

STATE SOVEREIGN IMMUNITY IN BANKRUPTCY AFTER *SEMINOLE TRIBE OF FLORIDA V. FLORIDA*

A recent Supreme Court decision—in a case not involving bankruptcy—will continue to have a significant impact on the role states play in bankruptcy cases. In *Seminole*,²³⁰³ the Supreme Court held that the Eleventh Amendment prevents Congress, acting pursuant to its Article I powers, from abrogating a state’s sovereign immunity by subjecting it to suit in federal court without its consent.²³⁰⁴ *Seminole* specifically addressed Congress’ power under the Indian Commerce Clause, but the Court did not limit the scope of its decision to that specific Article I provision.²³⁰⁵ Like its power under the Indian Commerce Clause, Congress has plenary power to enact “uniform laws of bankruptcy” under the Bankruptcy Clause in Article I of the Constitution.²³⁰⁶ Accordingly, *Seminole* calls into question whether Congress may

²³⁰³ 116 S. Ct. 1114 (1996). Chief Justice Rehnquist wrote the opinion, joined by Justices O’Connor, Scalia, Kennedy and Thomas. Justice Stevens filed a dissenting opinion, as did Justice Souter, joined by Justices Ginsburg and Breyer.

²³⁰⁴ *Seminole*, 116 S. Ct. at 1131-32 (“Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against nonconsenting 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* overruled an earlier Supreme Court case that had endorsed Congress’ power to abrogate a state’s sovereign immunity under the Commerce Clause in Article I. *See* *Pa. v. Union Gas Co.*, 491 U.S. 1 (1989).

²³⁰⁵ *Seminole*, at 1131-32. For a discussion of the controversy and confusion arising from the Supreme Court’s opinion, see Laura M. Hershers, Note, *State Sovereign Immunity: Myth or Reality after Seminole Tribes of Florida v. Florida*, 46 *CATH. U. L. REV.* 1005, 1018 (1997) (arguing that *Seminole* will “create both federalism and separation of powers problems, as well as confusion in the lower courts.”).

²³⁰⁶ U.S. CONST. art. I, § 8, cl. 4. Congress has enacted five comprehensive bankruptcy statutes since the ratification of Article I: The Bankruptcy Act of 1800, Act of Apr. 4, 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248; The Bankruptcy Act of 1841, Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614; The Bankruptcy Act of 1867, Act of Mar. 2, 1867, ch. 176, 14 Stat. 517, *amended by* Act of June 22, 1874, ch. 390, 18 Stat. 178, *repealed by* Act of June 7, 1878, ch. 170, 20 Stat. 99; The Bankruptcy

abrogate a state's sovereign immunity under its Article I plenary bankruptcy powers. The Court briefly mentioned the potential impact of its opinion on bankruptcy cases, noting in a footnote that "[a]lthough the copyright and bankruptcy laws have existed practically since our nation's inception . . . , there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States."²³⁰⁷

Since the decision in *Seminole*, a number of courts have found that the bankruptcy court does not have jurisdiction over states because of the Eleventh Amendment.²³⁰⁸ The Commission discussed the *Seminole* decision and its inevitable

Act of 1898, Nelson Act, ch. 541, 30 Stat. 544, *amended by* Chandler Act, ch. 575, 52 Stat. 840 (1938), *repealed by* Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549; Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, *amended by* Bankruptcy Amendments and Federal Judgeship Act, Pub. L. No. 98-353, 98 Stat. 333 (1984), and by Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act, Pub. L. No. 99-554, 100 Stat. 3088 (1986), and by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. Until the Supreme Court's holding in *Seminole*, Congress' authority to abrogate state sovereign immunity in the bankruptcy context had never been questioned. The Supreme Court, however, had previously questioned whether Congress had in fact abrogated state sovereign immunity in the bankruptcy context. *See Hoffman v. Conn. Dep't of Income Maintenance*, 492 U.S. 96, 101 (1989) ("To abrogate the States' Eleventh Amendment immunity from suit in federal court . . . Congress must make its intention 'unmistakably clear in the language of the statute' ."); *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

²³⁰⁷ *Seminole*, 116 S. Ct. at 1132 n.16. In his dissent, Justice Stevens argued that Article III permits enforcement of federal question actions against states in federal court. *Id.* at 1137 (Stevens, J., dissenting).

²³⁰⁸ *See, e.g.*, Department of Transp. and Dev. v. PNL Asset Management Co. (*In re Fernandez*), No. 96-31013, 1997 WL 570353, at *5 (5th Cir. Sept. 15, 1997) ("Section 106(a) of the Bankruptcy Code is unconstitutional. Congress cannot locate the authority claimed here to abrogate sovereign immunity in either the Bankruptcy Clause or in Section 5 of the Fourteenth Amendment."); *Schlossberg v. Maryland (In re Creative Goldsmiths of Wash., D.C., Inc.)*, 119 F.3d 1140 (4th Cir. 1997) (dismissing trustee's preference action against state under *Seminole*; state did not waive its sovereign immunity under section 106(b) by filing proof of claim for sales and withholding taxes unrelated to preference action); *AER-Aerotron, Inc. v. Texas Dep't of Transp.*, 104 F.3d 677, 680-81 (4th Cir. 1997) (stating in *dicta* that "perhaps the handwriting is on the wall that the abrogation provisions of the Bankruptcy Reform Act will suffer the same fate as the statutes involved in *Seminole*."); *Light v. State Bar of Cal.*, 1996 WL 341112 (9th Cir. 1996) (dismissing automatic stay action against state bar association); *Kish v. Verniero*, No. 97-1405, 1997 WL 471911 (D.N.J. Aug. 18, 1997) (holding that state department of motor vehicles was immune from debtor's dischargeability action; Congress does not have authority to abrogate state sovereign immunity under bankruptcy clause and no indication section 106 was enacted pursuant to Fourteenth Amendment); *Sacred Heart Hosp. of Norristown v. Pennsylvania Dep't of Pub. Welfare (In re Sacred Heart Hosp. of Norristown)*, 204 B.R. 132 (E.D. Pa. 1997) (dismissing debtor's action to recover for services provided under medical assistance program; court had no jurisdiction over state agency); *see also In re NVR, LP*, 206 B.R. 831 (Bankr. E.D. Va. 1997); *In re Charter Oak Assoc.*, 203 B.R. 17 (Bankr. D. Conn. 1996);

effect on the bankruptcy process in both plenary and working group sessions. The Commission is not proposing a specific recommendation in this area -- given the constitutional basis of the decision, there may be no statutory change to recommend. Nevertheless, *Seminole's* impact as well as a variety of related bankruptcy policy considerations cannot be ignored. The effect of *Seminole* on a state's role in bankruptcy should be weighed as part of any amendment to the substantive provisions of the Bankruptcy Code.²³⁰⁹

In the 1994 amendments to the Bankruptcy Code, Congress substantially revised the sovereign immunity provisions in 11 U.S.C. § 106.²³¹⁰ As amended, section 106(a)(1) explicitly abrogates a state's sovereign immunity with respect to a wide variety of Bankruptcy Code protections including the automatic stay, avoidance, and turnover proceedings.²³¹¹ Now in the wake of *Seminole*, lower courts have held

In re York-Hannover Dev., Inc., 201 B.R. 137 (Bankr. E.D.N.C. 1996); *In re* Burke, 200 B.R. 282 (Bankr. S.D. Ga. 1996); *In re* Lazar, 200 B.R. 358 (Bankr. C.D. Cal. 1996); *In re* William Ross, Inc., 199 B.R. 551 (Bankr. W.D. Pa. 1996).

