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

In the matter of:	)	
	)	Adversary Proceeding
JAMIE L. FRAZIER, SR.	)	
(Chapter 13 Case Number 02-41136)	)	Number 02-4133
	)	
Debtor	)	
	)	
	)	
JAMIE L. FRAZIER, SR.	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
STATE OF GEORGIA	)	
	)	
Defendant	)	

FILED
at 09 O'clock & 00 min A M
Date 12 JUNE 2003
MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia

MEMORANDUM AND ORDER

Jamie L. Frazier, Sr. ("Debtor") filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code on April 10, 2002. This case comes before the Court upon the State of Georgia's ("State") Motion for Summary Judgment that was filed in response to Debtor's Adversary Complaint that was filed on October 7, 2002. In his complaint, Debtor is seeking a Declaratory Judgment ordering the State to reinstate his license to operate a motor vehicle ("license") that was suspended on March 27, 2000.

This Court has jurisdiction pursuant to 28 U.S.C. §157 (a) and (b)(1) over this core proceeding.

DISCUSSION

The facts are not in dispute. On May 31, 1996, the Superior Court of Chatham County entered an order imposing child support obligations on Debtor. On November 4, 1998, Debtor was notified pursuant to Georgia Code §19-11-9.3(f) that if he did not comply with the terms of his child support order his license would be suspended. Debtor did not satisfy the outstanding child support obligation, reach an agreement to pay the delinquent child support or request an administrative hearing within 20 days of receiving said notice as is his right. Thus, Debtor's license was suspended by the Department of Public Safety at the request of the Office of Child Support Enforcement ("OCSE") pursuant to O.C.G.A §19-11-9.3(g) on November 30, 1998. Thereafter, the Savannah Police Department provided Debtor with notice that his license had been suspended.

During January of 2000, Debtor agreed to the terms of a Repayment Agreement for License Denial/Suspension ("Repayment Agreement"). Because of such agreement, Debtor's license was reinstated at the request of OCSE on January 29, 2000. Debtor did not make any of the payments contemplated under the terms of the Repayment Agreement; therefore, Debtor's driver's license was again suspended on March 27, 2000 at

the request of OCSE pursuant to the terms of the Repayment Agreement. Debtor's license has not since been reinstated.

Debtor filed his case seeking relief under Chapter 13 on April 10, 2002. Debtor properly listed OCSE as an unsecured priority creditor. Debtor had no other creditors at the time he filed bankruptcy. Since Debtor's filing, OCSE has not taken any affirmative action to collect on Plaintiff's outstanding child support obligations other than filing proof of claims in the amount of $14,503.62 and $101.

Debtor filed this Adversary Complaint against the State seeking a Declaratory Judgment that would order the State to reinstate his license. Debtor argues that §362 stays the suspension of his license because it prohibits the continuation of administrative or judicial actions to collect from a debtor.

The State argues that there exists no genuine issue of material fact and that Debtor's complaint failed to state a claim upon which relief can be granted. First, the State argues that Debtor's complaint is barred by the Eleventh Amendment to the Constitution and the State's sovereign immunity. Second, the State contends that the actions required to suspend Debtor's license were completed before the filing of Debtor's bankruptcy petition; therefore, there was no proceeding instituted by the State that could be stayed by the filing

of Debtor's bankruptcy petition.

CONCLUSIONS

Summary Judgment Standard

Federal Rule of Civil Procedure 56, made applicable to bankruptcy practice pursuant to Federal Rule of Bankruptcy Procedure 7056, governs a summary judgment motion. Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties indicate that there is no genuine issue of material fact and show that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing no such issues exist. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once the moving party has met its burden, the burden then shifts to the nonmoving party to produce evidence that shows a genuine issue of material fact exists on issues as to which the nonmovant bears the burden of proof at trial. *See* Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997). Fed. R. Civ. P. 56(e) provides that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Finally, in analyzing a motion for summary judgment, the Court must view all the evidence and factual inferences drawn therefrom in the light most favorable to the nonmoving party. *See* Allen, 121 F.3d at 646.

The State's Sovereign Immunity has Been Abrogated

The Eleventh Amendment to the Constitution provides that, "[t]he 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. It codifies, to a limited extent,[1] the principle of sovereign immunity that private suits against states may only proceed if the state waives its immunity or if Congress, acting pursuant to a valid constitutional authority, abrogates such immunity.

