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In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Brunswick Division

In the matter of: )  
)  
) Adversary Proceeding  
LESTER HARRIS, JR., )  
(Chapter 13 No. 97-21358) ) Number 98-2008  
)  
*Debtor* )  
)  
)  
LESTER HARRIS, JR. )  
)  
*Plaintiff* )  
)  
v. )  
)  
)  
DEPARTMENT OF HUMAN )  
RESOURCES, )  
FAMILY SUPPORT DIVISION )  
)  
*Defendant* )

**PROPOSED FINDINGS AND RECOMMENDATION**  
**FOR WITHDRAWAL OF REFERENCE**

Before the Court is Plaintiff Lester Harris's complaint to determine the dischargeability of his debt to the State of Georgia pursuant to Section 523(a)(5) of Title 11 of the United States Code. The parties have agreed to resolution of the matter on brief without oral argument, and the issue was submitted to this Court on July 15, 1998. This Court has jurisdiction in this adversary proceeding by virtue of 28 U.S.C. § 1334(b). Determinations of dischargeability are core proceedings under 28 U.S.C. § 157(b)(2)(I).

In its answer and brief, DHR asserts that this Court lacks jurisdiction to hear this adversary because the complaint is barred by the Eleventh Amendment to the United States Constitution. A clear consensus has not emerged as to whether a bankruptcy court can even address the constitutionality of an act of Congress. Some courts have done so without discussion of this threshold issue, In re Lazar, 200 B.R. 358 (Bankr. C.D.Cal. 1996), while others have noted that while a bankruptcy court may uphold an act of Congress, it must refer the case to the district court if it finds there to be a “valid constitutional challenge.” In re Headrick, 203 B.R. 805 (Bankr. S.D.Ga. 1996) (Dalis, J.) (court does not automatically lose jurisdiction when confronted with constitutional challenge), *aff’d on other grounds*, In re Burke, 146 F.3d 1313 (11<sup>th</sup> Cir. 1998); In re Burke, 200 B.R. 282 (Bankr. S.D.Ga. 1996) (bankruptcy court cannot determine constitutionality of statute under *Northern Pipeline*), *aff’d on other grounds*, 146 F.3d 1313 (11<sup>th</sup> Cir. 1998).

In light of Headrick, because of the conclusion reached herein as to the constitutionality of 11 U.S.C. § 106 as applied to the facts of this case, I hereby submit Proposed Findings of Fact and Conclusions of Law to the United States District Court for the Southern District of Georgia.

#### PROPOSED FINDINGS OF FACT

The parties have stipulated the material facts as follows. On several

occasions, from December 1986 to August 1997, Lester Harris entered into a consent order or was ordered by the Glynn County Superior Court to pay support to the Defendant, the Department of Human Resources (“DHR”). (Doc. 11, Ex. A-G). Pursuant to these Orders, Mr. Harris owes \$15,405.38 to the custodial parents of his children. Further, Mr. Harris owes \$23,104.66 to DHR by virtue of an assignment to DHR by the custodial parents pursuant to the Social Security Act and O.C.G.A. § 19-11-6.

Debtor filed a petition for relief under Chapter 13 on October 22, 1997. He filed this adversary on April 10, 1998, alleging that the debts owed to DHR are dischargeable under Section 523(a)(5). DHR has not filed a claim in the bankruptcy case, although Debtor scheduled DHR in his petition.

#### PROPOSED CONCLUSIONS OF LAW

The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. The states thus enjoy immunity from suit in federal courts, with the apparent sole exception being actions brought for the enforcement of Fourteenth Amendment rights. Seminole Tribe v. Florida, 517 U.S. 44, 59, 116 S.Ct. 1114, 1125, 134

L.Ed.2d 252 (1996) (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 452-456, 96 S.Ct. 2666, 2669-71, 49 L.Ed.2d 614 (1976)). Although the language of the Eleventh Amendment appears to restrict only diversity jurisdiction under Article III, the Supreme Court has interpreted the Amendment to restrict the jurisdiction of federal courts to hear suits by private citizens against a state that has not consented to the suit. See Hans v. Louisiana, 134 U.S. 1, 15, 10 S.Ct. 504, 507, 33 L.Ed. 842 (1890).

1. IS THIS A “SUIT” WITHIN THE MEANING OF THE ELEVENTH AMENDMENT?

The first threshold to be crossed, therefore, is to determine whether the action before this Court lies in the nature of “suit” so as to implicate the Eleventh Amendment at all. As a general rule, a suit lies against the state if “the judgment would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or compel it to act.” Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102 n.11, 104 S.Ct. 900, 908 n.11, 79 L.Ed.2d 67 (1984) (citations omitted).

