited therein.

[60] See *In re Walker, 51 F.3d at 562-67;* *Kendall v. Sorani (In re Richmond Produce Co.), No. C-93-0390-EFL, 1993 WL 470434, at 6 n.4* (N.D. Cal. Nov. 10, 1993); *Wieboldt Stores, Inc. v. Schottenstein, 111 B.R. 162, 167-68 (N.D. Ill. 1990);* *Barber v. Riverside Int'l Trucks, Inc. (In re Pearson Indus., Inc.), 142 B.R. 831, 848 (Bankr. C.D. Ill. 1992);* *Neill v. Borreson (In re John Peterson Motors, Inc.), 56 B.R. 588, 591 n.5 (Bankr. D. Minn. 1986).*

[61] See *Kendall, 1993 WL 470434, at 5;* *Neill, 56 B.R. at 591 n.5.*

[62] See *Walls v. Wells Fargo Bank, 276 F.3d 502, 506-07 (9th Cir. 2002);* *Taylor v. United States Dep't of Educ. (In re Taylor), 263 B.R. 139, 151-52 (N.D. Ala. 2001);* Kibler v. WFS Fin., Inc., No. CV-00-5217 LGB RNBX, 2000 WL 1470655, at 6 (C.D. Cal. Sept. 13, 2000); *Molloy v. Primus Auto. Fin. Servs., 247 B.R. 804, 818 n.12 (C.D. Cal. 2000);* *Holloway v. Household Auto. Fin. Corp., 227 B.R. 501, 506 (N.D. Ill. 1998);* *Reyes v. FCC Nat'l Bank (In re Reyes), 238 B.R. 507, 520 (Bankr. D.R.I. 1999);* *Knox v. Sunstar Acceptance Corp. (In re Knox), 237 B.R. 687, 699-701 (Bankr. N.D. Ill. 1999);* *Lenior v. GE Capital Corp. (In re Lenior), 231 B.R. 662, 674 (Bankr. N.D. Ill. 1999);* see also *Pertuso v. Fort Motor Credit Co., 233 F.3d 417, 423 (6th Cir. 2000)* (rejecting argument that violation of *Bankruptcy Code 524* may be remedied pursuant to 105); *Henthorn v. GMAC Mortgage Corp. (In re Henthorn), 299 B.R. 351, 356 (E.D. Pa. 2003)* (finding that Congress did not authorize or intend to authorize a private right of action for violation of 105(a)); *Yancey v. Citifinancial, Inc. (In re Yancey), 301 B.R. 861, 863, 866, 867, 868 (Bankr. W.D. Tenn. 2003)* (concluding that there is no private right of action under a combination of *Bankruptcy Code 105(a)* and Bankruptcy Rule 2016); *Costa v. Welch (In re Costa), 172 B.R. 954, 965 (Bankr. E.D. Cal. 1994)* ("It is one thing for Section 105 to serve as a statutory basis for contempt, it is another matter to use it to sanction an implied right of action distinct from contempt."). But see *Bessette v. Avco Fin. Servs., Inc., 230 F.3d 439, 444-45 (1st Cir. 2000)* (finding that although 105 does not itself create a private cause of action, 524 is enforceable through 105); *Rogers v. NationsCredit Fin. Servs. Corp., 233 B.R. 98, 109 (N.D. Cal. 1999)* (permitting a private right of action under 524 is consistent with the Congress' legislative goals in enacting 105); ***Vogt v. Dynamic Recovery Servs. (In re Vogt), 257 B.R. 65, 69 (Bankr. D. Colo. 2000)*** (believing that when 524(a) has been violated court may fashion an implied remedy under 105).

[63] See ***Kelvin v. Avon Printing Co., Inc. (In re Kelvin Publ'g, Inc.), 72 F.3d 129, at 4, 5 (6th Cir. 1995)*** (unpublished opinion).

[64] See *Holloway, 227 B.R. at 504-07;* *Kerney v. Capital One Fin. Corp. (In re Sims), 278 B.R. 457, 466-67 (Bankr. E.D. Tenn. 2002);* see also *In re Knox, 237 B.R. at 699-01* (concluding no private right of action can be implied under *Bankruptcy Code 105* for alleged filing of inflated proofs of claims); *In re Lenior, 231 B.R. at 674* (same).

[65] See *In re Henthorn, 299 B.R. at 356;* Willis v. Chase Manhattan Mortgage Corp., No. CIV.A. 01-CV-1312, 2001 WL 1079547, at 3 (E.D. Pa. Sept. 14, 2001).

[66] See *Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.), 158 B.R. 614, 616 (E.D. Va. 1993),* aff'd, *26 F.3d 481 (4th Cir. 1994).*

[67] See *In re Weir, 173 B.R. 682, 692-93 (Bankr. E.D. Cal. 1994).*

[68] See *Taylor v. United States Dep't of Educ. (In re Taylor), 263 B.R. 139, 150-51 (N.D. Ala. 2001).*

[69] See *Smith v. Keycorp Mortgage, Inc. 151 B.R. 870, 875-77 (N.D. Ill. 1993)* (finding no private right of action under *Bankruptcy Code 1322* or the Chapter 13 plan).

III. GENERAL EQUITABLE POWERS

A. Introduction

Another type of implied power is the ability to act as a "court of equity." And, there is virtually no disagreement among the federal courts that a bankruptcy court is a court of equity.

This part will trace the origin of this proposition from the United States Constitution through the former and current bankruptcy laws to demonstrate that a bankruptcy court under the Bankruptcy Code is not a court of equity. Instead, it will be shown that a bankruptcy judge may exercise only particular equitable powers that are expressly conferred by statute. As a result, a bankruptcy judge cannot resort to implied equitable authority (except where the judge is construing nonbankruptcy law that furnishes this authority).

This part will also describe the consequences of a bankruptcy court not being a "court of equity," such as: (1) preserving the right to a jury trial in a legal action notwithstanding filing of a petition, proof of claim or adversary proceeding with the bankruptcy court; (2) increasing the number of jury trials in the district court; and (3) prohibiting a bankruptcy judge from overriding bankruptcy law on equitable grounds.

[*12]

B. Origins of the Bankruptcy Court as a "Court of Equity"

The equitable powers of all courts are "wholly derived from and measured by the provisions of statutes or constitutions." [74] As for federal courts, the "equity side of the court only has judicial power in equity as conferred by the Constitution and delegated to it by the statute creating the court." [75] Article III, Section 2 of the United States Constitution and the Judiciary Act

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[70] See Molloy v. Primus Auto. Fin. Servs., 247 B.R. 804, 819 (C.D. Cal. 2000); ***Vogt v. Dynamic Recovery Servs. (In re Vogt), 257 B.R. 65, 69 (Bankr. D. Colo. 2000).*** Relying on two other cases, the Vogt court also believes that an implied remedy may be fashioned under 105 when 524(a) has been violated. Id. However, this reliance is misplaced because neither of these cases involved implying a private right of action from 105. See Mountain Am. Credit Union v. Skinner (In re Skinner), 917 F.2d 444, 446-48 (10th Cir. 1990); Cuffee v. Atl. Bus. & Cmty. Dev. Corp. (In re Atl. Bus. & Cmty. Corp.), 901 F.2d 325, 328-29 (3d Cir. 1990).

[71] See Malone v. Norwest Fin. Cal., Inc. 245 B.R. 389, 395-98 (E.D. Cal. 2000); Rogers v. NationsCredit Fin. Servs. Corp., 233 B.R. 98, 108-09 (N.D. Cal. 1999).

Before enactment of Bankruptcy Code 362(h) in 1994 some decisions implied a private right of action under 362 for violation of the automatic stay. There is no longer any need to do so for an individual plaintiff.

[72] See Walls v. Wells Fargo Bank, 276 F.3d 502, 504, 507-11 (9th Cir. 2002) (effectively overruling the California district court cases mentioned in the two preceding footnotes). Thus, ***In re Vogt, supra*** note 70, is the only outstanding published authority for implying a cause of action under 524. However, Vogt adopted the reasoning of Molloy, 247 B.R. 804, and Molloy was effectively overruled by Walls, 276 F.3d 502.

[73] See Walls, 276 F.3d at 1507-10; Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 422-23 (6th Cir. 2000); see also Cox v. Zale Del., Inc., 239 F.3d 910, 917 (7th Cir. 2001) (concluding that a suit for violation of 524(c) can be brought only as a contempt action); cf. Peterson v. Wells Fargo Bank, No. CV-99-6389 REC/SMS, 2000 WL 1225788, at 4-6 (E.D. Cal. Aug. 17, 2000) (finding no private right of action under 524).

The First Circuit has observed that, because a bankruptcy court has statutory contempt power under Bankruptcy Code 105 to order damages for violating the 524 discharge injunction, there is no need to determine whether a private right of action exists thereunder. Bessette v. Avco Fin. Servs., Inc. 230 F.3d 439, 445 (1st Cir. 2000).

[74] John Morton Pomeroy, 1 A Treatise on Equity Jurisprudence 282, at 530 and 292, at 554 (4th ed. 1918); see id. 292, at 554; see also Joseph Story, 1 Commentaries on Equity Jurisprudence 57, at 64 (2d ed. 1839) ("The Constitution of the United States has, in one clause, conferred on the National Judiciary cognizance of cases in Equity … ."); Ex Parte Christy, 44 (3 How.) U.S. 292, 317 (1845) ("Congress possess [sic] the sole right to say what shall be the forms of proceedings, either in equity or at law, in the courts of the United States … .").

of 1789, as amended, confer and delegate, respectively, equitable authority to federal district judges in, inter alia, diversity cases and all federal question cases. [76] Bankruptcy judges, who are not vested with the judicial power under Article III and who do not have jurisdiction over diversity or all federal question cases, do not possess this same equitable authority. [77] While the federal district courts across the country have invoked their statutory authorization to refer bankruptcy cases and proceedings to the bankruptcy judges in their respective districts, [78] the federal district courts have no prerogative to refer or delegate to bankruptcy judges their judicial power under Article III or their other federal nonbankruptcy equitable powers. [79] Consequently, all of the federal equitable authority of a bankruptcy judge, if any, must derive from the bankruptcy statutes that pertain to bankruptcy judges. [80] The origins of these statutes will be discussed below, beginning **[*13]** with the first national legislation that vested the district courts with the power to exercise jurisdiction in bankruptcy matters and proceedings in the nature of summary proceedings in equity.

The first national bankruptcy act, which was enacted in 1800 and repealed in 1803, did not confer equitable authority on the district courts in matters in bankruptcy. [81] However, the later bankruptcy acts of 1841, 1867, 1898, and 1978 used different formulations to confer some kind of equitable authority.

1. The Bankruptcy Act of 1841

The Bankruptcy Act of 1841 [82] contained the following provision: "That the District Court, in every district, shall have jurisdiction in all matters and proceedings in bankruptcy under this act, and any other act which may hereafter be passed on the subject of bankruptcy, the said jurisdiction to be exercised summarily in the nature of summary proceedings in equity … ." [83]

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[75] Stanley L. Sabel, Equity Jurisdiction in the United States Courts with Reference to Consent Receiverships, 19 Iowa L. Rev. 406, 410 (1933); see also *McConihay v. Wright, 121 U.S. 201, 206 (1887)* (stating equity jurisdiction "is vested, as a part of the judicial power of the United States, in its courts by the constitution and the acts of congress in execution thereof"); *Noonan v. Lee, 67 U.S. (2 Black) 499, 509 (1862)* ("The equity jurisdiction of the Courts of the United States is derived from the Constitution and Laws of the United States.").

[76] See U.S. Const. Art. III, 2; *28 U.S.C. 1331,* 1332 (2000).

[77] Cf. Leandra Lederman, Equity and the Article I Court: Is the Tax Court's Exercise of Equitable Powers Constitutional?, *5 Fla. Tax Rev. 357, 378 (2001)* ("Article I courts have no general equitable powers or generalized ability to grant equitable relief purely from their existence as courts of law. However, to the extent that Congress affords to an Article I court jurisdiction over equitable causes of action or jurisdiction to grant equitable relief, the court has those powers unless the grant unconstitutionally infringes on Article III courts.").

[78] See *28 U.S.C. 157*(a) (2000).

[79] See *Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994)* (stating that federal courts have only the power authorized by the Constitution and statute, and that this power cannot be expanded by judicial decree).

[80] Cf. Marcia S. Krieger, "The Bankruptcy Court is a Court of Equity": What Does that Mean?, *50 S.C. L. Rev. 275, 292 (1999)* ("Bankruptcy remedies and insolvency rights have always been a product of legislative enactment rather than case-by-case determination in common law or equity courts."); Lederman, supra note 77 at 376 ("In general, any equitable power an Article I court exercises finds its source in a statute."); see also *In re Grabill Corp., 967 F.2d 1152, 1156 (7th Cir. 1992)* (stating that bankruptcy courts derive their authority solely from Congress); *Burton Coal Co. v. Franklin Coal Co., 67 F.2d 796, 797 (8th Cir. 1933)* (bankruptcy court does not have "plenary jurisdiction in equity, but is confined, in the application of the rules and principles of equity, to the jurisdiction conferred upon it by the provisions of the [former] Bankruptcy Act, reasonably interpreted"); *In re Taylor Oak Flooring Co., 87 F. Supp. 6, 10 (W.D. Ark. 1949)* (the bankruptcy court "does not … have plenary jurisdiction in equity but is confined in the application of the rules and principles of equity to the jurisdiction conferred upon it by the provisions of the [former] Bankruptcy Act") (citations omitted); *Nelson v. Svea Pub. Co., 178 F. 136, 140 (W.D. Wash. 1910)* ("This court does not have the chancery power of a court of unlimited jurisdiction. The whole of its jurisdiction over this case is conferred by the bankruptcy act … ."); Plank, supra note 7, at 668 (the bankruptcy courts "have, and can only have, those equitable powers that Congress can grant them under the Bankruptcy Clause.").

[81] See *Ex Parte Christy, 44 U.S. (3 How.) 292, 311-12 (1845).*

[82] Bankruptcy Act of 1841, ch. 9, ***5 Stat. 440*** (repealed 1843).

This provision, by its terms, did not vest the district courts with any equitable authority; rather it simply instructed the district courts to exercise their bankruptcy jurisdiction summarily as summary proceedings in equity were exercised. Nevertheless, one scholar has observed: "It seems likely that it was this provision, more than anything else, which led to later statements that a bankruptcy court is a court of equity." [84] Indeed, Justice Joseph Story, **[*14]** who, along with Daniel Webster, a principal draftsman of the Bankruptcy Act of 1841, [85] was called upon to answer various questions regarding this Act in his capacity as a Justice of the Circuit Court for the Districts of Massachusetts and Maine and as a Justice of the Supreme Court. In 1842 he described the district court: (1) "sitting as a court of equity in bankruptcy," [86] or "as a court of equity sitting in bankruptcy," [87] and (2) "sitting in bankruptcy, and having the full powers of a court of equity in all cases of bankruptcy." [88] In another case in 1842, Justice Story said that a "district court, sitting in bankruptcy has general equity jurisdiction, and may summarily do whatever a court of equity may do in the ordinary course of its practice and proceedings." [89] In still another opinion that same year he expanded on these statements:

> And here I lay it down as a general principle, that the district court is possessed of the full jurisdiction of a court of equity, over the whole subject-matters which may arise in bankruptcy, and is authorized by summary proceedings to administer all the relief which a court of equity could administer under like circumstances, upon a regular bill and regular proceedings, instituted by competent parties. In this respect, the act of congress, for wise purposes, has conferred a more wide and liberal jurisdiction upon the courts of the United States than the lord chancellor, sitting in bankruptcy, was authorized to exercise. In short, whatever he might properly do, sitting in bankruptcy, or sitting in the court of chancery, **[*15]** under his general equity jurisdiction, the courts of the United States are by the act of 1841 competent to do. [90]

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[83] Act of 1841, ch. 9, 6, ***5 Stat. at 445*** (emphasis added). This same section gave the district courts the same authority and jurisdiction to compel obedience to their bankruptcy orders as the circuit courts then had in any suit in equity pending in the circuit courts. Id.

[84] John C. McCoid, II, Right to Jury Trial in Bankruptcy: Grandfinanciera, S.A. v. Nordberg, *65 Am. Bankr. L.J. 15, 34 (1991).* Professor McCoid also noted that this provision "spoke to how the jurisdiction was to be asserted rather than to what the nature of the jurisdiction was." *Id. at 36.* Bankruptcy jurisdiction was to be exercised summarily in the nature of proceedings in equity. In other words, this jurisdiction was not truly equitable. Instead, it was to be exercised like a court of equity in the sense that the proceedings would be summary (i.e., without a jury) except where the 1841 Act provided otherwise. See *Dudley's Case, 7 F. Cas. 1150, 1157 (C.C.E.D. Pa. 1842) (No. 4114)* (this provision, "in referring to proceedings in equity, [refers to] the forms and modes adopted by courts of equity in the exercise of their jurisdiction, as contradistinguished from those of the common law; a new jurisdiction is created, to be exercised by a court with limited and special powers, … ; a court sui generis - … , to whose action only one rule is presented, that it shall be summary in the nature of summary proceedings in equity"); *Ex Parte Corse, 6 F. Cas. 600, 601 (S.D.N.Y. 1843) (No. 3254)* (the provision "indicates most clearly the purpose of congress to impose upon the district courts, as they are organized, the duty of executing the bankrupt law, and to relieve those courts of the embarrassment of procrastination attendant upon conducting business as law courts merely, it imparts to them in this behalf, the chancery faculty of exercising the jurisdiction summarily in the nature of summary proceedings in equity").

[85] Charles Warren, Bankruptcy in United states History 70 (1935); Carl B. Swisher, 5 History of the Supreme Court of the United States-The Taney Period 1836-64, at 133 (1974) ("According to Millard Fillmore the bill as introduced was the joint product of Webster and Justice Story … ."); see also *Merrill v. Nat'l Bank of Jacksonville, 173 U.S. 131, 175 (1899)* (J. White, dissenting) (it is well known that Mr. Justice Story drafted the Bankruptcy Act of 1841); 2 Life and Letters of Joseph Story 407 (William W. Story, ed., 1851) (the Bankruptcy Act of 1841 was the product of Joseph Story's pen).

[86] *In re Vila, 28 F. Cas. 1188, 1188 (C.C.D. Mass. 1842)* (No. 16,941).

[87] Id.

[88] *In re Cheney, 5 F. Cas. 539, 540 (C.C.D. Mass. 1842) (No. 2636).*

[89] *Ex Parte Carlton, 5 F. Cas. 86, 87 (C.C.D. Mass. 1842) (No. 2415);* see also *Ex Parte Foster (In re Remick), 9 F. Cas. 507, 508 (C.C.D. Me. 1842) (No. 4959)* (J. Story) (stating that a district court is to decide, under the Bankruptcy Act of 1841, whether petitioning creditor's alleged debt is due as a summary proceeding in equity if the petitioning creditor does not desire the issue tried by a jury).

[90] *Ex Parte Foster, 9 F. Cas. 508, 512 (C.C.D. Mass. 1842) (No. 4960).*

Thus, during the calendar year after enactment of the Act of 1841, Justice Story on several occasions referred to the district court sitting in bankruptcy as a court of equity. [91] The following year, 1843, Justice Story reiterated his view in at least four more decisions. [92] But during that same year Supreme Court Justice Catron, in a dissenting opinion in another case, more accurately followed the text of the 1841 Act when he said that "Under the bankrupt law [of 1841], the proceedings are in the form prescribed to courts of equity." [93]

Even more importantly, however, in 1845 the Supreme Court, in yet another opinion authored by Justice Story, declared:

The manifest object of the [1841] act was to provide speedy proceedings, and the ascertainment and adjustment of all claims and rights in favor of or against the bankrupt's estate, in the most expeditious manner, consistent with justice and equity, without being retarded or obstructed by formal proceedings, according to the general course of equity practice, which had nothing to do with the merits. [94]

Thus, notwithstanding Justice Story's earlier statements in lower court **[*16]** opinions that the district court sitting in bankruptcy was a court of equity, the basic jurisdictional provision of the 1841 Act - as correctly construed in Justice Story's opinion for the Supreme Court - simply gave the district courts the ability to exercise their bankruptcy jurisdiction speedily and summarily as courts of equity could then do. [95]

Under the 1841 Act the district courts also had concurrent jurisdiction with the circuit courts of all suits at law or in equity brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against the assignee, touching any property or rights of property of the bankrupt transferable to or vested in the assignee. [96] The district courts were vested with full authority to compel obedience to all bankruptcy orders to the same extent the circuit courts could do in any suit therein in equity. [97] Assignees, who were analogous to bankruptcy trustees, liquidated assets of the debtor and distributed any dividends. [98] There was no party analogous to today's bankruptcy judge. This Act was quickly repealed in 1843. [99]

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[91] At least one other circuit judge also determined that the district court sitting in bankruptcy under the 1841 Act had all the powers of a general equity court. See *Shaw v. Mitchell, 21 F. Cas. 1195, 1197 (D. Me. 1843)* (No. 12,722) (the district court, "sitting in bankruptcy, has all the powers of a court of general equity jurisdiction … ."); *Ayer v. Brastow, 2 F. Cas. 263, 265 (D. Me. 1842)* (No. 682) ("The proceedings in bankruptcy are according to the course of equity, and to enable the court to do full justice to all partners in interest, the district court, sitting as a court of bankruptcy, is clothed with all the powers of a court of general equity jurisdiction.").

[92] *Mitchell v. Great Works Milling & Mfg. Co., 17 F. Cas. 496, 500 (C.C.D. Me. 1843) (No. 9662)* (the courts that are to administer the bankruptcy system under the 1841 Act "must possess not only jurisdiction at law, but in equity; not only a right to proceed in formal way, but to act summarily"); *In re Grant, 10 F. Cas. 969, 969 (C.C.D. Mass. 1843) (No. 5690)* ("The whole proceedings in bankruptcy are on the equity side of the court; and whatever a court of equity might do in the exercise of its general jurisdiction over subjects, requiring a like interposition, may properly be done by the district court, in cases of bankruptcy."); *Fletcher v. Morey, 9 F. Cas. 266, 271 (C.C.D. Mass. 1843) (No. 4864)* ("The fullest jurisdiction is given by the bankrupt act both in the district court and the circuit court, in equity, in all matters touching the bankruptcy; and, of course, that jurisdiction must be, and is to be, exercised according to the general principles applicable to courts of equity."); *Fiske v. Hunt, 9 F. Cas. 169, 171 (C.C.D. Mass. 1843) (No. 4831)* (referring to the jurisdiction of the district court, sitting as a court of equity in bankruptcy, under the sixth section of the Bankruptcy Act of 1841).

[93] *Nelson v. Carland, 42 U.S. (1 How.) 265, 266 (1843)* (Catron, J., dissenting).

[94] *Ex Parte Christy, 44 U.S. (3 How.) 292, 314 (1845).* In 1857 the Supreme Court again noted that the jurisdiction conferred on the district courts by the 1841 Act was to be "exercised summarily, in the nature of summary proceedings in equity." *Commercial Bank of Manchester v. Buckner, 61 U.S. (20 How.) 108, 119 (1857).*

[95] See supra note 83 and accompanying text.

[96] Bankruptcy Act of 1841, ch. 9, 8, ***5 Stat. 440, 446*** (repealed 1843).

[97] Id. 6, at 445.