As a threshold matter, it must be determined whether Debtor's action is in the nature of a "suit" so as to implicate the Eleventh Amendment. The test for determining whether an action is a suit is whether, "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the

[1]A literal reading of the text of the Eleventh Amendment would appear to only restrict the diversity jurisdiction of federal courts; however, Courts have, "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 775, 779, 111 S.Ct. 2578,2581, 115 L.Ed.2d 686 (1991). Thus, "the Court has upheld States' assertions of sovereign immunity in various contexts outside the literal text of the Eleventh Amendment." Alden v. Maine, 527 U.S. 706, 727, 119 S.Ct. 2240, 2254, 144 L.Ed.2d 636 (1999).

judgment would be to restrain the Government from acting, or to compel it to act." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102 n.11, 104 S.Ct. 900, 909, 79 L.Ed.2d 67 (1984) (*citations omitted*). The fact that Debtor is not seeking monetary damages does not preclude the State from asserting sovereign immunity. Here, Debtor seeks to compel action by the State and any sort of declaratory relief, "could result in an order having *res judicata* effect in a later proceeding to recover damages." Mitchell v. Franchise Tax Bd. (In re Mitchell), 209 F.3d 1111, 1121 (9th Cir. 2000) *abrogation on other grounds recognized by* Hibbs v. Dep't of Human Res., 273 F.3d 844 (9th Cir. 2001) (holding debtors' complaint for determination of dischargeability constituted a suit for purposes of the Eleventh Amendment); *see also* Halderman, 465 U.S. at 101-02, 104 S.Ct. at 908-9 ("when the State itself is named as the defendant, a suit . . . against a State is barred regardless of whether it seeks damages or injunctive relief"). Accordingly, this is a suit against the State and sovereign immunity can be invoked unless it has been validly abrogated.

Congress abrogated the sovereign immunity of states in certain bankruptcy situations pursuant to 11 U.S.C. §106. It states that in relevant part:

> Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections . . . 362 [and] 525 . . . of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

11 U.S.C.A. §106(a)

In order to abrogate a state's sovereign immunity, Congress must: (1) make an unequivocal statement of intent to abrogate sovereign immunity, and (2) act pursuant to a valid exercise of power. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55, 116 S.Ct. 1114, 1123, 134 L.Ed.2d 252 (1996) (*quoting* Green v. Mansour, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985)). Section 106 is unequivocal in its intent to abrogate immunity. Thus, I must determine whether Congress was acting pursuant to a valid exercise of power when it enacted §106.[2]

[2]Other Courts in this district have argued that §106 was enacted by a valid exercise of power under the Fourteenth Amendment. *See* Headrick v. Georgia (In re Headrick), 203 B.R. 805 (Bankr. S.D. Ga. 1996)(Dalis, J.), *aff'd on other grounds sub nom.*, In re Burke, 146 F.3d 1313 (11th Cir. 1998); Burke v. Georgia (In re Burke),203 B.R. 493 (Bankr. S.D. Ga. 1996) (Dalis, J.), *aff'd on other grounds,* 146 F.3d 1313 (11th Cir. 1998). I do not address this issue as I find that a state's sovereign immunity was first abrogated when the states ratified the Bankruptcy Clause of Article I. U.S.C.A. Const. Art. I, §8, cl.4.

In Seminole Tribe, 517 U.S. at 72-3, 116 S.Ct. at 1131-32, the Supreme Court stated:

> 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. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

Seminole Tribe precluded Congress from abrogating a state's sovereign immunity by means of a statue enacted pursuant to the Indian Commerce Clause of Article I. While the majority opinion in Seminole Tribe only discussed bankruptcy in a footnote while responding to Justice Stevens' dissent[3], many courts, including this one[4], have interpreted the decision to render 11 U.S.C. §106(a) unconstitutional such that states can assert sovereign immunity when confronted with a suit in Bankruptcy Court. *See, e.g.,* Monseratt v. Fla. Dept. of Educ. (In re Monseratt), 289 B.R. 183, 188 (Bankr. M.D. Fla. 2002); Jordon v. Norfolk

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[3]In his dissent, Justice Stevens stated that, "[t]he majority's opinion does not simply preclude Congress from establishing the rather curious statutory scheme under which Indian tribes may seek the aid of a federal court to secure a State's good-faith negotiations over gaming regulations. Rather, it prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy." Seminole Tribe, 517 U.S. at 77, 116 S.Ct. at 1134.