²³⁰⁹ One commentator described the effect of *Seminole* on bankruptcy litigation against states:

If you represent a state, it may be one of the best things that ever happened in bankruptcy law. If you believe the dissent, it may seriously impair the bankruptcy system. If you believe the majority's response, it won't necessarily mean that much. . . . It is clear, though, that there will be many dramatic changes in how the federal courts relate to the states in the bankruptcy courts and elsewhere — and that we won't know all of the changes for many months to come.

Karen Cordry, *A Tale of Two Sovereigns: Will the Bankruptcy Code Survive Seminole?*, 5 NORTON BANKR. L. ADV. 1, (May 1996). “There is grave concern that *Seminole* will act as precedent for lack of jurisdiction by the bankruptcy court to deal with any issue involving the state except in situations where the state consents to jurisdiction.” *Seminole: What it Means/Possible Defenses*, 29 BANKR. CT. DECISIONS A1, August 13, 1996 (quoting Phil Hendel); see Thomas Patterson & Russell L. Dees, *State Dealings in Bankruptcy Are in for Some Changes*, BANKR. STRATEGIST 5, 1996.

²³¹⁰ Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113 (1994).

²³¹¹ See 11 U.S.C. § 106(a)(1) (1994). Section 106(a)(1) provides that “[n]otwithstanding 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” Section 106(a)(1) then lists virtually every substantive section of the Bankruptcy Code, including section 105, the automatic stay, and avoidance actions.

When Congress enacted section 106(a) in 1994, it was acting in complete accordance with the then current Eleventh Amendment view. The clear congressional abrogation language in 1994 was in response to the Supreme Court's decision in *Hoffman* and *Nordic Village*, which held that congressional intent to abrogate sovereign immunity must be stated unequivocally. See *Hoffman v.*

that section 106(a)(1) is invalid because it purports to abrogate a nonconsenting state's sovereign immunity by subjecting it to the jurisdiction of the bankruptcy court under a variety of substantive Bankruptcy Code provisions.²³¹² The conflict between the holding in *Seminole* and the language of section 106(a) has almost uniformly been resolved in favor of *Seminole* and Eleventh Amendment sovereign immunity.²³¹³

Prior to *Seminole*, it was widely believed that Congress was empowered by the Fourteenth Amendment and by Article I to abrogate expressly a state's sovereign immunity to suit in federal court as provided by the Eleventh Amendment.²³¹⁴ Following *Seminole*, however, Eleventh Amendment sovereign immunity arguably insulates a state from bankruptcy court jurisdiction. Thus, *Seminole* may well have invalidated Congress' express abrogation of the sovereign immunity of states and state agencies, which otherwise permitted private parties to engage states without their consent in bankruptcy court.

A. Bankruptcy Policy Before and After *Seminole*

Bankruptcy is a collective proceeding, providing a single forum for the resolution of claims against a debtor's property "wherever located."²³¹⁵ Accordingly,

Conn. Dep't of Income Maintenance, 492 U.S. 96, 101 (1989) ("To abrogate the States' Eleventh Amendment immunity from suit in federal court . . . Congress must make its intention 'unmistakably clear in the language of the statute'."); *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

²³¹² See cases cited *supra* note 2308; see also Elizabeth Gibson, *Sovereign Immunity in Bankruptcy: The Next Chapter*, 70 AM. BANKR. L.J. 195, 201 (1996).

²³¹³ See cases cited *supra* note 2308; but see *In re Straight*, 209 B.R. 540 (D. Wyo. 1997) (abrogation of state sovereign immunity under bankruptcy clause was valid exercise of power under fourteenth amendment); *Headrick v. Georgia (In re Headrick)*, 200 B.R. 963, 967 (Bankr. S.D. Ga. 1996) (same).

²³¹⁴ In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (plurality opinion) *overruled by Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), the Supreme Court held that Congress had the power under the Interstate Commerce Clause (and more generally under Article I) to abrogate a state's Eleventh Amendment immunity. *Union Gas*, at 23. The Court found that Congress must clearly express an intent to abrogate a state's immunity and render it liable in federal court. *Id.* at 8 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). In the bankruptcy context prior to *Seminole*, courts found that section 106 was a clear congressional abrogation of a state's sovereign immunity. See, e.g., *In re Merchants Grain*, 59 F.3d 630 (7th Cir. 1995), *vacated and remanded sub nom.*, *Ohio Agric. Commodity Depositors Fund v. Mahern*, 116 S. Ct. 1411 (1996) (remanded in light of Court's decision in *Seminole*); *In re Crook*, 966 F.2d 539 (10th Cir.), *cert. denied*, 506 U.S. 985 (1992) (finding that mortgage held by state agency could be restructured by a bankruptcy court despite Eleventh Amendment).

²³¹⁵ 28 U.S.C. § 1334(e) (1994) ("The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located,

all creditors who seek to assert a claim against property of the estate must assert their claims in the bankruptcy court where the debtor's case is pending. By providing a single forum governed by a single set of procedural rules, the bankruptcy process ensures uniform procedural treatment for every type of claimant, including secured creditors, unsecured trade creditors, priority tax claimants, environmental claimants, child support claimants, employee and pension claimants, tort victims, bondholders, and equity security holders. A single bankruptcy forum also advances a variety of fundamental policy goals, including, equal distribution and treatment for similarly-situated creditors, promotion of a cost-effective and speedy process to minimize the cost to creditors, and the rehabilitation of individuals as well as business entities. Determining creditors' rights in the debtor's estate is a fundamental role of the bankruptcy court. A single forum for the resolution of claims against a bankruptcy estate is a critical component of the court's responsibility for a number of reasons.

First, multiple proceedings in different courts may result in conflicting determinations of rights in a debtor's estate. Two separate courts arriving at divergent determinations of the rights in a piece of the debtor's property leads to further litigation between the parties seeking to enforce those rights. Moreover, separate treatment in multiple courts may also result in unequal treatment of similarly-situated creditors. A creditor that is able to enforce its rights in a separate forum without consideration of other possible claims in the property will benefit to the detriment of other creditors.

