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An Agricultural Law Research Article

***In Re Krisle: Civil Contempt  
Power of the Bankruptcy Court***

by

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## IN RE KRISLE: CIVIL CONTEMPT POWER OF THE BANKRUPTCY COURT

*In In re Krisle, Bankruptcy Judge Peder Ecker held a Chapter 11 bankruptcy debtor in civil contempt for failure to disclose the whereabouts of \$94,000 in cash collateral. The debtor was ordered imprisoned until the cash collateral was turned over to the bankruptcy court. This article will examine the bankruptcy court's power of contempt, discussing current statutory provisions and case law defining the court's contempt powers, the constitutionality of these powers, and whether the violation of the Bankruptcy Code gives rise to a charge of contempt.*

### INTRODUCTION

“For if [they] arose from madness, it was to be pitied; if from levity, to be despised; and if from malice, to be forgiven.”<sup>1</sup> So said a legal scholar in 1939 arguing that contemptuous conduct in court should not be punishable. In *In re Krisle*,<sup>2</sup> a bankrupt rancher was found to be in civil contempt for failing to disclose the whereabouts of \$94,000 and was imprisoned until such proceeds were made available to the bankruptcy court. This comment will explore the controversial and confusing area of the bankruptcy court's power of contempt. It begins with a discussion of the history of the bankruptcy court's power of contempt, analyzes the statutory provisions and case law defining the court's contempt powers, assesses the constitutionality of these powers, and finally, discusses whether a bankruptcy court can impose sanctions for violations of a bankruptcy statute.

### BACKGROUND

The facts underlying *Krisle* are a familiar result of the Midwest farm crisis. Kenneth Krisle was a farmer in western South Dakota, who because of crop failure, drought and low cattle prices filed a Chapter 11 reorganization on June 1, 1984.<sup>3</sup> Several attempts were made by both sides to negotiate a confirmation plan with Mr. Krisle's major creditor, First Bank of South Dakota, who had a secured interest in, among other things, debtor's livestock.<sup>4</sup> While these negotiations were pending, Mr. Krisle, acting as a debtor in possession,<sup>5</sup> sold the cattle and deposited the proceeds in a debtor in possession

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1. PATTERSON, ON LIBERTY OF SPEECH AND PRESS 18 (1939), *quoted in* *In re Reed*, 11 Bankr. 258 (Bankr. D. Utah 1981).

2. 54 Bankr. 330 (Bankr. D.S.D. 1985).

3. *Id.* at 332.

4. *Id.* From the time Mr. Krisle filed for Chapter 11 reorganization and the date the *Krisle* opinion was issued, seven different attorneys from six different firms represented Mr. Krisle in some manner during the bankruptcy proceedings. *Id.*

5. 11 U.S.C. § 1107 (Supp. II 1984) states as to the rights, powers, and duties of a debtor in possession:

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and

account in a local bank. On May 23, 1985, Mr. Krisle withdrew the secured proceeds from the debtor in possession account and had it closed.<sup>6</sup> On June 4, 1985, an emergency hearing was held to determine the whereabouts of the missing cash collateral.<sup>7</sup> As a result of Mr. Krisle's refusal to testify as to the location of the proceeds, Judge Peder Ecker ordered the debtor to turn over the cash collateral<sup>8</sup> and remanded Mr. Krisle to the custody of the United States Marshall until the cash collateral was made available to the court.<sup>9</sup>

Debtor was released from jail by the Honorable Donald J. Porter pending the outcome of a petition for writ of habeas corpus, which was heard in the South Dakota District Court on August 20, 1985.<sup>10</sup> After this hearing, Judge Porter entered an order which held (1) a bankruptcy court has the jurisdiction to confine a debtor for civil contempt;<sup>11</sup> and (2) a bankruptcy court can impose sanctions for civil contempt arising from the violation of a bankruptcy statute or rule or order of the bankruptcy court.<sup>12</sup> Judge Porter remanded the matter to the bankruptcy court specifically to readjudicate the issue of whether the debtor was in civil contempt for violating the provisions of a statute, rule or order of the bankruptcy court.<sup>13</sup>

A remand hearing was held before the bankruptcy court on October 2, 1985.<sup>14</sup> Mr. Krisle again refused to disclose the location of the cash collateral withdrawn from the debtor in possession account.<sup>15</sup> In an opinion dated October 11, 1985,<sup>16</sup> Judge Ecker held that as a debtor in possession, Mr. Krisle was required to segregate and account for cash collateral in his control<sup>17</sup> and was restricted from using the cash collateral without the consent of an entity in interest or court authorization.<sup>18</sup> Because Mr. Krisle refused to turn over the cash, Judge Ecker found him in civil contempt for violating 11 U.S.C. section 363 and disobeying a court order.<sup>19</sup> Judge Ecker followed the district court's

shall perform all the functions and duties, except the duties specified in sections 1106 (a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

6. *Krisle*, 54 Bankr. at 332.

7. *Id.* at 332-33.

8. *Id.* at 333.

9. *Id.*

10. *Id.* The petition claimed Mr. Krisle had been illegally incarcerated for refusing to testify and that the court proceeding was invalid because of the lack of notice to the debtor of the motion for turnover of property. *Id.*

11. *Krisle v. Mortimer*, Civ. No. 85-3038 (D.S.D. Sept. 3, 1985), cited in *Krisle*, 54 Bankr. at 334.

12. *Id.*

13. *Krisle*, 54 Bankr. at 334.

14. *Id.* at 335.

15. *Id.* at 335-36.

16. *Id.* at 330.

17. *Id.* at 337 (citing 11 U.S.C. § 363(c)(4) (1982), FED. R. BANK P. 9001(10)).

18. *Krisle*, 54 Bankr. at 337 (citing 11 U.S.C. § 363(c)(2) (1982)).

19. *Krisle*, 54 Bankr. at 337. 11 U.S.C.A. § 363 (Supp. II 1984) states in part:

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title. . . .

lead in finding that the bankruptcy court has the power to impose imprisonment sanctions on the debtor for civil contempt<sup>20</sup> and ordered Mr. Krisle to be remanded to the custody of the United States Marshall until he returned the wrongfully withdrawn proceeds to the court.<sup>21</sup> Also, in a rare move, Judge Ecker ordered Mr. Krisle's attorney, Carter King, into the United States Marshall's custody until Attorney King advised his client to turn over the cash proceeds.<sup>22</sup>

The *Krisle* opinion is a landmark decision in many aspects and raises a number of issues which warrant closer examination. Before these issues can be examined, however, it is important to understand the history of the bankruptcy court's power of contempt and the changes which have occurred.

### HISTORY OF BANKRUPTCY COURT'S POWER OF CONTEMPT

Since the beginning of our judicial system, courts have had the inherent power to enforce their lawful orders by appropriate means.<sup>23</sup> One of the most important elements of this general power is the authority judges entertain to punish a person for contempt of court.<sup>24</sup> The bankruptcy court's power of contempt originated with the Bankruptcy Act of 1898 (Bankruptcy Act).<sup>25</sup> Under this act, the district court served as the bankruptcy court and in certain instances referred a bankruptcy case to a referee who performed minor admin-

(c) (2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section. . . .

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

20. *Krisle*, 54 Bankr. at 337 (citing *Krisle v. Mortimer*, Civ. No. 85-3038 (D.S.D. Sept. 3, 1985)).

21. *Krisle*, 54 Bankr. at 343. Mr. Krisle later purged himself of the contempt by divulging the whereabouts of the missing money in open court on November 5, 1985. Mr. Krisle also appealed the contempt finding of Judge Ecker, but the appeal was dismissed by Judge Porter on the grounds that Mr. Krisle's purging of his contempt rendered the appeal moot. *Krisle v. First Bank of South Dakota*, Civ. No. 85-3073 (Dec. 13, 1985). It is also interesting to note that on July 12, 1985, a suit was filed in the District Court of South Dakota on behalf of the debtors against First Bank and Judge Ecker seeking over \$3 million in compensatory and punitive damages. The suit claimed that Judge Ecker and First Bank had willfully and maliciously violated the debtor's civil rights. This suit was dismissed on March 31, 1986. *Krisle v. First Bank of South Dakota*, Civ. No. 85-5113 (March 31, 1986).

22. *Id.* at 345. The incarceration of Attorney King is an interesting twist in *Krisle*, and is worthy of an article by itself. Attorney King informed the court that it was under his advice that Mr. Krisle was refusing to turn over the proceeds and requested that if Mr. Krisle was to be incarcerated, he wished to go to jail with him. After discussing the applicable law, Judge Ecker obliged Attorney King on his request. *Id.* at 343-45. For another bankruptcy case involving the incarceration of an attorney for contempt of court, see *In re D. H. Overmyer Telecasting Co.*, 30 Bankr. 755 (Bankr. N.D. Ohio 1983).

23. *Ex parte Terry*, 128 U.S. 289, 302-04 (1888). See also Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1023 (1924).

24. *Shillitani v. United States*, 384 U.S. 364, 370 (1966); *Ex Parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873).

25. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544. For a thorough discussion of the history of the development of bankruptcy in the United States see Merrick, *Constitutional Chaos: Rodrick v. Security Industrial Bank Thorp Finance Corporation v. Gifford*, 2 N. Ill. U.L. Rev. 167 (1982).

isterial roles.<sup>26</sup> The referee's orders were not given the same finality as under present law.<sup>27</sup> Referees were only appointed to two-year terms<sup>28</sup> and paid on a commission fee basis.<sup>29</sup> Under section 41 of the 1898 Act, the bankruptcy referee could certify facts he felt were contemptuous to the district court judge if a person did not obey a process, order or writ of the referee.<sup>30</sup>

During the first half of the 20th century, the referee was gradually authorized to exercise more power, and the commission system was discontinued in favor of a six year salaried position.<sup>31</sup> In 1973, the United States Supreme Court promulgated the Rules of Bankruptcy Procedure.<sup>32</sup> These rules renamed referees as bankruptcy judges<sup>33</sup> and enhanced the judicial character

26. Bankruptcy Act of 1898, ch. 541, at § 22a, 30 Stat. at 552 (formerly codified at 11 U.S.C. § 45 (1952)). Under this section the referral was not automatic, but was in the discretion of the district court judge. *Id.* See also H.R. REP. NO. 595, 95th Cong., 1st Sess. 8 (1977) (hereinafter cited as H.R. REP. NO. 595), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5969.

27. See H.R. REP. NO. 595, *supra* note 26, at 8, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 5969.

28. Bankruptcy Act of 1898, ch. 541, at § 34, 30 Stat. at 555 (formerly codified at 11 U.S.C. § 62 (1952)). See also H.R. REP. NO. 595, *supra* note 26, at 8, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 5969.

29. Bankruptcy Act of 1898, ch. 541, at § 40, 30 Stat. at 556 (formerly codified at 11 U.S.C. § 68 (1940)). Under this section, the referee was paid \$10 for every case referred to him plus a percentage based commission which gave the referee incentive to resolve disputes in favor of the estate. *Id.*; see also H.R. REP. NO. 595, *supra* note 26, at 8, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 5970.

30. Bankruptcy Act of 1898, ch. 541, at § 41, 30 Stat. at 556 (formerly codified as amended at 11 U.S.C. § 69 (1952)). Section 41 read as follows:

a. A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or having taken the oath, refuse to be examined according to law: *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

b. The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

In addition to the statutory contempt power authorized by § 41, *Boyd v. Glucklich*, 116 F. 131 (8th Cir. 1902) held that a district court when acting as a bankruptcy court was vested with the inherent power of contempt. *Boyd*, 116 F. at 135.

31. The Act of June 22, 1938, ch. 575, 52 Stat. 840, removed many of the referees' administrative duties and transferred them to the trustee or clerk. The Act of June 28, 1946, ch. 512, §§ 2, 6, 60 Stat. 323, 324, 326-27 removed the referee from the fee system and extended the term of referees from two to six years. See also H.R. REP. NO. 595, *supra* note 26, at 8-9, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 5970; Eisen & Smrtnik, *The Bankruptcy Reform Act of 1978—An Elevated Judiciary*, 28 DEPAUL L. REV. 1007, 1017-19 (1979).

32. 415 U.S. 1003 (1973). These rules were passed by the Supreme Court pursuant to 28 U.S.C. § 2075 (1982), which provides that the Supreme Court shall have the power to prescribe by general rules, the practice and procedure of bankruptcy cases. The rules were promulgated on the advice of the United States Judicial Conference on Bankruptcy Rules. The entire text of the 1973 Rules of Bankruptcy Procedure and Official Forms is reprinted in 12-15 COLLIER ON BANKRUPTCY (14th ed. 1976-1978), and for a brief overview of the 1973 Rules see Kennedy, *The New Bankruptcy Rules*, 20 PRAC. LAW. 11 (April 1974).

33. FED. R. BANK PRO. 901(7), reprinted in 13 COLLIER ON BANKRUPTCY (14th ed. 1977). See

of the office to "emphasize the judicial in contradistinction to the ministerial functions of the referee in bankruptcy administration and to enhance the dignity of the office as that of the principal judge of the bankruptcy court."<sup>34</sup> Rule 920 of the Rules of Bankruptcy Procedure gave the new bankruptcy judge authority to deal with minor contempt violations which did not require imprisonment or a fine greater than \$250.<sup>35</sup> If the conduct appeared to warrant imprisonment or a fine greater than \$250, the referee was to follow the same procedures which existed prior to Rule 920 and certify the facts to the district judge.<sup>36</sup>

The Bankruptcy Reform Act of 1978<sup>37</sup> (Bankruptcy Reform Act) did not contain a section defining the bankruptcy court's contempt powers as did section 41 or Rule 920. The contempt powers of the bankruptcy court under the new Bankruptcy Code (Code) were implied from reading three statutes together. First, 18 U.S.C. section 401, which dictated contempt proceedings in other federal courts, provided the following:

A court of the United States shall have the power to punish by fine or imprisonment at its discretion, such contempt of its authority, and none others, as

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct an administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.<sup>38</sup>

The Bankruptcy Reform Act, however, did limit the bankruptcy court's con-

also H.R. REP. NO. 595, *supra* note 26, at 9, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 5970; Note, *Limits on Legislative Court Judicial Power: The Need for Balancing Competing Interests*, 59 CHI. KENT L. REV. 873, 884 (1983).

34. H.R. REP. NO. 595, *supra* note 26, at 9, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 5970 (quoting the Judicial Conference's Advisory Committee on Bankruptcy Rules).

35. FED. R. BANK. PRO. 920, *reprinted in* 13 COLLIER ON BANKRUPTCY (14th ed. 1977). Rule 920(a) stated:

(a) Contempt Committed in Proceedings Before Referee.

(1) Summary Disposition by Referee. Misbehavior prohibited by § 41a(2) of the Act may be punished summarily by the referee as contempt if he saw or heard the conduct constituting the contempt and it was committed in his actual presence. The order of contempt shall recite the facts and shall be signed by the referee and entered of record.

(2) Disposition by Referee upon Notice and Hearing. Any other conduct prohibited by § 41a of the Act may be punished by the referee only after hearing on notice. The notice shall be in writing and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged and whether the contempt is criminal or civil or both. The notice may be given on the referee's own initiative or on motion by a party, by the United States attorney, or by an attorney appointed by the referee for that purpose. If the contempt charged involves disrespect to or criticism of the referee, he is disqualified from presiding at the hearing except with the consent of the person charged.

(3) Limits on Punishment by Referee. A referee shall not order imprisonment nor impose a fine of more than \$250 as punishment for any contempt, civil or criminal.

(4) Certification to District Judge. If it appears to a referee that conduct prohibited by § 41a of the Act may warrant punishment by imprisonment or by a fine of more than \$250, he may certify the facts to the district judge. On such certification the judge shall proceed as for a contempt not committed in his presence.

36. *Id.*

37. Pub. L. No. 95-598, 92 Stat. 2549 (codified in 11 U.S.C. (1982)).

38. 18 U.S.C. § 401 (1982).

tempt powers. Subsection 241(a) of the Bankruptcy Reform Act, adding 28 U.S.C. section 1481, provides:

A bankruptcy court shall have the powers of a court of equity, law and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court of warranting a punishment of imprisonment.<sup>39</sup>

Finally, 11 U.S.C. section 105(a) reads: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."<sup>40</sup>

When read together, these statutes appeared to give the bankruptcy court very broad discretion and power to enforce any of its orders or rules. Also, in reading 18 U.S.C. section 401 in conjunction with 28 U.S.C. section 1481, it appeared that the \$250 monetary limitation on a bankruptcy judge's power to punish for civil contempt or criminal contempt committed in his presence had been eliminated in cases filed under the Bankruptcy Code.<sup>41</sup> Several bankruptcy courts took advantage of the liberal contempt power and enforced it vigorously, levying large fines on violators and even ordering imprisonment in certain cases.<sup>42</sup>

### MODERN CONTEMPT POWER

The modern contempt power controversy began in 1982 with the landmark case of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>43</sup> In *Northern Pipeline* a debtor filed a bankruptcy petition and shortly thereafter filed a breach of contract suit with the bankruptcy court, claiming the action was part of the administration of the bankruptcy estate.<sup>44</sup> A four justice plurality found that 28 U.S.C. section 1471 (granting jurisdiction to the bankruptcy court) was an unconstitutional delegation of article III powers to a

39. 28 U.S.C. § 1481 (1982).

40. 11 U.S.C. § 105(a) (1982).

41. In re Crabtree, 39 Bankr. 702 (Bankr. E.D. Tenn. 1984); In re Johns-Manville Corp., 26 Bankr. 919 (Bankr. S.D.N.Y. 1983); In re Stacy, 21 Bankr. 49 (Bankr. W.D. Va. 1982); In re Eisenberg, 7 Bankr. 683 (Bankr. E.D.N.Y. 1980); see also H.R. REP. NO. 595, *supra* note 26, at 13 reprinted in U.S. CODE CONG. & AD. NEWS at 5974 which states:

[t]here is inadequate authority on the part of the bankruptcy judges in the contempt area. If there is major, serious contempt that involves something more and requiring something more than a fine of \$250, it has got to be transferred and certified to a district judge. We feel that is totally inappropriate and tends to weaken the respect that litigants and lawyers should entertain for the bankruptcy court;

1 COLLIER ON BANKRUPTCY 3.01 at 3-68 (15th ed. 1982). *But see* In re Mantolesky, 14 Bankr. 973 (Bankr. D. Mass. 1981); In re King's Row Fireplace Shops of Rivergate, Inc., 1 Bankr. 720 (Bankr. M.D. Tenn. 1979).

