THE LONG AND WINDING ROAD: STATE SOVEREIGN IMMUNITY'S EFFECT ON GAMING LICENSE REVOCATION FOR THE CASINO DEBTOR

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I. INTRODUCTION

Once thought to be financial thoroughbreds, casinos are feeling the financial squeeze of the economic recession. Nevada gaming revenues declined 10.4 percent in 2009, setting the state record for the largest single-year decrease.[1] Over $10 billion in development projects are on indefinite hiatus in Atlantic City, and more are postponed in Las Vegas.[2] MGM Mirage has placed properties in Biloxi and Detroit on the market and sold the Treasure Island Hotel Casino in Las Vegas.[3] Local gaming giant Station Casinos recently filed for bankruptcy.[4] Notable gaming attorneys fear that there are many more bankruptcies on the horizon.[5]

The casino debtor is a unique breed. The casino debtor must abide by both the substantive and procedural laws of the bankruptcy court while also adhering to the regulatory process of the state gaming control board. Consequently, there are overlaps between the powers of the bankruptcy courts and the gaming regulators.[6] Legal commentators advocate the two competing bodies of power strike

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[1] Howard Stutz, *Casino Revenues Take Plunge*, LAS VEGAS REV.-J., Feb. 12, 2010, at 1A, *available at* http://www.lvrj.com/news/gaming-revenues-fall-by-biggest-percentage-ever-84117117.html.

[2] Lori Tripoli, *Wasn't the Gaming Law Business Supposed to Be Recession-Proof?*, 13 GAMING L. REV. & ECON. 23, 24 (2009).

[3] Howard Stutz, *Wynn Interested in Buying Some MGM Mirage Casinos*, LAS VEGAS REV.-J., Apr. 28, 2009, http://www.lvrj.com/news/breaking_news/43900967.html.

[4] Motion for Interim and Final Orders Directing Joint Administration of Chapter 11 Cases Pursuant to Fed. R. Bankr. P. 1015(b) and Local Rule 1015(b) at 2, *In re* Station Casinos, Inc., No. 09-52477 (Bankr. D.Nev. July 29, 2009).

[5] John C. Edwards, *Casino Bankruptcies Nothing New for Gordon Silver Official*, LAS VEGAS REV.-J.,May 3, 2009, at 1E, *available at* http://www.lvrj.com/business/44255982.html (Gerald Gordon stated "for the last 10 years, we've seen consolidation in the industry. I think for the next five years we're going to see deconsolidation in the industry. Properties are going to be sold off.").

[6] *See* NEV. GAMING COMM'N REG. § 9.030 (2011) (§ 9.030 requires the casino debtor to notify the regulatory body if "a licensee files any petition with the bankruptcy court for relief

a copasetic relationship due to the jurisdictional tensions that underlie a bankruptcy proceeding of a casino debtor.[7]

One of the most vital and contentious proceedings between a casino debtor and a regulatory agency is a post-petition license revocation hearing. Much debate exists about whether the license qualifies as property of the estate and whether the regulatory agency can be exempted from the protections inherent in the Bankruptcy Code due to the use of police and regulatory power. However, maybe the most contentious and impactful debate is whether the regulatory agency is free from the bankruptcy court's jurisdiction due to the Eleventh Amendment's guarantee of sovereign immunity.[8] Sovereign immunity has been a core belief of our government dating back to English common law.[9] In *Federal Maritime Commission v. South Carolina State Ports Authority*,[10] Justice Thomas stated:

> Dual sovereignty is a defining feature of our Nation's constitutional blueprint. States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union "with their sovereignty intact." An integral component of the "residuary and inviolable sovereignty," retained by the States is their immunity from private suit . . . .[11]

At the center of the tension concerning sovereign immunity lies 11 U.S.C. § 106(a),[12] which authorizes the bankruptcy court to abrogate state sovereign immunity. In the past fifteen years, the United States Supreme Court issued three key decisions concerning the federal government's ability to abrogate statutorily states' sovereign immunity pursuant to its Article I power and the bankruptcy court's unique position in the long standing controversy.[13] The states' ability to assert their sovereign immunity in bankruptcy proceedings is particularly relevant to casino bankruptcies due to the heavy involvement of the state gaming regulator. With the Bankruptcy Code in question, state governmental units and the jurisdiction of the bankruptcy court are in direct conflict.[14]

This Note will outline the historical context, relevant Supreme Court decisions, and the cloudy, ill-defined area in which bankruptcy courts are authorized to abrogate states' sovereign immunity. Additionally, this Note will explore the analysis courts use when determining whether a regulatory

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as a debtor or has such a petition filed against it[.]" Additionally, the regulation requires the regulatory body's authorization of any appointed trustee.).

[7] Robert W. Stocker II & Peter J. Kulick, *Gambling with Bankruptcy: Navigating a Casino Through Chapter 11 Bankruptcy Proceedings*, 57 DRAKE L. REV. 361, 379-81 (2008).

[8] U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State").

[9] 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3524 (3d ed. 2008).

[10] 535 U.S. 743 (2002).