Second, the ability of a bankruptcy court to quickly restructure a debtor's obligations enhances the likelihood of saving a business or giving a family a fresh start and increasing the distribution to creditors. The bankruptcy court has the ability to give notice to all parties with an interest in the debtor's property and to bring those persons or entities into the bankruptcy court for a final, binding determination of the rights in the property. The ability to obtain this determination in the bankruptcy court may be lost if all parties with a claim against the debtor are not required to enforce their claims in the same court.

Third, a single forum reduces the cost of collection for creditors. Creditors often have overlapping interests in the debtor's estate and multiple proceedings would require creditors to participate in each proceeding to protect their interests, greatly increasing their cost of collection. Creditors are already bearing the cost of administering the bankruptcy estate because a trustee or other professionals retained by the estate are paid before any distribution is made to unsecured creditors. The additional costs of enforcing a claim in a separate forum place creditors at a distinct disadvantage.

of the debtor as of the commencement of such case, and of property of the estate.”).

Fourth, Chapter 11 of the Bankruptcy Code favors the reorganization of debtors in an effort to preserve going-concern value, retain jobs, and promote the efficient use of capital. A bankruptcy court that does not control all critical aspects of a debtor's business will be unable to achieve a reorganization. These fundamental policies underlie the importance of a single bankruptcy forum to determine all claims by and against a debtor.

Because the Eleventh Amendment protects *only* the states, the ability to bring actions against federal and municipal agencies remains unaffected by the *Seminole* decision.²³¹⁶ For example, if a federal agency obtained possession of property of the estate in violation of the automatic stay, a debtor could seek to recover this property on an expedited basis in the bankruptcy court. However, unless a state waives its sovereign immunity, it may not be possible to bring that same action in the bankruptcy court against a state agency. As a result, states must be treated differently from all other creditors and parties in interest (including the federal government) in the bankruptcy process.

States play an important role in the bankruptcy process, appearing in many bankruptcy cases in a myriad of roles -- as priority tax creditor, secured creditor, unsecured creditor, police and regulatory authority, environmental creditor, landlord, guarantor, bondholder, leaseholder, and equity interest holder. Similarly, a debtor may have a number of potential actions against a state, including a stay violation, preferences, turnover of property, and lien avoidance. The different treatment accorded states under *Seminole* may result in fewer proceedings against them within the bankruptcy process due to the increased costs required to seek a recovery against a state, including sanctions for violation of the automatic stay.²³¹⁷ Different treatment

²³¹⁶ As one commentator has observed:

From a bankruptcy perspective, the unfortunate result of this partial invalidation of section 106 is the asymmetry it creates. Of all the parties who might be involved in a bankruptcy case, only state governments are given the special shield of immunity. Other creditors, including other governmental units, are subject to suit in the bankruptcy court to recover preferences or to answer for violating the automatic stay or to determine the validity and priority of liens. But state governmental units are immune from such suits. Presumably the Supreme Court would opine that this lack of equality is the price we must pay for the Constitution's continuing recognition of the sovereignty of the states.

Gibson, *supra* note 2312, at 202.

²³¹⁷ In addition to authorizing the recovery of property, the Bankruptcy Code entitles debtors to bring motions for sanctions or contempt for willful violations of the automatic stay against governmental entities that pursue actions outside of the scope of the police and regulatory exception in section 362(b)(4) without seeking permission from the bankruptcy court. However, the ability to obtain damages for stay violations by states may be substantially limited under *Seminole* although

of state entities will alter the statutory equilibrium struck in the Bankruptcy Code that balances the rights of creditors against each other as well as against the rights of the debtor.

The Bankruptcy Code carefully balances the rights of the debtor and all creditors, including states. State interests are protected in a number of ways in bankruptcy. An exception to the automatic stay is codified in section 362(b)(4) and (5), which recognizes the need for a state to enforce its police and regulatory

it may be possible for a state court (not the bankruptcy court) to grant damages to the debtor under section 362(h).

Whether a state court could decline to adjudicate a federal cause of action because of a nondiscriminatory (equally applicable to state and federal actions) state law sovereign immunity doctrine is unclear. *See Felder v. Casey*, 487 U.S. 131 (1988) (though state notice statute applied equally to state and federal cause of action, notice statute impermissibly discriminated against federal cause of action under section 1983); *General Oil Co. v. Crain*, 209 U.S. 211, 226 (1908) (retaining appellate review of state supreme court decision that found no jurisdiction to enjoin state action; “[i]f a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a state to its courts, . . . without power of review by this court, . . . an easy way is open to prevent the enforcement of many provisions of the Constitution and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation.”). For a thorough discussion of enforcing federal causes of action in state court, *see R. FALLON, D. MELTZER & D. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 469-478 (4th ed.).

A recent case is illustrative. In *Tri-City Turf Club, Inc. v. Kentucky Racing Commission*, the debtor sued the state racing commission for violating the stay when the commission revoked the debtor’s operating license to conduct live horse races and intertrack betting. 203 B.R. 617 (Bankr. E.D. Ky. 1996). The court found that the state’s actions violated the stay and awarded attorneys’ fees, but reserved the amount of the damages until the fee hearings. *Id.* In the interim, the Supreme Court issued the *Seminole* decision. The *Tri-City* court found that, under *Seminole*, it had no jurisdiction over the state commission to award damages remedying a present violation, and therefore lacked jurisdiction to hear the debtor’s adversary proceeding against the state. *Id.* Thus, the debtor’s only option to recover property wrongfully taken was to delay the bankruptcy proceeding and to sue the state commission in state court.

power.²³¹⁸ Similarly, state tax claims are given priority treatment.²³¹⁹ Thus, the Bankruptcy Code generally recognizes the interests of governmental units and accords them special treatment where necessary while balancing the interests of other creditors as well as the debtor. *Seminole's* interpretation of the Eleventh Amendment, as applied by the lower courts, has begun to alter this delicate balance by removing states from the jurisdiction of the bankruptcy court unless they consent to that jurisdiction.

B. Bankruptcy Litigation Involving States After *Seminole*

Given the fundamental need for a single binding bankruptcy proceeding, there are a number of possible alternatives to an action against a state in bankruptcy court.²³²⁰ Assuming that a nonconsenting state is not subject to suit in the bankruptcy court, a debtor may be able to seek an *Ex parte Young* injunction against an individual state official (not the state itself) in federal court. Alternatively, the debtor could bring a suit against the state in state court. If the state has filed a proof of claim, the debtor may be able to show that the state waived its sovereign immunity under section 106(b), although a recent Court of Appeals decision suggests this type of waiver may be limited.²³²¹ In addition, a debtor may be able to assert an *in rem* action to recover property of the estate. While a few courts have upheld section 106(a) in light of *Seminole*, finding that section 106 was enacted as a proper exercise of Congressional

²³¹⁸ “The filing of a petition . . . does not operate as a stay under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit’s police or regulatory power.” 11 U.S.C. § 362(b)(4) (1994); *see also* Board of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc., 502 U.S. 32 (1991) (Federal Reserve Board’s administrative proceedings against debtor are excepted from automatic stay by section 362(b)(4)). The Supreme Court in *MCorp* was “not persuaded . . . that the automatic stay provisions have any application to ongoing, nonfinal administrative proceedings.” *Id.* at 37. Similarly, section 362(b)(5) permits the enforcement of a prepetition nonmonetary judgment obtained in a police or regulatory action against the debtor or against property of the estate. 11 U.S.C. § 362(b)(5) (1994).