42. In re Crabtree, 39 Bankr. at 712-13 (\$1000 per day fine to a maximum amount of \$10,000, and thereafter imprisonment); In re Myers, 18 Bankr. 362, 364 (Bankr. E.D. Va. 1982) (\$10,000 fine for violating discharge injunction); In re Martin-Trigona, 16 Bankr. 792 (Bankr. D. Conn. 1982) (imprisoned for refusal to comply with court order to answer trustee's questions).

43. 458 U.S. 50 (1982). For discussions concerning *Northern Pipeline*, see Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197; Note, *Limits on Legislative Court Judicial Power: The Need for Balancing Competing Interests*, 59 CHI. KENT L. REV. 873 (1983).

44. *Northern Pipeline*, 548 U.S. at 56.

non-article III court.<sup>45</sup> *Northern Pipeline*, however, was only to be applied prospectively in order to protect debtors and creditors who had relied on the constitutionality of the bankruptcy court's jurisdiction.<sup>46</sup> And while it never addressed the constitutionality of the bankruptcy court's contempt power, it did leave open the question.

In order to allow Congress time to cure the constitutional infirmity created by *Northern Pipeline*, the emergency district court rules<sup>47</sup> were implemented in 1982. Such rules continued the authority of the bankruptcy court to punish civil contempt under 28 U.S.C. section 1481 and 11 U.S.C. section 105. Several bankruptcy courts continued to issue civil contempt sanctions under the emergency rules.<sup>48</sup> In one such case,<sup>49</sup> a creditor violated the automatic stay rule of Code section 362. The bankruptcy court held that they had the power to punish for civil contempt under section 1481 regardless of the *Northern Pipeline* holding.<sup>50</sup>

The final and most confusing piece of the contempt power puzzle was added on July 10, 1984, when the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the Amendments Act)<sup>51</sup> was passed in response to *Northern Pipeline*. The Amendments Act ostensibly repeals 28 U.S.C. section 1481 of the Code governing the bankruptcy court's contempt powers, but even this is not clear. Section 113 of the Amendments Act provides that section 1481 "shall not be effective."<sup>52</sup> Section 121 of the same Act, however, provides that section 1481 shall be effective.<sup>53</sup> The limited number of courts who have reviewed this matter have differing opinions on the effect of this conflict.<sup>54</sup>

The Amendments Act attempts to cure the constitutional problems raised in *Northern Pipeline* by limiting the bankruptcy court's authority to deal with proceedings unrelated to the bankruptcy case by adopting a "core" and "related" proceeding distinction. Section 157 of Title 28 grants the district court the authority to refer bankruptcy cases to the bankruptcy judges. Bankruptcy judges may then hear and determine all cases under Title 11 and also all "core" proceedings arising under the same title.<sup>55</sup> Thus, section 157 limits the bankruptcy court's jurisdiction by granting them the authority to hear only matters going to the core of the primary bankruptcy case. Core proceedings

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45. *Id.* at 87.

46. *Id.* at 88.

47. A copy of the Emergency Rules can be found in the Appendix to *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 265 (6th Cir. 1983).

48. *See, e.g., Johns-Manville Corp.*, 26 Bankr. 919.

49. *Johns-Manville Corp.*, 26 Bankr. 919.

50. *Id.* at 926.

51. Bankruptcy Amendments and Federal Judgeship Act of 1984; Pub. L. No. 98-353, 98 Stat. 333. For an explanation of the Amendments Act *see* Chatz & Schumm, *1984 Bankruptcy Code Amendments—Fresh From the Anvil*, 89 COM. L.J. 317 (1984); Ferraro, *The Bankruptcy Act of 1984: Is it a Crown, or a Crown of Thorns?*, 11 W.S.U.L. REV. 153 (1984).

52. Bankruptcy Amendments and Federal Judgeship act of 1984, *supra* note 51, at § 113, 98 Stat. at 343.

53. *Id.* at § 121, 98 Stat. at 345.

54. *See infra* notes 70-115 and accompanying text.

55. 28 U.S.C. § 157 (Supp. II 1984).



are proceedings which deal with the restructuring of debtor-creditor relations.<sup>56</sup> In related proceedings, the bankruptcy judge must submit findings of fact and conclusions of law to the district court.<sup>57</sup> Core proceedings are reviewed under the deferential "clearly erroneous" standard,<sup>58</sup> while in contrast related proceedings are subject to *de novo* review by the district court.<sup>59</sup>

Courts have differing views on what are classified as core or related proceedings, but section 157 gives several examples of what are to be considered core proceedings. While not an all-inclusive list, actions which are considered core proceedings include matters concerning the administration of the estate, counterclaims by the estate against persons filing claims against the estate, orders in respect to obtaining credit, orders to turn over property of the estate, proceedings to determine fraudulent conveyances, objections to discharges, confirmation of plans, orders approving the use of cash collateral, orders approving the sale of property, and other proceedings affecting the liquidation of the assets of the estate or adjustment of the debtor-creditor or the equity-security holder relationship, except personal injury or wrongful death claims.<sup>60</sup> Whether contempt proceedings are core or related is not apparent under the statute, and courts which have heard the issue have differing viewpoints.<sup>61</sup>

#### CIVIL VS. CRIMINAL CONTEMPT

As a final background point, a distinction must be made between civil and criminal contempt. In *Krisle*, on remand Judge Ecker found Mr. Krisle to be in civil contempt for refusing to turn over the cash collateral. The difference between civil and criminal contempt is often subtle if distinguishable at all.<sup>62</sup> An act of a debtor may contain characteristics of both civil and criminal contempt.<sup>63</sup> The key to determining the character of the contempt usually lies in the purpose behind the sanction imposed.<sup>64</sup> The character and purpose of a civil contempt sanction is generally remedial and coercive.<sup>65</sup> It is intended to benefit the complainant and force a debtor to comply with a court's order.<sup>66</sup> Criminal contempt, however, is intended to punish a person for affirmatively committing an act against the court's orders.<sup>67</sup> The United States Supreme

56. *Northern Pipeline*, 458 U.S. at 71.

57. See 28 U.S.C. § 157(c)(1) (Supp. II 1984); *In re Omega Equip. Corp.*, 51 Bankr. 569, 573 (D.D.C. 1985).

58. *Omega Equip. Corp.*, 51 Bankr. at 573. See also 28 U.S.C. § 158 (Supp. II 1984).

59. 28 U.S.C. § 157(c)(1) (Supp. II 1984). See also *Omega Equip. Corp.*, 51 Bankr. at 573.

60. 28 U.S.C. § 157(b)(2) (Supp. II 1984).

61. See *infra* notes 70-115 and accompanying text.

62. For general background on the difference between civil and criminal contempt see Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677 (1981); Fink, *Basic Issues in Civil Contempt*, 8 N.M.L. REV. 55 (1977-1978).

63. *Gompers v. Buck's Stove and Range Co.*, 221 U.S. 418, 441 (1911). See also *In re Reed*, 11 Bankr. at 266 and accompanying cites.

64. *Shillitani*, 384 U.S. at 370; *Gompers*, 221 U.S. at 441-44; *Ager v. Jane C. Stormont Hosp. and Training School for Nurses*, 622 F.2d 496, 499-500 (10th Cir. 1980); *In re Reed*, 11 Bankr. at 266.

65. See, e.g., *Shillitani*, 384 U.S. at 369-70.

66. *Id.* at 368.

67. The *Gompers* court defined the difference as follows:

It is not the fact of punishment, but rather its character and purpose, that often serve to

Court has stated:

When the prisoners carry "the keys of their prison in their own pockets" . . . "the action is essentially a civil remedy designed for the benefits of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees. . . ." In short, if the petitioners had chosen to obey the order they would not have faced jail.<sup>68</sup>

Because *Krisle* "carried the keys of his prison in his own pocket" and could have purged himself of the contempt by turning over the cash collateral, this imprisonment was clearly for civil contempt. As stated above, section 41 of the Bankruptcy Act of 1898 and Rule 920 granted the bankruptcy referee limited remedial and punitive powers.<sup>69</sup> Section 1481 of Title 28 increased the bankruptcy court's authority to deal with civil contempt matters before it, but eliminated any authority over criminal contempt proceedings.<sup>70</sup> Thus, with the ostensible repeal of section 1481 by the Amendments Act, the bankruptcy court's civil power of contempt has evolved into a legal twilight of seemingly unending confusion.

#### CASES SINCE 1984

Judge Ecker ruled in *Krisle* that bankruptcy courts have the power to imprison individuals for civil contempt. Only a limited number of other courts have addressed the problem since the passage of the Amendments Act of 1984, each of which has issued an opinion remarkably different than the others. Some courts have ruled that the bankruptcy court has no power of contempt; others like *Krisle* have stated that if the contempt arose in the administration of the estate the bankruptcy court has the power to deal with it. One court has even stated that 28 U.S.C. section 1481 is still in effect due to conflicting statutory language.

The first case to deal with a civil contempt following the Amendments Act of 1984 was *In re Wallace*.<sup>71</sup> In *Wallace*, debtor refused to obey a court order to turn over money previously given to the debtor by the court on the condition that debtor use the money to pay creditors.<sup>72</sup> The bankruptcy court tentatively held that it appears the bankruptcy court has no contempt powers.<sup>73</sup> The court felt that the Amendments Act and prior cases indicate that

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distinguish between the two classes of cases . . . [I]mprisonment for civil contempt . . . is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order. . . . [O]n the other hand . . . [i]f the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.

