Civil and Criminal Contempt in Bankruptcy Court

by
Clifford J. White III[1]
Assistant United States Trustee - Greenbelt, Maryland

The number of bankruptcy filings has exploded in recent years to reach more than 1.4 million in fiscal year 1998. Although the number of chapter 11 cases has dipped, the volume of consumer cases continues to grow and, with the increased filings, so have problems associated with keeping order in the court. In many jurisdictions, overworked bankruptcy judges have to cope with thousands of diverse cases, ranging from complex business reorganizations to small consumer cases that involve pro se debtors or, worse yet, non-attorney petition preparers whose knowledge of and respect for the rules are often glaringly deficient. With so many matters to juggle, the need has never been greater for bankruptcy courts to insist upon prompt compliance with judicial orders that protect the integrity of the system and the rights of all parties to a bankruptcy case.

An important arrow in the quiver of bankruptcy courts to uphold the rule of law is the power to hold parties in civil, or even criminal, contempt of court. By holding recalcitrant debtors, creditors, lawyers, and other parties in contempt of court, bankruptcy judges may impose appropriate penalties to vindicate the authority of the court, to compensate victims of the contemnors' acts of commission or omission, and to compel compliance with lawful court orders.

---

[1]The views expressed in this article are those of the author and do not necessarily represent the views of, and should not be attributed to, the Department of Justice or the United States Trustee Program.

Civil Contempt

It is generally accepted that bankruptcy judges have the power to enforce their orders by finding violators in civil contempt of court.[2] The purpose of civil contempt may be either coercive or remedial.[3] Civil contempt penalties are not punishments, but rather are means by which to bring a party into compliance with a court order or to force the contemnor to compensate the victim of his acts that were committed in disregard of a court order.

A court need consider only two factors in determining whether to hold a party in civil contempt: whether the alleged contemnor had notice of the court order and whether that person complied with the order. Courts have held that the contemnor's intent or state of mind is irrelevant. Given the seriousness of the civil contempt finding and the penalties that may be imposed on the violator, the court should be satisfied by "clear and convincing" evidence that a party has committed civil contempt. Furthermore, the court may not impose a civil contempt penalty if the contemnor can prove an inability to comply (e.g., impecunious contemnor cannot pay a fine) or if the underlying order is later found to be invalid.

The Federal Rules of Bankruptcy Procedure (Fed. R. Bankr. P.) set out the procedures a court must follow in civil contempt matters. Although contempt committed in the presence of the judge may be summarily disposed of by the judge, other instances of contempt require more deliberate steps. Under Fed. R. Bankr. P. 9020(b), before finding a party in contempt, the court must issue a written notice that provides specific details about the alleged acts of contempt, states the time

---

[2]A bankruptcy court's authority to hold a party in contempt derives from several sources, including the inherent authority of any court to regulate the conduct of those appearing before it, 11 U.S.C. §105 (the power to issue orders necessary or appropriate to carry out the Bankruptcy Code), 28 U.S.C. § 157(b) (jurisdiction of bankruptcy courts to hear "core" matters), and Fed. R. Bankr. P. 9020 (discussed infra).

[3]For a concise overview of civil contempt in a bankruptcy proceeding, see, e.g., In re Walters, 868 F.2d 665 (4th Cir. 1989).

and place of the hearing on the charges, and allows a reasonable response time. The judge is disqualified from hearing a contempt charge involving disrespect or criticism of that judge.

A bankruptcy court order of contempt does not become effective for 10 days. The contemnor may object to the finding by filing exceptions with the district court that will consider the matter de novo. The district court may confine itself to the record below or take additional evidence. If objections are not filed, the bankruptcy court order "shall have the same force and effect as an order of contempt entered by the district court . . . ." Fed. R. Bankr. P. 9020(c).

Although civil in nature, penalties for civil contempt may be severe. Civil contempt penalties have been imposed for a wide variety of violations, including failure to attend § 341 meetings, failure to disgorge fees, and violation of other court orders. Fines are commonly imposed. If, however, the court finds that the contemnor is unable to pay a monetary penalty, the court may be creative. For example, attorneys who fail to disgorge fees have been enjoined from practicing before the court that issued the disgorgement order until the fees are refunded.

Insofar as the purpose of civil contempt is to coerce compliance, the court may impose a regimen of escalating penalties. For example, if the contemnor pays a fine but still disregards a court order, the court may impose additional fines. A contemnor who continues to violate a court order may even be incarcerated. It is increasingly agreed that bankruptcy judges may order the United States Marshal to take contemnors into custody and even to incarcerate them until they purge themselves of contempt. As long as the civil contemnor possesses the "keys to the jailhouse door," he may remain in custody.[4]

In addition to civil contempt, bankruptcy courts sometimes avail themselves of other similar remedies. For

---

[4]Among the earlier cases holding that bankruptcy judges may impose incarceration as a civil contempt penalty are In re Duggan, 133 B.R. 671, 673 (Bankr. D. Mass. 1991), and In re Maxair Aircraft Corporation, 148 B.R. 353, 359 (M.D. Ga. 1992).

example: Fed. R. Bankr. P. 9011, which is nearly identical to Fed. R. Civ. P. 11, provides for sanctions against parties who sign and file court papers; 11 U.S.C. § 349 has been used by some courts to penalize debtors whose cases are dismissed (such as by enjoining refiling for a period of time or by denying the discharge of debts in any future cases); and 28 U.S.C. § 1927 allows federal courts[5] to sanction attorneys who "vexatiously" protract litigation.