²³¹⁹ 11 U.S.C. § 507(a)(8) (1994) (establishing a priority of distribution for certain types of tax claims).

²³²⁰ The *Seminole* court noted that “several avenues remain open for ensuring state compliance with federal law.” 116 S. Ct. at 1131. These include consent of the state to federal jurisdiction, an *Ex parte Young* injunction, and suit in state court.

²³²¹ *Schlossberg v. Maryland (In re Creative Goldsmiths of Wash., D.C., Inc.)*, 119 F.3d 1140 (4th Cir. 1997) (holding that waiver of Eleventh Amendment sovereign immunity applied to only compulsory counterclaims to state’s proof of claim for sales and withholding taxes and not to trustee’s preference action; trustee failed to seek a setoff in preference action for amount of proof of claim and court never reached the issue of whether state had waived sovereign immunity to extent of setoff).

power under section 5 of the Fourteenth Amendment,²³²² this argument has been undercut recently by the Supreme Court.²³²³ Finally, the U.S. trustee could be empowered to sue states on behalf of debtors in federal court to enforce states' compliance with the Bankruptcy Code.

1. *Ex parte Young* Injunction

While a state may be immune under the Eleventh Amendment, individual state officials nonetheless may still be subject to federal injunctive relief from ongoing Bankruptcy Code violations. Before a state official actually has completed an act of wrongfully obtaining property, a debtor may be able to use an *Ex parte Young* injunction to enjoin the state official from completing the seizure.²³²⁴ An *Ex parte Young* injunction operates on the theory that an individual state official who is about to act or is acting in violation of federal law is not protected by the state's sovereign immunity. Once the state has obtained the property, the federal violation may no longer be ongoing and this option would no longer be available.²³²⁵ At least one commentator believes that the ability to obtain *Ex parte Young* relief against state officials means that "little has changed" after the *Seminole* decision.²³²⁶

A recent Supreme Court case, however, limited the application of an *Ex parte Young* injunction to another suit brought by an Indian Tribe. In *Idaho v. Coeur d'Alene Tribe of Idaho*, a plurality of the Supreme Court held that *Ex parte Young* injunctive relief was unavailable in a suit against state officials seeking to establish

²³²² See *In re Straight*, 209 B.R. 540, *20 (D. Wyo. 1997) (notwithstanding *Seminole* and Eleventh Amendment, section 5 of the Fourteenth Amendment authorizes Congress to abrogate state sovereign immunity in bankruptcy); *Headrick v. Georgia (In re Headrick)*, 200 B.R. 963, 967 (Bankr. S.D. Ga. 1996) (same).

²³²³ *City of Boerne v. Flores*, 1997 WL 345322, at *12 (U.S., June 25, 1997) ("Any suggestion that Congress has a substantive non-remedial power under the Fourteenth Amendment is not supported by our case law.").

²³²⁴ 209 U.S. 123 (1908). An *Ex parte Young* injunction can only be issued against a state officer to prevent an ongoing constitutional rights violation for which money damages will not suffice. Once the state has acted, an *Ex parte Young* injunction is not a viable option. See *Edelman v. Jordan*, 415 U.S. 651 (1974) (*Young* permits prospective relief only).

²³²⁵ *Edelman v. Jordan*, U.S. 651, 667 (1974).

²³²⁶ Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996) (arguing that because of the continuing vitality of the *Ex Parte Young* rule, "sovereign immunity has become a rare exception to the otherwise prevailing system of state governmental accountability in federal court for violations of federal law, an exception that many, including this author, find difficult to justify.").

ownership of a lake bed as part of the tribe's reservation.²³²⁷ The Court held that the Tribe's request for injunctive relief to recover ownership of the lake bed was essentially a quiet title action "in that substantially all benefits of ownership and control would shift from the state to the Tribe."²³²⁸ A trustee's ability to bring an *Ex parte Young* action to enjoin the fixing of a lien or to recover property of the estate actually held by the state may be limited if the Court's quiet title language is interpreted literally. The facts in *Cour d'Alene* may be distinguishable, however, as applying to cases only where the state would lose regulatory control as a result of the *Ex parte Young* action. These circumstances would rarely, if ever, be present in bankruptcy.

2. State Court Action

A state's Eleventh Amendment immunity only protects it from suit in federal court. As a result, a state court action may be brought to enforce a state's compliance with the Bankruptcy Code.²³²⁹ In the event of a wrongful seizure by a state of property of the estate, for example, the debtor may be able to commence a state court action to recover the property.²³³⁰ State civil litigation, with its concomitant delays, might not provide an adequate substitute for the expedited hearing that otherwise would have been available in the bankruptcy court. There is also some question, in

²³²⁷ *Idaho v. Cœur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2040 (1997) ("An allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction. However, this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests.").

²³²⁸ *Id.*

²³²⁹ The Court in *Seminole* alluded to the fact that a state court action may be blocked by the state's own sovereign immunity. *Seminole*, 116 S. Ct. 1114, 1131 n.14 ("this Court is empowered to review a question of federal law arising from a state court decision *where a State has consented to suit*" citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (emphasis added)).

²³³⁰ The Eleventh Amendment does not apply to claims brought in state court. *See* *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 205 (1991). Commentators debate, however, whether the Eleventh Amendment provides a state with complete immunity from suit or simply directs suits against states to state court. *Compare* Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1723 (1997) (discussing the "diversity interpretation" and the "immunity from liability" interpretation; "there appears to be no evidence that the Framers 'intended' to establish the forum-allocation principle that some regard the Eleventh Amendment as embodying.") *with* Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495, 546 n.176 (1997) (disagreeing with Professor Vazquez's assertion that a state may be immune from all liability because of the Eleventh Amendment and sovereign immunity under state law).

light of the comprehensive federal bankruptcy scheme, whether a state court would enforce federal relief.²³³¹

Assuming that a state court would enforce federal bankruptcy law, dual proceedings are not without other risks. In such a circumstance, a state seizure of property of the estate could have the practical and virtually immediate effect of unraveling a Chapter 11 case, shutting down the business, and potentially undercutting the interests of creditors and employees of the debtor. For example, a state asserting its police and regulatory power may revoke the debtor's operating license for failure to pay state licensing fees.²³³² Without an operating license, the debtor's business would have to shut down until a determination could be made that the state was acting pursuant to a valid police and regulatory power (permitted notwithstanding the automatic stay) and was not merely seeking to satisfy a monetary action (not permitted under the automatic stay). Under these circumstances, a debtor would not be able to seek an expedited review in the bankruptcy court, but would have to seek review in state court. The debtor's business could well be closed until a favorable determination had been made in state court.