Taking this general rule and applying it to the context of bankruptcy and estate administration, I hold that a complaint filed by a debtor against a state for a determination of dischargeability is a “suit” within the meaning of the Eleventh Amendment. In the instant case, Debtor is seeking a declaratory judgment that his child support debt is a dischargeable obligation. Such a determination requires this Court to “exercise fully its core jurisdiction” under 28 U.S.C. § 157(b)(2)(I) to adjudicate

dischargeability under Section 523 of the Bankruptcy Code. See In re Mitchell, 222 B.R. 877, 882 (9<sup>th</sup> Cir. B.A.P. 1998).<sup>1</sup> The fact that the complaint does not seek monetary damages is not a deterrent to Eleventh Amendment immunity. Declaratory relief “could result in an order having *res judicata* effect in a later proceeding to recover damages.” Mitchell, 222 B.R. at 885. See also Seminole Tribe, 517 U.S. at 58 (citing Hess v. Port Authority Trans-Hudson-Corp., 513 U.S. 30, 115 S.Ct. 394, 130 L.Ed.2d 245 (1990) and Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993)).

I therefore hold that this action is a suit against the State within the meaning of the Eleventh Amendment.

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<sup>1</sup> The court also noted that to find complaints to determine dischargeability *not* to be suits would render Section 106(a) superfluous. In re Mitchell, 222 B.R. 877, 883 (9<sup>th</sup> Cir. B.A.P. 1998). That section lists the specific code sections to which Congress intended to abrogate state immunity. Determinations of nondischargeability, under Section 523, are specifically listed in Section 106. Whether or not Section 106 is a constitutional abrogation of immunity, the fact that Congress specifically listed determinations of dischargeability “supports a determination that Congress understood that such proceedings are ‘suits’ subject to the Eleventh Amendment.” Id.

## II. HAS CONGRESS VALIDLY ABROGATED THE STATE'S IMMUNITY PURSUANT TO THE ELEVENTH AMENDMENT?

In this case, the State filed no proof of claim and has not waived its sovereign immunity.<sup>2</sup> The final question then is whether Congress validly abrogated the State's immunity in 11 U.S.C. § 106 so as to permit this action to proceed. Absent consent by the State, Congress may abrogate Eleventh Amendment immunity only if its intent to do so is unequivocally expressed and if the abrogation is pursuant to a valid exercise of Congressional power. Green v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 425, 88 L.Ed.2d 371 (1985), *reh'g denied*, 474 U.S. 1111, 106 S.Ct. 900, 88 L.Ed.2d 933 (1986). Congressional intent to abrogate states' immunity in the Bankruptcy Code is hardly debatable:

Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit<sup>3</sup> to the extent set forth in this section.

11 U.S.C. § 106(a). The remaining issue, whether the abrogation is pursuant to a valid

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<sup>2</sup> In this circuit, at least, a state waives its Eleventh Amendment immunity when it files proofs of claim in a debtor's bankruptcy case. In re Burke, 146 F.3d 1313 (11<sup>th</sup> Cir. 1998). Thus a state could not assert immunity once it has filed a claim, and the debtor would be free to pursue an adversary proceeding to determine dischargeability.

<sup>3</sup> "Governmental unit" is defined in 11 U.S.C. § 101(27) as "a State; . . . [or] department, agency, or instrumentality of . . . a State."

exercise of Congressional authority, remains unanswered in this circuit.<sup>4</sup>

The majority of courts to face this issue have found that Section 106(a), as applied to state governments, is an unconstitutional abrogation of Eleventh Amendment immunity. See In re Creative Goldsmiths, Inc., 119 F.3d 1140 (4<sup>th</sup> Cir. 1997), *cert. denied sub nom.*, Schlossberg v. Maryland Comptroller of Treasury, \_\_ U.S. \_\_, 118 S.Ct. 1517, 140 L.Ed.2d 670 (1998); In re Estate of Fernandez, 123 F.3d 241 (5<sup>th</sup> Cir. 1997); In re Sacred Heart Hosp. of Norristown, 133 F.3d 237, 243 (3rd Cir. 1998); In re Elias, 218 B.R. 80, 84 (9<sup>th</sup> Cir. B.A.P. 1998). The fact that an adversary proceeding lies in this Court's core jurisdiction has no bearing on the application of Eleventh Amendment immunity.

[W]e reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.