[4]In Harris v. Department of Human Resources (In re Harris), 1998 WL 34064509, *3 (Bankr. S.D. Ga. 1998) I recommended that the District Court for the Southern District of Georgia find §106 unconstitutional. In an unreported order dated October 9, 1998, the District Court adopted my findings and recommendations. (Alaimo, J.). Having analyzed the arguments adopted by the Court of Appeals for the Sixth Circuit, Hood v. Tennessee Student Assistance Corp. (In re Hood), 319 F.3d 755 (6th Cir. 2003) *petition for cert. filed,* 71 U.S.L.W. 3724 (May 2, 2003)(No.02-1606), I have chosen to reverse my prior decision.

State Univ. (In re Jordon), 275 B.R. 755, 761 (Bankr. W.D. Virg. 2002); Askey v. Pennsylvania (In re Askey), 261 B.R. 160, 163 (Bankr. W.D. Pa. 2001) *aff'd*, 52 Fed.Appx. 593 (3rd Cir. 2002) (unpublished) *cert. denied*, 123 S.Ct. 1934 (2003).

The Bankruptcy Appellate Panel of the Sixth Circuit has stated that while the Seminole Tribe decision, "establishes the analytical framework to be applied . . . , its dicta about the application of that framework in the bankruptcy context is entitled to little weight." Hood v. Tennessee Student Assistance Corp. (In re Hood), 262 B.R. 412, 425 (6th Cir. B.A.P. 2001), *aff'd*, 319 F.3d 755 (6th Cir. 2003) *petition for cert. filed*, 71 U.S.L.W. 3724 (May 2, 2003) (No. 02-1606). Further, it is not incumbent upon courts to follow such dicta. *See* Colgrove v. Battin, 413 U.S. 149, 158, 93 S.Ct. 2448, 2453, 37 L.Ed.2d 522 (1973) ("We cannot, therefore, accord the unsupported dicta of these earlier decisions the authority of decided precedents."). Based on a historical analysis of the intent of the Framers of the Constitution and the need for uniformity in the area of bankruptcy at the time, the Sixth Circuit upheld the Bankruptcy Appellate Panel in Hood and found that, "[t]he state's immunity was thus 'altered by the plan of the Convention.'" Hood, 319 F.3d at 767. I find the reasoning of the Sixth Circuit in Hood persuasive.

The Bankruptcy Clause grants Congress the power, "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const.

Art. I, §8, cl.4. "The peculiar terms of the grant certainly deserve notice." Hood, 319 F.3d at 763. Indeed, the need for uniformity in the area of bankruptcy law makes the clause distinguishable from other Article I powers. It is for this reason that the Seminole Tribe doctrine is not controlling in bankruptcy despite the continued expansion of Eleventh Amendment immunity.[5]

The Circuit Courts that have found §106 unconstitutional have relied on broad dicta in Seminole Tribe while summarily rejecting the argument that the uniformity requirement in the Bankruptcy Clause compels a different conclusion. *See* Nelson v. La Crosse County Dist. Atty., (In re Nelson), 301 F.3d 820, 832 (7th Cir. 2002); Mitchell 209 F.3d at 1121; Sacred Heart Hosp. of Norristown v. Pennsylvania (In re Sacred Heart Hosp. of Norristown), 133 F.3d 237, 243 (3rd Cir.1998); Department of Transp. & Dev. v. PNL Asset Mgmt. Co. LLC (In re Fernandez), 123 F.3d 241, 243 (5th Cir. 1997), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997); Schlossberg v. Maryland (In re Creative Goldsmiths Of Washington, D.C.), 119 F.3d 1140, 1145-46 (4th Cir. 1997).

[5] In Alden v. Maine, 527 U.S. 706, 119 S.Ct. 2240, 144 L.E.2d 636 (1999), the Court held that, in a Fair Labor Standards Act suit, Congress has no power to make states amendable to private suits for violation of federal law even in it's own state's court. In a patent infringement suit, Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank ("College Savings Bank I"), 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999), held that the 14th Amendment authorization for "appropriate legislation" to protect against deprivation of property does not authorize congress to abrogate state sovereign immunity. Finally, in College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board ("College Savings Bank II"), 527 U.S. 666, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999), the Court held that a state does not constructively waive its 11th Amendment immunity by voluntarily engaging in nongovernmental function that is subject to federal regulation in a Lanham Act suit for false advertising.

