

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF GEORGIA  
MACON DIVISION

IN RE:	)	CHAPTER 7
	)	CASE NO. 03-51856-JDW
HOWARD ROBERTS,	)	
	)	
DEBTOR.	)	
	)	
HOWARD ROBERTS,	)	ADVERSARY PROCEEDING
	)	NO. 03-5225-JDW
PLAINTIFF,	)	
	)	
VS.	)	
	)	
GEORGIA DEPARTMENT	)	
OF REVENUE,	)	
	)	
DEFENDANT.	)	

BEFORE

JAMES D. WALKER, JR.

UNITED STATES BANKRUPTCY JUDGE

COUNSEL

For Debtor: Kirby R. Moore  
803 Watson Boulevard, Suite 4E  
Warner Robins, Georgia 31093

For Defendant: Thurbert E. Baker  
Daniel M. Formby  
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Lesley White Berggren  
40 Capitol Square, SW  
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## MEMORANDUM OPINION

This matter comes before the Court on Plaintiff Howard Roberts' complaint to determine dischargeability of state income tax liability, which is a core matter within the meaning of 28 U.S.C. § 157(b)(2)(I). Defendant Georgia Department of Revenue filed a motion to dismiss the case on the ground that it is shielded from suit by state sovereign immunity.

During the past several years, the arguments for and against state sovereign immunity in bankruptcy have been thoroughly discussed by courts at all levels, except the Supreme Court, and need not be rehearsed here. In the course of this debate, courts have staked out four different positions, which can be summarized as follows:

First, the position adopted by the majority of circuit courts to consider the issue is that Congress's attempt to abrogate state sovereign immunity through Section 106(a)<sup>1</sup> of the Bankruptcy Code was done through its Article I bankruptcy power<sup>2</sup> and therefore is unconstitutional in light of Seminole Tribe of Florida v. Florida. 517 U.S. 44, 73, 116 S. Ct. 1114, 1132 (1996) ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). See Nelson v. La Crosse County Dist. Atty., 301 F.3d 820, 832 (7th Cir. 2002); Mitchell v. Franchise Tax Bd. (In re Mitchell), 209 F.3d 1111, 1121 (9th Cir. 2000); Sacred Heart Hosp. of Norristown v. Pennsylvania Dep't of Pub.

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<sup>1</sup> "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section . . ." 11 U.S.C.A. § 106(a) (West Supp. 2003)

<sup>2</sup> "The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States[.]" U.S. Const. Art. I, § 8, cl. 4.

Welfare (In re Sacred Heart Hosp. of Norristown), 133 F.3d 237, 243 (3d Cir. 1998); Schlossberg v. Maryland (In re Creative Goldsmiths of Washington, D.C., Inc.), 119 F.3d 1140, 1145 (4th Cir. 1997); Department of Transp. & Dev. v. PNL Asset Mgmt. Co., L.L.C. (In re Estate of Fernandez), 123 F.3d 241, 243 (5th Cir. 1997).

Second, the position adopted by the Sixth Circuit is that by ratifying the Constitution, which authorizes Congress to pass uniform bankruptcy laws, the States granted Congress the power to abrogate their sovereign immunity in bankruptcy. Thus, Section 106(a) is an effective and constitutional abrogation of that immunity. Hood v. Tennessee Student Assistance Corp., 319 F.3d 755, 767 (6th Cir. 2003), petition for cert. filed, 71 U.S.L.W. 3724 (U.S. May 2, 2003) (No. 02-1606); see also Frazier v. Georgia (In re Frazier), No. 02-41136, Adv. Proc. No. 02-4133, slip op. at 11-12 (Bankr. S.D. Ga. June 11, 2003) (Davis, J.), reconsideration denied by order of August 1, 2003.

Third, the position adopted by a small minority is that Congress passed Section 106(a) through its power to enforce the Privileges and Immunities clause of the Fourteenth Amendment,<sup>3</sup> rather than its Article I bankruptcy power. As a result, the abrogation is valid. See Wilson v. South Carolina State Educ. Assistance Auth., 258 B.R. 303, 307-09 (Bankr. S.D. Ga. 2001) (Dalis, C.J.).

Fourth, a position also adopted by a small minority is that by ratifying the Constitution, the States surrendered their sovereign immunity with respect to bankruptcy.

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<sup>3</sup> “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .” U.S. Const. amend. XIV, § 1. “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” Id. § 5.

Because they have no sovereign immunity, Congress's attempt to abrogate it via Section 106(a) need not be considered. States cannot raise the sovereign immunity argument in bankruptcy because they have no such immunity. Bliemeister v. Industrial Comm'n of Ariz. (In re Bliemeister), 251 B.R. 383, 389-92 (Bankr. D. Ariz. 2000), aff'd on other grounds sub nom. Arizona v. Bliemeister (In re Bliemeister), 296 F.3d 858 (9th Cir. 2002).

In a Southern District case, I supported the fourth position in dicta. King v. Florida Dep't of Revenue (In re King), 280 B.R. 767, 770-73 (Bankr. S.D. Ga. 2002). I now adopt that position as the holding in this case. Thus, for the reasons fully explained in King, I conclude that Georgia does not have sovereign immunity in this bankruptcy case. As a result, its motion to dismiss must be denied.

An Order in accordance with this Opinion will be entered on this date.

Dated this 15th day of September, 2003.

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James D. Walker, Jr.  
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

I, Cheryl L. Spilman, certify that the attached and foregoing have been served on the following:

Kirby R. Moore  
803 Watson Boulevard, Suite 4E  
Warner Robins, Georgia 31093

Lesley White Berggren  
John B. Ballard, Jr.  
40 Capitol Square, SW  
Atlanta, Georgia 30334-1300

J. Coleman Tidwell  
Post Office Box 1796  
Macon, Georgia 31202

This \_\_\_\_\_ day of September, 2003.

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Cheryl L. Spilman  
Deputy Clerk  
United States Bankruptcy Court

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GEORGIA DEPARTMENT	)	
OF REVENUE,	)	
	)	
DEFENDANT.	)	

**ORDER**

In accordance with the Memorandum Opinion entered on this date, Defendant Georgia Department of Revenue's motion to dismiss is hereby DENIED.

So ORDERED, this 15<sup>th</sup> day of September, 2003.

\_\_\_\_\_  
James D. Walker, Jr.  
United States Bankruptcy Judge

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