Seminole Tribe, 517 U.S. 44, 72-73, 116 S.Ct. 1114, 1131-32. In Seminole Tribe, the

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<sup>4</sup> The Eleventh Circuit stated in Burke that it “need not resolve this abrogation issue because assuming arguendo that the State of Georgia has Eleventh Amendment immunity and it has not been validly abrogated by § 106(a), we conclude that in this case the State waived its sovereign immunity.” 146 F.3d at 1317. In the case at bar, however, waiver is not at issue and the debtor's position must rise or fall on the validity of Section 106 abrogation. Debtor apparently missed this crux of the case, however, as its only defense to the Eleventh Amendment argument is that the State is trying to “opt out of ‘Federalism.’” Debtor's only argument pertaining to this “opt-out” is that Georgia “tried this in 1861 with disastrous consequences.” Historical anecdotes aside, this Court finds the federalism concerns present within the Eleventh Amendment important enough to address on the merits.

Supreme Court addressed the abrogation of immunity by Congress in the Indian Gaming Regulatory Act (IGRA). The IGRA was passed by Congress pursuant to the Indian Commerce Clause. *Id.* at 59. Reasoning that “Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction,” the Court affirmed the Eleventh Circuit in dismissing the petitioner’s suit against the State of Florida. *Id.* at 73.

Like the Indian Commerce Clause, the Bankruptcy Clause empowers Congress with exclusive control in an arena of law. Both clauses are found in the Constitution in Article I, Section 8.<sup>5</sup> To reason that one clause of Section 8 grants Congress authority to abrogate immunity while other clauses do not is insupportable. The Supreme Court not only found that the Indian Commerce Clause grants no such power, it also overruled a prior decision which found such a grant in the Interstate Commerce Clause. *See Seminole Tribe*, 517 U.S. at 66, 114 S.Ct. at 1128 (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989)). Moreover, the Court subsequently remanded a decision of the Seventh Circuit in which the lower court found a constitutional abrogation through the Bankruptcy Clause. *See Ohio Agricultural Commodity Depositors Fund, et Attorney at Law. v. Mahern*, 517 U.S. 1130, 116 S.Ct. 1411, 134 L.Ed.2d 537 (1996) (vacating circuit court opinion and remanding “for further consideration in light of” *Seminole Tribe*).

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<sup>5</sup> “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes; . . . To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies througho ut the United States.”

The only alternative avenue for upholding Section 106 would be to find that the abrogation is authorized by and enacted pursuant to the Fourteenth Amendment. Indeed, this was the approach taken in Burke at the trial court level. In re Burke, 203 B.R. 493, 497 (Bankr. S.D.Ga. 1996) (Dalis, J.); *see also* In re Headrick, 200 B.R. 963, 965-99 (Bankr. S.D.Ga. 1996) (Dalis, J.) I might be inclined to follow that rationale but for the subsequent rejection of that theory by three circuit courts and a bankruptcy appellate panel. *See* Creative Goldsmiths, 119 F.3d at 1146; Fernandez, 123 F.3d at 244; Sacred Heart, 133 F.3d at 244; Mitchell, 222 B.R. at 881-882.

#### RECOMMENDATION

In light of these holdings, I recommend that the United States District Court for the Southern District of Georgia withdraw the reference of this adversary proceeding and hold that Section 106 abrogation of sovereign immunity, while unequivocal, was not enacted pursuant to valid constitutional authority and therefore is unconstitutional. Because this action is a suit against Georgia within the meaning of the Eleventh Amendment, because Georgia has not consented to being sued nor waived its sovereign immunity, this case cannot proceed in light of the Eleventh Amendment. The adversary proceeding should therefore be dismissed.

The determination of dischargeability of a specific debt owed the State is targeted directly at the State's rights and remedies rather than at the Debtor's creditors in

general.<sup>6</sup> Such a determination requires that a separate adversary proceeding be filed, served and answered. The adversary proceeding is handled procedurally exactly like any other civil law suit in federal court, and offends the Eleventh Amendment absent consent or waiver.

### ORDER

In consideration of the foregoing, the Clerk is hereby directed to transmit these proposed Findings of Fact and Conclusions of Law to the United States District Court for the Southern District of Georgia for further consideration.

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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_\_ day of September, 1998.

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<sup>6</sup> These proposed conclusions of law should be read narrowly and not as a blanket holding that the Bankruptcy Code can never protect debtors where a state is concerned. State immunity may not extend to all aspects of bankruptcy jurisdiction. For example, entry of an order of discharge or an order confirming a reorganization plan may very well bind even non-consenting states. The bankruptcy court may have jurisdiction to enter a discharge on debts owed to the state, but only so that the discharge may be raised in a state forum. Texas v. Walker, 142 F.3d 813, 820 (5th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3156 (U.S. Aug. 26, 1998) (No. 98-348). “[T]he granting of a bankruptcy discharge does not offend the Eleventh Amendment – although commencement of certain adversary proceedings directly against a state that has not filed a proof of claim in a bankruptcy case would do so.” Id.