ELEVENTH AMENDMENT IMMUNITY

Overcoming the Constitutional Invalidity of Section 106(a)

By Adam L. Rosen and Jill L. Makower

The 1996 U.S. Supreme Court decision *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), is widely viewed as holding that Congress lacks the power under Article I to abrogate states' sovereign immunity under the Eleventh Amendment, and broadly interpreted as rendering Bankruptcy Code § 106(a)'s abrogation of sovereign immunity unconstitutional as applied to states.

After *Seminole Tribe*, it was generally believed that, even if Eleventh Amendment immunity precluded certain bankruptcy-related actions against unconsenting states in federal courts, state courts would be required to entertain such actions under the Supremacy Clause. Last year, that view was rejected by the Supreme Court in *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240 (1999), in which the Court held that states have common law sovereign immunity to suits in state courts brought to enforce rights conferred by Article I.

Commentators have observed that the Supreme Court's construction of the Eleventh Amendment under *Seminole Tribe* and its recognition of a constitutional right to sovereign immunity under *Alden* risk undermining the paramount bankruptcy policies of a debtor's discharge and "fresh start," and of the fair and equitable distribution of the estate's assets to creditors.[1]

The *Seminole Tribe* and *Alden* decisions have made it difficult to hold states accountable in bankruptcy cases. Except to any extent that the states waive their immunity, states appear to be free to infringe on the bankruptcy rights of other parties without fear of suit for money damages in any court.

For example, since *Seminole Tribe*, courts have rendered decisions which, in effect, permit states to violate a variety of Code provisions, including those related to:

- discharge [see, e.g., *Franchise Tax Bd. v. Lapin (In re Lapin)*, 226 B.R. 637, 641 (9th Cir. B.A.P. 1998)];
- avoidance of preferences, fraudulent conveyances and unauthorized postpetition transfers [see, e.g., *Brewer v. N.Y. State Dep't of Correctional Servs. (In re Value-Added Communications Inc.)*, 224 B.R. 354, 359 (N.D. Tex. 1998) (preferences); *Sparkman v. Fla. Dept. of Revenue (In re York-Hannover Devs. Inc.)*, 201 B.R. 137, 138, 142 (Bankr. E.D.N.C. 1996) (fraudulent conveyances); *Mather v. Oklahoma Employment Sec. Comm'n (In re Southern Star Foods Inc.)*, 190 B.R. 419, 426 (Bankr. E.D. Okla. 1995) (unauthorized postpetition transfers)];
- turnover of property of the estate [*Horwitz v. Zywiczynski (In re Zywiczynski)*, 210 B.R. 924, 925-26 (Bankr. W.D.N.Y. 1997)];
- protection against discriminatory treatment [*In re Perez*, 220 B.R. 216, 224-25 (Bankr. D.N.J. 1995), *aff'd*, No. 98-2043, 1998 U.S. Dist. LEXIS 21513 (D.N.J. Aug. 10, 1998) (unpublished opinion)];
- the automatic stay [*Louis; Harris v. Barall (In re Louis; Harris)*, 213 B.R. 796, 798 (Bankr. D. Conn. 1997); *Tri-City Turf Club Inc. v. Kentucky Racing Comm'n (In re Tri-City Turf Club)*, 203 B.R. 617, 618 (Bankr. E.D. Ky. 1996)]; and
- determination of tax liability of the bankruptcy estate [*Bakst v. New Jersey (In re Ross)*, 234 B.R. 199, 202-03 (Bankr. S.D. Fla. 1999)]; while using the Eleventh Amendment as a shield.

The Fourteenth Amendment

In *Seminole Tribe*, the Supreme Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), which held that Congress may abrogate sovereign immunity pursuant to its Article I powers. *Seminole Tribe* also, however, reaffirmed Congress' power to abrogate states' Eleventh Amendment immunity through legislation enacted pursuant to § 5 of the Fourteenth Amendment. Since *Seminole Tribe*, courts and commentators have considered whether § 106(a) may be sustained as legislation enacted pursuant to § 5 of the Fourteenth Amendment.

Sec. 5 of the Fourteenth Amendment grants Congress the power to enforce the guarantees of the Due Process Clause. The Fourteenth Amendment provides in relevant part

"§ 1. ...No State shall ...deprive any person of life, liberty, or property, without due process of law...

"§ 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

U.S. Const., 14th Amendment, §§ 1, 5.

At least four bankruptcy courts and one district court have relied on the Fourteenth Amendment to uphold the constitutionality of § 106(a), but every circuit court to address the issue has ruled otherwise. Moreover, the 1999 decision of the U.S. Supreme Court in the patent infringement case *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank (Florida Prepaid)*, 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999), effectively overruled the minority of cases relying on the Fourteenth Amendment as a means of "rescuing" the viability of § 106(a).

Florida Prepaid addressed the issue of whether the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), which amended the federal patent laws to expressly abrogate state sovereign immunity, could be sustained as legislation enacted pursuant to § 5 of the Fourteenth Amendment. In *Florida Prepaid*, the Supreme Court recognized that Congress can abrogate a state's sovereign immunity in order to vindicate property rights protected under the Fourteenth Amendment Due Process Clause. The Supreme Court explained that for Congress to invoke § 5 of the Fourteenth Amendment, however, "it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Id.* at 2207.

