

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF GEORGIA  
WAYCROSS DIVISION

IN RE: )  
)  
JAMES EDWARD CADY, JR. ) CHAPTER 7  
) CASE NO. 93-50258  
)  
Debtor )  
)  
RENTRAK CORPORATION )  
)  
Plaintiff )  
)  
v. ) ADVERSARY PROCEEDING NO.  
) 93-05024  
)  
JAMES EDWARD CADY, JR. )  
)  
Defendant/Third Party )  
Plaintiff )  
)  
v. )  
)  
WILLIE EUGENE SAPP and )  
RONNIE LEE TUCKER )  
)  
Third Party Defendants )

BEFORE

JAMES D. WALKER, JR.

UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For the Debtor/Defendant: GRADY W. HENRY  
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For the Plaintiff: DENNIS STRICKLAND  
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The Chapter 7 Trustee: STEPHEN L. JACKSON

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For Third Party Defendant  
Willie Eugene Sapp:

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For Third Party Defendant  
Ronnie Lee Tucker:

KENNETH E. FUTCH, JR.  
231 S. Hiway Avenue  
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**AMENDED MEMORANDUM OPINION**

On March 1, 1994, this Court entered a Memorandum Opinion in this case. It appears that the opinion contained certain errors which needed to be corrected in the interest of clarity. This Amended Memorandum Opinion is substituted for the previous Memorandum Opinion. The order dated March 1, 1994, continues in full force and effect. The previous opinion together with this revised opinion and the order will be docketed simultaneously hereafter.

**FACTS**

Willie Eugene Sapp ("Sapp") and Ronnie Lee Tucker ("Tucker") were formerly engaged<sup>1</sup> in a venture known as Video Odyssey. Video Odyssey was in the business of renting videocassettes to the general public for a fee.

On May 10, 1989, Video Odyssey entered into a leasing agreement (the "Agreement") with the Rentrak Corporation ("Rentrak") for 1267 videocassettes which Video Odyssey would in turn rent to the general public. The Agreement called for Video Odyssey to remit a portion of the rental fees to Rentrak as consideration. Video Odyssey was obligated to provide Rentrak with transaction reports so that transaction fees could be calculated and assessed against Video Odyssey's account. Both Sapp and Tucker were personally obligated under the Agreement as

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<sup>1</sup>The record is unclear whether the business arrangement was a partnership or a corporation.

guarantors.

On June 13, 1990, Sapp and Tucker sold Video Odyssey to their then employee James Cady ("Debtor"). Debtor was 19 years old at the time. The Agreement was assigned to Debtor as part of the sale, and Rentrak consented to the assignment. Several months later<sup>2</sup>, Sapp and Tucker "took over"<sup>3</sup> Video Odyssey from Debtor.

On August 5, 1991, Rentrak gave notice of termination of the Agreement for failure to submit the transaction reports called for in the Agreement. Upon termination of the Agreement, Video Odyssey<sup>4</sup> failed to return the videocassettes to Rentrak. On September 10, 1991, Rentrak filed suit against Debtor in the United States District Court for the District of Oregon. On December 23, 1991, Debtor entered into a stipulated judgment with Rentrak admitting liability. The District Court of Oregon awarded damages in the amount of Twenty-Five Thousand Eight Hundred Twenty-Two Dollars and Twelve Cents (\$25,822.12).

On May 10, 1993, Debtor filed his petition for relief under

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<sup>2</sup>The record does not provide a clear time frame for these events.

<sup>3</sup>The record is unclear as to how Sapp and Tucker "took over" Video Odyssey. The Court has not been supplied with any documents pertaining to any transfer of the business from Debtor to Sapp and Tucker. Interrogatories reveal only that the transfer was not in the form of a conventional sale.

<sup>4</sup>The record does not indicate who had control over the videocassettes at this time. Indeed, this issue is at the heart of Rentrak's claim for conversion of the videocassetes.

Chapter 7 of the Bankruptcy Code. On August 9, 1993, Rentrak brought this adversary proceeding seeking (1) a determination that Debtor is liable to Rentrak for the retail value of the videocassettes and (2) a determination that the Debtor's financial obligations to Rentrak are nondischargeable pursuant to 11 U.S.C. §§ 523(a) (4) and 523(a) (6). Debtor has filed third party complaints against both Sapp and Tucker seeking contribution. Tucker has requested that the Court abstain from hearing any claim against him.

#### ANALYSIS

The jurisdiction of the district court is conferred by 28 U.S.C. § 1334.<sup>5</sup> Under section 1334, there are four species of matters over which the district court exercises jurisdiction:

- (1) all cases under title 11;
- (2) all civil proceedings arising under title 11;
- (3) all civil proceedings arising in cases under title 11;
- (4) all civil proceedings related to cases under title 11.