[98] Charles J. Tabb, The History of the Bankruptcy Laws in the United States, *3 Am. Bankr. Inst. L. Rev. 5, 17 (1995).*

[99] *Id. at 18.*

2. The Bankruptcy Act of 1867 and Its Aftermath

In the next bankruptcy statute, the Bankruptcy Act of 1867, [100] the district courts were constituted "courts of bankruptcy," and were given original jurisdiction in all matters and proceedings in bankruptcy. [101] They were directed to appoint one or more "registers in bankruptcy, to assist the [district judge] in the performance of his duties." [102] The "registers" were the predecessors of the twentieth century "referees" and of current bankruptcy judges. [103] As under the 1841 Act, the district courts had concurrent jurisdiction with the circuit courts of all suits at law or in equity brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against the assignee, touching any property or rights of property of the bankrupt transferable to or vested in the assignee. [104] The circuit courts were given general superintendence and jurisdiction of all cases and questions arising under the Bankruptcy Act of 1867 and generally could hear and determine the case in a court of equity. [105] And, as under the 1841 Act, the district courts were vested with full authority to compel obedience to all **[*17]** orders in bankruptcy to the same extent that the circuit courts had in any suit pending therein in equity. [106] Therefore, unlike the district courts under the 1841 Act, the district courts under the 1867 Act were not authorized to exercise their bankruptcy jurisdiction summarily [107] in the nature of summary proceedings in equity. [108]

Instead, they had only limited equitable authority to adjudicate suits between the assignee in bankruptcy and third parties regarding the bankrupt's transferable property [109] and to enforce bankruptcy orders. In 1870 the Supreme Court observed that,

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[100] Bankruptcy Act of 1867, ch. 176, ***14 Stat. 517*** (repealed 1878).

[101] Id.

[102] Tabb, supra note 98, at 19.

[103] Id.

[104] Bankruptcy Act of 1867, ch. 17, ***14 Stat. 518.***

[105] Id. 2.

[106] Id. The district courts were also authorized to compel the attendance of witnesses, the production of books and papers, and the giving of testimony in the same manner as suits in equity in the circuit court. Id. 38, at 536.

[107] Commenting on the 1867 bankruptcy act, the Supreme Court observed that: "The bankrupt law does not distinguish in what cases the District Court may proceed summarily, and in what cases by plenary suit … ." *Marshall v. Knox, 83 U.S. 551, 556 (1872).*

[108] The Supreme Court, in comparing the 1867 Act to the 1898 Act, noted that, unlike the first section of the 1867 Act, the second section of the 1898 Act began "by describing the jurisdiction conferred on 'the courts of bankruptcy' as 'such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings.'" *Bardes v. First Nat'l Bank of Hawarden, 178 U.S. 524, 534 (1900).* Thus, it is clear that the 1867 Act did not confer general equitable authority on the district courts sitting in bankruptcy.

It is also worth noting that in 1882 Senator Ingalls of Kansas introduced a simple bankruptcy bill known as the Equity Bill, which provided for assignments for benefit of creditors under state law to be filed by debtors in federal court, a marshaling of assets by the court and a discharge if no fraud is shown. Charles Warren, Bankruptcy In United States History 128, 133, 152 (1935); see also David A. Skeel, Jr., Debt's Dominion, a History of Bankruptcy Law in America 250 n.52 (2001) ("Ingalls's bill proposed to authorize the federal courts to handle bankruptcy under their equity power and included few specific details as to how bankruptcy should work.").

[109] This limited equitable authority over such a suit is to be distinguished from the district court's jurisdiction over the proceeding in bankruptcy, from the commencement to its close upon final settlement of the estate. See *Wiswall v. Campbell, 93 U.S. 347, 348 (1876); Lathrop v. Drake, 91 U.S. 516, 517 (1875)* (noting that the district court had two distinct classes of jurisdiction: "jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt … [and] jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him."); see also *Bardes, 178 U.S. at 533* ("Under the act of 1867, then, the distinction between proceedings in bankruptcy, properly so called, and independent suits, at law or in equity, between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared."); *Cleveland Ins. Co. v. Globe Ins. Co., 98 U.S. 366, 370 (1878); Sandusky v. Nat'l Bank, 90 U.S. 289, 293 (1874).*

independent of the 1867 Act, the district courts possessed no equity jurisdiction in bankruptcy; whatever equity jurisdiction they possessed was wholly derived from the 1867 Act. [110]

Although the Act of 1867 was repealed in 1878, [111] in a case involving an **[*18]** equity railroad receivership, the Supreme Court in 1881 in dicta nevertheless observed that bankruptcy courts act as courts of equity:

> In cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. [112]

This was the Supreme Court's first explicit (erroneous) statement that bankruptcy courts act as courts of equity. [113]

It is certainly true that a bankruptcy proceeding is similar to some proceedings in equity, most notably the proceeding known as a general creditor's bill. [114] However, does this similarity mean that a bankruptcy case is also an equitable proceeding in all respects? The answer is no. A bankruptcy case, unlike a creditor's bill, is governed by statute and is by no means identical to a creditor's bill. For example, in bankruptcy a debtor can receive a discharge of his obligations, and there is no requirement that any of the debtor's creditors hold a judgment against the debtor. [115] It is not the similarity between a bankruptcy case and proceedings in equity that determines whether a bankruptcy court is a court of equity. As noted previously, a bankruptcy court is a court of equity only if the statute that creates it actually makes it a court of equity.

3. The Bankruptcy Act of 1898

The Bankruptcy Act of 1898 ("1898 Act") [116] once again defined the district courts as "courts of bankruptcy." [117] The district courts were generally **[*19]** vested with "such jurisdiction at law and in equity as will enable them to exercise original

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This same dichotomy between proceedings in bankruptcy, and suits at law or in equity, was continued in the Bankruptcy Act of 1898. See *Bardes, 178 U.S. at 536.*

[110] See *Morgan v. Thornhill, 78 U.S. 65, 80 (1870);* see also *Stickney v. Wilt, 90 U.S. 150, 161 (1874)* ("Prior to the passage of the Bankrupt Act [of 1867] the District Courts possessed no equity jurisdiction whatever … .").

[111] Tabb, supra note 98, at 19.

[112] *Barton v. Barbour, 104 U.S. 126, 134 (1881).*

[113] See McCoid, supra note 84, at 37.

[114] See *In re Anderson, 23 F. 482, 495, 497 (W.D. Va. 1885)* ("The proceeding in bankruptcy is, in character, effect, and object, the same as a general creditor's bill in chancery."); accord *Fowler v. Dillon, 9 F. Cas. 616, 618 (E.D. Va. 1875) (No. 5000);* see also *Doty v. Mason, 244 F. 587, 590 (S.D. Fla. 1917)* (stating that a petition in involuntary bankruptcy may be assimilated to a creditor's bill); *In re Farthing, 202 F. 557, 562 (E.D.N.C. 1913)* (same); *Cummings v. Mead, 6 F. Cas. 954, 956 (D. Wis. 1857) (No. 3478)* ("The proceeding in equity, by judgment creditors' bill, is not a commission in bankruptcy, but in effect as to the property of the debtor, it is similar to it."). Contra *Van Horn v. Levison (In re Van Horn), 246 F. 822, 823 (3d Cir. 1917)* (stating that some "decisions proceed upon the mistaken theory that a petition in bankruptcy is analogous to a creditor's bill to set aside fraudulent conveyances.") (quoting Black's treatise on bankruptcy); *In re Western Gear Co., 53 F.2d 644, 645 (E.D. Mich. 1931)* (same); *In re Mullen, 101 F. 413, 417 (D. Mass. 1900)* (same).

[115] See *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 319, 321 (1999)* (stating that generally a creditor's bill could only be brought by a judgment creditor).

[116] Bankruptcy Act of 1898, ch. 541, *30 Stat. 544* (repealed 1978).

[117] 11 U.S.C. 1(10) (repealed 1978).

jurisdiction" in many different types of cases and proceedings under the 1898 Act. [118] The district courts in a liquidation proceeding were also given jurisdiction of

all controversies at law and in equity, as distinguished from [bankruptcy] proceedings under [the 1898 Act], between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. [119]

The 1898 Act was amended to provide that, after approval of the petition in a corporate reorganization, the bankruptcy court generally could exercise the powers of a federal equity receivership court. [120] In other words, the district court's bankruptcy jurisdiction was different from the district court's equitable jurisdiction. [121] In 1903, in what came to be recognized as the most authoritative treatise on the 1898 Act, Collier on Bankruptcy concluded that the origin of the district courts, as courts of bankruptcy, was statutory, and that they had no powers or jurisdiction other than conferred on them by or necessarily implied from the 1898 Act. [122]

The bulk of the judicial and administrative work under the 1898 Act was done by "referees" appointed by the district courts. [123] Referees were the successors to the "registers" of the 1867 Act, and the predecessors of today's **[*20]** bankruptcy judges. [124] Referees generally had jurisdiction to, among other things, consider all bankruptcy petitions and adjudicate persons bankrupt or dismiss petitions, exercise the powers vested in the courts of bankruptcy for administering oaths, examine persons as witnesses and require production of documents in proceedings before them, exercise the district judge's power to take possession and release the bankrupt's property due to the judge's absence, sickness or disability, and to perform the duties: (1) conferred on the district courts by the 1898 Act, and (2) prescribed by the rules or orders of the district court, except as otherwise provided in the 1898 Act. [125] In 1938 referees were also given express jurisdiction to perform the bankruptcy duties of the district court incidental to ancillary jurisdiction, to grant, revoke or deny discharges and to confirm or to refuse to confirm plans and to set aside confirmed plans. [126] Confusingly, the word "court" in the 1898 Act meant either the district judge or the referee of the court of bankruptcy in which the proceedings were pending. [127] Referees were renamed bankruptcy judges in 1973. [128]

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[118] See id. 11. This provision, which was amended without material change before it was repealed in 1978, was the "source of authority for the equity jurisdiction of the bankruptcy court." J. Vincent Aug, Recent Trends in the Application of Equitable Principles of Bankruptcy, 43 J. Nat'l Conf. Ref. Bankr. 109, 109 (1969); see also *Pepper v. Litton, 308 U.S. 295, 305 (1939)* (concluding that a bankruptcy court is a court of equity by virtue of this provision); *In re Taylor Oak Flooring Co., 87 F. Supp. 6, 10 (W.D. Ark. 1949)* (by virtue of this provision "a bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the act, it applies the principles and rules of equity jurisprudence"). However, it should be noted that in 1911 the district courts were also given original jurisdiction over all matters and proceedings in bankruptcy. *36 Stat. 1093,* ch. 231, 24, para. 19th (Mar. 3, 1911).

[119] 11 U.S.C. 46(a) (repealed 1978) (emphasis added).

[120] See id. 515.

[121] ***Nat'l Automatic Tool Co. v. Goldie, 27 F. Supp. 399, 401 (D. Minn. 1939)*** ("It is elementary that the District Court of the United States sitting in bankruptcy and the District Court of the United States sitting in law or equity are separate and independent courts."); see also *Am. Sur. Co. of N.Y. v. Wabash R.R. Co., 107 F.2d 685, 688 (8th Cir. 1939)* ("It is true that the jurisdiction of a District Court, acting in Bankruptcy, is different and distinct from its jurisdiction in equity."); *Hanna v. Brictson Mfg. Co., 62 F.2d 139, 145 (8th Cir. 1932)* ("That the court's equity jurisdiction is a thing entirely separate and apart from its jurisdiction in bankruptcy seems obvious.").

[122] Collier on Bankruptcy 2, at 11 (William H. Hotchkiss ed., 4th ed. 1903).

[123] Tabb, supra note 98, at 25.

[124] Id.

[125] Bankruptcy Act of 1898, ch. 541, 38, *30 Stat. 544, 555* (repealed 1978).

[126] Pub. L. No. 696, ch. 575, 38, *52 Stat. 840, 857-58 (1938)* (repealed 1978).

[127] 11 U.S.C. 1(9) (repealed 1978).

Consequently, referees (and later bankruptcy judges) had all the powers of a district judge under the 1898 Act, as amended, except those expressly reserved to the district judge. [129] The powers reserved to the district judge included the power to determine the legal and equitable controversies set forth in 23 of the 1898 Act whether or not the parties consented. [130]

In the course of construing the provisions of the 1898 Act dealing with equitable jurisdiction, the Supreme Court repeatedly remarked that bankruptcy proceedings are equitable in nature [131] and that courts of bankruptcy are courts of equity. [132] However, none of these Supreme Court opinions **[*21]** states that a referee (i.e., bankruptcy judge) has the powers of a court of equity. [133] To the contrary, there is no doubt that in all of these decisions, except for Katchen v. Landy, the Supreme Court declared that the district court is a court of equity. [134] Furthermore, as noted above, under the 1898 Act the district courts functioned as courts of law and equity or as courts of bankruptcy. [135] According to Collier on Bankruptcy, "It would seem … that … the district courts while sitting in bankruptcy are also separate courts, exercising a distinct jurisdiction, different from that, for instance, of the same court while sitting in admiralty." [136] Thus, when federal law was changed in 1915 to permit equitable defenses to be interposed directly in an action at law in federal court, [137] there was no effect on proceedings in

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[128] Tabb, supra note 98, at 25.

[129] *In re Swartz, 130 F.2d 229, 232 (7th Cir. 1942).*

[130] See 11 U.S.C. 46 (repealed 1978).

[131] See *Cont'l Ill. Nat'l Bank & Trust Co. v. Chicago R. I. & P. Ry. Co., 294 U.S. 648, 675 (1935); Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934); C. Elliott & Co. v. Toeppner, 187 U.S. 327, 331 (1902); Bardes v. First Nat'l Bank of Hawarden, 178 U.S. 524, 535 (1900);* see also *Bank of Marin v. England, 385 U.S. 99, 103 (1966)* ("There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction."); *Pepper v. Litton, 308 U.S. 295, 304 (1939)* (stating that by virtue of 2 of the 1898 Act a "bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the [1898 Act], it applies the principles and rules of equity jurisprudence").

It appears that the first Supreme Court case under the 1898 Act to declare that bankruptcy proceedings are equitable in nature was *Bardes, 178 U.S. 524, 534 (1900)* ("proceedings in bankruptcy generally are in the nature of proceedings in equity"). While this statement follows a discussion of 2 of the 1898 Act, the statement does not cite that section or any other section of the 1898 Act.

[132] See *Katchen v. Landy, 382 U.S. 323, 326-27 (1966); Young v. Higbee Co., 324 U.S. 204, 213 (1945); Columbia Gas & Elec. Corp. v. Am. Fuel & Power Co., 322 U.S. 379, 383 (1944)* (noting that a court of bankruptcy possesses and may exercise equitable powers but that a bankruptcy proceeding is not itself a suit in equity); *Pfister v. N. Ill. Fin. Corp., 317 U.S. 144, 151 (1942); Prudence Realization Corp. v. Geist, 316 U.S. 89, 95 (1942); Am. United Mut. Life Ins. Co. v. City of Avon Park, 311 U.S. 138, 145 (1940); Securities and Exchange Comm'n. v. United States Realty & Improvement Co., 310 U.S. 434, 455 (1940); Pepper v. Litton, 308 U.S. at 304* (stating that for many purposes bankruptcy courts are essentially courts of equity); *Wayne United Gas Co. v. Owens-Illinois Gas Co., 300 U.S. 131, 134 (1937)* (observing that a bankruptcy court applies the doctrines of equity); *Cont'l Ill. Nat'l Bank & Trust Co., 294 U.S. at 675; Local Loan, 292 U.S. at 240.*

[133] See supra note 132 and cases cited therein. It should also be mentioned that under the Bankruptcy Act of 1898 summary proceedings before referees were not understood to be proceedings in equity. See *Daniel v. Guar. Trust Co., 285 U.S. 154, 164 (1932).*

[134] All of the cases cited in note 132, supra, involved review of decisions of district judges, not referees, except for Pfister and Katchen. In the Pfister opinion it is quite clear that the courts of bankruptcy that the Supreme Court calls courts of equity are the district courts, not referees. See *317 U.S. at 152-53.* Only in the Katchen case, which is the most recent opinion listed, is it ambiguous whether the Supreme Court means the district court or the referee when it says that bankruptcy courts are essentially courts of equity. See *382 U.S. at 326-27, 337-39.* Yet, even in this instance the Supreme Court cited to two of its earlier cases, Local Loan Co. v. Hunt and Pepper v. Litton, each of which reviewed a decision of the district judge, not of a referee. See also Plank, supra note 7, at 668 ("It remains fashionable to say that bankruptcy courts are 'courts of equity.' This statement had some validity under the Bankruptcy Act of 1898 because under that Act the 'bankruptcy court' was the U.S. District Court, which did have broad equity powers.") (footnotes omitted).

[135] See supra notes 116-21 and accompanying text.

[136] Collier on Bankruptcy 2, at 11 (William H. Hotchkiss ed., 4th ed. 1903).

[137] Act to codify, revise, and amend the laws related to the judiciary, ch. 90, 274(b), ***38 Stat. 956 (1915).***

bankruptcy because they were not actions at law; before a bankruptcy referee this law could apply only to actions between the trustee and adverse claimants concerning property acquired or claimed by the trustee where the parties consented to the jurisdiction of the referee. And, to buttress the assertion that the district court (or referee) sitting in bankruptcy did not actually sit as a court of equity, when many federal statutes were revised in 1948 to reflect the merger of law and equity in the federal courts a decade earlier, none of the bankruptcy provisions dealing with the jurisdiction of the district court was amended.

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4. The Bankruptcy Reform Act of 1978

Congress repealed the 1898 Act and replaced it with the Bankruptcy Reform Act of 1978. [138] Therefore, the jurisdictional provisions upon which the Supreme Court has explicitly relied to declare that bankruptcy proceedings are equitable in nature no longer exist. Section 241 of the Bankruptcy Reform Act of 1978, 28 U.S.C. 1481, did vest bankruptcy judges with "the powers of a court of equity, law and admiralty." [139] However, Congress revoked these powers in 1984 [140] and current bankruptcy statutes do not confer any other general equitable power on bankruptcy (or district) judges. [141] They merely provide that "the district courts shall have original and exclusive jurisdiction of all cases under title 11," [142] without specifically granting any jurisdiction in equity. And the statutory power of district courts to refer bankruptcy cases and proceedings to bankruptcy judges similarly fails to refer **[*23]** to any jurisdiction in equity or to define the bankruptcy court as a court of equity. [143]

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[138] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 401, *92 Stat. 2549, 2682 (1978).*

[139] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 241(a), *92 Stat. 2549, 2671 (1978)* (former 28 U.S.C. 1481). The House Report on *510 of the Bankruptcy Code* states in pertinent part that "the bankruptcy court will remain a court of equity." H.R. Rep. No. 95-595, at 359 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6315 (emphasis added). The House Report on proposed 28 U.S.C. 1481 also declared that "this section gives the bankruptcy court the powers of a court of equity, law and admiralty. It is the concomitant of the bankruptcy courts increased jurisdiction, and is necessary to enable the bankruptcy court to exercise that jurisdiction and its powers under the bankruptcy code." Id. at 448, 1978 U.S.C.C.A.N. at 6404; see also *In re Kestner, 9 B.R. 334, 336 (Bankr. E.D. Va. 1981)* (Section 1481 provides that "courts of bankruptcy have the powers of a court of equity. This power is concomitant with the bankruptcy court's increased jurisdiction under the Bankruptcy Code, and it is necessary to enable it to effectively exercise that jurisdiction and its enhanced powers under the Bankruptcy Code.").

The floor statements on the Bankruptcy Reform Act of 1978 in both the House and the Senate further provide that "28 United States Code 1481 rounds out the power of a bankruptcy court by making clear that the court has all the powers of a court of equity, law, or admiralty." 124 Cong. Rec. 34010 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini); 124 Cong. Rec. 32411 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards).

[140] See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 113, *98 Stat. 333, 343 (1984).* The Senate committee report on the bill that culminated in this Act seems to indicate that 1481 was repealed to "enhance the control of the Article III courts over the adjunct bankruptcy courts" and because the committee "felt it more appropriate, following [the] Marathon [decision holding the bankruptcy courts established by the 1978 Reform Act unconstitutional], to allow the councils of each judicial circuit to make necessary and appropriate orders regarding the administration of … cases." S. Rep. No. 98-55, at 37 (1983).

[141] Cf. McCoid, supra note 84, at 36. Writing in 1991 Professor McCoid said:

It seems to me that it is fair to read what Congress has done, beginning in 1800 and extending through 1984, as perpetuating the English concept of a bankruptcy court with legal as well as equitable jurisdiction. Whether constituted of commissioners, district judges, referees, or bankruptcy judges, the essence of the enterprise has remained the same, a durable example of the merger of law and equity.

However, as noted in the text above, no equitable jurisdiction was conferred by the 1800 Act, referees had no equitable jurisdiction under the 1841 Act because they were not then in existence, and the equitable jurisdiction of both district judges and referees was quite limited under the 1867 Act. Referees only had meaningful equitable powers pursuant to the 1898 Act.

[142] *28 U.S.C. 1334*(a) (2000).

[143] *28 U.S.C. 157* (2000)

C. Current Equitable Powers Under Title 28, the Bankruptcy Code, and the Federal Rules of Bankruptcy Procedure

1. Equitable Powers Under Title 28

While Title 28 of the United States Code furnishes some equitable powers, no provision of Title 28 confers any general equitable authority upon bankruptcy judges. Section 959(a) of Title 28 states that trustees of any property, including debtors in possession, "may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property" and that "such actions shall be subject to the general equity power of such court … ." [144] However, as was just shown in this Article, a bankruptcy judge does not have any general equity power. Therefore, 959(a) confers no authority on a bankruptcy judge. On the other hand, 1452(b) of Title 28 authorizes a court to remand a removed claim or cause of action "on any equitable ground." [145] If a bankruptcy judge is a "court" within the meaning of this section, then a bankruptcy judge may rely on this specific type of equitable power to remand a removed claim or cause of action.

Section 1651 of Title 28 of the United States Code, which is known as the "All Writs Act," provides in pertinent part that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." [146] In 1945 the Supreme Court found that this language did not confer on the district courts any powers beyond those that are traditionally exercised by courts of equity. [147] And, of course, we have already seen that a bankruptcy judge does not have the powers of a court of equity. [148]

Since the bankruptcy "court" is a court established by Congress, it may **[*24]** issue orders authorized by the All Writs Act. [149] Alternatively, because a bankruptcy judge is a judicial officer of the district court, [150] and the district court is a court established by Congress, [151] a bankruptcy judge may issue orders under the All Writs Act. [152] One bankruptcy court has

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[144] *28 U.S.C. 959*(a) (2000).

[145] *28 U.S.C. 1452*(b) (2000).

[146] *28 U.S.C. 1651* (2000). The All Writs Act also authorizes a judge or justice of a court that has jurisdiction in a matter to issue an alternative writ or rule nisi. Id. An alternative writ is "[a] common-law writ commanding the person against whom it is issued either to do a specific thing or to show cause why the court should not order it to be done." A rule nisi, which is also known as a decree nisi, is a court's order "that will become absolute unless the adversely affected party shows the court, within a specified time, why it should be set aside." Black's Law Dictionary 441, 1640 (8th ed. 2004).

[147] See *De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 218-19, 222 (1945);* see also *ITT Cmty. Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978)* ("Both the All Writs Act and the inherent powers doctrine provide a federal court with various common law equity devices to be used incidental to the authority conferred on the court by rule or statute.").

[148] See supra notes 131-41 and accompanying text.

[149] See *In re Optical Techs., Inc., 261 B.R. 781, 784 (Bankr. M.D. Fla. 2001).*

[150] *28 U.S.C. 151,* 152(a) (2000).

[151] See id. 81-144, 451.

