

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF SOUTH DAKOTA**

**ROOM 211**

**FEDERAL BUILDING AND U.S. POST OFFICE**

**225 SOUTH PIERRE STREET**

**PIERRE, SOUTH DAKOTA 57501-2463**

**IRVIN N. HOYT**  
**BANKRUPTCY JUDGE**

**TELEPHONE (605) 224-0560**

**FAX (605) 224-9020**

October 26, 1995

James A. Hertz, Esq.  
Counsel for Plaintiff  
509 South Dakota Avenue  
Sioux Falls, South Dakota 57102

Dan Kelley, Esq.  
Counsel for Defendants  
428 Mt. Rushmore Road  
Custer, South Dakota 57730

Subject: **Hardy v. Blake (In re Warren A. and  
Patricia K. Blake),**  
Adversary No. 95-5009;  
Chapter 7; Bankr. No. 95-50058

Dear Counsel;

The matter before the Court is whether res judicata is applicable in the above-named dischargeability action based on the state court judgment entered February 23, 1995 and the state court's related findings and conclusions. Plaintiff argues that res judicata does not apply because the automatic stay was imposed before the time for appealing the state court judgment expired.

This is a core matter under 28 U.S.C. § 157(b) (2). This letter memorandum of decision and accompanying order shall constitute the Court's interlocutory findings and conclusions under F.R.Bank.P. 7052. As discussed below, the Court finds that res judicata does not apply at this time.

Plaintiff is correct that a judgment must be final before res judicata applies. See *Abbott Bank v. Armstrong*, 44 F.3d 665, 666(8th Cir. 1995). Here, the automatic stay imposed when Debtors filed their petition intervened during that appeal period. But for the stay, the parties to the state court action could appeal the state court decision. Therefore, the state court judgment is not final and this Court cannot yet rely on it when determining whether the claim held by Plaintiff is dischargeable.

The Court's conclusion that res judicata does not yet apply, however, does not mean that the Court will re-litigate the matter. To do so would waste judicial resources and ignore the near finality of the state court action. Instead, this Court must

consider whether it should abstain from further proceedings in  
October 26, 1995  
Adv. No 95-50058  
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this adversary until the state court judgment is final, as provided  
by 11 U.S.C. § 305(a)

Based on the record to date, the Court concludes that  
abstention under § 305(a) and relief from stay under § 362(d) would  
be in the best interest of both parties. The parties could then  
complete their litigation in state court. This Court could then  
address the dischargeability complaint

An appropriate order will be entered. The Court also will  
schedule a telephonic hearing on abstention under 11 U.S.C. §  
305(a) and set a deadline for each party to file comments on the  
abstention issue.

The original of this letter will be docketed. Counsel for  
each party shall receive a copy.

Sincerely,

Irvin N. Hoyt  
Chief Bankruptcy Judge

INH:sh

CC: Bankruptcy Clerk  
Trustee Dennis C. Whetzal

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
Western Division

In re: ) Bankr. No. 95-50058  
)  
WARREN ARTHUR BLAKE ) Adversary No. 95-5009  
PATRICIA K. BLAKE )  
) Chapter 7  
Debtors. )  
)  
GENERAL LEE HARDY )  
) ORDER DETERMINING RES JUDICATA  
Plaintiff, ) ISSUE, SETTING DEADLINE FOR  
vs. ) PARTIES TO COMMENT ON  
) ABSTENTION ISSUE, AND  
WARREN ARTHUR BLAKE ) SETTING HEARING ON  
PATRICIA K. BLAKE, ) ABSTENTION ISSUE  
)  
Defendants. )

In compliance with and recognition of the letter memorandum of decision entered this day,

IT IS HEREBY CONCLUDED that the state court judgment entered February 23, 1995 is not yet res judicata on matters raised in this adversary proceeding; and

IT IS FURTHER ORDERED that a hearing with counsel for all parties shall be held Tuesday, November 28, 1995 at 9:30 a.m. M.S.T. (10:30 a.m. C.S.T.) in the Magistrate Courtroom, Room 312, Federal Building and U.S. Courthouse, 515 9th Street, Rapid City, South Dakota. The issue to be discussed is whether under 11 U.S.C. §305(a) this Court should abstain from further proceedings in this adversary so that the state court action may proceed to a final determination. Out-of-town counsel may request to appear by telephone by contacting Nita Sarvis, Scheduling Clerk, at 605/224-6013; and

IT IS FURTHER ORDERED that on or before November 22, 1995 each party may file comments on whether this Court should abstain; and

IT IS FURTHER ORDERED that the hearing will be canceled if the parties stipulate to the Court's abstention under 11 U.S.C. § 305(a) and to relief from the automatic stay under 11 U.S.C. § 362(d) so that the state court action may proceed to a final judgment.

So ordered this 26th day of October, 1995., 1998.

BY THE COURT:

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Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

Charles L. Nail, Jr., Clerk

By: \_\_\_\_\_  
Deputy Clerk

(SEAL)