*Gompers*, 221 U.S. 418.

68. *Shillitani*, 384 U.S. at 368 (quoting *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902) and *Green v. United States*, 356 U.S. 165, 197 (1958) (Black, J., dissenting)).

69. See *supra* notes 30-36 and accompanying text.

70. See *supra* notes 37-42 and accompanying text.

71. 46 Bankr. 802 (Bankr. W.D. Mo. 1984).

72. *Id.*

73. *Id.* at 805-06.

any contempt powers exercised by a bankruptcy judge could conceivably violate the rule of *Northern Pipeline*.<sup>74</sup> Therefore, to avoid any confrontation on the issue the bankruptcy judge certified the facts to the district court.<sup>75</sup>

Soon after the *Wallace* decision was issued, a Tennessee bankruptcy judge was faced with the dilemma of a creditor blatantly violating the automatic stay provision of 11 U.S.C. section 362. In *In re Depew*,<sup>76</sup> a bank repossessed a debtor's car after being notified of the first meeting of creditors. The court noted the failure of Congress to reenact 28 U.S.C. section 1481, but held that contempt actions arising out of automatic stay violations clearly constitute core proceedings.<sup>77</sup> The "integrity and efficacy of the automatic stay as a fundamental debtor protection are unquestionably matters integral to the 'restructuring of debtor—creditor relations, which is at the core of the federal bankruptcy power.'" <sup>78</sup>

The next court to address the civil contempt issue was the District Court for the District of Columbia in *In re Omega Equipment Corp.*<sup>79</sup> This case was appealed from the bankruptcy court when the bankruptcy judge found certain creditors in civil contempt for disregarding and violating a temporary restraining order.<sup>80</sup> The district court held that 28 U.S.C. section 1481 had been repealed, and 11 U.S.C. section 105, which grants bankruptcy courts the authority to issue any order, process or judgment necessary or appropriate to carry out provisions of the Amended Bankruptcy Act, does not endow bankruptcy judges with the power of contempt.<sup>81</sup> The court also noted that while

74. *Id.*

75. *Id.* at 807.

76. 51 Bankr. 1010 (Bankr. E.D. Tenn. 1985).

77. *Id.* at 1013. The automatic stay provisions are contained in 11 U.S.C. § 362(a) (Supp. II 1984) and state:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
- (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
- (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
- (4) any act to create, perfect, or enforce any lien against property of the estate;
- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
- (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
- (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
- (8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

78. *Id.* at 1014 (quoting *Northern Pipeline*, 458 U.S. at 71).

79. 51 Bankr. 569 (D.D.C. 1985).

80. *Id.* at 570.

81. *Id.* at 572.

the bankruptcy court may enter its own orders in relation to core proceedings, related proceedings require a submission of findings of fact and conclusions of law to the district court.<sup>82</sup> The court rejected the argument that a contempt finding is a core proceeding.<sup>83</sup> Holding that contempt proceedings are not a part of the core restructuring of debtor-creditor relations, the court ruled that all contempt actions in bankruptcy cases are related proceedings under 28 U.S.C. subsection 157(c).<sup>84</sup> Thus, the district court refused to give the bankruptcy judge any powers of contempt and required all contempt charges to be certified to the district court for *de novo* review.<sup>85</sup>

A different view of the contempt power was set forth twenty-four days after *Omega* by the District Court of Virginia in *Better Homes of Virginia v. Budget Service Co.*<sup>86</sup> This case was appealed from a bankruptcy court's decision to award actual damages of \$350, attorneys fees of \$1,162, punitive damages of \$10,000, and a fine of \$15,000 for extreme actions by a creditor constituting civil contempt.<sup>87</sup> The defendants in this case were creditors who knowingly violated the automatic stay of subsection 362(a) by resorting to violence and force to reclaim a debtor's vehicle.<sup>88</sup> The district court ruled that contempt actions are an integral part of core proceedings of bankruptcy cases, and also stated that 28 U.S.C. section 1481 is still effective.<sup>89</sup> The court reasoned that the automatic stay plays a central role in the administration of bankruptcy cases.<sup>90</sup> Automatic stays are necessary to enforce other provisions of the Code, and the only way the bankruptcy courts can "put teeth behind it stay"<sup>91</sup> is to have contempt powers under 11 U.S.C. subsection 105(a).

The district court noted that 11 U.S.C. subsection 105(a) powers are limited by Title 28 to cases under Title 11 and core proceedings.<sup>92</sup> The court determined that civil contempt actions for violation of courts' orders "should be treated as part of the main cause."<sup>93</sup> They also stated that the legislative intent indicates that the core limitation was inserted to overcome the constitutionality problem raised by *Northern Pipeline* of bankruptcy judges adjudicating state law causes of action, not to limit the bankruptcy court's contempt authority.<sup>94</sup> In addition, the *Better Homes* court held that the statutory conflict between sections 113 and 121 of the Amendments Act, when reconciled with congressional intent, leaves 28 U.S.C. section 1481 unaffected by either provision.<sup>95</sup> Thus, because section 1481 only restricts the bankruptcy court's

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82. *Id.* at 573.

83. *Id.* at 574.

84. *Id.*

85. *Id.*

86. 52 Bankr. 426 (E.D. Va. 1985).

87. *Id.* at 427.

88. *Id.* at 428.

89. *Id.* at 429-30.

90. *Id.* at 429.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 430. See also notes 52-53 and accompanying text.

*criminal* contempt power, the bankruptcy court still has the powers of a court of equity or law to issue *civil* contempt sanctions.<sup>96</sup> The court concluded by upholding the civil contempt award of actual damages, attorneys fees and punitive damages, rejecting the \$15,000 as not properly being a civil contempt sanction, but a criminal contempt punishment.<sup>97</sup>

Relying on *Better Homes* as authority, a Florida bankruptcy court issued civil contempt sanctions in the case of *Matter of Crum*.<sup>98</sup> In *Crum*, a man filed a claim against his former wife while she was under the protection of the automatic stay provisions provided by a Chapter 11 filing.<sup>99</sup> The Florida court refused to follow the reasoning of *Omega* and held it is evident and obvious that the bankruptcy court must have the power to enforce their lawful orders through the threat of contempt.<sup>100</sup> Thus, civil contempt sanctions were issued.<sup>101</sup>

The next court to struggle with the contempt issue was the District Court of Georgia. In *In re Industrial Tools Distributors, Inc.*,<sup>102</sup> Tele-Wire Supply Corp. (Tele-Wire), a creditor, was ordered by the bankruptcy court to deposit \$59,000 into an escrow account until certain issues in the bankruptcy action could be resolved.<sup>103</sup> When Tele-Wire refused to fully comply with the order, the bankruptcy court found Tele-Wire in civil contempt and ordered them to pay a fine of \$100 for every day between the original non-compliance and the day of the hearing.<sup>104</sup> Although on appeal the district court found the fine more resembled a criminal rather than civil contempt sanction and thus vacated the bankruptcy court's order, they also determined that a bankruptcy court can issue civil contempt orders imposed to compel or coerce obedience of a court order or to compensate the complainant for actual losses due to the non-compliance.<sup>105</sup> While stating that a bankruptcy judge lacks statutory authority to issue a criminal contempt order, the court reasoned that the broad power granted by 11 U.S.C. section 105(a), combined with the power of the bankruptcy courts to hear and determine all cases and core proceedings arising under Title 11, give rise to the *statutory* authority to enforce civil contempt sanctions.<sup>106</sup>

Finally, the latest court to brave the jungle of contempt was the Bank-

96. *Better Homes*, 52 Bankr. at 431-32.

97. *Id.* at 432-33.

98. 55 Bankr. 455 (Bankr. M.D. Fla. 1985).

99. *Id.* at 456.

100. *Id.* at 458.

101. *Id.* at 459.

102. 55 Bankr. 746 (N.D. Ga. 1985).

103. *Indus. Tool*, 55 Bankr. at 746-47.

104. *Id.* at 747.

105. *Id.* at 749-50.

106. *Id.* The *Indus. Tools* court concluded by stating:

Because a civil contempt order—that is, either a remedial or coercive contempt order—resulting from a party's failure to comply with an order of the bankruptcy court in a "core proceeding" arising in a bankruptcy action can be said to be an "appropriate order" to effectuate the bankruptcy code, the court concludes that the power to issue such a contempt order is conferred on bankruptcy judges. . . .