[152] See Steve H. Nickles and David G. Epstein, Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code, *3 Chap. L. Rev. 7, 15 (2000)* ("We believe that the All Writs Statute still applies to bankruptcy courts, but only indirectly or derivatively as units of the federal district courts."). But see *Celotex Corp. v. Edwards, 514 U.S. 300, 329 n.16 (1995)* ("The 1984 amendments [to Title 28] also repealed the authorization of bankruptcy judges to act pursuant to the All Writs Act.") (J. Stevens, dissenting); 2 Collier on Bankruptcy 105.LH[3] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2004) (" *Section 105 [of the Bankruptcy Code* is] the sole remaining authority for the exercise by the [bankruptcy court] of the kinds of powers granted under the All Writs statute."); accord *Gnidovec v. Alwan (In re Alwan Bros. Co.), 105 B.R. 886, 895 n.10 (Bankr. C.D. Ill. 1989).*

stated that it "has power under the All Writs Act … to enter orders of restitution as a method of protecting its judgments." [153] And a few other decisions have noted that the All Writs Act authorizes the bankruptcy court to issue injunctions. [154]

The Supreme Court has more recently defined the scope of the All Writs Act:

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although [the] Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate. [155]

If no other provision of the Bankruptcy Code or Bankruptcy Rules applies in a given instance, it can be argued that *105(a) of the Bankruptcy [*25] Code* serves as a statute that "specifically addresses the particular issue at hand." Indeed, when 105(a) was enacted in 1978 Congress intended it to be more expansive than the All Writs Act. [156] Consequently, given both the fact that the All Writs Act does not confer any powers beyond traditional equitable powers and the broad scope of *Bankruptcy Code 105(a)*, even if a bankruptcy judge can utilize the All Writs Act, it seems clear that this Act does not furnish any powers beyond those available under the Bankruptcy Code (including 105(a)), [157] and the Bankruptcy Rules. This means that Title 28 effectively only affords a bankruptcy judge with a particular remand power; it does not actually provide any general equitable authority.

2. Equitable Powers Under the Bankruptcy Code and Rules

No subsequent amendments to the Bankruptcy Code have restored a bankruptcy judge's (or district judge's) general equitable authority in bankruptcy. [158] Some courts regard *105(a) of the Bankruptcy Code* as granting a bankruptcy judge the power to act as a "court of equity," [159] but this statement is clearly incorrect. Section 105(a) authorizes a bankruptcy judge to issue any

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[153] *Davis v. Ill. State Police Fed. Credit Union (In re Davis), 244 B.R. 776, 785 (Bankr. N.D. Ill. 2000).*

[154] *EEOC v. Rath Packing Co., 787 F.2d 318, 325 (8th Cir. 1986); Gatx Terminals Corp. v. A. Tarricone, Inc. (In re A. Tarricone, Inc.), 77 B.R. 430, 433 (Bankr. S.D.N.Y. 1987);* see also *UNR Indus., Inc. v. Cont'l Ins. Co., 101 B.R. 524, 526 n.2 (N.D. Ill. 1989)* (noting that the district court did not question bankruptcy judge's reliance upon the All Writs Act "as authority for an injunction entered restraining future claims against settling insurance companies"); *Brenham v. Deerfield Org., Inc. (In re Norman Indus., Inc.), 1 B.R. 162, 165 (Bankr. W.D. La. 1979)* (stating that the All Writs Act recognizes and declares the principle that bankruptcy courts are courts of equity and, therefore, they have the inherent "power to issue an injunction when necessary to prevent the defeat or impairment of [their] jurisdiction").

[155] *Pa. Bureau of Corr. v. United States Marshals Serv., 474 U.S. 34, 43 (1985);* see also *Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002).*

[156] See H.R. Rep. No. 95-595, at 317 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6274 ("Section 105 is repeated here [in the Bankruptcy Code] for the sake of continuity from current law and ease of reference, and to cover any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute.").

[157] One bankruptcy court has observed that it "has the authority under both *28 U.S.C. 1651* (the 'All Writs Statute') and *Bankruptcy Code 105* to issue any order in aid of its jurisdiction." In re Mayhew, No. 90-60141, 1994 WL 16006013, at 3 (Bankr. S.D. Ga. July 25, 1994).

[158] Contrast this lack of general equitable authority with the authority given to the Court of International Trade. Like the bankruptcy courts that were to be established under the Bankruptcy Reform Act of 1978 to replace the federal district courts sitting in bankruptcy, the Court of International Trade was created to replace the Customs Court. See *Alberta Gas Chems., Inc. v. United States, 496 F. Supp. 1332, 1334-35 (Cust. Ct. 1980).* Even though the Court of International Trade is an Article III Court just like a federal district court, Congress delegated to the Court of International Trade the equitable powers of a federal district court and authorized the Court of International Trade to issue declaratory judgments, injunctions, and writs of mandamus and prohibition under specific circumstances. See *28 U.S.C. 251*(a), 1585 and 2643 (2000). As pointed out in the text accompanying note 139 supra, Congress likewise vested the new bankruptcy courts with the powers of a court of equity. It seems clear, therefore, that Congress believed that neither the new bankruptcy courts nor the new Court of International Trade - an Article III court that should have all the inherent powers of any Article III court - had any general implied equitable powers. This is in contrast to the federal district courts that were expressly delegated original jurisdiction over certain cases in law and equity by acts of Congress before law and equity merged in 1938.

order, process or judgment necessary or appropriate to carry out the provisions of the Bankruptcy Code; [160] it does not mention equity or equitable **[*26]** power. Section 105(a) was first enacted together with former 28 U.S.C. 1481 that conferred the powers of a court of equity on bankruptcy judges. [161] If Congress intended to give general equitable power to bankruptcy judges in 105(a) such authority would have been expressly stated in 105(a) and not in former 1481 of Title 28. Consequently, when applying 105(a) a bankruptcy judge should not balance the equities of the situation. [162]

While a bankruptcy judge has no general equitable powers under bankruptcy law, Congress has incorporated into the Bankruptcy Code specific equitable concepts, interests, principles and remedies. The words "equity," "equities," "equitable" and "equitably" are used thirty-three times in the Bankruptcy Code. [163] For example, a bankruptcy judge may reduce the reach of a security interest on postpetition rents, proceeds, profits, products, or offspring based on the equities of the case. [164] The bankruptcy estate has the benefit of any defense, including equitable defenses available to the debtor against other entities. [165] The Bankruptcy Code provides the equitable remedy of an automatic injunction upon filing of a petition, [166] and a bankruptcy judge is specifically authorized to issue various types of equitable relief, including injunctions [167] and disgorgement. [168] Relying on a form of equitable **[*27]** power, a bankruptcy judge can consolidate the estates of the debtors who file a joint

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[159] Indeed, one district court has stated that, "because the bankruptcy court is a court of equity, … the relief it can provide under 105 is limited to equitable orders." *Malone v. Norwest Fin. Cal., Inc., 245 B.R. 389, 394 (E.D. Cal. 2000)* (citation omitted); see also *Brenham v. Deerfield Org., Inc. (In re Norman Indus., Inc.), 1 B.R. 162, 165 (Bankr. W.D. La. 1979)* (stating that the predecessor of 105(a), 2(a)(15) of the 1898 Bankruptcy Act, recognized and declared the principle that courts of bankruptcy are courts of equity).

[160] *11 U.S.C. 105*(a) (2000). Section 105(a) was derived from subsection 2(a)(15) of the former Bankruptcy Act. H.R. Rep. No. 95-595, at 316 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6273. Former subsection 2(a)(15) authorized the court to "make such orders, issue such process and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions" of the former bankruptcy act. 11 U.S.C. 2(a)(15) (repealed 1978). Like current *Bankruptcy Code 105(a)*, subsection 2(a)(15) of the former bankruptcy act neither mentioned equity nor provided any equitable authority.

[161] See supra note 139 and accompanying text.

[162] Contra ***Stupka v. Great Lakes Ed. (In re Stupka), 302 B.R. 236, 246 (Bankr. N.D. Ohio 2003).***

[163] See *11 U.S.C. 101*(5)(A),(B), (36), (54), 363(f)(5), 365(d)(10), 502(c)(2)(j), 510(c)(1), 524(g)(2)(B)(III), (4)(B)(ii), 524(h)(1)(A), 541(a)(1), (d), 552(b)(1), (b)(2), 557(d)(2)(D), 702(a)(2), 723(d), 902(3), 1112(d)(3), 1113(b)(1)(A), 1113(c)(3), 1114(f)(i)(A), (g)(3), 1124(1),(2)(d), 1129(b)(1), (b)(2), 1171 (2000). The Supreme Court has stated that *Bankruptcy Code 507(a)(8)(A)(ii)* "demonstrates that the Bankruptcy Code incorporates traditional equitable principles." *Young v. United States, 535 U.S. 43, 53 (2002)* (emphasis in original). And another court has referred to *Bankruptcy Code 522(g)* as "nothing more than a statutory expression of the doctrine of equitable estoppel." See *Mefford v. Avco Fin. Servs. of Indianapolis, Inc. (In re Mefford), 18 B.R. 853, 855 (Bankr. S.D. Ind. 1982).*

[164] *11 U.S.C. 552*(b) (2000).

[165] See *11 U.S.C. 558* (2000) (emphasis added). Equitable defenses include estoppel, laches, setoff, recoupment, unclean hands, mistake, fraud, illegality, failure of consideration, misconduct, compromise and ratification. Nonbankruptcy setoff rights are also expressly recognized in the Bankruptcy Code, and both setoff and recoupment are available in adversary proceedings. See *11 U.S.C. 553* (2000); *Fed. R. Bank. Proc. 7013* and *Fed. R. Civ. Proc. 13*.

[166] See *11 U.S.C. 362* (2000); *Quarles v. Wells Fargo Home Mortgage, Inc., (In re Quarles), 294 B.R. 729, 731,* (Bankr. E.D. Ark. 2003) ("Plaintiff's allegation regarding [violation of] the automatic stay invokes an equitable provision of the Bankruptcy Code … .").

[167] See *11 U.S.C. 110*(j), 304(b), 524(a), 524(g), 904, 921(w) and 1170(d) (2000).

[168] See *11 U.S.C. 329*(b) (stating court may order return of any excessive payment made to debtor's attorney); 330(a)(5) (providing court may order return of interim compensation to professionals to the extent it exceeds the final award); 1226(a) and 1325(a)(2) (stating trustee shall return certain payments to Chapter 12 or 13 debtor if a plan is not confirmed); see also *11 U.S.C. 1142*(b) (2000) (authorizing the court to direct debtor and any other necessary party to perform any act necessary for the consummation of a Chapter 11 plan); *In re Beta Int'l, Inc., 210 B.R. 279, 281-82, 283-84 (E.D. Mich. 1997)* (finding bankruptcy court had the power under a confirmed Chapter 11 plan and 1142(b) and other court decisions to order a creditor to return a portion of proceeds of sale of equipment to the trustee).

petition [169] and a Chapter 11 plan can provide for the consolidation of the debtor with one or more persons. [170] And, *105(b) of the Bankruptcy Code* expressly prohibits a bankruptcy judge from appointing a receiver, [171] which is a traditional type of equitable relief.

The Federal Rules of Bankruptcy Procedure provide for equitable setoff and recoupment, the equitable devices of interpleader, class actions, derivative proceedings by shareholders and intervention in adversary proceedings in bankruptcy, and for a party's equitable relief from a final judgment, order or proceeding upon such terms as are just. [172] Both the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure refer to making accounts or an accounting, which are equitable in nature, in several places. [173]

Thus, contrary to what Justice Story first said regarding the Bankruptcy Act of 1841, today there is no federal statute which states that the bankruptcy court has the full powers of a court of equity. [174] A bankruptcy judge **[*28]** (or a district judge sitting in bankruptcy) [175] has only the specific equitable kinds of powers provided by the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, Title 28 of the United States Code, and nonbankruptcy law.

D. Consequences of Lack of Grant of General Equitable Powers

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[169] *11 U.S.C. 302*(b) (2000).

[170] *11 U.S.C. 1123*(a)(5)(C) (2000).

[171] *11 U.S.C. 105*(b) (2000).

[172] See *Fed. R. Bankr. Proc. 7013*, *7022*, *7023*, *7023.1*, *7024*, *9024* and *Fed. R. Civ. Proc. 22(1)*, *60(b)*; see also *Ross v. Bernhard, 396 U.S. 531, 534-41 & n.15 (1970)*; *Lowry v. Int'l Bhd. of Boilermakers, 259 F.2d 568, 571 (5th Cir. 1958)*; *In re Acorn Hotels, LLC, 251 B.R. 696, 703 (Bankr. W.D. Tex. 2000)* ("Any motion brought under Rule 60(b) is one originating in equity. As such, equitable principles apply to the propriety of granting relief.")

[173] See *11 U.S.C. 303*(g), 345(b)(1)(C)(I), 363(c)(4), 542(a), 543(b)(2), 704(2)(9) (2000); *Fed. R. Bankr. P. 1019 (5)(A)*,(B), *2001(d)*, *2003(g)*, *2009(e)*, *2012(b)*, *5009*, *6002*. Another provision of the Code authorizes a Chapter 7 trustee of a debtor general partnership to sue a general partner to recover a deficiency in the property of the partnership estate necessary to pay all allowed claims in full. See *11 U.S.C. 723*(a) (2000). Such a suit is equitable in nature because it is essentially an action for an accounting. *Silk v. Miller (In re CS Assocs.), 167 B.R. 368, 369, & n.3 (E.D. Pa. 1994).*

[174] See Marcia S. Krieger, The Bankruptcy Court is a Court of Equity: What Does That Mean?, *50 S.C. L. Rev. 275, 310 (1999)* (concluding that "from historical, procedural, jurisprudential, and practical perspectives the bankruptcy court is not a court of equity. It is, instead, a specialized court of limited jurisdiction applying statutory law … ."); Daniel B. Bogart, Resisting the Expansion of Bankruptcy Court Power Under *Section 105 of the Bankruptcy Code*: The All Writs Act and an Admonition from Chief Justice Marshall, *35 Ariz. St. L.J. 793, 824 (2003)* (stating that "bankruptcy is not merely the sum of law and equity, but quite a bit more. The administrative process, and the federal nature and reach of American bankruptcy law, suggest that bankruptcy courts are not merely courts in equity."); Garrard Glenn, Effect of Discharge in Bankruptcy: Ancillary Jurisdiction of Federal Court, 30 Va. L. Rev. 531, 537 n.26 (1944)("The fact of history is that bankruptcy is a statutory process that is administered by a statutory court. Owing to a happy accident of history, such a court applies equitable principles, but in no other sense can it be called a court of equity … ."); Plank, supra note 7, at 668 ("Under the Code, bankruptcy courts are not Article III courts and do not have the full equity powers of Article III courts. They are courts of limited jurisdiction that do have some equitable powers."); see also Thomas O. Main, Traditional Equity and Contemporary Procedure, *78 Wash. L. Rev. 429, 511 (2003)* ("Bankruptcy courts seem to be equity courts largely in name only.") (citations omitted).

[175] If a district judge has jurisdiction over a bankruptcy case or proceeding under both 11 U.S.C. 1334 and another federal statute, and the other statute confers equitable authority upon the district judge, the district judge may, however, have the full powers of a court of equity. For example, if a district judge hearing a bankruptcy matter also has federal question or diversity jurisdiction over the matter, then the district judge probably can act as a court of equity pursuant to the other federal statute. Reason: before the merger of law and equity the district court had federal question and diversity jurisdiction over "all suits of a civil nature, at common law or in equity" and equitable relief and equitable defenses were available in both equitable and legal actions in the district court. See Historical and Statutory Notes to *28 U.S.C.A. 1331,* 1332 (West 2004); and ***38 Stat. 956*** (former 28 U.S.C. 398) (repealed as obsolete in 1948).

1. Creditor That Files Claim Should Still Have Jury Trial Right in Legal Actions

The *Seventh Amendment to the United States Constitution* preserves the right to a jury trial in a suit at common law where the value in controversy exceeds $ 20. [176] Because a suit at common law is a legal action, not an equitable action, there is no Seventh Amendment right to a jury trial for purely equitable causes of action. Therefore, if filing a proof of claim with the bankruptcy court effectively converts a creditor's legal cause(s) of action into equitable one(s), the creditor who so files would lose its right to have a jury adjudicate an objection to the claim or a legal counterclaim filed against the creditor in the bankruptcy court.

In Katchen v. Landy the Supreme Court said in regard to the 1898 Act that there is no right to a jury trial on claims in bankruptcy because the bankruptcy case is "inherently [a] proceeding[] in equity":

As bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession … ; and as the proceedings of bankruptcy courts are inherently proceedings in equity … ; there is no Seventh Amendment right to a jury trial for determination of objections to claims … . [177]

[*29] Eight years later the Supreme Court observed that Katchen v. Landy "recognized that a bankruptcy court has been traditionally viewed as a court of equity, and that jury trials would 'dismember' the statutory scheme of the Bankruptcy Act." [178]

In 1977, the Supreme Court characterized the Katchen holding as recognizing the bankruptcy court as a "specialized court of equity":

[In Katchen,] this Court sustained the power of a bankruptcy court, exercising summary jurisdiction without a jury, to adjudicate the otherwise legal issues of voidable preferences. The Court did so on the ground that a bankruptcy court, exercising its summary jurisdiction, was a specialized court of equity and constituted a forum before which a jury would be out of place and would go far to dismantle the statutory scheme. [179]

And, in 1990 in a case commenced under the current Bankruptcy Code, the Supreme Court held in Langenkamp v. Culp that creditors who filed claims against the bankruptcy estate brought themselves within the equitable jurisdiction of the bankruptcy court and consequently were not entitled to a jury trial on the trustee's preference action against them. [180]

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[176] *U.S. Const. amend. VII*.

[177] *Katchen v. Landy, 382 U.S. 323, 336-37 (1966).* The Katchen opinion also quoted an earlier Supreme Court case as follows:

So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods.

Id. at 337 (quoting dicta in *Barton v. Barbour, 104 U.S. (14 Otto) 126, 134 (1881).*

[178] *Curtis v. Loether, 415 U.S. 189, 195 (1974).*

[179] *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 454 n.11 (1977).*

[180] *Langenkamp v. Culp, 498 U.S. 42, 44-45 (1990).* In *Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 58 n.14 (1989),* the Supreme Court stated that:

As Katchen makes clear, however, by submitting a claim against the bankruptcy estate, creditors subject themselves to the court's equitable power to disallow those claims, even though the debtor's opposing counterclaims are legal in nature and the Seventh Amendment would have entitled creditors to a jury trial had they not tendered claims against the estate.

See also *Benedor Corp. v. Conejo Enters., Inc. (In re Conejo Enters., Inc.), 96 F.3d 346, 354 n.6 (9th Cir. 1996)* ("Once [creditor] filed its proof of claim it subjected itself to the bankruptcy court's equitable power and waived any right to a jury trial for the resolution of disputes

Subsequent lower court opinions have extended this reasoning to lender **[*30]** liability [181] and avoidance actions [182] brought by the debtor or trustee against a creditor who had filed a proof of claim. Defendants who filed a counterclaim in a turnover action were also deemed to have consented to the equitable jurisdiction of the bankruptcy court and therefore had no right to a jury trial. [183] One decision has even found that a creditor could not withdraw its proof of claim to restore its right to a jury trial where the creditor had filed its proof of claim - and thereby elected to participate in the equity court proceeding - before the avoidance action was brought against the creditor. [184]

It has already been shown, of course, that a bankruptcy judge does not have general equitable jurisdiction. [185] In the context of allowing and disallowing claims a bankruptcy judge's sole equitable power should be to reconsider an allowed or disallowed claim. [186] Therefore, to the extent that waiver of the right to a jury trial in a preference (or other) action brought by the trustee or debtor in possession depends upon the general equitable authority of the bankruptcy court, mere filing of a claim by a creditor with the bankruptcy court should not abrogate the creditor's entitlement to a jury trial on legal causes of action brought against the creditor by the estate.

2. A Voluntary Debtor Who Files a Petition or an Adversary Proceeding in the Bankruptcy Court Has Not Waived the Right to a Jury Trial

Just as courts have held that a creditor's filing of a proof of claim waives the creditor's right to a jury trial on certain legal counterclaims, some courts have found that the debtor's filing of a voluntary bankruptcy petition results in loss of the debtor's right to a jury trial on legal causes of action brought by the debtor in the bankruptcy court. [187] Similarly, other courts have held

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vital to the bankruptcy process of allowance and disallowance of the claims … ."); *Germain v. Conn. Nat'l Bank, 988 F.2d 1323, 1329 (2d Cir. 1993)* ("The Katchen, Granfinanciera, and Langenkamp line of Supreme Court cases stands for the proposition that by filing a proof of claim a creditor foresakes its right to adjudicate before a jury any issue that bears directly on the allowance of that claim - and does so not so much on a theory of waiver as on the theory that the legal issue has been converted to an issue of equity.") (emphasis in original).

[181] Cf. *Romar Int'l. Ga., Inc. v. Southtrust Bank of Ala. (In re Romar Int'l. Ga., Inc.), 198 B.R. 407, 411-12 (Bankr. M.D. Ga. 1996)* (finding that where defendant filed a proof of claim, debtor has no right to a jury trial in action brought under Georgia law because debtor subjected the action to the bankruptcy court's equitable powers to allow, disallow and offset debts).

[182] See *Official Employment-Related Issues Comm. of Enron Corp. v. Lavorato (In re Enron Corp.), 319 B.R. 122, 125 (Bankr. S.D. Tex. 2004); Citicorp N. Am., Inc. v. Finley (In re Wash. Mfg. Co.), 128 B.R. 198, 202 (Bankr. M.D. Tenn. 1991)* (stating trustee's fraudulent conveyance counterclaim to creditor's proof of claim is part of the claim allowance process within the bankruptcy court's equity power); see also *In re Jensen, 946 F.2d 369, 374 (5th Cir. 1991)* (stating in dicta that creditor's filing of a proof of claim also denied the debtor any right to a jury trial in a nondischargeability action brought by the creditor in the bankruptcy court).

[183] *Bayless v. Crabtree, 108 B.R. 299, 304-05 (W.D. Okla. 1989),* aff'd, *930 F.2d 32 (10th Cir. 1991).*

[184] *EXDS, Inc. v. RK Elec., Inc. (In re EXDS, Inc.), 301 B.R. 436, 437, 439-43 (Bankr. D. Del. 2003).*

[185] See supra notes 116-43 and accompanying text.

[186] See *11 U.S.C. 502*(j)(2000) ("A reconsidered claim may be allowed or disallowed according to the equities of the case.").

