In Brief: Supreme Court Ruling on Sovereign Immunity

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Revisiting an issue that it left unresolved 10 years ago, the U.S. Supreme Court ruled on January 23, 2006 in *Central Virginia Community College v. Katz* that the states agreed not to assert sovereign immunity from a bankruptcy trustee's suit to avoid a preferential transfer when they ratified the Constitution's bankruptcy clause. In its first bankruptcy ruling of 2006, the Court re-examined its 1996 decision on the scope of a state's 11th Amendment immunity in *Seminole Tribe of Florida v. Florida*. Both the majority and the dissenters in *Seminole* assumed that a statement in that case — that Congress lacks authority under Article I to abrogate a state's immunity — would apply in the bankruptcy context.

Writing for the 5-4 majority in *Katz*, Justice John Paul Stevens explained that the statement in *Seminole* was nothing more than non-binding dicta, and concluded that the "relevant 'abrogation' is the one effected in the plan of the [Constitutional] Convention, not by statute." In a dissenting opinion, Justice Clarence Thomas, joined by Chief Justice John G. Roberts, Jr., and Justices Antonin Scalia and Anthony M. Kennedy, argued that "history confirms that the adoption of the Constitution merely established federal power to legislate in the area of bankruptcy law, and did not manifest an additional intention to waive States' sovereign immunity against suit." According to the dissent, the bankruptcy clause is no different from other Article I provisions, such as the patent and commerce clauses, that were "motivated by the Framers' desire for nationally uniform legislation," yet do not authorize abrogating state immunity.

Section 106(a) of the Bankruptcy Code provides that a "governmental unit" is deemed to waive sovereign immunity in connection with litigation commenced under many provisions of the Bankruptcy Code, including preference and fraudulent transfer avoidance actions and proceedings seeking to establish the dischargeability of a debt. Previous rulings handed down by the Supreme Court and the highest appellate courts cast doubt on the validity of section 106(a). *Katz* would appear to have put an end to the debate, but not entirely. Although the majority opinion concludes that, in ratifying the Constitution, the states "acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts," Justice Stevens cautioned that not every bankruptcy law may properly impinge on state sovereignty. This leaves open the possibility that section 106(a) may not pass muster in situations not involving a bankruptcy court's *in rem* jurisdiction over a debtor's property or its debts.

Central Virginia Community College v. Katz, 126 S. Ct. 990 (2006).