*Indus. Tools*, 55 Bankr. at 749.

ruptcy Court for the Eastern District of New York in *In re Kalpana Electronics, Inc.*<sup>107</sup> In *Kalpana Electronics*, debtor was a sophisticated businessman who, through his manipulation of the automatic stay provision of the Code, sold business fixtures without turning over the proceeds and intentionally disobeyed court orders to surrender certain business realty.<sup>108</sup> While doubting that 28 U.S.C. section 1481 survived the conflicting language of the 1984 Amendments Act, the court felt that the better viewpoint advanced by courts deciding this issue of whether contempt proceedings are core or related appears to be that a civil contempt proceeding "cannot be divorced" from the underlying bankruptcy case.<sup>109</sup> Thus, bankruptcy courts probably have the authority to issue civil contempt sanctions.<sup>110</sup> In light of the present controversy surrounding the issue, however, the court felt the most prudent solution was to choose the safe pathway and certify the facts to the district court.<sup>111</sup>

Thus, of the three district courts which have addressed the bankruptcy court's power of contempt, two have held that the new amendments grant a bankruptcy court the *statutory* authority to issue sanctions for civil contempt in core proceedings.<sup>112</sup> Only one has ruled that neither criminal nor civil contempt sanctions are core proceedings, and therefore must be certified to the district court.<sup>113</sup> Also, of these three courts, two have stated that 28 U.S.C. section 1481 is effectively repealed,<sup>114</sup> while the other states that the conflicting statutory provisions of the amendments left section 1481 unaffected and still in force.<sup>115</sup>

There is an even split between the four bankruptcy courts that have addressed the issue. Two of the bankruptcy courts have at least questioned the bankruptcy court's power of contempt and to be safe certified the facts to the district court for their determination.<sup>116</sup> The other two bankruptcy courts have firmly held that bankruptcy courts have the statutory authority to issue civil contempt sanctions.<sup>117</sup>

Faced with the split of authority discussed above, Judge Ecker ruled in *Krisle* that a bankruptcy court has the power to impose civil contempt sanctions, including imprisonment.<sup>118</sup> Judge Ecker based his decision in part on the district court's finding and order issued in the habeas corpus proceeding which remanded the *Krisle* case to the bankruptcy court.<sup>119</sup> In the habeas

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107. 58 Bankr. 326 (Bankr. E.D.N.Y. 1986).

108. *Id.* at 328-32.

109. *Id.* at 334.

110. *Id.*

111. *Id.* at 335.

112. *Better Homes*, 52 Bankr. at 431-32; *Indus. Tools*, 55 Bankr. at 749-50; see also notes 86-106 and accompanying text.

113. *Omega Equip.*, 51 Bankr. at 573-74; see also notes 79-85 and accompanying text.

114. *Indus. Tools*, 55 Bankr. at 750; *Omega Equip.*, 51 Bankr. at 572.

115. *Better Homes*, 52 Bankr. at 429-30.

116. *Kalpana Electronics*, 58 Bankr. at 335; *Wallace*, 46 Bankr. at 805-07.

117. *Crum*, 55 Bankr. at 458; *Depew*, 51 Bankr. at 1014.

118. *Krisle*, 54 Bankr. at 343.

119. *Krisle v. Mortimer*, Civ. No. 85-3038 (D.S.D. Sept. 3, 1985), cited in *Krisle*, 54 Bankr. at 334.

proceeding, the district court ruled that a bankruptcy court has jurisdiction to imprison a debtor as a sanction for contempt of court.<sup>120</sup> Judge Ecker also held the bankruptcy court's civil contempt power is authorized by 11 U.S.C. section 105 and 28 U.S.C. section 157(b) which give the bankruptcy court the authority to issue orders necessary to hear and determine all core proceedings, which include orders to turn over property of the estate.<sup>121</sup> This reasoning is similar to the analysis of *Better Homes* and *Industrial Tool* and rejects the theory of *Omega*.

From the limited authority available, it appears Judge Ecker's ruling in *Krisle* is in the slim majority. Repealing 28 U.S.C. section 1481 left a "black hole" in the area of a bankruptcy court's power of civil contempt. The backlog of cases already accumulating on district court dockets and the increasing unwillingness of debtors and creditors to cooperate with the bankruptcy court and respect the bankruptcy judge's orders point out the need to give bankruptcy courts the authority to issue sanctions for civil contempt in core proceedings. Section 157 of Title 28 grants the bankruptcy court's authority to decide issues arising out of the main cause, or "core" proceedings. When debtors such as *Krisle* refuse to account for property of the estate, logic dictates that this must be considered a part of the main cause, or in other words, a core proceeding. When combined with the broad grant of power under 11 U.S.C. section 105 to issue any order necessary or appropriate to carry out the provisions of the Bankruptcy Code, it appears bankruptcy courts do have the statutory authority to issue civil contempt sanctions.

Of particular concern on this issue is the Preliminary Draft of Proposed Bankruptcy Rules. Proposed Rule 9020 concerning contempt proceedings states:<sup>122</sup>

(a) MOTION IN DISTRICT COURT. A motion for contempt shall be filed in the district court and served on the party in the motion.

(b) CERTIFICATION TO DISTRICT COURT. If it appears to a bankruptcy judge that contempt has occurred, the judge may certify the facts to the district court.

Such a rule, if adopted, will certainly clarify the issue, but will also be contrary to the holdings of *Better Homes*, *Industrial Tools* and *Krisle*. In addition, it will disrupt the effective control of the bankruptcy courtroom as the court will be unable to "put teeth behind its orders." To require the bankruptcy judges to certify every contempt proceeding to the district court will delay even further the already drawn out bankruptcy proceedings and will be one more added expense that an obviously limited estate will be forced to bear. Efforts should be made to oppose Proposed Rule 9020 before bankruptcy courts are stripped of the authority to fulfill their intended goals.

In order to protect creditors' rights and insure that debtors receive the

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120. *Id.*

121. *Krisle*, 54 Bankr. at 338 n.5.

122. Preliminary Draft of Proposed Rules and Official Forms Amendments, reprinted in BANKRUPTCY CODE, RULES & OFFICIAL FORMS (L. Ed. Bankr. Serv. 1986).

fresh start the Bankruptcy Code is intended to give, bankruptcy judges must have the authority to enforce the rules and orders of their court by appropriate means. While legislative action clarifying and acknowledging the bankruptcy court's power of contempt would be the best solution, in the alternative, statutory interpretation of 11 U.S.C. section 105 and 28 U.S.C. section 157 should continue to follow the decisions of cases such as *Krisle*, *Better Homes* and *Industrial Tool* in granting bankruptcy courts the statutory authority to issue civil contempt sanctions in core proceedings.

#### CONSTITUTIONALITY OF A BANKRUPTCY COURT'S POWER OF CONTEMPT

While the *Krisle* opinion never addresses the constitutionality of an article I bankruptcy court issuing contempt sanctions, several other cases have struggled with this issue. The seminal point of such a discussion is inevitably *Northern Pipeline*.<sup>123</sup> As stated above, *Northern Pipeline* held that 11 U.S.C. section 1471's grant of jurisdictional authority over all civil proceedings related to a bankruptcy case was an unconstitutional delegation of article II powers to article I courts.<sup>124</sup> Under section 1471 of the Bankruptcy Reform Act, the bankruptcy court could hear and issue a final decision in all civil matters related to bankruptcy cases;<sup>125</sup> could exercise most of the powers of a district court, which included the power to preside over jury trials, issue declaratory judgments and also issue any order, process, or judgment appropriate to enforce the provisions of Title 11;<sup>126</sup> and were subject to review only under the narrow, clearly erroneous standard.<sup>127</sup>

The court in *Northern Pipeline* stated that section 1471 violated the command of article III that judicial power of the United States be vested in courts which grant their judges the tenure and compensation protections specified in article III.<sup>128</sup> The court noted Congressional authority to vest certain judicial functions in administrative agencies as adjuncts to article III courts,<sup>129</sup> but ruled that the Bankruptcy Reform Act of 1978 unconstitutionally vested the "essential attributes of the judicial power"<sup>130</sup> reserved for an article III court into a non-article III adjunct.<sup>131</sup>

Although *Northern Pipeline* never addressed the issue of the constitutionality of the civil contempt power, it would not be too great a leap from the *Northern Pipeline* holding to a finding that granting article I courts the power of contempt is also unconstitutional. In fact, the Federal District Court for the Eastern District of Arkansas did just that in the 1982 case of *In re Cox*

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123. 458 U.S. 50.

124. See notes 43-46 and accompanying text.

125. *Northern Pipeline*, 458 U.S. at 54.

126. *Id.* at 55.

127. *Id.* at 55 n.5.

128. *Id.* at 60-61.

129. *Id.* at 80.

130. *Id.* at 87.

131. *Id.*



*Cotton Co.*<sup>132</sup> In this thorough, well-reasoned opinion, the district court held that the power of civil contempt under the 1978 Bankruptcy Code was unconstitutional.<sup>133</sup> The court began with a discussion of the historical changes which have occurred since the Bankruptcy Act of 1898 was implemented.<sup>134</sup> The court noted that prior to the 1973 rules, the district court judge was the bankruptcy judge, and prior to 1978, the federal district court was the bankruptcy court.<sup>135</sup> Thus, until 1978 the bankruptcy referee turned judge was simply an officer of the district court, similar to a magistrate.<sup>136</sup> Also, at least prior to 1973, when Rule 920 was issued (the constitutionality of which was never challenged)<sup>137</sup> the referee had no power to punish for contempt, and when the bankruptcy judge held someone in contempt, it was authorized only under the inherent power of an article III district court judge.<sup>138</sup>

*Cox Cotton* recognized that the contempt power is inherent in the courts of the United States, and Congress has the authority to place some limits on this power.<sup>139</sup> The argument does not, however, follow that Congress can freely grant contempt powers to non-article III courts, lest they could grant it to any decision making body or agency they wanted.<sup>140</sup> "The power of the national courts to enforce obedience, and to punish disobedience, of their orders, is not derived from the acts of Congress . . . but from the grant of them of all the judicial power of the nation by Section 1 of Article III of the constitution."<sup>141</sup>

*Cox Cotton* conceded that Congress can vest contempt powers in courts through its power to "ordain and establish" inferior courts under article III, but unless the court is established pursuant to article III it can not possess the power of contempt.<sup>142</sup> While the legislature can create non-article III fact-finding courts, they cannot freely vest all of the judicial power of article III courts in such creations.<sup>143</sup> Bankruptcy courts are not article III courts, as judges are appointed to serve fourteen year terms and are subject to dismissal for conduct less than the "high crimes and misdemeanors" standard of article III judges.<sup>144</sup> Bankruptcy judges are also subject to disciplinary proceedings

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132. 24 Bankr. 930 (E.D. Ark. 1982), *vacated*, *Lindsey v. Ipock*, 732 F.2d 619 (8th Cir. 1984), *cert. denied*, *Cryts v. French*, 105 S. Ct. 247 (1984). Because *Cox Cotton* was decided in 1982, it questioned the constitutionality of the contempt power under the 1978 Code, prior to the 1984 Amendments Act.