[187] See, e.g., *Longo v. McLaren (In re McLaren), 3 F.3d 958, 960-61 (6th Cir. 1993); N.I.S. Corp. v. Hallahan (In re Hallahan), 936 F.2d 1496, 1506 (7th Cir. 1991)* (concluding that a debtor who voluntarily files for bankruptcy and is a defendant in an adversary proceeding lost any Seventh Amendment jury trial right he might have asserted); *Hutchins v. Fordyce Bank & Trust Co. (In re Hutchins), 211 B.R. 322, 324 (Bankr. E.D. Ark. 1997)* ("This Court follows [the] well-reasoned authorities which hold that a debtor in bankruptcy does not have a right to jury trial on pre-petition claims."); *Auto Imports, Inc. v. Verres Fin. Corp. (In re Auto Imports, Inc.), 162 B.R. 70, 72 (Bankr. D. N.H. 1993)* (finding debtor's filing for bankruptcy submits debtor "to the Court's equitable determination of the claims against [debtor]"); *The Splash v. Irvine Co. (In re Lion Country Safari, Inc. Cal.), 124 B.R. 566, 573 (Bankr. C.D. Cal. 1991)* (holding a debtor is not entitled to a jury trial on debtor's cross-claims, integral to restructuring the debtor-creditor relationship, where debtor invoked the bankruptcy court's equitable jurisdiction by filing the bankruptcy petition); *Boatmen's Bank of Columbia v. Johnson (In re Johnson), 110 B.R. 433, 433-34 (Bankr. W.D. Mo. 1990)* (denying debtor's request for a jury trial in a ***Bankruptcy Code 523(a)(2)(A)*** proceeding because debtor voluntarily filed the bankruptcy case and created jurisdiction in the bankruptcy court voluntarily). Contra *In re Jensen, 946 F.2d at 374* (debtor's filing for bankruptcy did not waive right to jury trial of prepetiton legal claims against non-creditor third parties).

that, **[*31]** by merely filing suit in the bankruptcy court, the debtor effectively waives the right to a jury trial on all legal causes of action therein. [188]

The rationale underlying these opinions is that by filing the petition or the lawsuit the debtor has either consented to the bankruptcy court's equitable jurisdiction or equitable powers, or has converted [189] a legal dispute into an equitable dispute. However, as mentioned above, [190] a bankruptcy judge does not have general equitable jurisdiction or authority. Filing a bankruptcy petition or an adversary proceeding in the bankruptcy court therefore ought not transform legal causes of action into equitable ones so as to deny the debtor a right to a jury trial. [191]

3. District Courts Should Conduct More Jury Trials in Bankruptcy Cases

A bankruptcy judge may conduct a jury trial only if she has been specially **[*32]** designated by the district court and the parties have expressly consented. [192] Therefore, in those districts where the district court has not made this special designation and in those instances in which all of the parties have not consented, a bankruptcy judge may not conduct the jury trial. This means that United States District Judges or state court judges should be conducting more jury trials on legal causes of action, including claims to recover preferential or fraudulent transfers and contract and tort claims, regardless of whether the creditor filed a proof of claim or the debtor filed a bankruptcy petition or the action in the bankruptcy court. [193] Moreover, if a proceeding is transferred from the bankruptcy court to the district court for jury trial, the district court should not re-refer the proceeding to the bankruptcy court unless the bankruptcy court is authorized to conduct the jury trial and all parties now consent, or all parties have waived a jury trial.

4. The Bankruptcy Court Should Not Be Called a Court of Equity

Under the Bankruptcy Code, proceedings before a bankruptcy judge are not proceedings in equity. A bankruptcy judge does not function as a court of equity, specialized or otherwise, and has no general equitable jurisdiction. Consequently, a bankruptcy court should not be referred to as a court of equity. Supreme Court and other decisions rendered under the

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[188] See *Parsons v. United States (In re Parsons), 153 B.R. 585, 588 (M.D. Fla. 1993)* (debtors who "submitted their adversary action to the equitable jurisdiction of the bankruptcy court … had no right to a jury trial"); *Haile Co. v. R.J. Reynolds Tobacco Co. (In re Haile Co.), 132 B.R. 979, 981 (Bankr. S.D. Ga. 1991)* ("By voluntarily selecting the bankruptcy court rather than state court as the forum in which to assert its state-law cause of action, [debtor] consented to this court's equitable jurisdiction and thereby waived its right to trial by jury."); see also *Billing v. Ravin, Greenberg & Zackin, 22 F.3d 1242, 1253 (3d Cir. 1994)* (finding that debtors who alleged legal malpractice as a defense to postpetition fees for bankruptcy counsel have no right to trial by jury because their claim was converted from a legal one into an equitable dispute over a share of the bankruptcy estate); *Charlotte Commercial Group, Inc. v. Fleet Nat'l Bank (In re Charlotte Commercial Group, Inc.), 288 B.R. 715, 717, 720 (Bankr. M.D.N.C. 2003)* (concluding that voluntary Chapter 11 debtor that commenced an adversary proceeding in bankruptcy court against a creditor asserting causes of action that patently related to the creditor's proof of claim waived its right to a jury trial); *Romar Int'l Ga., Inc. v. Southtrust Bank of Ala. (In re Romar Int'l Ga., Inc.), 198 B.R. 407, 407-08, 411-12 (Bankr. M.D. Ga. 1996)* (finding that debtor who brought a lender liability action against creditor that filed proof of claim does not have a right to a jury trial in the action because the debtor subjected the action to the court's equitable powers to allow, disallow and offset mutual debts).

[189] See *Billing, 22 F.3d at 1253.*

[190] See supra note 141 and accompanying text.

[191] Cf. G. Ray Warner, Katchen Up in Bankruptcy: The New Jury Trial Right, *63 Am. Bankr. L.J. 1, 44-51 (1989)* where Professor Warner persuasively argues that procedural changes brought about by the 1978 and 1984 amendments to the bankruptcy laws require a jury trial right of all legal issues in bankruptcy-related actions.

[192] See *28 U.S.C. 157*(e) (2000).

[193] As mentioned in note 194, infra, a federal district judge may have equitable powers that a bankruptcy judge does not possess. However, this does not necessarily mean that a federal district court is a "court of equity" in which a debtor that has filed a bankruptcy petition or a creditor that has filed a proof of claim would be denied the right to a jury trial on a legal cause of action. The authority and powers of a federal district judge are beyond the scope of this Article.

Bankruptcy Code stating that the bankruptcy court possesses all equitable authority or powers are incorrect - at least where a bankruptcy judge is the presiding judicial officer. [194]

5. A Bankruptcy Judge Cannot Invoke Equity to Vary the Bankruptcy Code or Rules or to Promulgate Bankruptcy Law

Since a bankruptcy court is not a court of equity, a bankruptcy judge ought not resort to non-statutory equitable principles, defenses, doctrines or remedies to excuse compliance with [195] or to override provision(s) of the **[*33]** 33 Bankruptcy Code or rules, [196] or nonbankruptcy federal law. [197] Thus, she should refrain from invoking the maxims of equity, [198] such as the

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[194] A federal district judge may also have equitable powers under Article III, Section 2 of the United States Constitution, which states: "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States … ." U.S. CONST., Art. III, 2; see also John T. Cross, The Erie Doctrine in Equity, *60 La. L. Rev. 173, 214 & n.230 (1999)* (noting that a federal court's authority to enforce a legal right in equity stems from the judicial power of Article III). The key question is whether this provision of the Constitution, or a nonbankruptcy federal statute, would vest a federal district judge hearing a bankruptcy matter with equitable authority not possessed by a bankruptcy judge.

[195] But see *Canino v. Bleau (In re Canino), 185 B.R. 584, 594 (B.A.P. 9th Cir. 1995)* ("generally, a failure to comply with bankruptcy rules may be excused by equitable doctrines").

[196] See *Welzel v. Advocate Realty Invs., LLC (In re Welzel), 275 F.3d 1308, 1318 (11th Cir. 2001)* ("The statutory language of the Bankruptcy Code should not be trumped by generalized equitable pronouncements, especially when Congress has been explicit when it intends for courts to exercise equitable discretion in the bankruptcy arena."); see also *Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988)* ("Whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."); Nickles & Epstein, supra note 152, at 16 ("Equitable principles and rules, however, are not a source of general authority to act beyond or different from the Bankruptcy Code.").

[197] Cf. *Butner v. United States, 440 U.S. 48, 56 (1979)* ("Undefined considerations of equity provide no basis for adoption of a uniform federal rule affording mortgagees an automatic interest in the rents as soon as the mortgagor is declared bankrupt.").

[198] Contra, e.g., *Swinney v. Academic Fin. Servs. (In re Swinney), 266 B.R. 800, 806 (Bankr. N.D. Ohio 2001)* ("This Court … has held that it will only invoke its equitable powers under 105(a), so as to partially discharge a student loan debt, if it finds that the equities of the situation tip distinctly in favor of the debtor… . This principle is based on the simple legal maxim that one who seeks equity must also do equity.") (citations omitted); see also *Greene v. Schmukler (In re De Berry), 59 B.R. 891, 898-99 (Bankr. E.D.N.Y. 1986)* (barring trustee's action for turnover of lawsuit proceeds under *Bankruptcy Code 542(a)* by the maxim "equity aids the vigilant, not those who slumber on their rights.")

The maxims of equity are:

1. Equity regards that as done which ought to be done.

2. Equity looks to the intent, rather than to the form.

3. He who seeks equity must do equity.

4. He who comes into equity must come with clean hands.

5. Equality is equity.

6. Where there are equal equities, the first in time shall prevail.

7. Where there is equal equity, the law must prevail.

8. Equity aids the vigilant, not those who slumber on their rights.

9. Equity imputes an intention to fulfill an obligation.

10. Equity will not suffer a wrong without a remedy.

11. Equity follows the law.

12. Where one of two innocent parties must suffer, he through whose agency the loss occurred must bear it.

2 Spencer W. Symonds, Equity Jurisprudence 363 (5th ed. 1941).

"unclean hands" principle, unless she is authorized to do so by a specific provision of the Code, Title 28 or other applicable nonbankruptcy law.

A bankruptcy judge should not: (1) imply private rights of action under the Bankruptcy Code simply because it is equitable to do so; [199] (2) order disgorgement of funds predicated on general equitable authority, [200] or (3) **[*34]** invoke broad equity powers to govern the practice of law in bankruptcy. [201] She ought not, pursuant to her purported federal equitable power, apply equitable marshaling, [202] or the equitable doctrine of election of remedies, nor should she invoke the "clean-up" doctrine of equity to either decide legal issues under the Bankruptcy Code ancillary to equitable ones without affording a jury trial on these legal issues, [203] or to award damages under the Bankruptcy Code for incidental harms, such as emotional distress damages, in addition to damages for financial injuries. [204] She should not apply the doctrine of equitable mootness to dismiss a lawsuit seeking to revoke a Chapter 11 plan confirmation order where the plan has been substantially consummated. [205] Similarly, there ought to be no federal bankruptcy law of equitable subrogation, contribution or reimbursement, except as provided in *Bankruptcy Code 502(e)*, [206] 507(d) [207] and 509, [208] or of equitable indemnity. [209]

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[199] But see *Russell v. Fort McDowell Yavapai Nation (In re Russell), 293 B.R. 34, 39 (Bankr. D. Ariz. 2003)* (noting that when a court implies a private right of action in a statute it does so because it is equitable).

[200] Contra *In re Anolik, 207 B.R. 34, 39 (Bankr. D. Mass. 1997)* (noting that disgorgement of interim fees in a Chapter 7 or 11 case that is administratively insolvent is a harsh remedy that should be applied only when mandated by the equities of the case); *Cass Bank & Trust Co. v. Lemay Bank & Trust Co. (In re Jostco, Inc.), 166 B.R. 399, 400, 404-05 (Bankr. E.D. Mo. 1994)* (finding that equity required disgorgement of funds paid to a creditor by debtor where the court had previously ordered: (1) the debtor to place the funds in separate accounts, and (2) such funds be disbursed only upon further court order).

Both of these disgorgement orders could properly be based upon *Bankruptcy Code 105(a)* because they carry out the distribution provision of *Bankruptcy Code 726* or *1129* and/or prevent an abuse of process as defined in 105(a).

[201] Contra Patton v. Scholl, No. 98-*MC-153, 1998 WL 779238, at 11* (Bankr. E.D. Pa. Nov. 6, 1998); *In re Arthur, 15 B.R. 541, 543 (Bankr. E.D. Pa. 1981).*

[202] Contra *C.T. Dev. Corp. v. Barnes (In re Oxford Dev. Ltd.), 67 F.3d 683, 686-87 (8th Cir. 1995)* (considering doctrine of marshaling under federal bankruptcy law); *Ramette v. United States (In re Bame), 279 B.R. 833, 837 (B.A.P. 8th Cir. 2002)* (finding federal doctrine of marshaling may be applied by bankruptcy courts where it is equitable to do so); *In re Pray, 242 B.R. 205, 209 n.6 (Bankr. D. Mass. 1999)* ("A bankruptcy court has the authority to order the marshaling of funds under its equity jurisdiction."); *Blackwell v. First Nat'l Bank of St. Louis (In re Liberty Outdoors, Inc.), 204 B.R. 746, 749 (Bankr. E.D. Mo. 1997)* (considering the facts of the case under the federal doctrine of marshaling); *In re Robert E. Derecktor of R.I., Inc., 150 B.R. 296, 299 (Bankr. D.R.I. 1993)* ("A bankruptcy court has the authority under its equity jurisdiction to order the marshaling of funds."); see also *In re Eagle Pine Prods., Inc., 284 B.R. 784, 786-87 (Bankr. E.D.N.C. 2001)* (determining that the application of marshaling provides basis for bonafide dispute regarding creditor's interest that enables trustee to sell equipment free and clear of this interest under ***Bankruptcy Code 363(f)(4)***).

Equitable marshaling may, however, pertain under nonbankruptcy law.

[203] See Black's law Dictionary 244 (7th ed. 1999); *Towers v. Titus, 5 B.R. 786, 795 & n.18 (N.D. Cal. 1979).*

[204] But cf. *Aiello v. Providian Fin. Corp., 239 F.3d 876, 880 (7th Cir. 2001).*

[205] Contra *Almeroth v. Innovative Clinical Solutions, Ltd. (In re Innovative Clinical Solutions, Ltd.), 302 B.R. 136, 140-42,* (Bankr. D. Del. 2003); see also *RTC v. Best Prods. Co. (In re Best Prods. Co.), 68 F. 3d 26, 29-30 (2d Cir. 1995)* (finding that appeal of order may be moot in bankruptcy cases because of equitable considerations).

In *Innovative Clinical Solutions, 302 B.R. at 144,* the bankruptcy judge actually held, quite correctly, that the Chapter 11 plan confirmation order could not be revoked under *Bankruptcy Code 1144*.

[206] *11 U.S.C. 502*(e) (2000).

[207] *11 U.S.C. 507*(d) (2000).

Equitable tolling [210] should not apply to limitation periods in the Bankruptcy **[*35]** Code, including 108, 502(b)(9), [211] 507(a)(8)(A), [212] 546(a), [213] 548, [214] 549(d), [215] 727(e)(1), [216] 727(e)(2), [217] 1144, 1228(d), 1230(a), 1328(e), **[*36]**

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[208] *11 U.S.C. 509* (2000).

[209] Cf. *Wasserman v. Immormino (In re Granger Garage, Inc.), 921 F.2d 74, 77 (6th Cir. 1990)* (concluding that a bankruptcy court's equitable powers do not allow it to impose indemnity on a creditor's attorney; these "powers may only be exercised within the confines of the Bankruptcy Code").

[210] The "adverse domination doctrine," as a specific form of equitable tolling, also should not apply to any causes of action arising under the Bankruptcy Code. This "is an equitable doctrine that operates to toll the statute of limitations for a corporation's claims against its officers or directors when the persons in charge of the corporation cannot be expected to pursue claims adverse to their own interests." *Pereira v. Aetna Cas. & Sur. Co. (In re Payroll Express Corp.), 186 F.3d 196, 205 (2d Cir. 1999)* (citation omitted).

[211] But see *I.R.S. v. Hildebrand, 245 B.R. 287, 290 (M.D. Tenn. 2000),* appeal dismissed, *248 F.3d 484 (6th Cir. 2001)* (finding that a bankruptcy court may apply equitable doctrines to allow what would otherwise be an "untimely" filing of a proof of claim by the Internal Revenue Service).

In a Chapter 7 case in which a late proof of claim is filed in time to permit payment, the claim will be paid as if it were timely filed where the claimant had no notice or knowledge of the case in time to file a timely proof of claim. *11 U.S.C. 726*(a)(1), (2) (2000). If the claimant has no such notice or knowledge in time to file a timely proof of claim, its claim should not be discharged. See *In re Herndon, 188 B.R. 562 (Bankr. E.D. Ky. 1995).*

[212] Contra *Young v. United States, 535 U.S. 43, 47 (2002)* ("The three-year lookback period [of *11 U.S.C. 507*(a)(8)(A)(i)] is a limitations period subject to traditional principles of equitable tolling"); *Bair v. United States (In re Bair), 240 B.R. 247, 254 (Bankr. W.D. Tex. 1999)* (exercising authority under *Bankruptcy Code 105(a)* to equitably toll the 3-year and 240-day limitations periods of *11 U.S.C. 507*(a)(8)(A)(i), (ii)).

[213] Contra *Jobin v. Boryla (In re M & L Bus. Mach. Co.), 75 F.3d 586, 591 (10th Cir. 1996)* (stating that "Section 546(a) is subject to the doctrine of equitable tolling."); *Ernst & Young v. Matsumoto (In re United Ins. Mgmt., Inc.), 14 F.3d 1380, 1387 (9th Cir. 1994)* (concluding that equitable tolling applies to *Bankruptcy Code 546(a)(1)* in some instances); *Lee v. Nat'l Home Centers, Inc. (In re Bodenstein), 253 B.R. 46, 50 (B.A.P. 8th Cir. 2000)* ("Equitable tolling prevents the limitations period of Section 546(a) from expiring when … ."); *Dec v. Dec (In re Dec), 272 B.R. 218, 224 (Bankr. N.D. Ill. 2001)* ("equitable tolling may be applied with respect to causes of action brought under 546(a)"); Naturally *Beautiful Nails, Inc. v. Bay Area Capital, Inc. (In re Naturally Beautiful Nails, Inc.), 243 B.R. 827, 829 (Bankr. M.D. Fla. 1999)* ("The two year limitation fixed by Section 546(a) is subject to the doctrine of 'equitable tolling.'").

On the other hand, the limitations period of Code 546(a) should be tolled in a Chapter 7 case where the debtor conceals or fails to disclose facts that would give rise to cause(s) of action under 544, 545, 547, 548, or 553; it would be necessary or appropriate pursuant to 105(a) to carry out the trustee's duties to collect and reduce to money property of the estate under *Bankruptcy Code 704(1)*. See *Dec, 272 B.R. at 224-25.*

[214] Contra *Official Comm. of Unsecured Creditors v. Pardee (In re Stanwich Fin. Servs. Corp.), 291 B.R. 25, 27-29 (Bankr. D. Conn. 2003)* (noting that one-year window within which fraudulent transfer must occur may be equitably tolled).

[215] Contra *Olsen v. Zerbetz (In re Olsen), 36 F.3d 71, 73 (9th Cir. 1994)* (holding that 549(d) can be equitably tolled); *Smith v. Mark Twain Nat'l Bank, 805 F.2d 278, 294 (8th Cir. 1986)* (holding that the doctrine of equitable estoppel applies to the time limits of 549(d)); *Kearns Motor Co., Inc. v. Cimino (In re Dreiling), 233 B.R. 848, 878 (Bankr. D. Colo. 1999)* ("In bankruptcy actions where a transaction is concealed by the debtor and/or defendant, 546(a)(1) and 549(d)(1) are tolled until there is discovery of the fraud."); *Helms v. Arboleda (In re Arboleda), 224 B.R. 640, 648 (Bankr. N.D. Ill. 1998)* ("The common law doctrine of equitable tolling may be applied to the statute of limitations set forth in 549(d) … ."); *Michaels v. Nat'l Bank of Sussex County (In re E-Tron Corp.), 141 B.R. 49, 55 (Bankr. D.N.J. 1992)* (concluding the 549 statute of limitations can be equitably tolled where the transfers sought to be avoided were concealed).

The limitations period of 549(d) should be tolled where the debtor conveys property to a third party postpetition without court authorization or notice to the trustee, as necessary or appropriate under 105(a) to carry out the debtor's duties in *Bankruptcy Code 521(3)*,(4) and the trustee's duties set forth in *Bankruptcy Code 704(1)*. See *Olsen, 36 F.3d at 73.*

1330(a), and particularly the deadline to revoke a Chapter 7 discharge or to revoke confirmation of a Chapter 11, 12 or 13 plan due to the fact that relief from such a deadline cannot be sought under Bankruptcy Rule 9024. [218]

Similarly, equitable tolling should have no place in Bankruptcy Rules 1006(b)(2), 1007(d), 2003(a) and (d), 3002(c), 3003(c), 3004, 3005(a), 4003(b), [219] 4004(a), [220] 4007(c), [221] 7052, 8002, 9023, 9024 [222], and 9033 - especially because Bankruptcy Rule 9006(b) provides that the time for taking action under each of these Bankruptcy Rules either cannot be enlarged or may be enlarged only to the extent and under the conditions stated in the **[*37]** particular Rule. [223]

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[216] See, e.g., Dery v. Rosenberg, No. 02-73274, 2003 WL 21919267, at 10 (E.D. Mich. Jan. 13, 2003); *Hadlock v. Dolliver (In re Dolliver), 255 B.R. 251, 255-56 (Bankr. D. Me. 2000);* *Dahar v. Bevis (In re Bevis), 242 B.R. 805, 808-11 (Bankr. D.N.H. 1999);* *Casciato-Northrup v. Phillips (In re Phillips), 233 B.R. 712, 717 (Bankr. W.D. Tex. 1999).*

[217] Contra *Dwyer v. Peebles (In re Peebles), 224 B.R. 519, 523 (Bankr. D. Mass. 1998)* (concluding that doctrine of equitable tolling should be read into 727(e)(2)); *Caughey v. Succa (In re Succa), 125 B.R. 168, 171-74 (Bankr. W.D. Tex. 1991)* (holding statute of limitations of 727(e)(2) is equitably tolled).

The deadlines set forth in *Bankruptcy Code 727(e)(2)* may, however, be effectively extended on two other grounds. First, if the case was not validly closed, the deadline will continue until lawful closing. *Peebles, 224 B.R. at 520-21;* *Succa, 125 B.R. at 70-71.* Second, if the debtor's failure to disclose an asset is the basis for objecting to discharge, and the trustee has not administered the asset, it would be appropriate under 105(a) to toll the deadline in order to carry out *Bankruptcy Code 521(1)*, (3) (debtor's duties to schedule assets, cooperate with the trustee, and to surrender property and information to the trustee) and 704(6) (trustee's duty to oppose the debtor's discharge).

[218] See *Fed. R. Bankr. P. 9024*.

[219] But cf. *Moss v. Block (In re Moss), 266 B.R. 697, 700-01 & n.4 (B.A.P. 8th Cir. 2001)* (finding that an objection to a claim of exemption that was untimely under *Fed. R. Bankr. P. 4003(b)* would not have deprived the bankruptcy court of jurisdiction to consider it).

[220] But see *Landmark Cmty. Bank v. Perkins (In re Perkins), 271 B.R. 607, 612 (B.A.P. 8th Cir. 2002)* (determining that a bankruptcy court may extend the deadline by which to file a complaint objecting to debtor's discharge or dischargeability of a debt if equitable grounds exist for doing so); *In re Moss, 266 B.R. at 414* (holding that *Fed. R. Bankr. P. 4004* is subject to the defense of equitable tolling); *DeAngelis v. Rychalsky (In re Rychalsky), 318 B.R. 61, 63-64 (Bankr. D. Del. 2004)* (concluding that equitable tolling should be applied to action objecting to debtor's discharge).

[221] Contra *European Am. Bank v. Benedict (In re Benedict), 90 F.3d 50, 54 (2d Cir. 1996)* (concluding that *Fed. R. Bankr. P. 4007(c)* is subject to equitable tolling); *In re Moss, 266 B.R. at 701 n.4* (finding *Fed. R. Bankr. P. 4007* is subject to the defense of equitable tolling); *Erie Ins. Co. v. Romano (In re Romano), 262 B.R. 429, 431 (Bankr. N.D. Ohio 2001)* (finding that *Fed. R. Bankr. P. 4007(c)* is a statute of limitations that may be equitably tolled under certain circumstances); *First Bank Sys. v. Begue (In re Begue), 176 B.R. 801, 804 (Bankr. N.D. Ohio 1995)* (same).