Adam L. Rosen and **Jill L. Makower** are with Rosen & Slome, LLP in Garden City, N.Y.

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Applying that test, the Supreme Court found that, in enacting the Patent Remedy Act, Congress identified no history of deprivation of property rights by the states "of the sort Congress has faced in enacting proper prophylactic § 5 legislation." *Id.* at 2202. In view of the absence of a pattern of patent infringement, the Court concluded that the abrogation provisions of the Patent Remedy Act were "so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 2210. Accordingly, the Court held that the constitutionality of the Patent Remedy Act could not be sustained as legislation enacted pursuant to § 5 of the Fourteenth Amendment.

Applying the *Florida Prepaid* decision to the Bankruptcy Code, it seems clear that the constitutionality of § 106 similarly cannot be sustained on the grounds that it was enacted pursuant to § 5 of the Fourteenth Amendment. First, in enacting § 106, Congress did not identify "conduct transgressing the Fourteenth Amendment's substantive provisions." Second, there is no evidence that § 106 was tailored to remedy or prevent conduct violative of the Fourteenth Amendment's substantive provisions.

Overcoming the Constitutional Invalidity of § 106(a)

In a recent Vanderbilt Law Review article titled "State Defiance of Bankruptcy Law,"[2] authors Kenneth N. Klee, James O. Johnston and Eric Winston argue that Congress should consider enacting legislation to neutralize some of the potentially devastating effects of *Seminole Tribe* and *Alden*. The authors offer the following five possible avenues for Congress to explore in order to overcome the constitutional invalidity of § 106(a) as applied to states.

First, Congress could purport to reenact § 106(a) pursuant to its powers under § 5 of the Fourteenth Amendment. Although the article concludes that Congress cannot rely on either the Equal Protection Clause or the Privileges and Immunities Clause of the Fourteenth Amendment to reenact § 106(a), it argues that Congress may be able to constitutionally abrogate a state's Eleventh Amendment or common law sovereign immunity for bankruptcy purposes to further the protections guaranteed by the Fourteenth Amendment Due Process Clause. The authors note that Congress could reenact § 106(a) pursuant to § 5 of the Fourteenth Amendment if it could show a widespread and persistent pattern of state deprivations of property rights protected under the Bankruptcy Code. Based on the numerous times states have been found to violate the automatic stay, the authors opine that Congress could establish such a pattern.[3]

Second, Congress could authorize U.S. trustees or possibly private trustees or debtors in possession to sue states on bankruptcy causes of action in the name of the United States, thereby circumventing the Eleventh Amendment and common law sovereign immunity.

Third, Congress could amend the Bankruptcy Code to provide for a standing injunction against state officials under the Ex parte Young doctrine.

Fourth, Congress could amend the Bankruptcy Code to provide for the automatic disallowance of a state's claim unless the state waives Eleventh Amendment and sovereign immunity regarding the claim and compulsory counterclaims.

Fifth, Congress could condition the granting of federal funding to states based on each state's waiver of Eleventh Amendment immunity. The article notes that such a condition might be valid under Congress' Spending Clause power under Article I, § 8.

Congress should immediately consider these proposed solutions to remedy the deleterious consequences of *Seminole Tribe*, *Alden* and their progeny in bankruptcy cases and proceedings.

(1) See Klee, Johnston & Winston, State Defiance of Bankruptcy Law, 52 Vanderbilt Law Review 1527, 1576 (Nov. 1999).

(2) Klee, Johnston & Winston, State Defiance of Bankruptcy Law, 52 Vanderbilt Law Review 1527 (Nov. 1999).

(3) Klee, Johnston & Winston, State Defiance of Bankruptcy Law, 52 Vanderbilt Law Review 1527 at 1581-82.

The Bankruptcy Hotline

ATTORNEY FEES

Civil Rights Plaintiff Awarded Fees for Work In Bankruptcy Court

A plaintiff who prevails in a Title VII action and is forced to participate in a bankruptcy proceeding to collect the judgment may later apply for additional attorney fees for the work performed in bankruptcy court. *Seibel v. Paolino*, No. 90-752, (May 19).

Four women filed a Title VII sexual harassment suit in federal district court, which the defendant failed to defend. A default judgment was entered in favor of the plaintiffs, and after a hearing on damages, they were awarded approximately $250,000 and $24,000 in attorney fees. Almost immediately after the judgment was entered, the defendant filed a Chapter 7 bankruptcy petition. The plaintiffs sought to have their claims classified as administrative priorities, and also that the claims be deemed nondischargeable on the basis that the defendant's actions were willful and malicious. An agreement was reached with the trustee with respect to the issue of priority, which provided for 80 percent of the Title VII judgment (not including the attorney fees) to be given administrative priority.

As to the issue of nondischargeability, the bankruptcy court found that, because the judgments were issued by default, there was never any determination as to the nature of the conduct and the issue needed to be litigated de novo. After a trial, the bankruptcy court found that the debtor's conduct was willful and malicious and that neither the judgment nor the attorney fees

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