133. *Cox Cotton*, 24 Bankr. at 956.

134. *Id.* at 939-45.

135. *Id.* at 940-41.

136. *Id.*

137. *See, e.g., id.* at 942-43 and accompanying cites.

138. *Cox Cotton*, 24 Bankr. at 945.

139. *Id.* at 945-46 (quoting *Michaelson v. United States*, 266 U.S. 42, 45-46 (1924)).

140. *Cox Cotton*, 24 Bankr. at 946.

141. *Id.* (quoting *In re Nevitt*, 117 F. 448, 455 (8th Cir. 1902)).

142. *Cox Cotton*, 24 Bankr. at 947-55.

143. *Id.* at 947.

144. *Id.* Art. III, § 1 of the Constitution states: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." The "good Behavior" clause guarantees that article III judges enjoy life tenure, subject only to removal by impeachment. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955).

by federal judges, thus the salary and tenure provisions of article III are not guaranteed to bankruptcy judges.<sup>145</sup> *Cox Cotton* held the vesting of contempt powers in such judges unconstitutionally delegates judicial powers reserved for article III courts.<sup>146</sup>

*Cox Cotton* also relied on Justice Douglas' discussion of an individual's constitutional guarantee of having a legal dispute resolved by an article III court.<sup>147</sup> In considering the qualifications of the resolving judge, Justice Douglas stated:

Judges who sit on Article I courts are chosen for administrative or allied skills, not for their qualifications to sit in cases involving the vast interests of life, liberty or property. . . . Judges who might be confirmed for an Article I court must never past muster for the honourous and life-or-death duties of Article III judges.<sup>148</sup>

Thus, while bankruptcy judges may be expertly qualified to decide important bankruptcy problems, even more so than most article III judges, *Cox Cotton* felt the contempt powers are such an infringement upon an individual's fundamental rights that it requires the consideration and expertise of the constitutionally protected article III judge.<sup>149</sup>

Finally, *Cox Cotton* extended the finding of unconstitutionality in *Northern Pipeline* to the granting of the contempt power. The *Cox Cotton* court felt the power to punish contemptuous behavior is clearly a proceeding "arising in or related to" bankruptcy matters disallowed by *Northern Pipeline*.<sup>150</sup> While *Northern Pipeline* only overruled the broad grant of jurisdictional authority to bankruptcy courts, *Cox Cotton* held that the broad grant of contempt powers is in the same vein of "essential attribute[s] of judicial power"<sup>151</sup> as those disallowed in *Northern Pipeline*.

On appeal, *Cox Cotton* was vacated and remanded for failing to properly apply prospectively the holding of *Northern Pipeline*.<sup>152</sup> The Eighth Circuit Court of Appeals, however, did not overrule the analysis of the *Cox Cotton* court and did not pass on the merits of the *Cox Cotton* decision.<sup>153</sup>

Another argument against the constitutionality of the bankruptcy court's power of contempt which was not discussed in *Cox Cotton* is that a bankruptcy judge is often compared to a federal magistrate, who is not conferred with the power of contempt. While the Federal Magistrate Act of 1979<sup>154</sup> has been constitutionally upheld in several cases, a major factor in many of these

145. *Cox Cotton*, 24 Bankr. at 947; see also 28 U.S.C. §§ 152-154 (1982).

146. *Cox Cotton*, 24 Bankr. at 956. The *Cox Cotton* court stated: "To allow the contempt power to be vested in a non-Article III court would conflict with the doctrine of separation of powers, disregard the awesome nature of the contempt power itself, subvert its inherently judicial character, and seriously undermine the fundamental policies which underly Article III." *Id.* at 947-48.

147. *Id.* at 951 (quoting *Glidden v. Zdanok*, 370 U.S. 530, 606 (1962) (Douglas, J., dissenting)).

148. *Glidden*, 370 U.S. at 606 (Douglas, J., dissenting).

149. *Cox Cotton*, 24 Bankr. at 951.

150. *Id.* at 955-56.

151. *Id.* at 956.

152. *Lindsey*, 732 F.2d 619.

153. *Id.* at 623.

154. Pub. L. No. 96-82, 93 Stat. 643 (codified at 28 U.S.C. § 636 (1982)).

cases is the Act's reservation of the contempt power in the district courts.<sup>155</sup> Magistrates are required to certify to the district court facts which may be considered contemptuous.<sup>156</sup> This reservation of the contempt power to article III judges has retained the "essential attributes of the judicial power" in an article III court and has thereby been found constitutional.<sup>157</sup>

Since the *Cox Cotton* opinion was issued, several courts have at least tentatively agreed with the *Cox Cotton* reasoning. In *Matter of R & M Porter Farms, Inc.*,<sup>158</sup> the Missouri bankruptcy court refused to issue contempt sanctions due to the conflicting status of the contempt power. *Porter Farms* noted that the holding and dicta in *Cox Cotton* seems to be supported by the Supreme Court's decision in *Northern Pipeline* and the applicable provisions in the emergency rules.<sup>159</sup>

While basing their final decision on the allegation that a bankruptcy court does not have statutory contempt powers due to the repeal of 28 U.S.C. section 1481,<sup>160</sup> thereby avoiding any necessity to resolve the constitutional issues, *In re Omega Equipment Corp.*<sup>161</sup> also raised doubts concerning the validity of the bankruptcy court's contempt power. The court hinted that the contempt grant did not fit within *Northern Pipeline's* holding that a bankruptcy court cannot have all the powers of a court of law or equity.<sup>162</sup> The *Omega* court compared the bankruptcy judge to a magistrate or other legislative fact-finder and stated the conclusion that as far as being consistent with the Constitution, the bankruptcy judge's power of contempt is to say the least "dubious."<sup>163</sup>

Previously discussed *Industrial Tool* is the final case to resolve that the bankruptcy court's power of contempt is unconstitutional. In *Industrial Tool*, while the district court held that bankruptcy courts have the *statutory* authority to issue civil contempt sanctions,<sup>164</sup> the court also addressed the constitutionality of this statutory authority. In a two-paragraph discussion of the matter, the court agreed with the *Cox Cotton* reasoning and held that the delegation of contempt powers to bankruptcy judges in the 1984 Amendments Act is unconstitutional.<sup>165</sup>

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155. See *Omega*, 51 Bankr. at 572; see also *Fields v. Washington Metropolitan Area Transit Auth.*, 743 F.2d 890 (D.C. Cir. 1984); *Geras v. LaFayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984); *Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Ref. Corp.*, 739 F.2d 1313 (8th Cir. 1984). *cert. denied*, 105 S. Ct. 906 (1984); *Puryear v. Ede's Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Goldstein v. Kelleher*, 728 F.2d 32 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 172 (1984); *Wharton-Thomas v. United States*, 721 F.2d 922 (3rd Cir. 1983).

156. 28 U.S.C. § 636(e) (1982).

157. *Omega*, 51 Bankr. 572; see *Geras*, 742 F.2d at 1044; *Collins v. Foreman*, 729 F.2d 108, 116-17 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 218 (1984); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instrumedix, Inc.*, 725 F.2d 537, 545 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 100 (1984).

158. 38 Bankr. 88 (Bankr. W.D. Mo. 1984).

159. *Id.* at 91-92.

160. See *supra* notes 70-122 and accompanying text.

161. 51 Bankr. 569 (D.D.C. 1985).

162. *Id.* at 574.

163. *Id.* at 572.

164. *Indus. Tool*, 55 Bankr. at 749-50; see also notes 102-106 and accompanying text.

165. *Indus. Tool*, 55 Bankr. at 751-52.