Other cases have found that a bankruptcy court may exercise its equitable powers of 105(a) to accept an untimely filed complaint objecting to the dischargeability of certain debt(s). *Nicholson v. Isaacman (In re Isaacman), 26 F.3d 629, 632 (6th Cir. 1994);* see *Themy v. Yu (In re Themy), 6 F.3d 688, 689-90 (10th Cir. 1993)* (stating that court has authority under 105(a) to accept a late-filed complaint where the court misled the creditor as to the deadline); *Anwiler v. Patchett (In re Anwiler), 958 F.2d 925, 928-29 (9th Cir. 1992)* (finding that bankruptcy court may exercise its equitable power given it by Section 105(a) to correct its own mistake regarding the deadline to file complaints). Note also that where the court issues an order containing an incorrect deadline to file complaints objecting to discharge or to determine the dischargeability of particular debts, the court should be able to correct the date pursuant to Bankruptcy Rule 9024(a). See *Leisure Dev. Inc. v. Burke (In re Burke), 95 B.R. 716, 718 (B.A.P. 9th Cir. 1989).*

[222] But see *In re Benjamin's-Arnolds, Inc., Bankruptcy No. 4-90-6127, 1997 WL 86463, at 10 n.9* (Bankr. D. Minn. Feb. 28, 1997) (concluding it is arguable that *Fed. R. Civ. P. 60(b)(3)* would apply to the case because the doctrine of equitable tolling would act to toll the one-year statute of limitations period therein).

[223] *Fed. R. Bankr. P. 9006(b)*. With regard to the period for filing a complaint to determine a debt nondischargeable in a Chapter 13 case in which the debtor seeks a "hardship discharge," the Bankruptcy Rules permit the period to be enlarged if the creditor can show that its failure to act was the result of excusable neglect. *Fed. R. Bankr. P. 4007(d)*, *9006(b)(1)*.

Relying on equitable authority, a bankruptcy judge ought not partially discharge or revise the repayment schedule of an educational loan that is nondischargeable under *Bankruptcy Code 523(a)(8)* [224] or a marital obligation nondischargeable pursuant to *Bankruptcy Code 523(a)(15)*. [225]

To the extent that substantive consolidation relies upon the purported general equity powers of a bankruptcy court, [226] a bankruptcy judge should **[*38]** not have power to order consolidation of estates [227] of different debtors. A bankruptcy judge ought not have equitable power to order pre-plan payment of prepetition claims of vendors that furnish postpetition services or goods required by a debtor to reorganize [228] (the "Necessity of Payment" rule or "Doctrine of Necessity"). She should not

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[224] Contra Educ. Credit Mgmt. Corp. v. Jones, No. CIV.A. 3:99CV 258, 1999 WL 1211797, at 3 (E.D. Va. July 14, 1999) (holding that the bankruptcy court, although finding student loans nondischargeable, was not precluded from fashioning an equitable remedy to give the debtor some relief); *Hafner v. Sallie Mae Servicing Corp. (In re Hafner), 303 B.R. 351, 356 (Bankr. S.D. Ohio 2003)* (observing that "courts have utilized their equitable powers to provide partial discharges, grant payment deferrals or modify payment schedules"); *Oderkirk v. Northwest Educ. Loan Ass'n, Fin. Assistance, Inc. (In re Oderkirk), Nos. 94-01078, 94-6226, 1995 WL 241338, at 3* (Bankr. D. Idaho April 13, 1995) ("Where a complete denial of discharge is not appropriate, bankruptcy courts have the equitable power to either restructure or partially discharge student loans."); *Berthiaume v. Pa. Higher Educ. Assistance Auth. (In re Berthiaume), 138 B.R. 516, 521-22 (Bankr. W.D. Ky. 1992)* (using its equitable powers, court partially discharged debtor-husband's educational loans and ordered repayment of nondischargeable loans on a monthly schedule); *Cadle Co. v. Webb (In re Webb), 132 B.R. 199, 202-03 (Bankr. M.D. Fla. 1991)* (providing a payment schedule for nondischargeable educational loans pursuant to equitable powers); *Hawkins v. Chase Manhattan Bank (In re Hawkins), 139 B.R. 651, 654 (Bankr. N.D. Ohio 1991)* (finding that all but $ 4000 of educational loans totaling over $ 11,000 were nondischargeable based upon the equities of the case).

Bankruptcy Code 105(a) does not furnish authority to order partial discharge of an educational loan where undue hardship has not been shown under 523(a)(8) because this would be clearly inconsistent with such section. *Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman), 325 F.3d 1168, 1173-75 (9th Cir. 2003);* see also Bogart, supra note 174, at 875-76 (stating that 105 is not a valid basis for the bankruptcy courts' grant of partial discharge of student loans). But see *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby), 144 F. 3d 433, 439 (6th Cir. 1998).*

In any event, it is difficult to conclude that partial discharge of educational loan debt is necessary or appropriate to carry out 523 (a)(8) of the Code, which provides that educational loan debt is nondischargeable unless excepting the debt from discharge will impose an undue hardship on the debtor and the debtor's dependents. In other words, the debt is dischargeable only if excepting it from discharge would create an undue hardship. If excepting it from discharge would create such a hardship, then it should be discharged. If, however, excepting educational loan debt from discharge would not create an undue hardship, then neither it (nor part of it) should be dischargeable.

[225] Contra *In re Smither, 194 B.R. 102, 109-10 (Bankr. W.D. Ky. 1996)* (finding that, for purpose of 523(a)(15), if the debtor has the ability to pay only a portion of the debt, the court may discharge part of the debt and/or equitably modify the debt); *Comisky v. Comisky (In re Comisky), 183 B.R. 883, 884 (Bankr. N.D. Cal. 1995)* (fashioning an equitable remedy under 523(a)(15) by declaring part of the debt discharged and limiting enforcement of the debt held nondischargeable).

[226] Substantive consolidation traces its roots to the Bankruptcy Act of 1898. The Act then contained no express statutory authorization for consolidation, either generally or in the case of spouses. Instead, the authority to order substantive consolidation was implied from the bankruptcy court's general equitable powers." *Reider v. FDIC (In re Reider), 31 F.3d 1102, 1105 (11th Cir. 1994).* Some courts still rely on these so-called general equitable powers as the authority to order substantive consolidation. See, e.g., *Eastgroup Props. v. S. Motel Assocs., Ltd., 935 F.2d 245, 248 (11th Cir. 1991); **Drabkin v. Midland-Ross Corp. (In re Auto-Train Corp.), 810 F.2d 270, 275 (D.C. Cir. 1987).*** While other courts predicate substantive consolidation upon *Bankruptcy Code 105(a)*, no reported case ordering consolidation of two or more estates pursuant to this statute actually analyzes 105(a) to see whether it authorizes, by its terms, substantive consolidation.

It is difficult to understand how an order consolidating two different entities would be necessary or appropriate to carry out other provisions of the Bankruptcy Code. Moreover, since substantive consolidation is clearly a substantive right and the courts have found that 105 may not be used to create substantive rights, courts certainly should not permit substantive consolidation under the aegis of 105. See also Bogart, supra note 174, at 875-76 (asserting that 105 is not a valid basis for substantive consolidation of cases).

[227] Substantive consolidation may, of course, be ordered pursuant to *Bankruptcy Code 302(b)* (consolidation of estates in a joint case) or *Bankruptcy Code 1123(a)(5)(C)* (consolidation of a debtor with one or more persons pursuant to a confirmed Chapter 11 plan). See *11 U.S.C. 302*(b) & 1123(a)(5)(C) (2000).

refuse to grant relief from the automatic stay simply because it would be inequitable to do so. [229] A bankruptcy judge should not reduce a post-default contractual interest rate on the debtor's loan by applying equitable considerations. [230] She should not measure a bankruptcy examiner's duties using the principles of equity. [231] She also should not have equitable power to approve rejection of a nonresidential lease of real property retroactive to a date before the date of such approval. [232] She ought not direct equitable surcharge of a debtor's statutory **[*39]** exemptions. [233] Nor should she order equitable restitution, such as imposing an equitable lien or constructive trust, [234] to effectuate federal bankruptcy law. And, a bankruptcy judge's equitable

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[228] See *Capital Factors, Inc. v. Kmart Corp., 291 B.R. 818, 823 (N.D. Ill. 2003),* aff'd, *359 F.3d 866 (7th Cir. 2004).* The prepetition claims of postpetition vendors may be paid pursuant to ***Bankruptcy Code 363(b)(1)*** if: (1) the vendor(s) would have ceased doing business with the debtor-in-possession if they were not paid for their prepetition claims; (2) the prepetition unsecured creditors that would not be paid will be at least as well off as they would have been had the order not been issued; and (3) this discrimination among unsecured creditors is the only way to facilitate a reorganization. See *In re Kmart Corp., 359 F.3d 866, 872-74 (7th Cir. 2004).*

[229] Contra *Compass Bank for Sav. v. Billingham (In re Graves), 212 B.R. 692, 697 (B.A.P. 1st Cir. 1997)* (concluding it would be inequitable to grant secured creditor relief to foreclose on its contaminated collateral where the creditor had waited until after the trustee obtained a money judgment to fund cleanup of the property, which was more than five years after the debtor's postpetition default).

[230] Contra *Casa Blanca Project Lenders, L.P. v. City Commerce Bank (In re Casa Blanca Project Lenders, L.P.), 196 B.R. 140, 142-45, 148 (B.A.P. 9th Cir. 1996).* A post-default interest rate may not be allowed under state law where, for example, the rate is usurious or the rate is deemed to be unconscionable or unenforceable liquidated damages.

[231] Contra *United States v. Schilling (In re Big Rivers Elec. Corp.), 355 F.3d 415, 433 (6th Cir. 2004)* (finding that an examiner's duties flow from the "once-distinct principles of equity"). An examiner's duties are actually set forth in *Bankruptcy Code 1106*. See *11 U.S.C. 1106* (2000).

[232] Contra *Thinking Machs. Corp. v. Mellon Fin. Servs. (In re Thinking Machs. Corp.), 67 F.3d 1021, 1028 (1st Cir. 1995)* (ruling that a bankruptcy court may approve rejection of a nonresidential lease under 365(a) retroactive to the motion filing date); *Pac. Shores Dev., LLC v. At Home Corp. (In re At Home Corp.), 392 F.3d 1064, 1071 (9th Cir. 2004)* (holding that "a bankruptcy court, in exercising its equitable powers under *11 U.S.C. 105*(a), may approve the retroactive rejection of a nonresidential lease when 'necessary or appropriate to carry out the provisions of' 365(d)"); *In re Amber's Stores, Inc., 193 B.R. 819, 827 (Bankr. N.D. Tex. 1996)* ("nothing precludes a bankruptcy court, based on the equities of the case, from approving the trustee's rejection of a nonresidential real property lease retroactively to an earlier date").

[233] Contra *Latman v. Burdette, 366 F.3d 774, 786 (9th Cir. 2004)* (holding that a "bankruptcy court may equitably surcharge a debtor's statutory exemptions when reasonably necessary both to protect the integrity of the bankruptcy process and to ensure that a debtor exempts an amount no greater than what is permitted by the exemption scheme of the Bankruptcy Code"); *In re Karl, 313 B.R. 827, 831 (Bankr. W.D. Mo. 2004)* (noting that the purpose of surcharging the debtor's exemptions is to "reach an equitable result by preserving the spirit of the Bankruptcy Code and the creditors' reasonable expectations in the event of liquidation").

Alternatively, where the debtor's concealment or failure to disclose assets results in the debtor exempting more property than the debtor is entitled to, *Bankruptcy Code 105(a)* can be employed to surcharge the debtor's exemptions as necessary or appropriate to carry out the provisions of *Bankruptcy Code 521* and *522*.

[234] Restitution in equity, which is ordinarily in the form of a constructive trust or an equitable lien, may also take the form of an accounting for profits. *Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213-14 n.2 (2002).* As described in the text accompanying note 173 supra, the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure specially provide for accountings in certain circumstances.

A bankruptcy judge could, however, order restitution as a remedy for a violation of *Bankruptcy Code 524*. See *Cox v. Zale Del., Inc., 239 F.3d 910, 916 (7th Cir. 2001)* (observing that debtor who makes involuntary payments under an unenforceable reaffirmation agreement could obtain restitution of these payments where the creditor is in contempt of the discharge injunction); see also *Molloy v. Primus Auto. Fin. Servs., 247 B.R. 804, 819-20 (C.D. Cal. 2000)* (concluding that a debtor may pursue a claim under 524 for restitution even where there is no reaffirmation agreement to rescind). These would be forms of legal, as opposed to equitable, restitution. See *Knudson, 534 U.S. at 212-20.*

powers ought not to enable her to authorize a creditors' committee to sue on the estate's behalf to avoid a fraudulent transfer where the debtor-in-possession has refused to pursue the avoidance claim. [235]

a. No Laches

In the bankruptcy court, laches should not bar relief under one or more provisions of the Bankruptcy Code and Rules, [236] such as a motion to reopen a bankruptcy case pursuant to 350 [237] (which is expressly exempted from the **[*40]** one-year deadline for seeking relief under *Federal Rule of Bankruptcy Procedure 9024*), a complaint to except a debt from discharge under 523, [238] a motion to avoid a lien pursuant to 522(f), [239] a motion for relief from stay [240] **[*41]** or for violation of the stay under

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[235] Contra *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 552, 580* (3d Cir.) (en banc opinion), cert. dismissed ***540 U.S. 1001 (2003).*** However, a creditors' committee should have the authority to bring such an action pursuant to *11 U.S.C. 105*(a) and 1103(c)(5).

[236] Contra *Beaty v. Selinger (In re Beaty), 306 F.3d 914, 925 (9th Cir. 2002)* ("We see no reason why laches should not be available in bankruptcy when it is available elsewhere.").

[237] Contra *Morlan v. Universal Guar. Life. Ins. Co., 298 F.3d 609, 620 (7th Cir. 2002)* ("The equitable origins and character of bankruptcy point to laches as the proper doctrinal guide to cutting off belated efforts to reopen."); ***Albuquerque Chem. Co., Inc. v. Arneson Prods., Inc., 201 F.3d 447,*** No. 98-2336, 1999 WL 1079600, at 2 (10th Cir. Nov. 30, 1999) (unpublished opinion) (reopening of case incorporates an equitable defense akin to laches); *Harvey v. Flener (In re Harvey), 245 B.R. 834, 836 (D. Ky. 1999)* (concluding that laches may apply to a request to reopen a case); *Urbanco, Inv. v. Urban Sys. Streetscape, Inc., 111 B.R. 134, 135-36 (W.D. Mich. 1990)* (holding laches properly barred reopening of bankruptcy case); *In re Hunter, 283 B.R. 353, 357 (Bankr. M.D. Fla. 2002)* ("It is well recognized that the motion to reopen is an equitable proceeding and laches is a valid and recognized defense to any motion to reopen a closed case."); In re Graves, No. 91-82947-JAC-7, 2001 WL 483999, at 1 (Bankr. N.D. Ala. Jan. 23, 2001) (lapsing of more than nine years bars debtor's motion to reopen under doctrine of laches); *In re Levy, 256 B.R. 563, 566 (Bankr. D.N.J. 2000)* ("A recognized limitation on the granting of motions to reopen for lien avoidance is the doctrine of laches."); *In re Kean, 207 B.R. 118, 124 (Bankr. D.S.C. 1996)* ("The Court is also convinced that the doctrine of laches prevents this Court from reopening this case … ."); *In re Caicedo, 159 B.R. 104, 106-08 (Bankr. D. Conn. 1993)* (denying motion to reopen due to laches); *In re Lundberg, 152 B.R. 316, 319 (Bankr. E.D. Okla. 1993)* (finding laches "most applicable" to request by creditor to reopen a case and permit modification of the discharge injunction); see also *In re Tarkington, 301 B.R. 502, 508 (Bankr. E.D. Tenn. 2003)* (denying debtor's motion to reopen because it would be inequitable and futile to reopen the case).

If a creditor has innocently incurred expenses prosecuting a claim against the debtor during the period that the debtor delayed in bringing the motion to reopen, then it would be appropriate under *Bankruptcy Code 105(a)* to condition reopening of the case upon payment of these expenses by the debtor.

[238] Contra *In re Beaty, 306 F.3d at 926* (opining that laches is available as a defense to a nondischargeability action brought under ***Bankruptcy Code 523(a)(3)(B)***; *Sly v. United States (In re Sly), 305 B.R. 67, 71 (Bankr. N.D. Fla. 2003)* (finding that laches may be a defense to an action under ***Bankrupcy Code 523(a)(1)*** to declare tax debts discharged); *Fed. Mortgage Mgmt., Inc. v. Weeks (In re Weeks), 133 B.R. 201, 205-06 (Bankr. W.D. Tenn. 1991)* (determining that laches barred debtor from asserting his debt to a creditor is dischargeable pursuant to ***Bankruptcy Code 523(c)***); *Odle Cumberlin Auctioneers v. Rider (In re Rider), 89 B.R. 137, 143 (Bankr. D. Colo. 1988)* (finding creditor that waited almost three years to file its nondischargeability complaint in a Chapter 7 case is certainly guilty of laches); *United States v. Vlavianos (In re Vlavianos), 71 B.R. 789, 795 (Bankr. W.D. Va. 1986)* (finding laches is an effective defense to creditor's request for appropriate equitable relief as part of its complaint to have a portion of its claim declared nondischargeable); *Hadden v. Stone (In re Stone), 43 B.R. 377, 380 (Bankr. D. Vt. 1984)* (finding that creditor who waited almost eighteen months after the debtor acquired title to property to file a complaint to determine dischargeability of debt is guilty of laches).

A creditor, whose debt was not properly scheduled or listed by the debtor, that files a tardy complaint may nonetheless be barred. If an unscheduled creditor alleges in a Chapter 7 case that the debt owed to the creditor is nondischargeable under ***Bankruptcy Code 523(a)(2)***, (4), or (6), the debt will be discharged if the creditor had notice or actual knowledge of the case in time to timely file the complaint and a proof of claim for the debt. If the debt is nondischargeable on some other ground, the debt will similarly be discharged where the creditor had notice or actual knowledge of the case in time to timely file a proof of claim for the debt. See ***11 U.S.C. 523***(a)(3)(B) (2000) and *Rider, 89 B.R. at 139-43.*

362, [241] a motion to file a late proof of claim, [242] the timeliness of a filed claim, [243] a request for payment of an administrative **[*42]** expense under 503, [244] debtor's claim of exemption [245] or amendment of exemption pursuant to 522,

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[239] Contra *In re Hunter, 164 B.R. 738, 739-40 (Bankr. W.D. Ky. 1994)* ("The legislative history of *11 U.S.C. 350*(b) provides that laches may constitute a bar to an avoidance action.") (citing committee report); *In re Chestnut, 50 B.R. 309, 311 (Bankr. W.D. Okla. 1985)* (finding that creditor may respond to a motion to avoid lien and argue that it is not timely for equitable reasons, including laches); *In re Montemurro, 66 B.R. 124, 125 (Bankr. E.D.N.Y. 1984)* (invoking laches to deny debtor's motion to avoid lien under *Bankruptcy Code 522(f)*).

The quotation above from the In re Hunter case is erroneous for three reasons. First, the committee report may refer to reopening a case instead of an avoidance action. Second, this report refers to the trustee exercising an avoidance power, not the debtor. H.R. Rep. No. 95-595, at 338 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6294. Third, this committee report may assume that the bankruptcy court would have equitable powers under new Bankruptcy Code 1481. However, as noted above, these equitable powers were revoked. See supra notes 139-40 and accompanying text.

[240] Contra *Compass Bank for Sav. v. Billingham (In re Graves), 212 B.R. 692, 696-97 (B.A.P. 1st Cir. 1997)* (finding laches barred secured creditor from charging interest and using this interest to show that debtors had no equity in the collateral in a motion for relief from stay). However, this interest should not have been chargeable because the value of the collateral was less than the principal amount owed to the secured creditor. See *id. at 696* and *11 U.S.C. 506*(b) (2000).

[241] Contra *Bostanian v. Am. Hilton Corp. (In re Bostanian), 41 Fed. Appx. 66, 67* (9th Cir. July 1, 2002) (determining that doctrine of laches may be applied to an action for willful violation of the automatic stay under *Bankruptcy Code 362(h)*) (unpublished); ***Cooper v. United States, 66 F.3d 325,*** Nos. 94-1107, 94-1178, 1995 WL 555292, at 2, 4 (6th Cir. Sept. 14, 1995) (finding that district court appropriately concluded that the doctrine of laches barred debtors' claims that penalties assessed against them by the IRS were void because they were assessed in violation of the automatic stay) (unpublished); *Thornton v. First State Bank of Joplin, 4 F.3d 650, 653 (8th Cir. 1993)* (noting that laches may apply to debtor's claim alleging that bank violated the automatic stay); *Sinatra v. Gucci (In re Gucci), 309 B.R. 679, 684-86 (S.D.N.Y. 2004)* (vacating judgment of bankruptcy court and remanding case to bankruptcy court to make findings and conclusions as to whether creditor had shown that laches barred the Chapter 11 trustee from arguing that postpetition registration of judgment lien in estate property violated the automatic stay); White v. RB-3 Assocs. (In re White), No. 94-CV-0736E(H), *1995 WL 643345, at 2* (W.D.N.Y. Oct. 6, 1995) (affirming bankruptcy judge's decision that laches barred debtor's motion for contempt against creditor for violation of the automatic stay); *Adams v. Hartconn Assocs., Inc. (In re Adams), 212 B.R. 703, 711-13 (Bankr. D. Mass. 1997)* (finding doctrine of laches would bar debtor from recovering for violation of the automatic stay under *Bankruptcy Code 362(h)*; *Nelson v. Post Falls Mazda (In re Nelson), 159 B.R. 924, 924-25 (Bankr. D. Idaho 1993)* (opining that laches might be an appropriate defense to an action for willful violation of the automatic stay pursuant to *Bankruptcy Code 362(h)*).

In Bostanian the Ninth Circuit alternatively found that there was no willful violation of the stay. The assessments in Cooper probably would not violate the automatic stay under current law. See *11 U.S.C. 362*(b)(9) (2000). In Thornton the creditor may have been able to obtain retroactive relief from the automatic stay, and the debtor should have been judicially estopped from claiming that the creditor violated the stay. In White it seems clear that the District Court could have reached the same result by applying res judicata.

[242] Contra *Indian Motorcycle Assocs., Inc. v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.), 157 B.R. 532, 538-39 (S.D.N.Y. 1993)* (affirming denial of motion for leave to file claim after bar date because claim was barred by laches); *Wright v. Placid Oil Co., 107 B.R. 104, 105-07 (N.D. Tex. 1989)* (affirming decision of bankruptcy judge that creditor's nearly eight-month delay in filing motion for leave to file a late proof of claim constitutes laches); *Walters v. Hunt (In re Hunt), 146 B.R. 178, 184 (Bankr. N.D. Tex. 1992)* (denying creditor's request to file a late proof of claim under the doctrine of laches); *In re Flanigan's Enters., Inc., 77 B.R. 963, 967 (Bankr. S.D. Fla. 1987)* (barring creditor's motion for leave to file a late proof of claim due to laches); *In re Cmehil, 43 B.R. 404, 408 (Bankr. N.D. Ohio 1984)* (denying motion for order permitting late filing of proof of claim because of laches where creditor waited over two years to file the motion); see *In re Maguire, 148 B.R. 344, 346 (Bankr. M.D. Fla. 1992)* (denying motion for reconsideration of order denying assignee's motion for leave to file an unsecured claim where the assignee of claimant was guilty of laches).

In a Chapter 7 case a tardy proof of claim will be effectively subordinated if the creditor had notice or actual knowledge of the case in time to timely file a proof of claim. See *11 U.S.C. 726*(a)(2) (2000). In a Chapter 12 or 13 case a late proof of claim will ordinarily be disallowed. See *Fed. R. Bankr. P. 3002*)(c), 9006(b)(3). Similarly, in a Chapter 11 case a tardy proof of claim will usually be disallowed unless the creditor can establish the delay was the result of the creditor's excusable neglect. *Fed. R. Bankr. P. 3003(c)(3)*, *9006(b)(1)*.