Another complication may result from the issue preclusive and claim preclusive effect of a state court determination. If a debtor litigates its claims against a state in state court "with a full and fair opportunity" to litigate other related issues, the debtor may be precluded from asserting those claims in another context in the bankruptcy court.²³³³ The facts in a recent Fourth Circuit Court of Appeals decision

²³³¹ See, e.g., *Smith v. Mitchell Constr. Co.*, 481 S.E.2d 558, 561 (Ga. App. 1997) (dismissing state-law action for violation of the stay; bankruptcy law preempts state law and "creditors should be held to a uniform standard of conduct when dealing with bankruptcy debtors, and the bankruptcy courts are the only courts capable of fashioning such a uniform standard."); Jeffrey A. Stoops, *Monetary Awards to the Debtor for Violations of the Automatic Stay*, 11 FL. ST. UNIV. L. REV. 423, 427 (1983) ("State courts seem unsure of their ability to deal with cases so closely related to a pending bankruptcy case and most would likely abstain.").

²³³² See, e.g., *Tri-City Turf Club, Inc. v. Kentucky Racing Comm'n.*, 203 B.R. 617 (Bankr. E.D. Ky. 1996) (the debtor sued the state racing commission for violating the stay when the commission revoked the debtor's operating license to conduct live horse races and intertrack betting).

²³³³ *Allen v. McCurry*, 449 U.S. 90 (1980). In *Allen*, the Supreme Court applied the doctrine of collateral estoppel to preclude a section 1983 action in federal court. The *Allen* criminal defendant (after his state law conviction) sued the officers arresting him under 42 U.S.C. § 1983 for violating his constitutional rights. The Court failed to find any congressional intent in enacting section 1983 to "deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights." *Id.*

provide a good example of how complicated this may become.²³³⁴ In *Creative Goldsmiths*, the trustee filed an action against the State of Maryland Comptroller of the Treasury to avoid an income tax payment as a preference because it was made to the state within ninety days of the petition date.²³³⁵ The State of Maryland had also filed a proof of claim in the bankruptcy case for sales taxes and withholding taxes owed by the debtor.²³³⁶ The Fourth Circuit held that the bankruptcy court did not have jurisdiction over the state in the preference action under the Eleventh Amendment.²³³⁷

If the *Creative Goldsmiths* debtor were to litigate the preference claim against the state in state court, the debtor also may be required to assert any defenses it may have to the state's proof of claim for sales and withholding taxes despite the fact that the state "waived" its sovereign immunity with respect to those taxes in the bankruptcy court under section 106(b) by filing a proof of claim. The claims are related because the debtor has a permissive counterclaim to setoff the state's tax claim from its preference claim.²³³⁸ What remains unclear is whether the debtor will later be estopped in bankruptcy court from asserting defenses to a claim that it had a "full and fair opportunity" to litigate in state court. Each time the debtor litigates with a state in state court, the bankruptcy court will have to determine the effect of the state court judgment. This will delay the bankruptcy process and may result in prejudice to other creditors if the debtor is estopped from asserting legitimate defenses to a claim.

3. State Waiver of Eleventh Amendment Sovereign Immunity

Eleventh Amendment immunity is not absolute; a state may waive its own immunity. A state's Eleventh Amendment waiver must be specific and must be "stated by the most express language."²³³⁹ The Bankruptcy Code also provides for

²³³⁴ Schlossberg v. Maryland (*In re Creative Goldsmiths of Wash. D.C., Inc.*), 119 F.3d 1140 (4th Cir. 1997).

²³³⁵ *Id.* at 1142.

²³³⁶ *Id.* at 1143.

²³³⁷ *Id.*

²³³⁸ *Id.* at 1149.

²³³⁹ Edelman v. Jordan, 415 U.S. 651, 667 (1974) *citing* Miller v. Wilson Distilling Co., 213 U.S. 151, 171 (permitting a state to assert Eleventh Amendment immunity on appeal after litigating on the merits in the lower courts). *See also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239-40 (1985) ("A State will be deemed to have waived its immunity only where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction."); *In re Midland Mech. Contractors, Inc.*, 200 B.R. 453 (Bankr.

a waiver of sovereign immunity under certain circumstances. Section 106(b) provides that a “governmental unit” that has filed a proof of claim has waived its sovereign immunity with respect “to a claim . . . that is property of the estate and that arose out of the same transaction or occurrence” in which the government’s claim arose.²³⁴⁰ The same principle is applied more generally outside the Eleventh Amendment context; creditors who file proofs of claim against a debtor’s estate are subject to the equitable jurisdiction of the bankruptcy court.²³⁴¹

The *Creative Goldsmiths* decision, however, calls the constitutionality of section 106(b) into question in light of *Seminole*.²³⁴² In *Creative Goldsmiths*, the trustee filed an action against the State of Maryland Comptroller of the Treasury to avoid an income tax payment as a preference because it was made to the state within 90 days of the petition date.²³⁴³ The State of Maryland had also filed a proof of claim for sales taxes and withholding taxes owed by the debtor.²³⁴⁴ In the preference action, the bankruptcy court held and the district court agreed that the payment to the state had been made in the ordinary course of the debtor’s business and was therefore not avoidable as a preference.²³⁴⁵ On appeal, the State of Maryland raised the Eleventh Amendment immunity issue for the first time.²³⁴⁶ The trustee argued, among other things, that the state had waived its Eleventh Amendment immunity pursuant to section 106(b) by filing a proof of claim in the bankruptcy case.²³⁴⁷

N.D. Ga. 1996) (attorney general’s Eleventh Amendment immunity waiver not binding unless state statute explicitly authorized attorney general to consent to waiver).

²³⁴⁰ 11 U.S.C. § 106(b) (1994).

²³⁴¹ See *Langenkamp v. Culp*, 498 U.S. 42, 58-59 (“By filing a claim against a bankruptcy estate the creditor triggers the process of ‘allowance and disallowance’ of claims thereby subjecting himself to the bankruptcy court’s equitable power.”), *reh’g denied*, 498 U.S. 1043 (1990) *citing* *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); see also *Katchen v. Landy*, 382 U.S. 323 (1966) (Act case) (granting bankruptcy court summary jurisdiction to review preference claim against creditor that filed proof of claim).

²³⁴² *Schlossberg v. Maryland (In re Creative Goldsmiths of Wash. D.C., Inc.)*, 119 F.3d 1140 (4th Cir. 1997).