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<sup>5</sup>Section 1334 provides in pertinent part:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with state courts or respect for state law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334(a) and (b); Wood v. Wood (Matter of Wood), 825 F.2d 90, 92 (5th Cir. 1987). The jurisdiction of category (1) is original and exclusive. The other three confer original but not exclusive jurisdiction.

The first category, "cases under title 11", refers to the original bankruptcy petition. An adversary proceeding is not one of the "cases under title 11" for the purposes of section 1334(a).

The second category, proceedings "arising under" title 11, are matters which rely upon a cause of action either created or determined by a provision of title 11 such as an action by the trustee to avoid a preference. The third category, proceedings "arising in" cases under title 11, are those administrative matters which, although not based on any right expressly created by title 11, nonetheless would not exist outside of bankruptcy such as the filing of a proof of claim or an objection to discharge. Wood at 97. These second and third categories of proceedings refer to those matters "at the core of the federal bankruptcy power." Marathon v. Northern Pipelines, 458 U.S. 50, 71 (1982).

The fourth category of matters over which the district court may exercise jurisdiction are those proceedings which are "related to" a case under title 11. The test to determine if a proceeding is "related to" a case under title 11 is if the outcome of the proceeding could conceivably have an effect on

the administration of the bankruptcy estate. In re Lemco Gypsum, Inc., 910 F.2d 784, 788 (11th Cir. 1990).

The matter at issue here involves claims asserting state law causes of action for breach of contract, conversion and contribution.<sup>6</sup> These state law claims neither rely upon provisions of title 11 nor depend upon bankruptcy for their existence. These claims neither "arise under title 11" nor "arise in a case under title 11."

The provisions of 28 U.S.C. § 157 provide for the referral of cases to the bankruptcy judges for the district.<sup>7</sup> The language in section 157 describing cases to be referred tracks the language of section 1334 which describes the district court's jurisdiction. Once referred, the procedure to be followed in the Bankruptcy Court is determined by the character of the matter. If the matter is a case under title 11 or a core

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<sup>6</sup>The record is not clear whether Rentrak's claim against Debtor is liquidated or not. The Court has reviewed the stipulated judgment from the district court and cannot determine from that document what issues or claims were litigated in that action. Therefore, this Court cannot conclude that Rentrak's claim is a matter of res judicata. If res judicata applied, Rentrak could not relitigate its cause of action, and consequently, could not now seek the retail value of the videotapes in addition to the district court's award of damages. Without more evidence, this Court will not foreclose Rentrak from pursuing its cause of action, and will treat Rentrak's claim against Debtor as unliquidated.

<sup>7</sup>28 U.S.C. § 157(a) provides:

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

proceeding, the bankruptcy judge will hear the case and render a final decision. If the matter is a non-core proceeding, the bankruptcy judge will hear the case and submit proposed findings of fact and conclusions of law to the district court for de novo consideration.

The statutory scheme contemplates that bankruptcy judges will hear and determine matters described above as category one, category two and category three, the latter two categories being designated as core proceedings. A non-exclusive list of matters which are characterized as core proceedings is set out at section 157(b)(2). A non-core proceeding is designated as category four above. The bankruptcy judge does not render a final decision in a non-core matter unless the parties consent.<sup>8</sup>

The first step in deciding how to proceed is to determine whether there is jurisdiction under section 1334. In this case, the Plaintiff seeks to obtain an order from this Court holding

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<sup>8</sup>28 U.S.C. § 157(c) provides:

(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

that its claim against the Debtor is nondischargeable. Such a claim is one within the scope of category three above as "arising in" a case under title 11.<sup>9</sup> Such a matter is designated by section 157(b)(2)(i) as a core proceeding.

The Plaintiff in this case also seeks to establish a judgment claim against the Debtor and Third Party Defendants. Finding liability for conversion, breach of contract, or contribution on the part of the Debtor or Third Party Defendants would affect the administration of the Debtor's estate. Jurisdiction of such a matter is proper as one described in category four above as a proceeding "related to" a case under title 11.

Having determined that there is jurisdiction to hear both the discharge objection and the liability claim, the next step is to determine the procedure for hearing the two claims. The discharge objection matter is a core proceeding. The liability matter is a non-core proceeding. The first can be finally

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<sup>9</sup>The guidance which is provided by Wood suggests that "arising in" proceedings are those proceedings which, although based on state law, could only exist in bankruptcy. Although Rentrak's complaint asserts the nondischargeability of Debtor's debt to Rentrak, Rentrak is yet to establish the existence of said debt. Conversion is a state law concept which is not defined in the Bankruptcy Code. Asserting a claim based on state law principles of conversion is not the same as asserting the nondischargeability of an established debt for conversion. The former is exclusively a question of state law, the latter, although based on state law, could not exist outside of bankruptcy. The former is a non-core proceeding, the latter is a core proceeding "arising in" a case under title 11. The distinction is subtle, and yet critical to the analysis.

determined in this Court. The latter can only be finally determined by the district court after a de novo review of this Court's proposed findings of fact and conclusions of law.<sup>10</sup>

The next question is whether the Court should abstain as Third Party Defendant Tucker requests. The Bankruptcy Code provides for two types of abstention: discretionary and mandatory.<sup>11</sup> This case is not subject to the mandatory abstention provisions of 28 U.S.C. § 1334(c)(2). Therefore, the Court will limit its consideration to the discretionary abstention provisions of 28 U.S.C. § 1334(c)(1).