[243] Contra ***Morgan v. Barsky (In re Barsky), 933 F.2d 1013,*** Nos. 88-5965, 88-6076, 1991 WL 88170, at 3-4 (9th Cir. May 17, 1991) (affirming decision of bankruptcy judge applying laches to bar creditor's claim to the extent it was unsecured) (unpublished); *Venhaus v.*

[246] an action to enforce the discharge injunction of 524, [247] a motion to compel a custodian or other entity to turn over and/or account for property pursuant to 542(a) or 543(b), [248] a defense **[*43]** to an action to avoid a preference under 547 [249] or a

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Wilson (In re Wilson), 96 B.R. 257, 263 (B.A.P. 9th Cir. 1988) (holding claim barred by claimant's unjustifiable delay and resulting prejudice to debtors); Kings Terrace Nursing Home & Health Related Facility v. N.Y. Dep't of Soc. Servs. (In re Kings Terrace Nursing Home & Health Related Facility), No. 91 B 11478(FGC), *1995 WL 65531, at 7-8* (Bankr. S.D.N.Y. Jan. 27, 1995) (disallowing claim in Chapter 11 case due to laches); In re Conner Corp., No. 87-01697-*MO4, 1990 WL 124052, at 3, 6* (Bankr. E.D.N.C. June 20, 1990), (amended July 9, 1990) (disallowing amended claim as barred by laches); *In re Decko Prods., Inc., 73 B.R. 275, 276 (Bankr. N.D. Ohio 1987)* (barring late-filed proof of claim due to laches); *In re Jones, 57 B.R. 60, 61 (Bankr. D.S.C. 1985)* (disallowing late-filed claim because it was effectively barred by laches).

A creditor that has notice of the bar date for filing proofs of claims and of confirmation of a Chapter 11 plan but fails to file a proof of claim or to object to the plan ordinarily will not be allowed to pursue its preconfirmation claim after confirmation of the plan and passage of the bar date due to *Bankruptcy Code 1141(d)* and the res judicata effect of the order confirming the plan. See *Kings Terrace Nursing Home & Health Related Facility, 1995 WL 65531, at 6.* Also, a creditor that receives notice of the bar date in a Chapter 11, 12, or 13 case that files a tardy proof of claim may simply have its claim disallowed under *Bankruptcy Code 502(b)(9)*.

[244] Contra *In re H & G Distrib., Inc., 158 B.R. 959, 961-62 (E.D. Pa. 1993)* (affirming bankruptcy judge's decision denying landlord's motion to compel payment of administrative expense on account of laches); *Polysat, Inc. v. Union Tank Car Co. (In re Polysat, Inc.), 152 B.R. 886, 896 (Bankr. E.D. Pa. 1993)* ("The equitable principles of laches and estoppel may preclude an entity from asserting an administrative claim."); *In re Fulwood Enters., Inc., 149 B.R. 712, 715 (Bankr. M.D. Fla. 1993)* (denying request for repayment of postpetition loan as barred by laches).

Under current bankruptcy law a timely request for payment of an administrative expense may be filed; a tardy request generally may be filed only if permitted by the court for cause. See *11 U.S.C. 503*(a) (2000) (emphasis added). Thus, unless cause is found, a late request for payment of an administrative expense ordinarily will not be allowed and the expense will not be paid.

[245] Contra *Cassani v. Glinka (In re Cassani), 214 B.R. 459, 461-63 (D. Vt. 1997)* (remanding to bankruptcy court to determine whether laches shown in connection with debtors' exemption claiming an interest in real property); *Gazes v. DeArakie (In re DeArakie), 199 B.R. 821, 827-28 (Bankr. S.D.N.Y. 1996)* (barring debtor from asserting exemption in proceeds of property sold more than four years earlier due to laches); *In re Taylor, 8 B.R. 251, 253-54 (Bankr. D.C. 1981)* (barring debtor's claimed exemption in funds garnished prepetition on account of laches).

As mentioned in *Cassani, 214 B.R. at 463,* where a debtor's delay in claiming property as exempt is due to negligence, and the delay causes the trustee to incur expenses of preparing the property for sale, it is appropriate to require the debtor to reimburse these expenses in order to exempt the property.

[246] Contra *Redmond v. Tuttle (In re Tuttle), 16 B.R. 470, 472 (D. Kan. 1981)* (affirming bankruptcy judge's ruling that debtors' amendment of exemptions barred by laches, among other things); *In re Daniels, 270 B.R. 417, 419, 428 (Bankr. E.D. Mich. 2001)* (barring debtors from asserting amended claim of exemptions due to laches).

[247] Contra *Logan v. Quail Creek Bank (In re Logan), 144 B.R. 538, 538-39 (Bankr. W.D. Okla. 1992)* (barring debtors from asserting that creditor violated the discharge injunction of 524 because of laches).

In Logan the debtors omitted a creditor from their mailing matrix and the creditor did not learn of the bankruptcy case until after it was closed. The creditor brought suit against the debtor in Oklahoma and obtained a judgment, and then sued to enforce this judgment in Tennessee. Two years later the debtors filed an action seeking to enjoin the creditor's collection efforts. The court dismissed the suit on the ground of laches. Id. Unless this bankruptcy case was a "no-asset" case, the creditor's claim should have been nondischargeable under ***Bankruptcy Code 523(a)(3)***. See ***11 U.S.C. 523***(a)(3) (2000).

[248] Contra *Burtch v. Ganz (In re Mushroom Transp. Co.), 382 F.3d 325, 336-37 (3d Cir. 2004)* (finding that, because turnover claims arising under *11 U.S.C. 542* and 543 are equitable in nature, they are subject to laches); *Adams v. Hartconn Assocs., Inc. (In re Adams), 212 B.R. 703, 713 (Bankr. D. Mass. 1997)* (stating doctrine of laches would bar debtor from recovery under *Bankruptcy Code 543(b)* for turnover of rents); *Auto Dealer Servs., Inc. v. Prestige Motor Car Imports, Inc. (In re Auto Dealer Servs., Inc.), 96 B.R. 360, 365-66 (Bankr. M.D. Fla. 1989)* (invoking laches to bar an objection to debtor's standing to bring action to recover unearned commissions); see also *Greene v. Schmukler (In re De Berry), 59 B.R. 891, 898-99 (Bankr. E.D.N.Y. 1986)* (barring trustee's action for turnover of lawsuit proceeds under *Bankruptcy Code 542(a)* by the maxim "equity aids the vigilant, not those who slumber on their rights"); but cf. *Schwaber v. Reed (In re*

fraudulent transfer under 548, [250] a motion to dismiss or convert the bankruptcy case, [251] an action by a trustee against a partner of a debtor partnership pursuant to 723, [252] a motion to redeem collateral under 722, [253] an action to object to **[*44]** discharge [254] or to revoke discharge [255] under 727, an objection to the trustee's final account pursuant to 704(9), [256] a motion

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Reed), 940 F.2d 1317, 1320, 1324 (9th Cir. 1991) (not barring trustee's action to require debtor to turnover his share of proceeds of sale of residence by laches where the action was filed less than two months after the trustee learned of the sale).

In Auto Dealers Servs, Inc. it appears that the court could have reached the same result by relying upon the binding effect of a confirmed Chapter 11 plan or the res judicata effect of the order confirming the plan. See *96 B.R. at 365.* In DeBerry the court also denied the trustee's turnover action on the merits. See *59 B.R. at 895-98.*

[249] But see *Brin-Mont Chems., Inc. v. Worth Chem. Corp. (In re Brin-Mont Chems., Inc.), 154 B.R. 903, 907 (M.D.N.C. 1993)* ("[A] [bankruptcy] court is correct to consider the equitable defense of laches in cases governed by the statute of limitations contained in 546(a)(2)."); Philip Servs. Corp. v. Luntz (In re Philip Servs. (Del.), Inc.), *267 B.R. 62, 70-71 (Bankr. D. Del. 2001)* (finding defendants may raise affirmative defenses to a preference action, presumably including laches, not contained in ***Bankruptcy Code 547(c)(2)***).

[250] Contra *Metsch v. Republic Nat'l Bank of Miami (In re Colombian Coffee Co.), 66 B.R. 211, 214 (Bankr. S.D. Fla. 1986)* (finding trustee barred by laches with respect to his action to avoid a fraudulent transfer under *Bankruptcy Code 548(a)(2)*).

This action by the trustee was also barred by the doctrine(s) of res judicata and/or collateral estoppel. See *id. at 214.*

[251] Contra *In re Cutillo, 181 B.R. 13, 15 (Bankr. N.D.N.Y. 1995)* (finding debtors established laches as a basis for defense to trustee's motion to dismiss or convert their Chapter 13 case); see also *In re Shea & Gould, 214 B.R. 739, 749-51 (Bankr. S.D.N.Y. 1997)* (holding that laches barred creditor's motion to dismiss Chapter 11 case); Shuma v. No Respondents (In re Shuma), No. 93-20889 JKF, No. 84-21820 JKF, 1996 WL 377158, at 1 n.3 (Bankr. W.D. Pa. July 3, 1996) (noting that prosecution of motions to dismiss would be barred by laches); *In re Kirven, 188 B.R. 15, 17 (Bankr. D.S.C. 1994)* (finding laches as a ground for denying debtors' motion to dismiss their Chapter 7 case); *Boston Valuation Group, Inc. v. Hall (In re Tremont Place Realty Trust), 159 B.R. 624-25 (Bankr. D. Mass. 1993)* (concluding complaint to substantively consolidate or dismiss case barred by the doctrine of laches); *In re I.D. Craig Serv. Corp., 118 B.R. 335, 338 (Bankr. W.D. Pa. 1990)* (holding that debtor's board of directors' motion to dismiss case barred by laches).

In each one of these cases, except In re Shuma, the bankruptcy court could have found that there was no cause to dismiss the case and that dismissal would not be in the best interests of creditors and the estate, and denied the motion. In Shuma the motions to dismiss consolidated involuntary cases became moot once the court entered orders for relief. And, in In re Craig Serv. Corp., the bankruptcy court also found that the motion to dismiss should be denied because under state law the board of directors had ratified the unauthorized bankruptcy filing.

[252] But see *Silk v. Miller (In re CS Assocs.), 167 B.R. 368, 368-69 & nn.3-4 (E.D. Pa. 1994)* (opining that because *Bankruptcy Code 723* is equitable in nature, the only applicable rule of limitations is laches).

[253] But see *In re Eagle, 51 B.R. 959, 963 (Bankr. N.D. Ohio 1985)* (barring creditor's objection to valuation of collateral and request for appointment of appraiser due to laches). The creditor's objection could also have been denied as untimely because it was not raised until a hearing on the debtor's motion to redeem the collateral. See *id. at 962.*

[254] Contra *United N.M. Bank v. Wilferth (In re Wilferth), 57 B.R. 693, 695 (Bankr. D.N.M. 1986)* (stating court may consider the defense of laches to a complaint objecting to discharge).

[255] Contra *First Nat'l Bank of Harrisburg v. Jones (In re Jones), 71 B.R. 682, 685 (S.D. Ill. 1987)* (holding that bankruptcy court's implied finding that creditor's complaint to revoke discharge was barred by laches was not clearly erroneous); *Cont'l Builders v. McElmurry (In re McElmurry), 23 B.R. 533, 536 (W.D. Mo. 1982)* (finding revocation of discharge barred because of laches); *Chambers v. Benak (In re Benak), 91 B.R. 1008, 1009-10 (Bankr. S.D. Fla. 1988)* ("[A] request to revoke the debtor's discharge based on fraud should be denied when the requesting party is guilty of laches … ."); *Peoples Bank, Inc. v. Herron (In re Herron), 49 B.R. 32, 35 (Bankr. W.D. Ky. 1985)* (holding plaintiff barred from maintaining an action to revoke debtor's discharge because plaintiff is guilty of laches).

In each of these cases the court also found that the party requesting revocation of the debtor's discharge did not satisfy one of the elements necessary to revoke the discharge, to wit: the party either did not allege that the debtor had procured the discharge by fraud or the party knew of the fraud before the discharge was granted.

to modify [257] or an effort to void or alter the provision(s) of a confirmed plan, [258] a motion for relief from an order under *Federal Rule of Civil Procedure 60* and Bankruptcy Rule 9024, [259] a motion for stay pending appeal, [260] tolling of the 180-day period **[*45]** following dismissal of a case under 109(g), [261] or an objection to a proof of claim. [262]

Interestingly, the former bankruptcy act specifically provided that a party requesting revocation of discharge had to show that it was not guilty of laches. See *In re McElmurry, 23 B.R. at 535 n.1.* (emphasis added).

[256] Contra *In re Bobroff, No. Civ. A. 89-8123, 1990 WL 178557, at 1, 3* (E.D. Pa. Nov. 13, 1990) (concluding debtor's objection to Chapter 7 trustee's final account barred by laches). The debtor's objection lacked merit and was also barred by either collateral estoppel or judicial estoppel. Id. at 5-6.

[257] Contra *In re Boone, 53 B.R. 78, 80 (Bankr. E.D. Va. 1985)* (finding Chapter 13 trustee's motion for modification of confirmed plan barred by laches). Since the debtor had already completed payments under the confirmed plan, the plan was not subject to modification. See *id. at 79.*

[258] Contra *Z.A.K. Constr., L.P. v. Port Liberte Partners (In re Port Liberte Partners), No. Cir. A. 94-4854, 1995 WL 11186, at 3, 6* (D.N.J. Jan. 5, 1995) (concluding that bankruptcy court which found that laches and estoppel barred creditor from voiding a confirmed Chapter 11 plan, was correct in refusing to exercise its equitable powers to aid the creditor); Bonnet Res. Corp. v. Octagon Gas Sys., Inc. (In re Meridian Reserve, Inc.), Adv. No. 90-0131-BH, 1994 WL 903895, at 9 (Bankr. W.D. Okla. Oct. 7, 1994) (finding that laches barred party from claiming royalty interest in assets sold free and clear by bankruptcy court pursuant to a confirmed Chapter 11 plan); see also *Lyerly v. Internal Revenue Serv., 235 B.R. 401, 405 (W.D.N.C. 1998)* (affirming bankruptcy court which found that laches barred party's claim to settlement proceeds where party failed to object to confirmation or to file a proof of claim); *Virgin Island Bureau of Internal Revenue v. St. Croix Hotel Corp., 60 B.R. 412, 415 (D.V.I. 1986)* (holding government's unexplained failure to object to provisions of confirmed plan until twenty-six months after confirmation and six months after the case was dismissed supported the bankruptcy court's finding that the objection was barred by laches); *Washington v. Nissan Motor Acceptance Corp. (In re Washington), 158 B.R. 722, 724 (Bankr. S.D. Ohio 1993)* (finding that creditor's efforts to seek payment of an unsecured claim after all plan payments had been disbursed in a Chapter 13 case during a fifteen-month period would be barred by laches).

In each of these cases, except Washington, the relief sought by the complaining party would have been barred by the binding effect of a confirmed plan and/or by res judicata. In Washington the creditor failed to file a proof of claim for its unsecured claim and the debtor had received a Chapter 13 discharge of this claim. *158 B.R. at 723-24.*

[259] But see *In re Szabo Contracting, Inc., 283 B.R. 242, 254-55 (Bankr. N.D. Ill. 2002)* (finding laches barred parties from belatedly seeking to vacate an amended agreed order); *Official Comm. of Unsecured Creditors Metalsource Corp. v. U.S. Metalsource Corp. (In re U.S. Metalsource Corp.), 163 B.R. 260, 268, 272 (Bankr. W.D. Pa. 1993)* (holding that committee's motion to modify first-day wage and benefits order and to recover any excess severance payments barred by laches); *In re J.B. Winchells, Inc., 106 B.R. 384, 389 (Bankr. E.D. Pa. 1989)* ("Laches or undue delay thus may preclude a party from relief, even though the motion is made within the maximum time allowed by the rule.") (citations omitted); *Kleinfeld v. Sunland Props., Inc. (In re Kranich), 51 B.R. 286, 287 (Bankr. M.D. Fla. 1985)* (laches may preclude relief under *Fed. R. Civ. P. 60* even though the motion was made within the one-year limit); see also *In re Whitney-Forbes, Inc., 770 F.2d 692, 698 (7th Cir. 1985)* (doctrine of laches applies to an independent action for relief from a final order) (citations omitted).

In each of these decisions, other than Winchells and Kranich, the court also concluded that Bankruptcy Rule 9024 could not be used to modify or vacate the order in controversy.

[260] But see In re Hosp. Gen. San Carlos, Inc., No. 76-00279, 1988 WL 72529, at 3 (Bankr. D.P.R. Jan. 15, 1988) (finding that doctrine of laches prevents IRS' tardy request for stay pending appeal from being granted). The bankruptcy court also denied the request on the merits. See id. at 3-5.

[261] Contra *Greenwell v. Carty (In re Carty), 149 B.R. 601, 603-04 (B.A.P. 9th Cir. 1993)* (finding that doctrine of laches barred creditor from arguing tolling of the 180-day period following dismissal of a case where the debtor filed a second case during the 180-day period in violation of *Bankruptcy Code 109(g)*). As the Bankruptcy Appellate Panel noted, *id. at 604,* since the application of *Bankruptcy Code 109(g)(2)* is discretionary, the same result can be reached by simply not invoking this section.

[262] Contra *Shook v. CBIC (In re Shook), 278 B.R. 815, 829-31 (B.A.P. 9th Cir. 2002)* (affirming bankruptcy court's finding that debtors' objection to claim was barred by laches); In re Busick, CIV No. F 89-277, 1990 WL 63069, at 3 (N.D. Ind. Apr. 11, 1990) (holding that bankruptcy court did not abuse its discretion in deciding that laches barred the debtor's objection to the government's claim); *In re Barton,*

b. No Quasi or Equitable Estoppel

A bankruptcy judge should not invoke the doctrine of quasi-estoppel [263] to forbid a debtor from claiming that payments due his ex-spouse are dischargeable as a property settlement instead of nondischargeable alimony. [264] **[*46]** Similarly, equitable estoppel [265] ought not bar relief under the Bankruptcy Code or Rules, such as a debtor-in-possession's action to recover a preference, [266] a defendant's assertion of a statute of limitations defense to an avoiding action brought by the trustee, [267] the

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249 B.R. 561, 566-67 (Bankr. E.D. Wash. 2000) (stating that a claim objection may be subject to laches); In re Blue Coal Corp., 166 B.R. 816, 822 (Bankr. M.D. Pa. 1993) (opining that laches may be used as a defense to objections to timely-filed proofs of claim); In re Werth, 29 B.R. 220, 222 (Bankr. D. Colo. 1983) (concluding that right to object to a claim is only limited by the doctrine of laches); see also County Fuel Co., Inc. v. Equitable Bank Corp., 832 F.2d 290, 294, n.2 (4th Cir. 1987) (stating that if removed action were to be treated as a belated objection to the automatic allowance of bank's claim, it would be subject to the defense of laches).

Note that, to the extent objection to a claim is based upon nonbankruptcy law, including a claim unenforceable against the debtor and property of the debtor pursuant to Bankruptcy Code 502(b)(1), the bankruptcy judge will apply nonbankruptcy law to adjudicate the controversy and the claimant may assert equitable defenses available under nonbankruptcy law.

[263] Quasi estoppel' forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid the corresponding obligations or effects." Davidson v. Davidson (In re Davidson), 947 F.2d 1294, 1297 (5th Cir. 1991).

[264] Contra Robb-Fulton v. Robb (In re Robb), 23 F.3d 895, 899 (4th Cir. 1994) (finding quasi-estoppel precluded debtor from avoiding effects of classifying monthly payments to his ex-wife as alimony for tax purposes); In re Davidson, 947 F.2d at 1297 (holding debtor is estopped from claiming his payment obligations to his ex-wife are not in the nature of alimony when he has treated the payments as alimony for tax purposes); Stebbins v. Seibert (In re Stebbins) No. 3:99-38188-HCA-7, 2002 WL 1482728, at 2 (N.D. Tex. July 8, 2002) (same); Cox v. Cox (In re Cox), 292 B.R. 141, 146-48 (Bankr. E.D. Tex. 2003) (declaring doctrine of quasi-estoppel forbids the debtor from claiming payments due his ex-wife were dischargeable as a property settlement where the debtor had deducted previous payments as alimony on his federal income tax returns); Chance v. White (In re White), 265 B.R. 547, 555 (Bankr. N.D. Tex. 2001) (finding debtor's monthly payments to his ex-wife were nondischargeable pursuant to the doctrine of quasi-estoppel where debtor sought, and received, an agreement from his ex-wife to re-characterize these payments so that he could deduct them); Nowak v. Nowak (In re Nowak), 183 B.R. 568, 570-71 (Bankr. D. Neb. 1995) (holding that debtor was estopped from asserting that his ex-wife's claim is not alimony for purpose of ***Bankruptcy Code 523(a)(5)*** because debtor claimed past payments as alimony for income tax purposes); Holloway v. Kelley (In re Kelley), 151 B.R. 790, 791 (Bankr. S.D. Tex. 1992) (finding debtor who received the benefit of a tax deduction for payments made to his ex-wife based upon characterizing these payments as alimony in the divorce agreement is barred by quasi-estoppel from arguing these payments are not alimony).

In the Robb, White and Nowak decisions the court alternatively concluded that the claim of the debtor's former spouse was nondischargeable under ***Bankrutpcy Code 523(a)(5)*** or (15). See In re Robb, 23 F.3d at 899; In re White, 265 B.R. at 559; In re Nowak, 183 B.R. at 569, 571.

[265] Equitable estoppel should be distinguished from judicial estoppel. The latter "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (quoting Pegram v. Herdrich, 530 U.S. 211, 227 n.8 (2000)). Several factors typically inform the decision whether to apply judicial estoppel: (1) A party's later position must be clearly inconsistent with its earlier position; (2) the party's earlier position must have been accepted by a court; and (3) the party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party. See New Hampshire at 750-51 (citations omitted). The purpose of judicial estoppel is "to protect the integrity of the judicial process." See id. at 749-50 (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982)). But we have already seen that a bankruptcy judge has the authority to uphold the dignity and integrity of the judicial process. See supra notes 30-35 and preceding and accompanying text. Therefore, a bankruptcy judge can effectively invoke judicial estoppel without per se relying on the equitable doctrine.

[266] Contra Mickey's Enters., Inc. v. Saturday Sales, Inc., (In re Mickey's Enters., Inc.), 165 B.R. 188, 191, 194-95 (Bankr. W.D. Tex. 1994); Lill v. Bricker (In re Lill), 116 B.R. 543, 547 (Bankr. N.D. Ohio 1990).

In In re Mickey's Enters., Inc., 165 B.R. at 194, the court also concluded that the action to avoid a preference was barred by res judicata. In In re Lill, 116 B.R. at 549, the court found that plaintiff's complaint was filed after the statute of limitations had lapsed and that there was no preference in any event because the defendant was a fully secured creditor.

debtor's denial of the validity of a confirmed plan, [268] a motion to amend a confirmed plan, [269] the debtor's request **[*47]** that a debt has been discharged, [270] an objection to a creditor's claim where the approved disclosure statement indicated the claim was not disputed, [271] a creditor's request to have its claim declared nondischargeable, [272] the debtor's assertion that a complaint to determine dischargeability of debt was not timely filed, [273] a lessor's claim that the lease of nonresidential

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[267] Contra *Moore v. Manson (In re Springfield Furniture, Inc.), 145 B.R. 520, 531-32 (Bankr. E.D. Va. 1992); Brandt v. Gelardi (In re Shape, Inc.), 138 B.R. 334, 335, 338 (Bankr. D. Me. 1992);* see also *In re Bennett, 133 B.R. 374, 376, 381 (Bankr. N.D. Tex. 1991)* (holding that defendants' inequitable conduct barred them from raising statute of limitations defense).