²³⁴³ *Id.* at 1142.

²³⁴⁴ *Id.* at 1143.

²³⁴⁵ *Id.*

²³⁴⁶ *Id.*

²³⁴⁷ *Id.*

The Fourth Circuit rejected this argument, finding that the “deemed waived” language in section 106(b) “amounts to language of abrogation” in violation of *Seminole*.²³⁴⁸ The court went on to conclude that a waiver of a state’s Eleventh Amendment immunity is wholly within the particular state’s power.

While 11 U.S.C. § 106(b) may correctly describe those actions that, as a matter of constitutional law, constitute a state’s waiver of the Eleventh Amendment, it is nevertheless not within Congress’ power to abrogate such immunity by “deeming” a waiver. Rather, in the absence of a constitutional authorization, it lies solely within a state’s sovereign power to waive its immunity voluntarily and to consent to federal jurisdiction. Only if it waives such immunity may a private citizen sue the state in federal court.²³⁴⁹

To determine whether the State of Maryland had waived its sovereign immunity, the Fourth Circuit looked to Maryland state law.²³⁵⁰ Under the rationale in *Creative Goldsmiths*, Congress does not have the power to “deem” when a state has waived its Eleventh Amendment immunity.²³⁵¹ Thus, the Fourth Circuit found that section 106(b) was rendered unconstitutional by *Seminole*. Interestingly, however, the Fourth Circuit also examined the factual basis of the trustee’s claim and the state’s proof of claim, finding that because they were unrelated they did not satisfy the compulsory counterclaim provisions of the Bankruptcy Rules.²³⁵² The Fourth Circuit did not discuss the fact that the “same transaction or occurrence” test under the Bankruptcy Rules is also required for waiver under section 106(b).

At least one commentator has suggested that the Bankruptcy Code could condition a state’s very participation in the bankruptcy process on its waiver of sovereign immunity.²³⁵³ “For example, [Congress] may condition state claim tax priority on a state’s voluntary waiver of its immunity.”²³⁵⁴ Whether a waiver of this

²³⁴⁸ *Id.* at 1147.

²³⁴⁹ *Id.*

²³⁵⁰ *Id.* Under Maryland state law, the Fourth Circuit found that the state had not waived its Eleventh Amendment immunity.

²³⁵¹ *Id.* at 1147.

²³⁵² *Id.*

²³⁵³ Joseph F. Riga, *State Immunity in Bankruptcy After Seminole Tribe of Florida v. Florida* (1997) (manuscript on file with the National Bankruptcy Review Commission).

²³⁵⁴ *Id.* at 24.

type would withstand Supreme Court scrutiny remains in some doubt,²³⁵⁵ however, state action in order to participate in a related federal program has been upheld in other circumstances.²³⁵⁶

5. *In Rem* Proceeding in Bankruptcy Court

Another possible post-*Seminole* alternative is to frame a debtor's claim against a state as an *in rem* proceeding against property of the estate. Since *Seminole*, one court has found that a trustee's turnover action was an *in rem* proceeding against the property and not a "suit" against the state in violation of the Eleventh Amendment.²³⁵⁷ In *Zywiczynski*, the trustee sought the turnover of a certificate of deposit bought by the debtor to secure environmental reclamation obligations that might arise out of debtor's construction business.²³⁵⁸ The state disputed the turnover proceeding commenced by the trustee on the ground that it was immune from suit in the bankruptcy court under the Eleventh Amendment.²³⁵⁹ The *Zywiczynski* court found that it could make a summary inquiry into whether property is property of the estate and subject to turnover consistent with the Eleventh Amendment and the fundamental policy of the Bankruptcy Code to "obtain[] and maintain[] control of the property of the estate."²³⁶⁰

A close statutory analogy to this type of suit is a civil forfeiture action.²³⁶¹ An *in rem* suit against property is similar to a civil forfeiture *in rem* action for remedial civil sanctions.²³⁶² Under the civil forfeiture laws, federal and state statutes authorize

²³⁵⁵ *Id.* at 26.

²³⁵⁶ See *South Dakota v. Dole*, 483 U.S. 203 (1987) (statute conditioning receipt of highway funds on state minimum drinking age constitutional use of Congress' spending power).

²³⁵⁷ *Horwitz v. Zywiczynski (In re Zywiczynski)*, 210 B.R. 924 (Bankr. W.D.N.Y. 1997).

²³⁵⁸ *Id.* The certificate of deposit was held by the issuing bank and was not in the physical possession of the state. The trustee named the state agency in the turnover complaint, but the state refused to submit to the jurisdiction of the bankruptcy court under the Eleventh Amendment.

²³⁵⁹ *Id.*

²³⁶⁰ *Id.* at 925. Under section 1334(e), the district court, and by referral the bankruptcy court, has "exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(e) (1994).

²³⁶¹ *Zywiczynski*, at n.16.

²³⁶² *United States v. Ursery*, 116 S. Ct. 2135, 2142 (1996) (in rem civil actions not punishment for purposes of Double Jeopardy Clause).

government agents to seize property, including fungible property,²³⁶³ and the government entity initiates a civil forfeiture proceeding. A forfeiture judgment is a final adjudication of all rights of all claimants to the property and establishes the government's unencumbered title to the property. The government's title to the property ultimately relates back to the date of the original offense although relation back does not occur until the final adjudication proceeding.²³⁶⁴ Many forfeiture statutes enable co-owners and lienholders to file claims in the forfeiture action. However, not all statutes authorizing forfeitures have such "innocent owner" defenses.²³⁶⁵ In addition, there generally is no formal recognition of claims of *unsecured* creditors in judicial forfeiture proceedings.

An admiralty action is a close common law analogy to this type of *in rem* proceeding.²³⁶⁶ The Supreme Court has held that actual title to property may not be affected in an *in rem* proceeding consistent with the Eleventh Amendment.²³⁶⁷ Only *possession* of the property at issue but not the *title* to the property may be resolved by a federal court.²³⁶⁸ In the bankruptcy context, an *in rem* proceeding to recover a critical piece of the debtor's property from a state may be sufficient to enable a debtor to continue operations (to the benefit of all creditors) pending a state court determination of the title to the property.²³⁶⁹

²³⁶³ See 18 U.S.C. § 984 (1995) (authorizing forfeiture of fungible property, such as cash or monetary instruments).

²³⁶⁴ *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 129 (1993).

²³⁶⁵ See, e.g., *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (upholding Michigan statute allowing car to be forfeited as abatable nuisance after man engaged services of prostitute in car, notwithstanding state's failure to reimburse the man's wife for her part ownership interest).

²³⁶⁶ *Horwitz v. Zywczyński (In re Zywczyński)*, 210 B.R. 924, n.15 (Bankr. W.D.N.Y. 1997).