In the seminal work *The Federalist No. 81,*[6] Alexander Hamilton asserted that states could not be sued unless they had waived their immunity "in the plan of the convention" and that, "[t]he circumstances which are necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here." *The Federalist No. 81*, at 422 (Alexander Hamilton). The article on taxation that Hamilton cites to is *The Federalist No. 32. See* Hood, 319 F.3d at 766. In *The Federalist No. 32,* Hamilton discussed three ways that state sovereignty is alienated. He then concluded that the power of Congress over naturalization was an example of the third way in which state sovereignty is ceded to the federal government. According to Hamilton, Article I gives Congress the power "to establish an UNIFORM RULE of naturalization throughout the United States." Hamilton concluded, "[t]his must necessarily be exclusive; because if each state had power to prescribe a DISTINCT RULE there could be no UNIFORM RULE." *The Federalist No. 32*, at 152-53 (emphasis in original).

The fact that the Article 1, §8, clause 4 of the Constitution not only grants Congress the authority to make "uniform" laws on naturalization, but also provides for "uniform" laws on bankruptcy leads me to agree with the statement that, "the States ceded their sovereignty over bankruptcy matters at the Constitutional Convention, just as Hamilton concluded that the States ceded their sovereignty over naturalization matters." Hood, 262

[6]It should be noted that the Supreme Court has often relied on *The Federalist Papers* when resolving Constitutional issues. In fact, the Court in Seminole Tribe relied on Alexander Hamilton's views on sovereign immunity as expressed in *The Federalist No. 81.* 517 U.S. at 69, 116 S.Ct. at 1130.

B.R. at 419. Thus, Congress was acting constitutionally when it enacted §106 and abrogated sovereign immunity in bankruptcy matters.

I am aware of the holding of our District Court by Judge Moore in Florida Dept. of Revenue v. King (In re King), No. CV501-67 (S.D. Ga. February 11, 2002) (remanded case to bankruptcy court after finding that it was a "suit" for sovereign immunity purposes). Judge Moore stated that, despite any intention of the delegates at the Constitutional convention, "the Supreme Court [in Seminole Tribe] declared that the courts will nevertheless apply Eleventh Amendment sovereign immunity in areas where Congress gained exclusive power pursuant to Article I of the Constitution." *Id.*, slip op. at 7. He conceded, however, that the question of whether sovereign immunity had been abrogated is a difficult one and that it was not before the court at that time. *Id.*, slip op. at 11. Indeed, the case was remanded to this Court to consider the abrogation issue.[7] The remand and Judge Walker's order on remand both preceded the Sixth Circuit's ruling in Hood which I find persuasive. Accordingly, I find that Judge Moore's holding in King does not preclude my holding in this case that §106 is constitutional and a valid exercise of Congressional power.

Since I have determined that the State's argument that it is immune from

[7]Judge Walker recognized that the assertion that Seminole Tribe precludes Congress from abrogating state sovereign immunity pursuant to its Article I powers is a "broad statement" and "dicta". King v. Florida Dept. of Revenue (In re King), 280 B.R.767, 774 (Bankr. S.D. Ga. 2002). He held, though, that the Bankruptcy Clause is not a viable means of abrogation. *Id.*

Debtor's suit to have his license reinstated is not founded on a valid constitutional argument, it is incumbent upon this Court to retain jurisdiction and resolve the core proceeding. *See* Headrick v. Georgia (In re Headrick), 203 B.R. 805, 808 n.5 (Bankr. S.D. Ga. 1996) (Dalis, J.) (holding that court does not automatically lose jurisdiction when confronted with constitutional challenge) (*citing* Knox v. Lee, 79 U.S. (12 Wall.) 457, 531, 20 L.Ed. 287 (1870) for proposition that Acts of Congress are presumptively constitutional unless determined otherwise in an Article III court) *aff'd sub nom.*, In re Burke, 146 F.3d 1313 (11th Cir.1998). Even though bankruptcy judges may not be vested with the authority of Article III judges to declare a statute unconstitutional, they are authorized to find it constitutional so as to reach the merits of a case. *Id.* I conclude that it is within the sphere of this Court's jurisdiction to hold that §106 is a valid exercise of Congressional power, and I so hold. The State of Georgia is not immune from suit in this case.

Mere Inaction by the State is not a Violation of the Automatic Stay

The State's refusal to reinstate Debtor's license does not implicate the automatic stay of 11 U.S.C. §362. Section 362(a)(1) provides that the filing of a bankruptcy petition stays the, "commencement or continuation . . . 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." The suspension of Debtor's license was completed

more than two years prior to his filing for bankruptcy and is, therefore, not the continuation of an action.