[268] Contra *Riverside Nursing Home v. N. Metro. Residential Health Care Facilities, Inc., 977 F.2d 78, 80 (2d Cir. 1992);* see also *Texaco, Inc. v. Bd. of Comm'rs (In re Texaco, Inc.), 254 B.R. 536, 560-62 (Bankr. S.D.N.Y. 2000)* (finding debtor is equitably estopped from asserting that postconfirmation claims were discharged by order confirming plan); *Citizens Bank of Americus v. Kennedy (In re Kennedy), 79 B.R. 950, 953 (Bankr. M.D. Ga. 1987)* (concluding debtors are equitably estopped from contending that they are not bound by confirmed Chapter 11 plan).

In Riverside Nursing Home, the debtor would also have been bound by the confirmed Chapter 11 plan pursuant to *Bankruptcy Code 1141(a)* and the doctrine of res judicata. In re Texaco also held that the postconfirmation claims were not discharged by the plan confirmation order because, among other things, the claims did indeed arise postconfirmation and the claimants were denied due process. Id. at 558-60, 561-63. Similarly, *In re Kennedy, 79 B.R. at 952,* also found that the debtors were bound by the confirmed plan under *Bankruptcy Code 1141*.

[269] But see *Martin Marietta Corp. v. County of Madison (In re Penn-Dixie Indus., Inc.), 32 B.R. 173, 174, 179 (Bankr. S.D.N.Y. 1983)* (holding counties were barred by estoppel from pursuing a motion to amend a tax order incorporated into a confirmed Chapter 11 plan). The bankruptcy court also concluded that the counties' motion was barred by the doctrine of res judicata. See *id. at 175, 176-77, 179.*

[270] Contra *In re Raanan, 181 B.R. 480, 487 (Bankr. C.D. Cal. 1995);* see also *Doerge v. United States (In re Doerge), 181 B.R. 358, 368-69 (Bankr. S.D. Ill. 1995)* (finding equitable estoppel precludes debtor from changing his position to defeat the government's claim of nondischargeability).

In *In re Raanan, 181 B.R. at 481, 486-87,* the bankruptcy court annulled the automatic stay and found no violation of the discharge injunction so as to make the creditor's claim nondischargeable.

[271] Contra *In re Burkey Lumber Co., 149 B.R. 177, 179, 181 (Bankr. D. Colo. 1993).* The bankruptcy court could have also barred the debtor's objection in order to uphold the dignity and integrity of the judicial process; this would be tantamount to invoking judicial estoppel. See supra note 265.

[272] But see *Berr v. FDIC (In re Berr), 172 B.R. 299, 308, n.8 (B.A.P. 9th Cir. 1994)* (concluding FDIC equitably estopped from denying that revision of state court stipulated judgment barred FDIC from bringing a nondischargeability action in the event debtor filed for bankruptcy); *FCC Nat'l Bank v. Gilmore (In re Gilmore), 221 B.R. 864, 878-80 (Bankr. N.D. Ala. 1998)* (holding creditor estopped from relying on evidence of debtor's inability to pay in order to prove fraudulent intent under ***Bankruptcy Code 523(a)(2)(A)***); McKenzie v. Internal Revenue Serv. (In re McKenzie), No. 97-3161, 1997 WL 732514, at 1, 2 (Bankr. N.D. Ohio Aug. 26, 1997) (determining IRS should be equitably estopped from requiring debtor to produce his tax returns to establish that taxes were discharged); *L.R. Hollenbeck, D.D.S. v. Internal Revenue Serv. (In re L.R. Hollenbeck, D.D.S.), 166 B.R. 291, 296 (Bankr. S.D. Tex. 1993)* (finding IRS was equitably estopped from collecting taxes even though these taxes are ordinarily excepted from discharge).

In both the In re Berr and the In re Gilmore cases the bankruptcy court also found that the creditor had not shown that its claim was nondischargeable. See *In re Berr, 172 B.R. at 309-12* and *In re Gilmore, 221 B.R. at 870.* In In re McKenzie, 1997 WL 732514, at 1, the court noted that the IRS had seized all of the debtor's tax records, including filed tax returns for the years the IRS alleged that the debtor had not filed returns. The In re Gilmore court cited to *Bankruptcy Code 105(a)* as the source of its equitable power, id. at 2, but alternatively it perhaps could have invoked this section to prevent an abuse of process to reach the same result.

[273] Contra *Handler v. Steiner (In re Steiner), 209 B.R. 281, 285-86 (Bankr. E.D.N.Y. 1996); In re Walker, 195 B.R. 187, 207 (Bankr. D.N.H. 1996)* (finding that the debtor, who failed to list the creditor in the original schedules, was equitably estopped from asserting the expiration of the deadline to file a nondischargeability complaint); *Fed. Home Loan Mortgage Corp. v. Potter (In re Potter), 185 B.R. 68, 69-71, 75 (Bankr. C.D. Cal. 1995)* (finding that debtor was equitably estopped from invoking the deadline to file a nondischargeability complaint where he had concealed his bankruptcy filing from the creditor until after the deadline had passed).

property **[*48]** is deemed rejected pursuant to Code Section 365(d)(4), [274] a party to a reaffirmation agreement from arguing that it is unenforceable, [275] a debtor's pursuit of an action to avoid a creditor's lien under *Bankruptcy Code 522*, [276] an individual debtor from amending claimed exemptions, [277] or from asserting that proceeds of exempt property should be paid to her, [278] a creditor **[*49]** that joined in filing an involuntary petition from seeking termination of the automatic stay, [279] a

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In the In re Steiner case the court could have held that, under applicable case law in the Second Circuit, a timely motion to extend the deadline had been made, that the court had granted the motion, and that the complaint was filed before this new deadline had passed. See *In re Steiner, 209 B.R. at 285-86 & n.1.* The In re Walker court set a new deadline for filing a complaint by resorting to what it called the equitable powers under *Bankruptcy Code 105*. *In re Walker, 195 B.R. at 207-08.* The In re Potter court possibly could have found the creditor's claim nondischargeable by invoking 105 to prevent an abuse of process.

[274] Contra *In re Car-Gill, Inc., 125 B.R. 133, 138-39 (Bankr. E.D. Pa. 1991); In re S. Energy, Ltd., 98 B.R. 42, 43-44 (Bankr. N.D. Fla. 1989); In re Haute Cuisine, Inc., 57 B.R. 200, 203-04 (Bankr. M.D. Fla. 1986);* see also *In re Curio Shoppes, Inc., 55 B.R. 148, 153 (Bankr. D. Ct. 1985)* holding that bankruptcy courts may resort to equitable principles in considering enforcement of 365(d)(4)).

The court in the In re Car-Gill case also found that the landlord waived the right to evict the debtor because the lease was not assumed within the sixty-day period provided by 364(d)(4). *In re Car-Gill, 125 B.R. at 138-39.* The court in the In re Southern Energy case also found: (1) the lessor was bound by the confirmed plan, which included a provision that the lease in dispute was assumed by the debtor, and (2) the sixty-day period was tolled until the trustee was appointed in the involuntary case. *In re S. Energy, 98 B.R. at 43-44.*

[275] But see *Sweet v. Bank of Okla. (In re Sweet), 116 B.R. 283, 284, 286-87 (Bankr. W.D. Okla. 1990),* aff'd *954 F.2d 610 (10th Cir. 1992)* (finding debtors are equitably estopped from asserting that reaffirmation agreement is invalid); *In re Nikokyrakis, 109 B.R. 260, 263 (Bankr. N.D. Ohio 1989)* (concluding creditor that filed motion for relief from stay and for abandonment of its collateral is equitably estopped from denying the existence of a binding reaffirmation agreement); *Richardson v. Chrysler First Fin. Servs. Corp. (In re Richardson), 102 B.R. 254, 256 (Bankr. M.D. Fla. 1989)* (holding debtor estopped from asserting that reaffirmation agreement is unenforceable); *In re Kosanovich, 78 B.R. 825, 829 (Bankr. N.D. Ohio 1987)* (finding creditor is equitably estopped from raising the issue that debtor did not enter into a reaffirmation agreement in debtor's previous Chapter 7 case).

In *In re Sweet, 116 B.R. at 285,* the court also found that the reaffirmation had not been rescinded and was valid. In the In re Richardson case the court, using the law as interpreted in the In re Sweet decision, would have concluded that the reaffirmation agreement was valid even though the debtors did not appear at a reaffirmation hearing. The court in *In re Nikokyrakis, 109 B.R. at 261,* also denied the creditor's motion for relief from stay and abandonment of debtor's vehicle on the merits. In *In re Kosanovich, 78 B.R. at 829,* the court granted the creditor's motion for relief from stay, subject to debtor's ability to bring the past due mortgage payments current and remaining current on subsequent mortgage payments falling due.

[276] Contra *Casper v. Cadd, 60 Fed. Appx. 71, 72-73 (9th Cir. 2003)* (unpublished decision) (concluding debtor could be equitably estopped from avoiding creditor's lien); *In re Goodwin, 133 B.R. 141, 144-45 (Bankr. S.D. Ind. 1990)* (holding debtor is estopped from claiming household furnishings as exempt and thus cannot avoid creditor's security interest in these furnishings under *Bankruptcy Code 522(f)(2)(A)*; *In re Wickersheim, 107 B.R. 177, 179, 182 (Bankr. E.D. Wis. 1989)* (finding equitable estoppel precludes debtors from pursuing avoidance of creditor's lien).

In *In re Wickersheim, 107 B.R. at 180-82,* the court also held that, because the confirmed plan manifested a settlement of the lien avoidance issue between the debtors and the creditor, the motion to avoid lien was denied.

[277] Contra In re Bowman, No. 91-5-2533-SD, 1996 WL 529233, at 2 (Bankr. D. Md. July 11, 1996) (finding debtor is equitably estopped by her delay in asserting an amended claim of exemption); *Redmond v. Tuttle (In re Tuttle), 15 B.R. 14, 19 (Bankr. D. Kan. 1981)* ("proper exercise of court's discretion calls for denial of amended claim of exemption on consideration of laches and equitable estoppel").

In In re Bowman, 1996 WL 529233, at 2, the court also denied the debtor's amended claim of exemption on the merits because the debtor did not show she was entitled to exempt the property described in the amended claim of exemption. In *In re Tuttle, 15 B.R. at 19-20,* the court also denied the debtors' amended claim of exemption on procedural grounds and because the debtors were not entitled to exempt the property described in the amended claim of exemption under *Bankruptcy Code 522(g)*.

[278] Contra *Gazes v. DeArakie (In re DeArakie), 199 B.R. 821, 826-27 (Bankr. S.D.N.Y. 1996)* (concluding debtor who did not object to sale of property and payment of proceeds on ground that the property and its proceeds were exempt is equitably estopped from asserting that the

debtor from seeking relief under *Bankruptcy Code 362(h)* and *524*, [280] or the invocation of the automatic stay in debtor's second bankruptcy case, [281] the debtor from objecting to claims, [282] or from assuming and/or assigning leases and executory contracts pursuant to *Bankruptcy Code 365*, [283] a creditor from asserting that the creditor had filed an informal proof of claim, [284] or a party in interest from requesting or contesting an administrative expense claim. [285]

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proceeds of sale should have been paid to him); see also *Canino v. Bleau (In re Canino), 185 B.R. 584, 595 (B.A.P. 9th Cir. 1995)* (finding debtor is equitably estopped from receiving more than the statutory exempt amount for her automobile because she accepted the amount without formal protest before expiration of the time for the trustee to object to the higher amount she claimed as exempt).

In *In re DeArakie, 199 B.R. at 822, 823, 827,* the court also observed that the debtor's claim of exemption to the property that was sold was improper.

[279] Contra *Chicago Title Ins. Co. v. Goldberg (In re Goldberg), 12 B.R. 180, 185 (Bankr. D.N.J. 1981); In re Beaucrest Realty Assocs., 4 B.R. 166, 168 (Bankr. E.D.N.Y. 1980).*

In *In re Goldberg, 12 B.R. at 184-85,* the court also denied the creditor's motion for relief from stay because, in the court's opinion, no cause was shown to lift the stay.

[280] Contra *Davis v. Ill. State Police Fed. Credit Union (In re Davis), 244 B.R. 776, 794-95 (Bankr. N.D. Ill. 2000).* In this case the court could have also determined that the debtor was barred from seeking relief by *Bankruptcy Code 105(a)* due to the debtor's abuse of process. See id.

[281] Contra *Merchs. and Mechs. Fed. Sav. & Loan Ass'n v. Lewis (In re Lewis), 25 B.R. 422, 424 (Bankr. S.D. Ohio 1982)* (finding equitable estoppel dictates that foreclosure sale of debtor's property cannot be stymied by the automatic stay in debtor's second case after creditor had obtained relief from stay in the first case unless certain conditions are timely satisfied).

[282] Contra In re The Roof Doctor, Inc., No. CIV.A. 97-01648-W, 1998 WL 2016785, at 4 (Bankr. D.S.C. Aug. 25, 1998) (concluding principle of equitable estoppel should bar objection to claim where debtor waited over two years to assert the objection); *In re Mahan, 104 B.R. 300, 301, 303 (Bankr. E.D. Cal. 1989)* (finding debtors' breaches of various duties under *Bankruptcy Code 521* warranted estopping them from objecting to claims).

The court in In re The Roof Doctor, Inc., 1998 WL 2016785, at 4, also held that the debtor's objection to claim was barred by res judicata. In the Mahan case the debtors could have been prohibited from objecting to all creditor claims by *Bankruptcy Code 105(a)* as necessary or appropriate to carry out the debtors' duties under *Bankruptcy Code 521(3)*, (4).

[283] But see *In re Federated Dep't Stores, Inc., 135 B.R. 941, 943 (Bankr. S.D. Ohio 1991)* (finding lessor was estopped from arguing that proposed assignee had not provided adequate assurance of future performance of lease in shopping center); *In re Indep. Mgmt. Assocs., Inc., 108 B.R. 456, 465-66 (Bankr. D.N.J. 1989)* (concluding that a franchisor was equitably estopped from denying the debtors the opportunity to assign their franchise agreement).

[284] Contra *Phillips v. Phillips (In re Phillips), 175 B.R. 901, 909 (Bankr. E.D. Tex. 1994).* The court in this case also found that the creditor was barred by res judicata from asserting an informal proof of claim. *Id. at 908-09.*

[285] But see *In re Section 20 Land Group, Ltd., 261 B.R. 711, 717 (Bankr. M.D. Fla. 2000)* (finding debtor is estopped from denying administrative claim status to claimant); *In re Kids Creek Partners, L.P., 220 B.R. 963, 972-73 (Bankr. N.D. Ill. 1998)* (determining that trustee is estopped from arguing that existing order providing for possible superpriority claim is invalid); *In re Total Transp. Servs., Inc., 43 B.R. 8, 10 (Bankr. S.D. Ohio 1984)* (holding that lessors were equitably estopped from seeking to recover lease payments as an administrative expense).

In In re Section 20 Land Group the court estopped the debtor from denying that the claimant was entitled to an administrative expense and found that the claimant was entitled to such an expense. *In re Section 20 Land Group, 261 B.R. at 716-18.* In In re Kids Creek Partners the court concluded that the trustee, who was equitably estopped from contesting a superpriority administrative claim, was also barred by judicial estoppel and res judicata. *In re Kids Creek Partners, 220 B.R. at 970-73.* And, in *In re Total Transp. Servs., 43 B.R. at 10,* the court found that investors were estopped from seeking to recover rent as an administrative expense and that the right to assert an administrative expense was lost when the Chapter 11 plan was confirmed.

E. SUMMARY

To summarize, when a bankruptcy judge construes the Bankruptcy Code she should not invoke the equitable doctrines of election of remedies or "clean up," equitable mootness, marshaling, substantive consolidation, partial discharge of nondischargeable debt, the Necessity of Payment rule, equitable indemnity, equitable restitution, laches, equitable tolling, equitable estoppel, or quasi-estoppel.

CONCLUSION

A bankruptcy judge has virtually no implied authority under federal law. She should not rely on inherent powers to sanction parties, dismiss a case, punish for abuse of process or contempt of court, to deny compensation to professionals employed by the estate, or to grant any other relief except perhaps an order necessary for the court to perform its legitimate function. She should rarely, if ever, formulate any new federal common law or imply a private right of action under any section of the Code. While she has some statutory equitable powers, she has no non-statutory general equitable authority. She should refrain from referring to herself as a "court of equity." A bankruptcy judge should not deny a party to a legal cause of action the right to trial by jury simply because the party filed a proof of claim, counterclaim, a bankruptcy petition or the action itself in the bankruptcy court. She ought not invoke equitable principles, defenses, doctrines or remedies to make bankruptcy law or vary bankruptcy statutes or bankruptcy rules. As the Fifth Circuit observed sixty years ago, "as respects the original bankruptcy proceeding… [a court of bankruptcy] is not strictly a court of equity, but a statutory court created by the Bankruptcy Act, and governed by it." [286] Thus, a bankruptcy judge should function as a court with statutorily-defined powers, not as a court of equity with either traditional equitable powers or unbridled equitable authority.

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[286] *Berry v. Root, 148 F.2d 945, 946 (5th Cir. 1945);* see also Plank, supra note 7, at 668 (bankruptcy courts are "courts of limited jurisdiction that do have some equitable powers." They "have never been part of the equity court system.").

Another Way Of Thinking About Section 105(a) And Other Sources of Supplemental Law Under the Bankruptcy Code*

By
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I. Introduction

We are involved in research exploring the wholesale authority of bankruptcy courts to supplement the provisions of the Bankruptcy Code. By supplement, we mean to make decisions or take actions that are not provided for in applicable, specific statutes. Such a decision or action is "supplemental law."

Our use of the phrase "supplemental law" and our research does not include either artful interpretation or exercises of discretion that a particular statute allows. We only consider the court's authority to decide or act beyond, or different from, statutory provisions on the basis of general authority apart from the provisions themselves.

Our principal focus is Bankruptcy Code section 105(a)[1], which we'll refer to simply as 105. It allows a bankruptcy court "to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions"[2] of the Code. This section derives from the superseded Bankruptcy Act, section 2a(15)[3], which allowed "courts of bankruptcy" to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of [the] act."[4] Section 2a(15) was cited dozens of times in reported decisions under the old Bankruptcy Act. Section 105 of the Bankruptcy Code has been cited in thousands of reported cases as an authority to support a wide variety of judicial decisions and actions[5].

Even in the early days of the Code, in 1982, Richard Levine, the first Director and Counsel, Executive Office for the United States Trustees, warned that on the basis of 105, courts "have begun to develop a concept of almost unlimited power."[6] Ten years later, in 1992, Chaim Fortgang and Erin Enright, prominent New York bankruptcy practitioners, wrote that 105 "has developed into the 'catchall' provision of the Bankruptcy Code."[7] This concept has now fully matured. Today, 105 is the authority behind an incredibly long list of powers now exercised by bankruptcy courts.

Lawyers now commonly stand on 105 whenever the Code fails clearly to support their clients' position. They often seem to interpret 105 as a boundless source of power that enables the bankruptcy judge to make up the law as she goes along and, in so doing, to go where no member of Congress has gone before. Some judges and lawyers believe that 105 enables a bankruptcy court to hang or

otherwise fit decisions within the framework of bankruptcy law whether or not the bankruptcy statutes accommodate the decisions.

In this article we discuss the role of 105 in bankruptcy law generally rather than in specific bankruptcy cases. We mention a few cases as examples. Mainly, we aim at 105. We work toward an understanding of this section that explains our view of the bottom issue that determines the proper role and use of 105 and also the proper role and use of supplemental law generally.

Our view of section 105 as a source of supplemental law is different from the view reflected by bankruptcy court decisions and actions. We do not believe that 105 authorizes "supplemental law." Indeed, we think 105 is largely, even completely, redundant. We also think that some present uses of 105 are of questionable constitutional validity.

Preliminarily, in order to focus clearly on section 105 and the scope of authority the section gives bankruptcy courts, we separate other possible sources of authority for bankruptcy courts to supplement the Bankruptcy Code. There are three such sources: (1) inherent power, (2) federal common law and (3) equitable nature of bankruptcy courts.

First, all courts have certain, inherent power. This power is real but small and limited to process closely related to the conduct of court and functioning process.

Next, we consider the power of bankruptcy courts to create federal common law. We also consider the courts' power on the basis of state law to supplement the Bankruptcy Code with principles of common law and equity, especially including the principles of traditional equity jurisprudence. These powers exist but are tightly, narrowly constrained. We conclude that they are not sources of very wide, general authority for applying supplemental law under the Bankruptcy Code.

Then we consider the legitimacy and meaning of the oft-quoted description of bankruptcy courts as "courts of equity." We trace the source and find the meaning of this description. It means that apart from state law and as a matter of federal law, bankruptcy courts can apply principles of equity jurisprudence. These principles are an ancient source of supplemental law, but the principles of equity jurisprudence are doctrinally limited by their own terms and are also situationally limited by any applicable statute that contradicts or restrains them. Moreover, these principles *do not* include any power simply to do what seems fair, i.e. to "do equity." Such a power requires a specific statutory license and even then is restrained by legislative purpose and judicial precedent.

Finally we get to 105 as a basis of wholesale authority for bankruptcy courts to supplement the provisions of the Bankruptcy Code. The end of our search is anticlimactic. At most, and depending on whom you believe, 105 merely restates the power given elsewhere for bankruptcy courts to issue necessary process and to

act as courts of equity in applying principles of equity jurisprudence. Section 105 is not itself a larger or wider or even different source of supplemental law.

Many cases dispute our conclusion. They apply 105 in many ways that are well beyond the limits of equity jurisprudence. These cases make law under 105 as if the section were a delegation of lawmaking power by Congress to the courts. This interpretation may be supported by good policy, but it is not supported by statutory language. Moreover, the Constitution forbids it. Indeed, the practice of bankruptcy courts making law in any non-proximately, legislatively guided sense is unconstitutional under any congressional grant of supplemental power to the courts. It is unconstitutional regardless of the statutory basis of the power and whether or not the judicial law fits perfectly within the scope of the delegated power.

II. Inherent Power (Procedural Common Law)

Federal district courts possess inherent authority to make procedural common law for the purpose of protecting "their proceedings and judgments in the course of discharging their traditional responsibilities."[8] Presumably, bankruptcy courts derivatively share this authority. Enforcing compliance with court orders through the exercise of the contempt power is an obvious example of a court's inherent power.[9]

To a very small extent the courts' inherent authority is constitutionally protected. For the most part, however, this authority can be controlled or overridden by Congress. Indeed, even the Supreme Court is constitutionally limited in establishing federal rules of procedures. The role of the Court in promulgating and maintaining the federal rules is on the basis of a congressional delegation of authority in the Rules Enabling Act.[10]

The Rules Enabling Act limits the Court to making rules for practice and procedure only. Affecting substantive rights is flatly prohibited, and the meaning of "substantive rights" for this purpose may be growing.[11] Therefore, the courts' statutory authority to make procedural common law is shrinking. Also, the tiny inherent authority that the courts possess on their own is even more limited. It is not a source of meaningful supplemental law under the Bankruptcy Code.