The Bankruptcy Code gives this Court discretion to abstain in the interest of justice, comity with state courts or respect for state law.<sup>12</sup> A litany of relevant considerations is suggested by In re Republic Reader's Service, 81 B.R. 422, 429 (Bankr. S.D. Tex 1987).<sup>13</sup> It appears that abstention is

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<sup>10</sup>There has been no determination made as to whether the parties have consented to the hearing of this case in the bankruptcy court pursuant to 11 U.S.C. § 157(c)(2). The lack of specific objection could be interpreted as consent. In this case, Third Party Defendant Tucker has requested that the Court abstain from hearing the matter. That request is being construed by the Court as an unwillingness to consent to final hearing in this Court. In re G.S.F. Corporation, 938 F.2d 1467 (1st Cir. 1991)

<sup>11</sup>28 U.S.C. §§ 1334(c)(1) and 1334(c)(2) respectively.

<sup>12</sup>28 U.S.C. § 1334(c)(1).

<sup>13</sup>(1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable state law, (4) the presence of a related proceeding

warranted as to the liability matters.

The assertions of liability for breach of contract, conversion and contribution are all based on state law. These state law claims can be severed from the dischargeability issues, both allowing the state court to enter appropriate judgments and ensuring that all the parties involved receive the full and fair consideration to which they are entitled. Abstention in this matter will not jeopardize the efficient administration of Debtor's estate, and will enable all nondebtor parties to avail themselves of the remedies which state law provides. This appears to be a no asset case. Any delay in fixing the liabilities of the Debtor will not affect distribution of assets to creditors.

It further appears that cause exists for limited relief from the automatic stay for the purpose of allowing the parties to prosecute their claims of liability for conversion, breach of contract and contribution and to reduce such claims to

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commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than the form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the Bankruptcy Court, (9) the burden of any docket, (10) the likelihood that the commencement of the proceeding in Bankruptcy Court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

judgment.<sup>14</sup> This Court will conduct a trial as to the issues of dischargeability following a determination by the state court establishing and apportioning liability among the various parties.

DATED this 11th day of March, 1994.

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JAMES D. WALKER, JR.  
United States Bankruptcy Judge

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<sup>14</sup>11 U.S.C. § 362(d)(1).

CERTIFICATE OF SERVICE

I, Cheryl L. Spilman, certify that a copy of the attached and foregoing was mailed to the following:

GRADY W. HENRY  
P. O. Box 1122  
Jesup, GA 31545

DENNIS STRICKLAND  
P. O. Box 1592  
Waycross, GA 31502

STEPHEN L. JACKSON  
P. O. Box 1589  
Waycross, GA 31502

MARY JANE CARDWELL  
Post Office Box 177  
Waycross, Georgia 31502

KENNETH E. FUTCH, JR.  
231 S. Hiway Avenue  
Blackshear, Georgia 31516-2235

This 11th day of March, 1994.

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Cheryl L. Spilman  
Deputy Clerk  
United States Bankruptcy Court



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF GEORGIA  
WAYCROSS DIVISION

IN RE: )  
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Defendant/Third Party )  
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WILLIE EUGENE SAPP and )  
RONNIE LEE TUCKER )  
Third Party Defendants )

**ORDER**

In accordance with the memorandum opinion entered this date; it is hereby

ORDERED that this Court shall abstain from hearing the liability claims stated in this adversary proceeding. At the conclusion of the related state court action or upon a showing by the Debtor that Plaintiff has abandoned the liability claim, the Court will conduct a trial of the discharge objection claim. It is hereby further

ORDERED that the parties are relieved from the provisions of 11 U.S.C. § 362, to the extent necessary to permit them to prosecute their claims for liability against all parties, including the Debtor. The enforcement of any judgment obtained against the Debtor is stayed until further order of this Court.

SO ORDERED this 1st day of March, 1994.

\_\_\_\_\_  
JAMES D. WALKER, JR., Judge  
United States Bankruptcy Court



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I, Cheryl L. Spilman, certify that a copy of the attached  
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KENNETH E. FUTCH, JR.  
231 S. Hiway Avenue  
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This 11th day of March, 1994.

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Cheryl L. Spilman  
Deputy Clerk  
United States Bankruptcy Court