Performing ministerial acts postpetition where the judgment has been completed pre-petition is not a violation of the automatic stay. *See* Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969, 973-74 (1st Cir.1997) (noting that ministerial acts, even if undertaken in state judicial proceeding subsequent to bankruptcy filing, do not violate automatic stay); In re Watson, 192 B.R. 238 (Bankr. D. Nev. 1996) *aff'd, on appeal of unrelated issue,* 214 B.R. 597 (9th Cir. BAP 1997), *aff'd*, 161 F.3d 593 (9th Cir.1998) (filing of judgment by clerk postpetition is purely administrative act and does not affect validity of divorce decree or violate automatic stay); In re Capgro Leasing Assocs., 169 B.R. 305 (Bankr. E.D. N.Y. 1994)(entry of judgment will constitute ministerial act requiring no violation of automatic stay where judicial function has been completed and clerk has merely to perform rote function of entering judgment on court docket). It is questionable whether continuing to withhold Debtor's license even rises to the level of a ministerial action. Regardless, it is not an affirmative act that violates the automatic stay. *See* In re Moss, 270 B.R. 333 (Bankr. W.D. N.Y. 2001) (neither postpetition continuing existence of debarment from medicare program, nor failure to withdraw it constitutes continuation of administrative proceeding where actions to collect were completed three years prior to bankruptcy filing). Here, all necessary procedures for suspending Debtor's license were completed more than

two years prior to the filing of the bankruptcy petition.

The State's actions are not in violation of the stay as, "any act . . . to exercise control over property of the estate." 11 U.S.C. §362(a)(3). The automatic stay serves to freeze the positions of the debtor and his or her creditors as of the date of the petition in order to maintain the status quo. *See* In re Young, 193 B.R. 620, 623-24 (Bankr. D. Dist.Col. 1996) (creditor found not in violation of stay and allowed to retain car until question of adequate protection resolved); In re Richardson, 135 B.R. 256, 258-59 (Bankr. E.D. Tex. 1992) (to be sanctionable as violation of stay, creditor's exercise of control over property must occur postpetition). Further, I have held that there is, "no automatic turnover duty to a Chapter 13 debtor, because the Chapter 13 debtor's use of property is subject to a prior ruling on adequate protection." Brown v. Joe Addison, Inc. (In re Brown), 210 B.R. 878, 884 (Bankr. S.D. Ga. 1997).

Two primary purposes of the automatic stay are to permit debtor to carry on and rebuild his life while in bankruptcy and to provide protection for the creditors of an insolvent debtor. The State has taken no action that has hindered Debtor's fresh start. Further, there are a variety of State Court remedies provided to Debtor if he believes that his situation is too dire.[8] Also, the withholding of Debtor's license does not impair the rights of

[8] Debtor can seek proof of compliance from OCSE or a State Court. If his appeal is denied, he can proceed to appeal such denial through the State Court system. The Georgia legislature was undoubtedly aware that suspending an individual's license would impair their ability to earn the funds necessary to meet their child support obligation. It is

other creditors. Here, OCSE is the only prepetition creditor. Thus, disallowing Debtor's claim does not contravene the central precepts of the automatic stay.

Most cases addressing whether the Bankruptcy Code authorizes a bankruptcy judge to direct a state to lift a suspension of a debtor's driving license find against reinstatement. *See* In re Kimsey, 263 B.R. 244 (Bankr. E.D. Ark. 2001) (city's refusal to reinstate driver's license, which had been suspended based on traffic violations, did not qualify as violation of automatic stay); In re Whorley, No. 01-60191, slip op. at 6-7 (Bankr. S.D. Ga. July 12, 2001) (Dalis, J.) (debtor's request to have license reinstated prior to confirmation but after payments began denied); In re Raphael, 238 B.R. 69 (Bankr. D. N.J. 1999) (confirmation of Chapter 13 plan providing for payment of traffic fines which formed basis for prepetition suspension of debtor's license to operate motor vehicle did not carry with it the authority to restore debtor's license); In re Burkhardt, 220 B.R. 837 (D. N.J. 1998) (court lacked subject matter jurisdiction to order either municipal court or DMV to reinstate debtor's driving privileges in accord with confirmation and payment under his plan); Geiger v. Pennsylvania (In re Geiger), 143 B.R. 30 (Bankr. E.D. Pa. 1992) *aff'd*, 993 F.2d 224 (3rd Cir. 1993) (automatic stay of code does not excuse debtor from paying fee as precondition to restoration of license). *But see* In re Brown, 244 B.R. 62 (Bankr. D. N.J.