III. Making And Applying Substantive Common Law @

A. As A Matter Of Federal Law @

Everybody remembers from the first year of law school that there is no federal, *general,* substantive common law, especially not in diversity cases. *Erie*[12] and its progeny "so hold." We know this truth from the "canned briefs" we bought when we were first-year law students. Federal courts, unlike state courts, are not common-law courts[13]. Federal courts

"do not possess a general power to develop and apply their own rules of decision,"[14] because:

As the general structure of the Constitution and the tenth amendment make clear, the framers anticipated that the federal government would exercise only specifically enumerated powers. All other powers were reserved to the states or the people. The federal judiciary, as a branch of the federal government, is also limited by this specific enumeration of powers. Thus, any assertion by the judiciary of a general power to make law would encroach upon the powers reserved to the states.[15]

On the other hand, *Erie* does not control in matters covered by federal statutes. In these matters it is possible, though not certainly clear, that federal courts enjoy some little room to make true federal common law.[16]

Moreover, federal courts make what we will call *interpretative* federal common law. Here we adopt Professor Field's rightly wide definition of federal common law, which is "any rule of federal law created by a court (usually * * * a federal court) when the substance of that rule is not clearly suggested by federal enactments -- constitutional or congressional."[17] Making federal common law probably happens most often when federal courts interpret federal statutes by adding gloss or inferring a rule after finding that the statute permits the addition or inference, either generally or with respect to a particular matter or issue.

Bankruptcy courts are units of the district courts[19]. Presumably, therefore, bankruptcy courts share or derivatively enjoy the district courts' power of making federal common law. This power, which is separate from 105, enables bankruptcy courts legitimately to supplement the Code, if only interstitially, with substantive law.

In bankruptcy, however, the federal statutory and incorporated state law are very comprehensive, and any constitutional or policy reasons for looking to state law for filler are strong. While federal common law can sometimes trump otherwise applicable state law when the federal interest in doing so is sufficiently strong, the Supreme Court has clearly held that state law is not easily trumped by federal common law created by bankruptcy judges.[20]

Also, the Supreme Court has been equally clear that the Code's literal language must be followed closely so that proper occasion for interpretative law is small.[21] Very little room is therefore left for making federal common law under the Bankruptcy Code.

In any event, bankruptcy-made federal common law is not the sort of supplemental law that concerns us in this presentation. Bankruptcy judges

create federal common law, whatever the source or reference, under and within the bounds of the bankruptcy statute. Our concern is limited to judges' deciding or acting beyond, or different from, statutory provisions on the basis of general authority apart from the provisions themselves.

B. As A Matter Of State Law

Bankruptcy courts more often create state common law. It happens whenever the courts look to state law for substantive rights and liabilities of the debtor and other parties. These rights and liabilities are almost always governed by state law. In consulting state law for this purpose the bankruptcy courts make common law by interpreting applicable state statutes or by applying and developing pertinent state common law.

This state common law is not, however, the true supplemental law that interests us. The bankruptcy courts are applying and are constrained by specific statutes, or they are projecting common law that is also limited by state statutory law and by local precedent. Moreover, in creating state common law the bankruptcy courts are adding to state law on which the Bankruptcy Code operates rather than to the Code itself.

Sometimes an applicable state statute empowers courts to use, as a kind of supplemental law, state-law principles of common law and equity. The best example is Uniform Commercial Code section 1-103,[22] which provides:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.[23]

Bankruptcy courts applying local U.C.C. law will rely on 1-103 as authority to supplement the statute with principles of common law and equity. This process, too, is enabled and constrained by state law and does not add supplemental law to the Bankruptcy Code. Furthermore, the Bankruptcy Code can itself displace state law principles of common law and equity.[24]

IV. *Bankruptcy Courts As Courts of Equity*

Separately, bankruptcy courts apply equitable principles to directly affect the Bankruptcy Code on the basis of the bankruptcy court's supposed (though foggy) status as a court of equity. Bankruptcy courts are commonly described as being or having the powers of "courts of equity."[25] Until recently, clear statutory support

existed for this status. No longer. Today, any such support is, at best, uncertain and vague.

The first federal bankruptcy law, the 1800 Act, gave bankruptcy jurisdiction to the district courts. The second law, the 1841 Act, also empowered the district courts to exercise this jurisdiction summarily in the nature of summary proceedings in equity. The district courts were thereby empowered to effectively act as equity courts for purposes of bankruptcy. The Supreme Court made clear that, absent this equitable jurisdiction power given by the 1841 Act, "the District Courts of the United States possess no equity jurisdiction whatsoever; for the previous legislation of Congress conferred no such authority upon them."[26]

The district courts' equity power in bankruptcy matters was explicitly continued under the 1867 Act[27] and the 1898 Act. The critical language of the 1898 Act was the very first part – the introductory part -- of section 2:

> [T]he district courts of the United States * * * are hereby made courts of bankruptcy, and are hereby invested * * * with such jurisdiction at law *and in equity* as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * *. @

This language meant that "[a] bankruptcy court is a court of equity, … guided by equitable doctrines and principles except in so far as they are inconsistent with the [bankruptcy statute]."[28] To be a court of equity means "at least * * * that, in the exercise of the jurisdiction conferred upon it, it [the bankruptcy court] applies the principles and rules of equity jurisprudence."

More recently, in 1978, Congress enacted section 1481 of Title 28 which provided in pertinent part that "[a] bankruptcy court shall have the powers of a court of equity." However, when the provisions of title 28 relating to bankruptcy courts were amended in 1984 making the bankruptcy court a "unit" of the district court, section 1481 was repealed.[29] Accordingly, at present, nothing in the Bankruptcy Code or related statutes explicitly gives equity jurisdiction to bankruptcy courts that is different from or greater than the equity jurisdiction of a federal district court.[30]

It is generally assumed, however, that, under the Code, bankruptcy courts are equity courts[31] and can apply equitable principles and rules. Section 105(a) is sometimes cited as the basis for this status and power.[32]

It is simply not true that 105 is the basis for equity jurisdiction of courts in bankruptcy. The legislative history of the section flatly reports that section 105(a) is "derived from"[33] Bankruptcy Act section 2a(15). Reconsider the language of section 2:

a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such *jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act,* in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to---(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: *Provided, however,* That an injunction to restrain a court may be issued by the judge only; make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act. (emphasis added).[34]

The italicized prefatory language in section 2 is the statutory basis for bankruptcy courts' equitable power. Subsection 2a(15) did not itself give equity power to the bankruptcy courts. So, section 105, as the modern successor of only subsection 2a(15), cannot itself give the courts this power.

The congressional reports behind 105 also explain that "105 is similar in effect to the All Writs Statute, * * * under which the new bankruptcy courts are brought [separately] by amendment to 28 U.S.C. 451 [which defines the meaning of court for purposes of title 28]."[35] So, prior to 1984, when bankruptcy courts were separate courts, separate legislation brought them under the All Writs Statute.[36] Section 105 was redundant in this respect. Now, of course, the meaning of court in section 451 does not directly, explicitly include bankruptcy courts. So, the connection between 105 and the All Writs Statute is completely empty.

We believe that the All Writs Statute still applies to bankruptcy courts, but only indirectly or derivatively as units of the federal district courts. Still, the All Writs Statute is not a source of equity power or other supplemental law. It is a source of process only that must be closely related to fairly clear legislative intent.

Nevertheless, bankruptcy courts exercise equity power. The putative basis may be the doubtful authority of 105; the murky authority of the long-ago merger of law and equity in federal courts[37]; unsubstantiated case authority; or something else or nothing whatsoever. The truth is that even without citing authority, bankruptcy courts act as courts of equity in the sense of acting as though they are empowered to apply equitable principles and rules.

Equitable principles and rules, however, are not a source of general authority to act beyond or different from the Bankruptcy Code. So, even if there is a real and lawful basis for bankruptcy judges to assume the role of equity chancellors, this role gives them little legitimate reason or room to add substantive, supplemental law to the Bankruptcy Code.

Equity does not empower the judge to create or depart from law in pursuit of conscience or morality. It is a subset of principles, rules, and remedies well constrained by hundreds of years of precedent that fairly precisely defines equity. The important principles of equity were long ago all developed:[38]

> [E]quity became a system of positive jurisprudence, peculiar indeed, and differing from the common law, but founded upon and contained in the mass of cases already decided. The Chancellor was no longer influenced by his own conscience * * *. [Also,] * * * there can be no more capricious enlargement according to the will of individual chancellors.[39]

Although equitable principles can be adapted to novel conditions, "the broad and fruitful principles of equity have been established and cannot be changed by any judicial action."[40]

Moreover, these concrete principles are only applied to aid law, not to contradict law or even add to law. The Supreme Court forcefully made this point in its recent decision, *Grupo Mexicano de Desarrollo SA v. Alliance Bond Fund, Inc*.[41], holding that the equity jurisdiction conferred on federal courts by the 1789 Judiciary Act did not empower a court to freeze assets for the benefit of creditors. The Court stated:

> We do not question the proposition that equity is flexible; but in the federal system, at least, the flexibility is confined within the broad boundaries of traditional, equitable relief. To accord a type of relief that has never been available before – and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent – is to invoke a "default rule," … not of flexibility but of omnipotence.[42]

Clearly, equitable principles are subordinate and subservient to all law[43], including statutory law. So, especially when federal courts apply comprehensive federal statutes, the use of equity is triggered by, and strictly limited by, the letter and clear sense of the statutes. As courts of equity, therefore, bankruptcy courts are not empowered to go beyond or depart from the Bankruptcy Code and create supplemental law.

V. Section 105(a)

Collier and other secondary sources have classified and criticized the cases construing section 105.[44] Some of these reported decisions seem premised on the implicit if not explicit interpretation of section 105 as a direct, fresh, independent grant of supplemental power to the bankruptcy courts.[45]

Under this broad interpretation, 105(a) does not re-state inherent or equitable powers of courts elsewhere provided and otherwise limited. Rather, through 105(a), Congress separately delegated to bankruptcy courts the authority to act to the limits of a wholly independent meaning of 105(a).

Under this broad meaning, 105(a) could be interpreted as a basis of authority to fill in, extend, or retract the Bankruptcy Code in unprovided-for cases and unanticipated circumstances in ways that are beyond particular provisions but within the largest goals of bankruptcy. We can imagine appealing policy arguments that support giving bankruptcy courts such authority.

We believe that some uses of 105(a) can only be explained by interpreting and applying the statute this way. Good examples are partial discharge of student loans[46], substantive consolidation[47], payment of "necessary" unsecured claims early in a Chapter 11 case[48], and permanently stretching the discharge to protect non-debtors.[49]

We do not say that these uses are bad bankruptcy policies. We do, however, say that such uses raise problems of statutory language and constitutional concepts.

The problems of statutory language are straight-forward. Section 105 is limited to orders that "carry out the provisions of this title." Congress could have used the word "policies" or the word "purposes" in section 105. It did not.[50]

The problems of constitutional concepts are different and more subtle. The constitutional problem is not so much in Congress delegating wide powers to the courts through 105(a). The real problem is that in exercising such wide powers, the courts are making law to the extent of violating the constitutional separation of powers. It makes no difference that Congress may have desperately wanted, clearly intended, and explicitly provided for the courts to have such power. Congress cannot widen the constitutional limits of judicial power.

The division of authority between the three branches of the federal government is not exact or clear, but is flexible. Their responsibilities can permissibly overlap to a point. The overlap is constitutionally too great, that is, the separation of powers is offended, when the whole power of one branch is given to and exercised by another branch; when excessive authority is accumulated in a single branch; or when the authority and independence of one or another coordinate branch is undermined.[51]

With respect to the judicial branch the special concerns are law that "impermissibly threatens the institutional integrity of the Judicial Branch"[52] or the assignment of "tasks that are more properly accomplished by [other] branches."[53] So, when the Congress delegates certain authority to the courts, the seemingly decisive issue in terms of separation of powers is whether the particular authority is more properly exercised by another branch.

It's a fuzzy scale generally that applies fully to law making. Courts cannot create law in the sense of exercising Article I legislative power. On the other hand and at the other extreme, applying and interpreting legislation are necessary and essential judicial functions. In a sense, applying and interpreting law creates law (albeit not "supplemental law"). In sum, the rule is probably that courts cannot make law "except in conjunction with the lawful exercise of * * * judicial power."[54]

In judging the legality of a court's role under a statute, the separation-of-powers issue is whether, on a flexible, fuzzy scale, the role exceeds lawful exercise of judicial power under the statute and thus becomes unconstitutional law making. We think it depends in large part on the proximity between the court's "legislative" decisions under the statute and the clarity and precision of the policies expressed through the statute.

The issue is whether the court's decision is necessary to a fairly specific and certain statutory intention that drives and guides the judge's decision making and her related actions. It is not enough, for separation of powers, that the court's decision is compatible with relatively undefined or general legislative purposes, not even when these general purposes are clearly and forcefully expressed.

The likelihood of unconstitutional law-making by courts in applying statutes is directly related to the distance between the courts' decisions or actions under the statute and a well-defined congressional judgment about the matter behind the statute. The farther the stretch, the more likely judicial lawmaking is unconstitutional.

So, the ultimate question about partial discharge and all other judicial supplements to the Bankruptcy Code is whether they are too much of a legislatively projected reach from the statute to the decision. If so, the supplements may violate the Constitution even if they somehow satisfy the language of 105(a).

It's possible, too, that such supplements are not saved by having roots in traditional equity jurisprudence. Remember: we are not completely sure if, why, and to which extent bankruptcy courts are courts of equity. We are sure that even if they are fully courts of equity, this status gives little reason or room for making supplemental law. Also, it is never been entirely clear how far the Constitution permits the judicial branch, either on its own or through congressional grant, to exercise equitable power, but we cannot imagine that any such authority trumps Article I of the Constitution. Courts cannot exercise Article I legislative power directly through 105 or any other statute or indirectly through equity.

VI. **Conclusion**

For more than thirty years and in thousands of reported cases, bankruptcy judges and lawyers have thought about section 105. They have thought about 105 in terms of statutory interpretation, in terms of legislative history, in terms of other reported decisions, in terms of bankruptcy policy, in terms of doing equity. We recognize that these cases are of real importance and value to the bench and bar, which is why we are developing a Web site that collects all of these cases and also collects other supplemental law authorities.

We suggest, however, that from now on, judges and lawyers should also think of 105 in constitutional terms. We join the call of Professor Robert F. Nagel of the University of Colorado Law School who, writing more than 20 years ago about the limits of federal courts' equitable remedies generally, urged: "[l]egal commentators and courts should begin the potentially constructive business of deciding how separation of powers applies to the scope of equitable relief in particular cases."[55]

Finally, we suggest that judges and lawyers also think of section 105 in musical terms when deciding how the section fits within the whole of the Bankruptcy Code. We join the lament of the Oak Ridge Boys in their gospel classic, *Rhythm Guitar:*

> Nobody wants to play rhythm guitar behind Jesus.
> It seems like everybody wants to be the lead singer in the band
> I know it's hard to get a beat on what's divine
> When everybody's pushing toward the head of the line
> I don't think that its working out at all the way He planned.

We suggest that, musically and constitutionally, section 105 is at most a rhythm guitar.[56]

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1. 11 U.S.C. § 105(a) (1999).
2. Id.
3. Bankr. Act § 2a(15); 11 U.S.C. § 12(a)(15) (repealed).
4. Id.
5. To state the obvious [or at least what is obvious to us old timers] there were fewer bankruptcy cases and virtually no reports of the decisions of bankruptcy judges under the Bankruptcy Act.
6. Richard L. Levine, An Enhanced Conception of the Bankruptcy Judge: From Case Administrator to Unbiased Adjudicator, 84 W. VA. L. REV. 637, 653 (1982).

7. Chaim J. Fortgang and Erin Enright, "Carry Out the Provisions" and Section 105, at 3, (Paper presented at New York University Law School Workshop on Bankruptcy and Business Reorganization (1992)).
8. Degen v. United States, 517 U.S. 820, 823, 116 S. Ct. 1777, 1780, 135 L. Ed. 2d 102 (1996).
9. See In re McLean Indus., 68 B.R. 690, 695 (Bankr. S.D.N.Y. 1986) ("All courts . . . have inherent contempt powers to enforce compliance with their lawful orders."). But cf. Kellogg v. Chester, 71 B.R. 36, 37 (Bankr. N.D. Tex. 1986) ("[S]ection 105 in the first instance grants to bankruptcy courts the power to issue final orders of contempt insofar as such orders are necessary or appropriate to carry out the provisions of title 11.").
10. 28 U.S.C. § 2072 (1994).
11. See generally Leslie M. Kelleher, Taking "Substantive Rights" (In the Rules Enabling Act) More Seriously, 74 NOTRE DAME L. REV. 47 (1998).
12. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("[t]here is no federal general common law").
13. City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981).
14. Id.
15. Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. CHI. L. REV. 1, 13-14 (1985).
16. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 60 (5th ed. 1994).
17. Martha Field, Sources of Law: The Scope of Federal Common Law, 99 HARV. L. REV. 881, 890 (1986). Cf. Martin Redish, Federal Common Law and American Political Theory: A Response to Professor Weinberg, 83 NW. U.L. REV. 853, 857 (1989) ("When a court engages in statutory interpretation, it asks 'What did the legislature intend?' When it creates common law, it asks 'what is the best policy choice?'").
18. Defining federal common law so broadly, especially including interpretation, is not uncommon. In fact, it is accepted. See Martha Field, supra note 17, at 890-92; Thomas W. Merrill, supra note 15, at 4-5.
19. 28 U.S.C. § 151 (1999).
20. Butner v. United States, 440 U.S. 48, 54, 99 S.Ct. 914, 918 (1979).
21. See generally Robert K. Rasmussen, A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases, 71 WASH. U. L.Q. 535 (1993); Adam James Wiensch, Note, The Supreme Court, Textualism, and the Treatment of Pre-Bankruptcy Code Law, 79 GEO. L.J. 1831, 1859 et seq. (1991).
22. U.C.C. § 1-103.
23. Id.
24. In re Omegas Group, Inc., 16 F.3d 1443, 1452-53 (6th Cir. 1994) (State-law imposing constructive trust on property debtor obtained by fraud is inconsistent with goals of bankruptcy and is displaced by bankruptcy law.).
25. E.g., Local Loan v. Hunt, 292 U.S. 234, 240, 54 S.Ct. 695, 697 (1934)("But otherwise courts of bankruptcy are essentially courts of equity and their proceedings inherently proceedings in equity."); Kaiser Aerospace & Elec. Corp. v. Teledyne Indus., Inc., 229 B.R. 860, 871 (Bankr. S.D. Fla. 1999) ("Section 105(a)'s broad statutory directive that bankruptcy courts shall have the power to issue any order necessary to effectuate a Chapter 11 plan is consistent with the general understanding that these tribunals are courts of equity.").
26. Ex Parte, The City Bank of New Orleans in the Matter of William Christy, 44 U.S. 292, 311-12 (1845).
27. The Bankruptcy Act of 1867 again designated the district courts as courts of bankruptcy but did not expressly provide for them to act in equity. It was implicit that in bankruptcy, the district courts acted as courts of equity.
28. SEC v. United States Realty & Improvement Co., 310 U.S. 434, 455, 60 S. Ct. 1044, 1053 (1940) (citing Bankruptcy Act § 2).
29. See Industrial Tool Distrib., Inc., 55 B.R. 746, 749 fn.6 (Bankr. N.D. Ga. 1985).
30. Cf. Robert A. Greenfield, The National Bankruptcy Conference's Position on the Court System Under the Bankruptcy Amendments and Federal Judgeship Act of 1984 and Suggestions for Rules Promulgation, 23 HARV. J. ON LEGIS. 358, 360 (1986).
31. E.g. United States v. Energy Resources, Inc., 495 U.S. 545, 549, 110 S.Ct. 2139, 109 L. Ed. 2d 580 (1990); In re Nikoloutsos, 199 F.3d 233, 236 (5th Cir. 2000); But for a very recent, thoughtful, very rare cautionary view, see generally Honorable Marcia A. Krieger, "The Bankruptcy Court Is a Court of Equity": What Does That Mean?, 50 S.C. L. REV. 275 (1999).
32. Section 105 has been cited (probably wrongly) as independent authority for using supplemental equitable principles in bankruptcy. In re Momentum Mfg. Corp., 25 F.3d 1132 (2d Cir. 1994) (Section 105 supports bankruptcy court applying the doctrine of equitable estoppel.); In re Lapiana, 909 F.2d 221 (7th

Cir. 1990) (Bankruptcy rights are subject to well-recognized equitable defenses, such as estoppel; and the courts possibly can create new equitable defenses.).
33. S. REP. NO. 95-989, at 51 (1978), reprinted in U.S.C.C.A.N. 5787, 5837; H.R. REP. NO. 95-595, at 342 (1978), reprinted in U.S.C.C.A.N. 5963, 6298.
34. Bankr. Act § 2a(15); 11 U.S.C. § 12(a)(15) (repealed).
35. H.R. REP. NO. 95-595 (1977).
36. 28 U.S.C. § 1651 (1994).
37. The district courts, and presumably the bankruptcy courts operating as units of the district courts, "have original jurisdiction of all civil actions arising under the Constitution, laws, or treatises of the United States." 28 U.S.C. § 1331 (1999). Because of the merger of law and equity in federal courts, some people interpret "civil actions" in section 1331 to encompass traditional equity jurisdiction. John F. Duffy, Administrative Coimmon Law in Judicial Review, 77 TEX. L. REV. 113, 147 n.173 (1998).
38. 1 POMEROY, EQUITY JURISPRUDENCE § 59, at 75 (Spencer Symons, 5th ed. 1941).
39. Id. at 75-76.
40. Id. § 60, at 78.
41. 527 U.S. 308 (1999).
42. Id. at 333.
43. Admittedly, though, distinguishing equity from common law is very artifical in that the worlds are largely merged by procedure and also by judicial legislation that has absorbed much of the former into the latter. For present purposes, distinguishing equity from common law is also pointless because there is no general, federal common law and also because we are entirely interested in the exercise of equitable powers within and under statutes.
44. E.g., 2 COLLIER ON BANKRUPTCY 105.01[2] (15th ed. 1999); Manuel D. Leal, The Power of the Bankruptcy Court: Section 105, 29 S. TEX. L. REV. 487 (1988).
45. E.g., In re Morgan, 182 F.3d 775 (11th Cir. 1999) (tolling of priority period); In re Brown, 239 B.R. 204 (Bankr. S. D. Cal. 1999)(partial discharge of student loan).
46. See generally Cara A. Morea, Note, Student Loan Discharge in Bankruptcy-It Is Time for a Unified Equitable Appraoch, 7 AM. BANKR. INST. L. REV. 193 (1998).
47. See generally Mary Elizabeth Kors, Altered Egos: Deciphering Substantive Consolidation, 59 U. PITT. L. REV. 381 (1998).
48. See generally CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY § 11.12 (1997).
49. See generally Ralph Brubaker, Bankruptcy Injunctions and Complex Litigtion: A Critical Reappraisal of Non-debtor Releases in Chapter 11 Reorganizations, 1997 U. ILL. L. REV. 959 (1997).
50. Some courts, however, seem to use the words "provisions" and "purposes" interchangeably. E.g., In re Gurny, 192 B.R. 529, 539 (B.A.P. 9th Cir. 1996); In re Simmons, 224 B.R. 879, 884 (Bankr. N.D. Ill. 1998). See also In re Offshore Diving and Salvaging, Inc., 1999 WL 961763 (E.D. La 1999) ("This court agrees that recognizing equitable power to toll Section 507 under § 105(a) does not violate any Bankruptcy Code provision or policy and is in fact consistent with Congressional policy. Accordingly, the Court affirms the bankruptcy court's determination that Section 105(a) is broad enough to provide for equitable tolling of the priority period in 507(a).").
51. Mistretta v. United States, 488 U.S. 361, 381, 109 S. Ct. 647, 659, 102 L. Ed. 2d 714, 786 (1989).
52. Id. at 383.
53. Id.
54. Id. at 417 (Scalia, J., dissenting).
55. Robert F. Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 STAN. L. REV. 661, 724 (1978).
56. While we both agree that section 105 corresponds to a rhythm guitar, at least one of the authors is ill-equipped to identify what corresponds to Jesus.