²³⁶⁷ *Florida Dep't. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). In *Treasure Salvors*, a private party sought a warrant of arrest against artifacts held by the State of Florida. The State was not named as a party to the action and the complaint sought only to recover possession of the artifacts. The Supreme Court affirmed the portion of the Fifth Circuit's determination that returned possession of the artifacts to the private party but reversed the portion of the Fifth Circuit's holding that determined the state's ownership of the artifacts as violative of the Eleventh Amendment. *Id.* at 700.

²³⁶⁸ *Id.* at 699 ("The Eleventh Amendment thus did not bar the process issued by the District Court to secure possession of artifacts of the Atocha held by the named state officials. The proper resolution of this issue, however, does not require -- or permit -- a determination of the state's ownership of the artifacts.").

²³⁶⁹ The use of an *in rem* proceeding against property of the estate held by a state is consistent with the Supreme Court's narrowing of the use of an *Ex parte Young* action essentially

6. Congress' Power Under the Fourteenth Amendment

Seminole does not necessarily eliminate all avenues of congressional power to abrogate a state's Eleventh Amendment immunity. The *Seminole* Court recognized a valid exercise of congressional abrogation of Eleventh Amendment immunity under Section 5 of the Fourteenth Amendment.²³⁷⁰ The Fourteenth Amendment provides that "... No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."²³⁷¹ Section 5 empowers the federal government to enforce the Fourteenth Amendment's provisions.²³⁷²

In upholding congressional abrogation power, the Court relied on the fact that the Fourteenth Amendment "expand[ed] federal power at the expense of state autonomy, [and] fundamentally altered the balance of state and federal power struck by the Constitution."²³⁷³ A few courts now have used the *Seminole* rationale to find that section 106 was enacted as a "valid exercise of power under the Fourteenth Amendment."²³⁷⁴ One court held that

[t]he Bankruptcy Code is intended to provide all American citizens with the following: the privilege of efficient liquidation or other use and ratable distribution of a debtor's assets, or (to put it another way)

to quiet title in a dispute with the state. It is important to note that the court in *Idaho v. Cœur d'Alene Tribe of Idaho* distinguished its holding in *Treasure Salvors* by stating "[w]e do not think *Treasure Salvors* is helpful to the Tribe because the state officials there were acting beyond the authority conferred upon them by the State." 117 S. Ct. 2028, 2040 (1997). It is unclear whether the Supreme Court would find that Eleventh Amendment immunity is not applicable in an *in rem* proceeding.

²³⁷⁰ In so holding, the *Seminole* court upheld its opinion in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (authorizing abrogation of a state's Eleventh Amendment immunity under the Enforcement Clause of the Fourteenth Amendment). In *Fitzpatrick*, male state employees sued the state for title VII sex discrimination in federal court, and the state argued immunity under the Eleventh Amendment.

²³⁷¹ U.S. CONST. amend. XIV, § 1.

²³⁷² *Id.* at § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

²³⁷³ *Seminole*, 116 S. Ct. at 1125.

²³⁷⁴ *Wyoming Dep't of Transp. v. Straight (In re Straight)*, 209 B.R. 540 (D. Wyo. 1997); *Headrick v. Georgia (In re Headrick)*, 200 B.R. 963 (Bankr. S.D. Ga. 1996); *In re Southern Star Foods, Inc.*, 190 B.R. 419 (E.D. Okla. 1995) (decided before *Seminole*, holding that section 106 was enacted pursuant to Section 5 of the Fourteenth Amendment).

with immunity from the inefficient liquidation or use and inequitable distribution of a debtor's assets which may obtain under State laws; the privilege of discharge, or (to put it another way) with immunity from oppressive debt collection which may obtain under State laws; liberty from economic bondage, and protection against undue loss of value of property in exigent financial circumstances; and fair and efficient determination of all of the above, according to the process due in a national court of equitable jurisdiction, without regard to persons or to any special privileges save those considered by Congress to be justified as a matter of policy.²³⁷⁵

The court in *Straight* thus found that, despite *Seminole*, section 106(a) was a valid exercise of congressional abrogation power under the Fourteenth Amendment.

The Supreme Court, however, has questioned nonremedial legislation under the Fourteenth Amendment.²³⁷⁶ In *City of Boerne*, the Court held that the Religious Freedom Restoration Act of 1993 ("RFRA") exceeded Congress' power under Section 5 of the Fourteenth Amendment.²³⁷⁷ Specifically, the Court found that Congress has the power to enforce the constitutional right to the free exercise of religion but that its Section 5 power "to enforce" the Fourteenth Amendment is only preventative or remedial in nature.²³⁷⁸ The RFRA was not a remedial statute because it was not enacted in response to offensive state statutes.²³⁷⁹ Similarly, section 106 was not revised to remedy an inequity under state law, but rather in response to the Supreme Court's ruling in *Hoffman v. Conn. Dep't of Income Maintenance*, which held that former section 106(c) was not a clear congressional abrogation of Eleventh Amendment state sovereign immunity.²³⁸⁰ Despite this legislative history, whether section 106 could still be considered a "remedial" provision is unclear. It may be argued that section 106 was enacted to preserve the property rights protected under the Bankruptcy Code and to avoid the results under state law. In this regard, section 106 may be a remedial measure for purposes of abrogating a state's Eleventh

²³⁷⁵ *In re Straight*, 209 B.R. at at *13.

²³⁷⁶ *City of Boerne v. Flores*, 117 S. Ct. 2157, 2167 (1997) ("Any suggestion that Congress has a substantive non-remedial power under the Fourteenth Amendment is not supported by our case law.").

²³⁷⁷ *Id.* at 2158.

²³⁷⁸ *Id.* at 2158.

²³⁷⁹ *Id.* at 2166.

²³⁸⁰ 492 U.S. 96 (1989) (holding that former section 106(c) was not a clear abrogation of state Eleventh Amendment sovereign immunity).

Amendment sovereign immunity. Re-enactment of section 106(a) under Section 5 of the Fourteenth Amendment may, however, exceed the Section 5 bounds set by the Court in *City of Boerne*.²³⁸¹

7. Empowering the U.S. Trustee to Sue States in Bankruptcy Court

The Eleventh Amendment does not bar suits against states in federal court as long as those suits are commenced by the federal government rather than private parties.²³⁸² Under the Bankruptcy Code, the U.S. trustee has standing to raise, appear, and be heard on any issue in any case or proceeding in bankruptcy with certain limitations.²³⁸³ As a consequence, the U.S. trustee could be empowered to commence suits in the bankruptcy court against states to enforce compliance with the Bankruptcy Code.²³⁸⁴ A few commentators have supported using similar measures to seek relief against a state in federal court.²³⁸⁵ Specifically with regard to the U.S. Trustee Program, this alternative would be more expeditious if the U.S. trustee acted as the case trustee.²³⁸⁶ Under these circumstances, the U.S. trustee could sue the state on behalf of the estate in its role as the trustee in cases commenced under Chapters 7, 12 and 13. In Chapter 11 cases, where the debtor usually remains in

²³⁸¹ *City of Boerne*, 117 S. Ct. at 2169. (“If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means.’ It would be ‘on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.’” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

²³⁸² *West Virginia v. United States*, 479 U.S. 305, 311-12 & n.4 (1987) (“States have no sovereign immunity as against the Federal Government.”); *Employees v. Dep’t of Pub. Health and Welfare*, 411 U.S. 279, 286 (1973) (“[N]othing in . . . any . . . provision of the Constitution prevents or has ever been seriously supposed to prevent a State’s being sued by the United States.”).