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possible that Debtor finds himself in such a quandary; however, Georgia law gives the Debtor the ability to apply for a restricted driving permit. O.C.G.A. 40-5-54.1(e). If Debtor has found that he can not make the payments required of him by the child support order, it is well within his rights to request an order to modify his payments pursuant to O.C.G.A. 19-6-19.

2000) (antidiscrimination provision of §525 authorizes bankruptcy court to direct municipal court to rescind a driver's license suspension based on failure to pay a fine); In re Duke, 167 B.R. 324 (Bankr. D. R.I. 1994) (automatic stay barred department from enforcing statute providing for suspension of license until judgment from accident satisfied).

Duke emphasized that the statutes involved were, "collection devices provided by the State to assist in the recovery of claims by motor vehicle accident judgment creditors" who were private litigants. 167 B.R. at 325. In the case at bar, the statute in question serves a much more important function. Ensuring that parents are in compliance with a child support order is a legitimately strong interest of the State. Here, unlike in Duke, the actions of the State are more than a collection device and not in violation of the automatic stay. Moreover, "[t]he filing of bankruptcy does not necessarily cure the collateral consequences that were created by the debt, such as restoration of a license that was validly suspended prior to the filing of bankruptcy due to Debtor's pre-petition conduct." Raphael, 238 B.R. at 69.

Even if the State's actions in this instance constitute a continuation of a proceeding or an act to obtain possession, 11 U.S.C. §362(b)(4) creates an exception for, "the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power." To

determine whether an action is excepted from the automatic stay under §362(b)(4), courts have developed two tests to judge the government's action. *See* In re Universal Life Church, Inc., 128 F.3d 1294, 1297 (9th Cir.1997) (IRS's revocation of debtor's tax exempt status not in violation of automatic stay). The first test is the pecuniary purpose test (is the governmental unit pursuing a matter of public safety and welfare rather than a governmental pecuniary interest?). Second, courts apply the public policy test (is the governmental action designed to effectuate public policy rather than to adjudicate private rights?). If the answer to either question is "yes," then the exception from stay applies. Here, the money collected for child support will not inure to the benefit of the State. The government clearly has no pecuniary interest. Further, protecting the welfare of children is undoubtedly a matter of public policy. Thus, the government's action should be excepted from the automatic stay pursuant to §362(b)(4).

The State's Actions are not Discriminatory

11 U.S.C. §525(a)[9] does not provide Debtor relief in this situation either. Section 525 protects debtors from acts of discrimination by governmental units when the discrimination is due "solely" to the fact that the debtor filed a bankruptcy petition. Here,

[9]Section 525(a) provides in pertinent part that:
a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, . . . a person that is or has been a debtor under this title ..., solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

the State has not discriminated against Debtor or unfavorably altered its treatment of Debtor because of his bankruptcy. In fact, the State has ceased any attempts to collect the child support debt since Debtor's filing.

Section 525 codifies the result of Perez v. Cambell, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971). *See* H.R.Rep. No. 595, 95th Cong., 1st Sess. 366-67 (1977); S. Rep. No. 989, 95th Cong.2d Sess. 81 (1978). This case, though, is unlike Perez which involved an Arizona statute providing that a discharge in bankruptcy of an automobile accident tort judgment shall no have no effect on the judgment debtor's obligation to repay the judgment creditor. Despite a discharge of the tort judgment in bankruptcy, a debtor in Arizona would be unable to obtain driving privileges unless he paid such judgment. Because the Arizona statute conflicted with the mandate of the Bankruptcy Code that a discharge in bankruptcy fully discharges all but certain specified judgments, the statute was found unconstitutional.

Importantly, the debts involved in Perez were dischargeable and, in fact, had been discharged. In contrast, the child support involved here is nondischargeable pursuant to 11 U.S.C. 1328(a)(2) and §523(a)(5)(A). The fact that the debt is nondischargeable is a correct basis for denying a Debtor's complaint in this instance. *See* Johnson v. Edinboro State College, 728 F.2d 163, 165 (3rd Cir. 1984) (holding that despite §525 state college could retain transcripts of debtor for nonpayment of educational loans that were not

dischargeable). Thus, §525(a) is inapplicable to this situation.

ORDER

Because the State's actions in withholding Debtor's license are not in violation of the automatic stay, and there exists no genuine issue of material fact it is hereby ORDERED that Summary Judgment is granted to the State.

IT IS SO ORDERED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 11th day of June, 2003.