Despite the court's argument in *Cox Cotton*, several courts have also addressed the constitutionality of the bankruptcy court's power of contempt and have found it to be valid. Two months after the *Cox Cotton* opinion was issued, a New York bankruptcy court refused to follow the reasoning of *Cox Cotton* and held that any court of law, whether article III or article I, has the constitutional authority to punish an individual who disrupts the dignity and efficiency of the judicial process.<sup>166</sup>

In the post-1984 Amendment case of *Better Homes of Virginia v. Budget Service Co.*,<sup>167</sup> the District Court for the Eastern Division of Virginia also held that *Northern Pipeline* did not render the bankruptcy court's exercise of the power of civil contempt unconstitutional. *Better Homes* felt it "crucial to distinguish between that power necessary to the discharge of the [bankruptcy] Court's functions and that vested only in Article III courts to punish for criminally contemptuous conduct."<sup>168</sup> The court severely limited *Northern Pipeline* as only prohibiting the resolution of state court issues by the bankruptcy judge.<sup>169</sup> *Better Homes* distinguished the power of contempt from the issue in *Northern Pipeline* and held that a bankruptcy judge can constitutionally exercise the power of civil contempt in order to protect the administration of the Bankruptcy Code.<sup>170</sup>

Finally, in the previously discussed *Kalpna Electronics*,<sup>171</sup> the court held that there are no constitutional impediments to the issuance of civil contempt sanctions by a bankruptcy court. The *Kalpna Electronics* court felt the argument that article I courts cannot issue contempt orders ignored the fact that even before the Bankruptcy Reform Act was passed the bankruptcy judges had limited contempt powers under Rule 920.<sup>172</sup> This authority "was not the product of inadvertence since it was objected to vigorously at the time by Mr. Justice Douglas."<sup>173</sup> Also, the new Bankruptcy Rules issued in 1983 by the same court which decided *Northern Pipeline* were accompanied by Advisory Committee notes which stated the "decisional law" applicable to contempt orders issued by the district courts were equally inapplicable to bankruptcy courts.<sup>174</sup> Therefore, the *Kalpna Electronics* court ruled that Article I bankruptcy courts are constitutionally vested with civil contempt authority.<sup>175</sup>

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166. *Johns-Manville Corp.*, 26 Bankr. at 924.

167. 52 Bankr. at 426 (E.D. Va. 1985); see also notes 86-97 and accompanying text.

168. *Better Homes*, 52 Bankr. at 430.

169. *Id.* at 430-31. In another case not directly involving the power of contempt, the Tenth Circuit Court of Appeals limited the *Northern Pipeline* holding by stating:

It pertains only to the proposition that a "traditional state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an Article III court if it is to be heard by any court or agency of the United States.

*Matter of Colorado Energy Supply, Inc.*, 728 F.2d 1283, 1285 (10th Cir. 1984) (quoting *Northern Pipeline*, 458 U.S. at 921 (Burger, J., dissenting)).

170. *Better Homes*, 52 Bankr. at 431.

171. 58 Bankr. 326.

172. *Id.* at 332.

173. *Id.*

174. *Id.* at 332-33.

175. *Id.* at 333.

Thus, there is a split of authority on the matter of the constitutionality of the bankruptcy court's power of contempt, with a slight majority of the cases decided since *Northern Pipeline* either holding or at least indicating that the power is unconstitutional. It is important to note that none of these cases have been decided by an appellate court, but such an appeal is inevitable.<sup>176</sup> The 1984 Amendments Act has not only left the statutory authority of a bankruptcy court's power of contempt in complete disarray, but it has also created a serious question of constitutionality. While several cases have upheld the validity of the contempt power, they have done so in a brief, unconvincing manner. While it is a general and fundamental principle of American law that a statute is presumed to be constitutional and valid,<sup>177</sup> the seemingly rational reasoning behind the *Cox Cotton* decision has to this point been ignored.

One argument that has not yet been specifically raised is that in the past many bankruptcy courts have issued sanctions against creditors for violations of the automatic stay without being constitutionally vacated. The automatic stay is one of the most basic concepts of the Code and has been enforced through contempt sanctions by dozens of bankruptcy courts.<sup>178</sup> It seems obvious that the bankruptcy courts must be vested with this power to enforce the automatic stay. Without this power, the fundamental principle of granting

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176. The Court of Appeals for the District of Columbia recently had the chance to decide this issue, but disposed of the case on other grounds. In *In re Magwood*, 785 F.2d 1077 (D.C. Cir. 1986), a mortgagee and the trustee had agreed that the mortgagee would not list the mortgaged property for sale without the trustee's written approval. Mortgagee signed a listing agreement without the trustee's approval, and the bankruptcy court found mortgagee in civil contempt. The District Court affirmed and on appeal to the District of Columbia Court of Appeals, the court requested Professor Thomas G. Krattenmaker of the Georgetown University Law Center to appear as *amicus curiae* and brief the issues of the statutory authority and constitutionality of the bankruptcy court's power of civil contempt. The Department of Justice also appeared as *amicus curiae* urging affirmance. The court, however, expressly declined to resolve "whether there existed statutory or regulatory authorization from the exercise of power to issue civil contempt citations during the effect of the Interim Rule; whether the exercise of the contempt power by bankruptcy judges is constitutional; whether the 1984 Act authorizes the exercise of the contempt power by bankruptcy judges; whether such an authorization would be constitutional; and whether the civil contempt power is an essential judicial attribute for Article III purposes." *Id.* at 1078 n.1.

177. *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944); *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-52 (1938); *Becker Steel Co. of Am. v. Cummings*, 296 U.S. 74, 79 (1935); *Gitlow v. New York*, 268 U.S. 652, 668 (1925); see also 16 AM JUR. 2d *Constitutional Law* § 212 (1979).

178. While not an all inclusive list, some bankruptcy courts which have held creditors in civil contempt for violating the automatic stay of 11 U.S.C. § 362(a) include:

*In re Miller*, 22 Bankr. 479 (D. Md. 1982); *Crum*, 55 Bankr. 455; *In re Newman*, 53 Bankr. 7 (Bankr. M.D. Tenn. 1985); *Better Homes*, 52 Bankr. 426; *Depew*, 51 Bankr. 1010; *Mercer v. D.E.F., Inc.*, 48 Bankr. 562 (Bankr. D. Minn. 1985); *In re Mack*, 46 Bankr. 652 (Bankr. E.D. Penn. 1985); *In re Behm*, 44 Bankr. 811 (Bankr. W.D. Wis. 1984); *In re Pody*, 42 Bankr. 571 (Bankr. N.D. Ala. 1984); *In re Ashby*, 36 Bankr. 977 (Bankr. D. Utah 1984); *In re Burrow*, 36 Bankr. 960 (Bankr. D. Utah 1984); *In re Pierson*, 33 Bankr. 743 (Bankr. W.D.N.Y. 1983); *In re DePoy*, 29 Bankr. 471 (Bankr. N.D. Ind. 1983); *Johns-Manville*, 26 Bankr. 919; *In re Harbin*, 25 Bankr. 703 (Bankr. W.D. Tenn. 1982); *In re Shropshire*, 25 Bankr. 128 (Bankr. W.D. Wash. 1982); *In re Thacker*, 24 Bankr. 835 (Bankr. S.D. Ohio 1982); *In re Thayer*, 24 Bankr. 491 (Bankr. W.D. Wis. 1982); *In re Pyramid Restaurant Equip. Co.*, 24 Bankr. 455 (Bankr. W.D.N.Y. 1982); *In re Holland*, 21 Bankr. 681 (Bankr. N.D. Ind. 1982); *In re Shiko*, 21 Bankr. 203 (Bankr. M.D. Penn. 1982); *In re Roberts*, 20 Bankr. 914 (Bankr. E.D.N.Y. 1982); *In re Dublin Properties*, 20 Bankr. 616 (Bankr. E.D. Penn. 1982); *In re Wariner*, 16 Bankr. 216 (Bankr. N.D. Tex. 1981); *In re Nelson*, 6 Bankr. 248 (Bankr. D. Kan. 1980); *In re Edwards*, 5 Bankr. 663 (Bankr. M.D. Ala. 1980).

debtors immediate relief<sup>179</sup> from creditor pressure will be crippled. Of course, the bankruptcy court could always certify the facts surrounding the violation to the district court, but the time delay and the added expense are unnecessary burdens to place upon an obviously limited estate which needs immediate relief.<sup>180</sup>

The most obvious and simple solution is to recreate the bankruptcy court as an inferior court under article III of the Constitution. This was the original intent of the House of Representatives in the 1978 Act, but was abandoned because of the tremendous opposition by the federal judiciary.<sup>181</sup> Thus while this is perhaps the best solution, it appears to be an unrealistic one. Bankruptcy courts need to have the power of contempt in order to efficiently, expeditiously and properly dispose of bankruptcy matters and protect the rights of debtors and creditors alike. Until bankruptcy courts are granted article III status, or the reasoning behind *Cox Cotton* is confronted and overruled, the constitutionality of the power of contempt will continue to haunt and trouble judges, attorneys, debtors and creditors involved in the bankruptcy system.

#### VIOLATION OF BANKRUPTCY STATUTE AS CONTEMPT OF COURT

In a case filled with issues worthy of a symposium, the final issue raised in *Krisle* which this article addresses is the authority of a bankruptcy court to issue contempt sanctions for violation of a rule of the bankruptcy court. This discussion requires the assumption of two key issues previously discussed, namely, the bankruptcy court has the statutory authority to issue civil contempt sanctions and such statutory authority is constitutional. In *Krisle*, Judge Ecker found Mr. Krisle in civil contempt not only for disobeying a court order to turn over the cash collateral, but also for violating section 363

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179. The legislative history of § 362 stated:

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H.R. REP. NO. 595, *supra* note 26, at 340, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 6296-97.

180. A counter to this argument, however, is 11 U.S.C. § 362(h) which states "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." Thus, debtors can recover actual and punitive damages for creditors' actions in violation of the automatic stay, but this still does not totally dispell the above argument, as recovery is not guaranteed and will still be delayed.

