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Supreme Court Rules Bankruptcy Power Not Subject to Eleventh Amendment

In *Central Virginia Community College v. Katz*¹ the U.S. Supreme Court determined that the Eleventh Amendment did not apply to the exercise of the bankruptcy power.

In a 5-4 opinion by Justice John Paul Stevens with Chief Justice John Roberts joining in the dissent, the Court determined that the history of the bankruptcy power placed it beyond the constraints imposed by *Seminole Tribe of Fla. v. Florida*,² a seminal, decade old decision by Chief Justice William Rehnquist. The Court made explicit in *Katz* what was “implicit” in its opinion two years earlier in *Tennessee Student Assistance Corporation v. Hood*:³ “That the ratification of the Bankruptcy Clause...[in the Constitution] represent[ed] a surrender by the States of their sovereign immunity.”⁴

Expansion of a state’s Eleventh Amendment immunity was the centerpiece of the Rehnquist Court’s goal of enhancing state’s rights. The Eleventh Amendment bars a private party from suing a non-consenting state absent a valid abrogation by Congress of a state’s



sovereign immunity. In *Seminole Tribe*, the Supreme Court took an Indian Commerce Clause case and simply proclaimed that Congress could not abrogate a state’s sovereign immunity under any of its Article I powers, including bankruptcy.

‘Seminole Tribe’ Doctrine

The application of the *Seminole Tribe* doctrine in areas other than the Commerce Clause was clearly dicta.⁵ However, that dicta became accepted as the law of the land, as the Rehnquist Court repeatedly used the *Seminole Tribe* doctrine to invalidate Congress’s authorization of suits by private parties against states in areas of not only interstate commerce, but also patent law or any other exercise by Congress of its Article I powers.

The first minor incursion by the Supreme Court in the *Seminole Tribe* doctrine was its 1998 ruling in *California*

*v. Deep Sea Research Inc.*⁶ In *Deep Sea Research* the Court ruled that the Eleventh Amendment was inapplicable where a federal court was exercising its in rem jurisdiction in admiralty, but only when the res was not in the possession of a state. This narrow ruling created some precedent for constructing an in rem exception to the *Seminole Tribe* doctrine in bankruptcy. *Deep Sea Research*, however, did not directly implicate *Seminole Tribe*, because admiralty law is the product of the common law, and *Seminole Tribe* was directed at limiting Congress’s Article I powers.⁷

Six years later in *Hood*, the Supreme Court for the first time recognized an in rem exception to the *Seminole Tribe* doctrine with respect to Congress’ Article I powers. However, Chief Justice Rehnquist went over to the majority in that case in order to craft an opinion which limited the breadth of *Hood*’s in rem bankruptcy exception.⁸

The ‘Hood’ Case

In *Hood* the Court ruled that a state’s Eleventh Amendment immunity was not a bar to a bankruptcy court’s power to discharge a student loan debt owing to a state, even though the discharge was obtained by commencing an adversary proceeding (a form of lawsuit in bankruptcy) against a state. Chief Justice Rehnquist reasoned that “a bankruptcy court’s discharge of a student loan debt

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does not implicate a State's Eleventh Amendment immunity," because a bankruptcy court was only exercising its in rem jurisdiction. Moreover, *Hood* carefully avoided identifying what other areas of a bankruptcy court's in rem jurisdiction also did not implicate the Eleventh Amendment, although *Hood* included language suggesting that a preference action, a claim for monetary relief, would continue to be barred by the Eleventh Amendment.

Katz ended the fiction that *Hood's* recognition of a bankruptcy court's power to discharge a debt owing to a state did not implicate a state's sovereign immunity. Instead, the Court held that sovereign immunity had been surrendered by the states in their ratification of the Bankruptcy Clause in the Constitution. *Katz* ended the fiction that the expansive language in *Seminole Tribe* which extended that case's holding to all of Congress's powers was binding precedent. Instead, *Katz* described the application of *Seminole Tribe* in bankruptcy as being "erroneous" and "dicta."

Katz is startling to the extent to which it bars a state's Eleventh Amendment defense in bankruptcy. The Eleventh Amendment was directed especially at prohibiting monetary judgments against a state, but *Katz* upheld a trustee's right to bring a preference action for monetary relief against a state.

Katz extends *Hood's* acceptance of an adversary proceeding (an in personam device) from a means of discharging a debt owing to a state to encompass virtually any bankruptcy court order which is in furtherance of a bankruptcy court's in rem jurisdiction. *Katz* states:

Insofar as orders ancillary to the bankruptcy courts' in rem jurisdiction, like orders directing turnover of preferential transfers, implicate States' sovereign immunity from suit,

the States agreed in the plan of the Convention not to assert that immunity."¹⁰

How far a bankruptcy court's ancillary power to trump a state's sovereign immunity extends is left undefined in *Katz*. In footnote 15 the Court recognized that there was some limit to the extent "every law labeled a

The Court made explicit in 'Katz': "That the ratification of the Bankruptcy Clause ... [in the Constitution] represent[ed] a surrender by the States of their sovereign immunity."

'bankruptcy law' could... properly impinge upon state sovereign immunity." Maybe that limit will be defined based upon a bankruptcy court's core and non-core jurisdiction (i.e., a pre-bankruptcy, contract dispute). Such a determination is left for a later case.

The opinion in *Katz* carefully avoided a total abandonment of *Seminole Tribe*. Rather than recognizing a right by Congress to abrogate a state's Eleventh Amendment immunity, as provided in section 106(a) of the Bankruptcy Code, *Katz* states that there is nothing to abrogate, as the immunity was surrendered in the states' ratification of the Bankruptcy Clause. Thus, the Supreme Court still can state, albeit with a wink, that Congress lacks the power under Article I to abrogate a state's sovereign immunity.

Katz's reliance on the bankruptcy powers' history does not reflect Justice Stevens' adoption of an "originalist" approach. History has been used to define the scope of the Eleventh

Amendment since the nineteenth century. In addition, it appears from footnote 13, that Justice Stevens may have been unable to win a majority of his brethren over to an opinion based on the Bankruptcy Clause's requirement for uniformity, the basis of the lower courts' decisions. Such an analysis would have increased the extent to which the Court was departing from *Seminole Tribe*.

Justice Stevens filed a powerful dissent in *Seminole Tribe*. He wrote: "This case is about power."¹¹ In *Katz*, Justice Stevens restored Congress's power from the constraints imposed by *Seminole Tribe*, at least in the area of bankruptcy.

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1. 126 S.Ct. 990 (2006).
2. 517 U.S. 44 (1996).
3. 541 U.S. 440 (2004).
4. *Katz* at 126 S.Ct. at 1000 n. 9.
5. Leonard H. Gerson, "Circuits Uphold 'Seminole Tribe' Doctrine in Bankruptcy," N.Y.L.J., Oct. 30, 1997 at 1, col. 1.
6. 523 U.S. 491 (1998).
7. Leonard H. Gerson "New Trends in Applying 'Seminole' Doctrine in Bankruptcy" N.Y.L.J. July 16, 1998 at 4, col. 4; Leonard H. Gerson, "A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the 'Seminole Tribe' Doctrine," 74 Am. Bankr. L.J. 1, 25-29 (2000).
8. Leonard H. Gerson "High Court Alters 'Seminole Tribe' Doctrine of Bankruptcy," N.Y.L.J. Sept. 29, 2004 at 4, col. 3.
9. *Katz*, 126 S.Ct. at 996.
10. *Katz*, 126 S.Ct. at 1002.
11. *Seminole Tribe*, 517 U.S. at 76.

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