²³⁸³ 11 U.S.C. § 307 (1994).

²³⁸⁴ Authorization to sue states in bankruptcy court must be explicitly stated in order for the U.S. trustee to assume the mantle of the federal government under the Eleventh Amendment. See *Department of Transp. and Dev. v. PNL Asset Management Co. (In re Fernandez)*, No. 96-31013, 1997 WL 570353, *4 (5th Cir. Sept. 15, 1997) (“...the FDIC, as an agency of the national government, does not enjoy the status accorded the national government for Eleventh Amendment purposes. It follows that there must be a clear expression of purpose to abrogate the Eleventh Amendment in the grant of agency status for the purpose of jurisdiction.”).

²³⁸⁵ Daniel Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REVIEW 1, 56-57; JOSEPH F. RIGA, STATE IMMUNITY IN BANKRUPTCY AFTER *SEMINOLE TRIBE OF FLORIDA V. FLORIDA* 21 (1997) (unpublished manuscript) (citing Jonathan R. Siegel, *The Hidden Source of Congress’s Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995)).

²³⁸⁶ Private trustees are automatically appointed to serve in cases commenced under chapters 7, 12 and 13. Trustees are appointed to serve less often in cases commenced under Chapter 11.

possession, the U.S. trustee may need specific authorization to commence a suit against a state.

C. Repercussions of *Seminole* on Other Bankruptcy Policy Decisions

The Bankruptcy Code strikes a delicate balance between the rights of creditors to collect debts and the rights of debtors to restructure or discharge those debts. By exempting states from the jurisdiction of the bankruptcy court, *Seminole* arguably places states and state agencies outside this delicate balance regardless of what role they play in the case. This exclusion is detrimental to both debtors and creditors. Bankruptcy works in large measure because it provides a single forum with a binding determination of all of the competing rights in the debtor's property. Exempting even one party from this process invariably reduces its effectiveness for the remaining parties.

The state "is frequently both creditor and regulator, and its status as creditor often arises directly out of its position as a regulator. Its claims can run the gamut from taxes to compensatory and punitive damages for violations of environmental laws, to back wages collected as an agent for employees, to pecuniary losses suffered by the government in its own right."²³⁸⁷ Under *Seminole* and absent a state waiver of Eleventh Amendment immunity, these actions may have to be brought in state court. The possible alternatives discussed above are effective, to a greater or lesser degree, depending on the underlying circumstances.

Altering the power of any of the possible roles that states play in bankruptcy will magnify the results under *Seminole*. As a result, *Seminole* could have an exaggerated effect on any amendments to the Bankruptcy Code. Bankruptcy litigation against states in state court differs from normal state court litigation in one key aspect: in the majority of circumstances, the state court action will be an alternative forum for the action against the state; it will not be a duplicative forum. In a bankruptcy case, state court litigation against a state has a far greater impact than in a straight two-party dispute where it essentially acts as a choice of forum provision. The result in bankruptcy will be dual proceedings, moving at different speeds and possibly having conflicting results. The administrative costs associated with these additional proceedings will be borne by the creditors. A "uniform" system of bankruptcy may be unattainable if bankruptcy courts no longer provide a single forum for the resolution of claims by and against a bankruptcy estate.

In the context of bankruptcy legislation, the inability of a bankruptcy court to enforce a state's compliance with the Bankruptcy Code increases the power already

²³⁸⁷ KAREN CORDRY, *BANKRUPTCY LAW AND THE GOVERNMENTAL REGULATORY PROCESS*, xix (1995).

exercised by states in bankruptcy cases. For example, a recent provision in the proposed Chemical Weapons Implementation Act broadens a state's power (as well as any other governmental unit's power) to take certain police actions notwithstanding the automatic stay.²³⁸⁸ The proposed language in the Chemical Weapons Bill does not broaden the implications of *Seminole* and state sovereign immunity under the Eleventh Amendment. However, if the exceptions to the automatic stay are expanded to give greater authority for government units to obtain property of the estate without seeking court permission in advance, this may lead to more frequent litigation over whether the state has properly exercised the power at issue. The hurdles for pursuing any such litigation against nonconsenting state agencies will be much higher than for pursuing the same litigation against federal or local agencies.

As both a creditor and a regulator of debtors, states benefit from the collective, binding procedures under the Bankruptcy Code. Creditors bear the cost of administering the estate and, as discussed previously, duplicative litigation costs

²³⁸⁸ As part of the Chemical Weapons Implementation Act, which passed the Senate on May 23, 1997, section 362(b) would be amended to read as follows:

- (1) by striking paragraphs (4) and (5); and
- (2) by inserting after paragraph (3) the following:
“(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power[.]”

Chemical Weapons Implementation Act of 1997, S. 610 (May 23, 1997). This amendment is part of the chemical weapons legislation because:

The international body which oversees enforcement of the Chemical Weapons Convention is non-governmental and therefore is not covered under the exemption. This means that under current law a bankruptcy court could issue an injunction preventing any inspection for, or seizure of, chemical weapons. If this law had not been changed, the United States would come into noncompliance with the treaty.

Senator Charles Grassley, News Release (May 23, 1997). Given the proposed language in section 603 of this legislation, which repeals sections 362(b)(4) and (5) in their entirety, the effects of the amendment would appear not to be limited to actions in connection with the Chemical Weapons Convention but, rather, would extend to all governmental units and all types of actions. Electronic mail transmission from Stephen H. Case, Senior Adviser, to National Bankruptcy Review Commission (May 29, 1997). This legislation was referred to the House Judiciary Committee.

will be borne by creditors. Similarly, states (as both creditor and regulator) benefit from the fresh start to the extent that individual debtors become productive members of society after bankruptcy. An expeditious and binding bankruptcy process advances these policies under the Bankruptcy Code. As a result, it may be in the state's best interest to waive some or all of its Eleventh Amendment sovereign immunity and participate in bankruptcy cases to achieve these beneficial goals. If the waiver decision is left up to the state's litigation attorneys on a case-by-case basis, however, it is doubtful that they will give up an absolute defense to the federal suit.