181. See King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 676 (1985), which gives examples of several legislative bills which attempted to establish the bankruptcy courts as art. III courts. See also, Chatz & Schumm III, *1984 Bankruptcy Code Amendments—Fresh from the Anvil*, 89 COM. L.J. 317, 317 (1984).

of the Bankruptcy Code.<sup>182</sup> From the language of 11 U.S.C. section 363, Mr. Krisle was restricted from using or withdrawing the cash collateral received from the sale of the secured cattle without First Bank's consent or court authorization. He was also required to segregate and account for the cash collateral in his control. Mr. Krisle was clearly aware of these rules and the proper procedures to follow as he had previously followed the correct procedures in obtaining permission to use cash collateral in other circumstances.<sup>183</sup> While based in part on the violation of a direct order of the court to turn over the cash collateral, Judge Ecker also held Mr. Krisle liable in civil contempt for violation of a statute of the bankruptcy court.<sup>184</sup> It is this contempt sanction for violation of a section of the Bankruptcy Reform Act which is the focus of this section.

Not surprisingly, there is a split among bankruptcy courts as to whether a violation of a section of the Bankruptcy Code constitutes contempt. Courts have generally agreed that violating the automatic stay provision of 11 U.S.C. subsection 362(a) does give rise to a finding of contempt.<sup>185</sup> Courts which have so held traditionally base their finding on the fact that the automatic stay provision is a sufficiently specific and direct order of the court to invoke the remedy of contempt for its violation.<sup>186</sup> The automatic stay provided by section 362 is designed to expedite automatically the stay that would otherwise be obtained by court order, and generally it is no defense that a creditor did not receive formal notice of the automatic stay so long as the creditor has actual knowledge.<sup>187</sup>

It is when the debtor's conduct violates a statute other than 11 U.S.C. section 362 that the courts begin to divide on the power of contempt. In a case factually similar to *Krisle*, the Mississippi bankruptcy court refused to issue contempt sanctions against a debtor for violating 11 U.S.C. subsection 363(c) concerning cash collateral.<sup>188</sup> The court stated that "[a] judicial contempt does not ordinarily flow from the violation of a *statute* to the injury or damage or another. Ordinarily it flows from the violation of or non-compliance with a *court order*."<sup>189</sup> The court distinguished an automatic stay violation from a cash collateral violation stating that the former has the effect of a court or-

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182. *Krisle*, 54 Bankr. at 343.

183. *Id.* at 337.

184. *Id.* at 343.

185. *Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977); *Crum*, 55 Bankr. at 458; *Miller v. Sav. Bank*, 22 Bankr. 479 (D. Md. 1982); *In re Stacy*, 21 Bankr. at 52; *In re Reed*, 11 Bankr. at 268; *Abt v. Household Fin. Co.*, 2 Bankr. 323 (Bankr. E.D. Pa. 1980); *Kings Row*, 1 Bankr. at 721; *see also* 2 COLLIERS ON BANKRUPTCY 362.11 (15th ed. 1985).

186. *See, e.g., In re Stacy*, 21 Bankr. at 52 (citing *Household Fin.*, 2 Bankr. at 325).

187. *Fidelity Mortgage*, 550 F.2d at 51; *In re Hailey*, 621 F.2d 169 (5th Cir. 1980); *In re Reed*, 11 Bankr. at 270; *accord* 2 COLLIERS ON BANKRUPTCY 362.11 (15th ed. 1985). For a general discussion of § 362(a) and the automatic stay see Johnson & O'Leary, *Automatic Stay Provisions of the Bankruptcy Act of 1978*, 13 N.M.L. REV. 599 (1983); Note, *Adequate Protection and the Automatic Stay Under the Bankruptcy Code: Easing Restraints on Debtor Reorganization*, 131 U. PA. L. REV. 423 (1982); Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. MICH. J.L. REF. 175 (1978).

188. *In re Continental Maine Corp.*, 35 Bankr. 990 (Bankr. E.D. Mo. 1984).

189. *Id.* at 991.

der.<sup>190</sup> It also felt the contempt power is a drastic remedy and should not be invoked unless clearly warranted.<sup>191</sup>

While one line of cases refuses to extend the contempt power outside of automatic stay infringements, several courts have decided that the contempt power of the bankruptcy courts includes the authority to enforce the bankruptcy statutes themselves via contempt orders.<sup>192</sup> Most of these courts base their decision on the reasoning that to hold otherwise would deprive the courts of the authority to insure that the statutes are obeyed.<sup>193</sup> Perhaps the strongest language upholding the argument that violation of a bankruptcy section is civilly contemptuous is contained in *In re Crabtree*.<sup>194</sup> In this case, the debtor had violated numerous bankruptcy rules and court orders, including failure to turn over property of the estate, refusing to testify, and refusing to provide information concerning his financial affairs.<sup>195</sup> Although the total value of the debtor's assets was valued at nearly \$19 million, the debtor refused to turn over any more than a mere fraction.<sup>196</sup> In response to the argument that a violation of a specific and definite order of the court is a condition precedent to a finding of contempt, the *Crabtree* court responded that Code section 521 is the functional equivalent of a specific and definite order of the court.<sup>197</sup>

While Krisle was found to have actual knowledge of the requirements of the cash collateral rule of 11 U.S.C. section 363 due to his previous use of the rule,<sup>198</sup> there are also differing opinions concerning the actual knowledge or formal notice required before a contempt sanction for violation of the Bankruptcy Code can be issued. Most courts are apparently following an intermediate standard in which the violation of a bankruptcy rule alone is not enough to hold a violator in contempt. A party guilty of contemptuous conduct must be shown to have notice or knowledge sufficient to be aware of the prescribed conduct.<sup>199</sup> A person, however, does not have to receive formal notice of the

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190. *Id.*

191. *Id.* at 992.

192. *Fidelity Mortgage*, 550 F.2d at 53 ("The contempt power of the courts . . . includes the authority to enforce the rules themselves via contempt orders. To hold otherwise would be to deprive the courts of the authority necessary to ensure that the rules are obeyed.") *Id.*; *Krisle v. Mortimer*, Civ. No. 85-3038 (Sept. 3, 1984) (bankruptcy court can impose civil contempt sanctions for violation of statute or rule); *In re Crabtree*, 39 Bankr. at 709-10 (statute is specific and definite order of the court); *In re Smith*, 1 Bankr. at 335 (contempt founded upon violation of specific order or general rule).

193. *Fidelity Mortgage*, 550 F.2d at 53; *In re Crabtree*, 39 Bankr. at 710; *In re Smith*, 1 Bankr. 334, 335 (Bankr. D. Colo. 1979).

194. 39 Bankr. 702 (Bankr. E.D. Tenn. 1984).

195. *Id.* at 705.

196. *Id.* At one point the trustee demanded the turnover of a Rolex watch valued at nearly \$8000, and in response the debtor turned over a counterfeit Rolex valued at \$150. After discovering the deception and upon further demand, the debtor surrendered the genuine Rolex. *Id.* at 706.

197. *Id.* at 710.

198. *Krisle*, 54 Bankr. at 337.

199. *Hailey*, 621 F.2d 169; *Fidelity Mortgage*, 550 F.2d at 52; *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 213 (8th Cir. 1974); *Yates v. United States*, 316 F.2d 718, 723 (10th Cir. 1963); *Denver-Greeley Valley Water Users Ass'n v. McNeil*, 131 F.2d 67, 69 (10th Cir. 1942); *In re Behm*, 44 Bankr. 811, 812, (Bankr. W.D. Wis. 1984); *In re Marcott*, 30 Bankr. 633, 636 (Bankr. W.D. Wis.



rule if he knowingly violates it.<sup>200</sup>

The *Krisle* case is an important step in cleaning up our clogged bankruptcy system. The bankruptcy courts will be efficient and better equipped to perform their duties if the holding in *Krisle* is followed by other courts in allowing individuals to be held in civil contempt for knowingly violating a rule of the bankruptcy court. While contempt is a powerful remedy which should be reserved for extreme situations, *Krisle* is an example of one of these situations and the result should not only be upheld, but applauded.

#### CONCLUSION

The Bankruptcy Code is a complicated and integrated set of statutes which take years of study to master. When both debtors and creditors play by these rules the bankruptcy system is an invaluable tool which works well to preserve creditors' rights and insure that debtors receive their intended fresh start. When one or both parties refuse to cooperate and ignore the rules, the system bogs down. The Bankruptcy Code, however, offers little guidance for selecting the appropriate means for their enforcement. The contempt power of the bankruptcy courts is in a state of disarray. The statutes are vague, they do not address the contempt issue, and they may even be unconstitutional.

Until the constitutionality of the bankruptcy court's power of contempt is decided, bankruptcy courts should continue to follow the example set by Judge Ecker in *Krisle*. The power and validity of contempt should be presumed constitutional. Courts should continue to interpret the Bankruptcy Code as giving them the power of contempt to enforce their orders and issue sanctions to individuals who knowingly violate a bankruptcy rule. Again, the most practical solution would be to grant the bankruptcy court article III status, but since this does not appear to be a solution which will be implemented soon, the issue concerning the bankruptcy court's power of contempt will continue to plague and clutter our court system.

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1983); *In re Endres*, 12 Bankr. 404, 406 (Bankr. E.D. Wis. 1981); *In re Reed*, 11 Bankr. at 268; *In re Abt*, 2 Bankr. at 325.

200. *Fidelity Mortgage*, 550 F.2d at 52; *In re Behm*, 44 Bankr. at 812.