Criminal Contempt

The power of a bankruptcy court to find a party in criminal contempt of court remains unsettled.[6] Case law appears to be evolving, however, to permit bankruptcy courts to impose sanctions that may be characterized as criminal in nature.

Criminal contempt differs from civil contempt in numerous material respects. The key distinction between civil and criminal contempt is that contemnors are punished by criminal contempt sanctions. Once criminal contempt has been committed, the defendant cannot terminate the sanction by purging herself of the contempt.

Contempt of court is a crime under 18 U.S.C. § 401. Case law establishes at least three elements of the crime: the court must have issued a reasonably specific order; the contemnor must have violated the order; and the contemnor must have acted willfully. Unlike in civil contempt, a criminal contempt conviction will be upheld even if the underlying order is later invalidated. The rationale for this principle is that criminal contempt vindicates the authority of the court.

---

[5]It is unsettled whether a bankruptcy court qualifies as a "court of the United States" for purposes of imposing § 1927 sanctions.

[6]The leading cases on each side of this controversy are In re Ragar, 3 F.3d 1174 (8th Cir. 1993)(held attorney who represented a chapter 13 debtor after disqualification to be in criminal contempt) and In re Hipp, Inc., 895 F.2d 1503 (5th Cir. 1990)(held that bankruptcy court lacked jurisdiction to hold creditor in criminal contempt for violating injunction against filing motions).

A final key difference between civil and criminal contempt is that criminal contempt requires the same "beyond a reasonable doubt" standard of proof that is required for any other criminal conviction.

Although some courts and commentators have cast doubt on the power of a bankruptcy court to venture into the arena of criminal contempt, the Bankruptcy Rules clearly contemplate that bankruptcy judges will exercise criminal contempt powers. The notice requirement in Fed. R. Bankr. P. 9020(b) expressly requires that the alleged contemnor be informed in writing of whether the contempt charged is criminal or civil.

Those convicted of criminal contempt are sentenced under Sentencing Guideline § 2J1.1. Under that Guideline, the court is directed to apply whichever Guideline applies to an analogous crime. This means, for example, that a judge may look to Sentencing Guidelines covering such matters as obstruction of justice or fraud depending upon the nature of the acts committed.

No authority supports the power of a bankruptcy judge to impose a criminal sentence of incarceration. In the case of In re Finney,[7] the bankruptcy court conducted the criminal contempt trial, found the defendant to be in criminal contempt, and then referred the matter to the district court for sentencing. Under Fed. R. Bankr. P. 9020(c), the defendant also had 10 days within which to file exceptions before the bankruptcy court judgment was final. This procedure has been followed in at least one other case.[8]

Many special issues are presented by criminal contempt proceedings. The defendant may be entitled to a jury trial, which can only be held in district court. It is generally accepted that a defendant has a right to a jury trial before a conviction for any crime other than a petty offense (i.e., a crime carrying a penalty of six months or less). In addition, the defendant may be entitled to court-appointed counsel.

---

[7]167 B.R. 820 (E.D. Va. 1994).

[8]In re Darenda Downing, 195 B.R. 870 (Bankr. D. Md. 1996)(after conviction and sentencing, and while the case was on appeal, the defendant was indicted for criminal contempt and for other crimes).

Moreover, because a defendant is protected against double jeopardy, the courts and prosecutors should narrowly tailor the contempt charge so that it is not used to defeat a later indictment on other related charges. The double jeopardy problem might be more likely to arise for the unwary who convince a judge to impose a civil sanction that is later found to be a punishment. In In re Power Recovery Systems, Inc., the United States Court of Appeals for the First Circuit stated expressly that a higher court is not bound by a bankruptcy court's label on its own judgment. 950 F.2d 798, 802 (1st Cir. 1991).

There are effective alternatives to seeking criminal contempt sanctions in bankruptcy court. For example, the government could ask the bankruptcy court to conduct an evidentiary hearing and to certify its findings to the district court for de novo consideration. In addition, the wrongdoer can be separately indicted for his contumacious acts.

United States Trustee (UST) attorneys are instructed to consult with the United States Attorney's office before initiating or even participating in any criminal contempt proceedings. Furthermore, in light of the minefield of special issues that attach to any contempt action, UST attorneys are well advised to consult with their United States Attorney counterparts about civil contempt actions and potential sanctions as well.

Conclusion

Debtors ranging from large financial services companies to consumers who have reached the end of their financial ropes walk through the doors of bankruptcy courts each day. With a full plate of issues before them on matters as diverse as tax liability and curing arrearages on home mortgages, bankruptcy judges play a crucial role in both the commercial and consumer realms of our economy. Given these broad responsibilities, bankruptcy courts should fully exercise their powers as federal courts.

United States Attorneys, United States Trustees, and other prominent litigants in the federal bankruptcy system should ask bankruptcy courts in appropriate instances to utilize the power of contempt to effect the purposes of the Bankruptcy Code and to do justice. Federal government

lawyers, in particular, have a responsibility to assist the court in bringing and prosecuting contempt actions. As just described, the use of the contempt powers can inure to the benefit of the courts, as well as of the vast majority of diligent and honest litigants who rely upon the bankruptcy court to provide a “fresh start” for debtors and an efficient means for repaying creditors.