

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

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225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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January 26, 2000

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Rapid City, South Dakota 57709-0484

Subject: *In re Wayne A. and Nina C. Nielsen,*
Chapter 7; Bankr. No. 00-50015

Dear Counsel:

The matter before the Court is Debtors' Motion to Stay Collection Proceedings filed January 21, 2000 and Hospital Credit Service Company's response filed January 25, 2000. A hearing was held January 25, 2000. Appearances included Trustee Dennis C. Whetzal, John H. Mairose for Debtors and Robert A. Martin for Hospital Credit Services. The Court entered findings and conclusions on the record and directed Attorney Martin to submit a proposed order. Because the proposed order was broader than the Court intended and because the applicable law on the issues raised is difficult to apply under the circumstances presented, the Court is entering this letter decision. This letter decision and accompanying order shall supplement the Court's findings and conclusions entered on the record.

Summary. From the present record before the Court, it appears that Hospital Credit Service (HCS) obtained a judgment against Wayne and Nina Nielsen for \$16,205.38 in a state civil action, No. 85-65 in the Seventh Judicial Circuit for the State of South Dakota. In mid 1999, HCS served discovery requests on the Nielsens. The Nielsens did not comply. In late October 1999, the state court ordered the Nielsens to comply with HCS discovery request. They did not. A subpoena duces tecum was served on the Nielsens on December 3, 1999. They also did not comply with it or otherwise respond to the subpoena. Based on the Nielsens' inaction, the state court entered a Judgment and Decree of Contempt on January 7, 2000 (order was dated December 23, 1999). The contempt order directed that a Warrant of Commitment be issued. The Bench Warrant of Commitment, also entered January 7, 2000,

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ordered that the Nielsens be taken into custody until a hearing could be held to allow the Nielsens to purge themselves or post a bond. Included as a condition to the Nielsens purging themselves of the contempt was the payment of \$500 to HCS for costs and attorneys' fees.

Ultimately, the state court did not incarcerate the Nielsens, but it did hold a hearing on January 13, 2000, at which time it gave the Nielsens until January 27, 2000 to comply with the discovery request. However, the Nielsens (Debtors) filed a Chapter 7 petition on January 12, 2000.

On January 21, 2000, Debtors filed a Motion to Stay Collection Proceedings. Therein, they asked the Bankruptcy Court to stay any further proceedings in the state court action. HCS filed a response on January 25, 2000. It argued that the state court action was not stayed, citing *Dumas v. Atwood (In re Dumas)*, 19 B.R. 676 (B.A.P. 9th Cir. 1982), and *In re Cummings*, 201 B.R. 586 (Bankr. S.D. Fl. 1996).

DISCUSSION. The Court has reviewed the cases cited by HCS, as well as recent decisions by other courts. In *Dumas*, the court held that a state court contempt sentence arising from the debtor's pre-petition refusal to comply with the subpoena was not affected by the automatic stay. *Dumas*, 19 B.R. at 678 (citing *David v. Hooker, Ltd.* 560 F.2d 412 (8th Cir. 1977)). In *Hooker*, the court held that the sanction should not involve a determination of the debtor's ultimate liability nor be a harassment ploy by a creditor. *Dumas*, 19 B.R. at 678 (citing *Hooker*). Most important, the *Hooker* court noted that a distinction must be made between a non bankruptcy court's jurisdiction over the contempt matter and a suspension of the proceeding arising from the automatic stay. *Id.* at 678.

In *Cummings*, the bankruptcy court held that a state court had concurrent jurisdiction to determine whether a contempt proceeding before it was stayed when one of the litigants filed bankruptcy. It also held that it was collaterally estopped from re-litigating that issue. Only in dicta, citing *In re O'Brien*, 153 B.R. 305 (D. Ore. 1993), did it note that a state court contempt proceeding arising from a pre-petition disobedience of the state court's order is not stayed by the automatic stay. *Cummings*, 201 B.R. at 589.

A more thorough discussion of the issue is found in *Atkins v. Martinez (In re Atkins)*, 176 B.R. 998 (Bankr D. Minn. 1994). Therein, the court discussed the basic application of the automatic stay under 11 U.S.C. § 362(a) to proceedings pending against the debtor. *Id.* at 1004. It also distinguished both *Hooker* and *Dumas*,

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id. at 1005, and noted that civil contempt actions are not included in the list of exceptions to the automatic stay. *Id.* at 1006. It noted that the only possible exception would be for a criminal contempt action. *Id.* The court went on to note the difference: a civil contempt order, which seeks to get the contemnor to act, and a criminal contempt order, which punishes the contemnor for his past violation of an order. *Id.* (several cites there); *In re Maloney*, 204 B.R. 671, 674-75 (Bankr. E.D.N.Y. 1996) (discussion of difference between civil and criminal contempt orders); and *In re Dunham*, 175 B.R. 615 (Bankr. E.D. Va. 1994).

That is the situation presented in this case. The automatic stay suspends any further collection action by HCS or any action to get Debtors to comply with the discovery requests made by HCS related to HCS's collection of its judgment. The state court may, however, still punish Debtors for Debtors' pre-petition disobedience of the state court's order. That punishment must, of course, not violate the stay by involving estate property. See *Kearns v. Orr (In re Kearns)*, 168 B.R. 423 (D. Kan. 1994).

As I ruled at the hearing, though, in this case the continued criminal contempt proceedings may include requiring Debtors to pay the previously ordered attorneys' fees and costs to HCS from post-petition assets. HCS should note that Debtors in turn may argue that the \$500 is a discharged pre-petition debt. If so, I presume this Court will be asked to determine whether that debt is non dischargeable under § 523(a). See *Stovall v. Stovall*, 126 B.R. 814 (N.D. Ga. 1990).

To facilitate discovery, HCS may use the § 341 meeting of creditors and a motion under F.R.Bankr.P. 2004. All the information requested through the state court proceeding should be available through one or both of these avenues. A 2004 motion does not need to be noticed for hearing; HCS need only file the motion and a proposed order and serve the motion on parties in interest.

An appropriate order will be entered.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list


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CC: case file (docket original) serve parties in interest

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By: 

U.S. BANKRUPTCY COURT
DIST. OF SOUTH DAKOTA

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Total notices mailed: 6

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