FEDERALISM AND BANKRUPTCY: DECIPHERING *KATZ*

INTRODUCTION

A symposium on bankruptcy and state sovereign immunity was held on February 9, 2007 at St. John's University School of Law. Scholarly symposium papers included in this issue of the *American Bankruptcy Institute Law Review* were prepared by five participants who are experts on issues arising from the intersection of constitutional and bankruptcy law with state sovereign immunity from suits in federal courts. Three of the participating authors, who explore in their articles the theory and history of the jurisprudence of sovereign immunity and the Eleventh Amendment, are outstanding academics who have previously written extensively on this subject—Professor Ralph Brubaker of the University of Illinois College of Law; Professor Martin H. Redish of Northwestern University School of Law; and Professor Thomas E. Plank of the University of Tennessee College of Law. The other participating authors are Hon. Randolph J. Haines, Bankruptcy Judge of the District of Arizona, a frequent author of judicial opinions and law review commentary on the topic; and Susan M. Freeman, Esq., a partner of Lewis & Roca LLP in Phoenix, Arizona, and frequent lecturer and author on bankruptcy law topics.

This symposium was inspired by the Supreme Court's decision last year in *Central Virginia Community College v. Katz* (hereinafter "*Katz*").[1] In a five to four decision, the Court held that a State did not have sovereign immunity from a lawsuit brought by a bankruptcy trustee in a bankruptcy court to void a preferential transfer and recover a money judgment for the amount of the transfer. *Katz* was a surprise because scarcely ten years before, in *Seminole Tribe*,[2] a non-bankruptcy case, the Court broadly ruled that Congress did not have the power to abrogate state sovereign immunity by a statute enacted pursuant to its powers under Article I of the Constitution, and even stated in *dicta* that its ruling upholding state sovereign immunity applied to suits to enforce bankruptcy legislation. *Katz*'s new direction was premised on the notion that by virtue of the Constitution *itself*, the States surrendered immunity from suit for a money judgment to recover a preferential transfer. *Katz*'s theory was that such a judgment, as a historical matter, was ancillary to the *in rem* jurisdiction of bankruptcy. And, the States' Eleventh Amendment immunity from federal court suits did not bar such a suit because that amendment did not restore any immunity of the States that was surrendered by virtue of the Constitution itself.[3]

A number of significant questions are not squarely answered by *Katz*. The principal issues are whether the courts will extend the "ancillary jurisdiction" theory so as to permit suits in bankruptcy courts to recover a money judgment against a

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[1] 126 S. Ct. 990 (2006).
[2] Seminole Tribe of Fla. v. Fla., 517 U.S. 44 (1996).
[3] *See* Alden v. Maine, 527 U.S. 706, 722 (1999).

State based on any provision of the Bankruptcy Code or otherwise to enforce a provision of that Code. There is a further issue whether *Katz*'s theory will preclude the assertion of sovereign immunity by a State in a bankruptcy court suit to recover on a non-bankruptcy claim in which the court's subject matter jurisdiction is predicated on its "related to" bankruptcy jurisdiction.[4]

Some of the articles by the participating authors explore the impact of the Constitution on state sovereign immunity with respect to bankruptcy and the Supreme Court's jurisprudence on the subject from its constitutional origin to the present. Other symposium articles address the principal issues not squarely answered by *Katz* and look to its future—will the Supreme Court, the composition of which has changed since *Katz* was decided, limit or overrule it, and, until the Court speaks again, how will the lower courts apply it?

The participating authors bring a wealth of experience and knowledge to the subject. Judge Haines wrote the first opinion holding that the States do not have immunity from suits in bankruptcy courts on bankruptcy claims.[5] Previous writings by Judge Haines and by Professor Plank were relied upon by the Supreme Court in *Katz*. Ms. Freeman co-authored with Professor Richard Lieb of St. John's University, a professors' *amicus* brief filed in *Katz* in support of Respondent's position that, as subsequently held by the Court, the States do not have immunity from a bankruptcy court suit to recover a money judgment for an avoided preference. This symposium issue also includes an article by Professor Lieb on the paramount position of federal power over states' rights as expressed in the watershed constitutional law decisions of Chief Justice John Marshall during the "golden age" of the Supreme Court (1803–1827).

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[4] *See* 28 U.S.C.A. § 1334(b) (West Supp. 2006).

[5] Bliemeister v. Indus. Comm'n of Ariz. (*In re* Bliemeister), 251 B.R. 383 (Bankr. D. Ariz. 2000), *aff'd on other grounds*, 296 F.3d 858 (9th Cir. 2002) (holding state waived sovereign immunity by its litigation conduct).