[11] *Id.* at 751-52 (citations omitted); *see also* WRIGHT ET AL., *supra* note 9.

[12] 11 U.S.C. § 106(a) (2006) ("Notwithstanding 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: (1) Sections 105 . . . 1327 of this title.").

[13] *See generally* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) [hereinafter Seminole]; Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006).

[14] Gregg W. Zive, *The House Doesn't Always Win*, 8 GAMING L. REV. 278, 292 (2004).

agency's power to revoke licenses is exempted from the automatic stay. Lastly, this Note will argue that the three recent Supreme Court cases restored order to the bankruptcy court's ability to pierce the sovereign immunity of a regulatory agency during a license revocation hearing of a casino debtor.

II. THE *SEMINOLE* DOCTRINE AND ENSUING AFTERMATH

A. The Creation of the Seminole *Doctrine*

In the long history of the United States Supreme Court, there has only been one instance where the Court upheld an abrogation of state sovereign immunity by Congress' use of an Article I power.[15] In *Pennsylvania v. Union Gas Co.*,[16] the Court declared that Congress could abrogate sovereign immunity through the use of the Interstate Commerce Clause. The Court based its reasoning on the fact that if Congress could not create a cause of action against the states, then no one would be able to hold the states liable for money damages.[17] The Court further noted, "in many situations, it is only money damages that will carry out Congress' legitimate objectives under the Commerce Clause."[18]

In *Seminole Tribe of Florida v. Florida*,[19] the Supreme Court took an affirmative step to limit its previous holding of *Union Gas*.[20] In *Seminole*, the Court considered whether Florida could assert its sovereign immunity to protect itself from being haled into court for claims of violating the Indian Gaming Regulatory Act ("IGRA").[21] Congress enacted the IGRA under the power of the Indian Commerce Clause in Article I of the United States Constitution.[22] The IGRA places a duty on the State to "negotiate with the Indian tribe in good faith" to create a compact governing the conduct of gaming activities,[23] and provides the United States district courts with jurisdiction over all claims arising out of a failure to negotiate.[24] The Seminole Indian Tribe brought suit against the State of Florida for failure to negotiate, but Florida moved to dismiss the complaint on the grounds that the commencement of the suit violated its sovereign immunity.[25]

While recognizing the principle of stare decisis with regard to *Union Gas*, the Court chose to revisit the issue due to the *Union Gas*'s splintered decision and the plurality's desire to "deviate sharply from our established federalism jurisprudence."[26] *Union Gas* was a 5-4 decision, and the Court's makeup

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[15] *Seminole*, 517 U.S. at 59-60.
[16] 491 U.S. 1 (1989).
[17] *Id.* at 20.
[18] *Id.*
[19] 517 U.S. 44 (1996).
[20] Susan E. Hauser, *Necessary Fictions: Bankruptcy Jurisdiction After Hood and Katz*, 82 TUL. L. REV. 1181, 1182 (2008).
[21] 25 U.S.C. § 2702 (2006); *Seminole*, 517 U.S. at 47.
[22] U.S. CONST. art. III, § 8, cl. 3.
[23] 25 U.S.C. § 2710(d)(3).
[24] *Id.* § 2710(7)(A)(i).
[25] *Seminole*, 517 U.S. at 52.
[26] *Id.* at 63-65.

changed dramatically in the time between *Union Gas* and *Seminole*.[27] In *Seminole*, the addition of Justice Thomas gave dissenting justices in *Union Gas* the ability to reverse the opinion and revert back to a broad interpretation of the Eleventh Amendment.[28] No longer could Congress abrogate state sovereign immunity through the use of an Article I power.

> 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 unconsenting 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.[29]

Seminole had a drastic impact on the effectiveness of the bankruptcy court to effectuate its orders upon the states. Eleven U.S.C. § 106(a) allows the bankruptcy court to abrogate state sovereign immunity and issue "an order, process, or judgment . . . including an order or judgment awarding a money recovery, but not including an award of punitive damages" against a governmental unit.[30] However, the Bankruptcy Clause is one of the Article I powers authorized to Congress by the United States Constitution.[31] *Seminole*'s prohibition of abrogation of state sovereign immunity stemming from Article I powers immediately placed § 106(a)'s constitutionality in question.

In *In re Estate of Fernandez*,[32] the State of Louisiana asserted sovereign immunity when NCNB Texas National Bank brought an adversary proceeding against the state to determine the validity of title concerning purchased property.[33] The Fifth Circuit rested its argument upon Justice Scalia's statements espousing the similarities between the Commerce Clause and the Bankruptcy Clause.[34] After determining the Bankruptcy Code was within the scope of *Seminole*'s reach, the *Fernandez* Court easily determined that § 106(a) was unconstitutional.[35]

Additionally, doubt began creeping in concerning limitations on Congress's power to determine when a state has waived its sovereign immunity. Traditionally, a state waived its immunity from suit when it filed a claim in a bankruptcy proceeding pursuant to § 106(b).[36] However, in *Schlossberg v. Maryland* (*In re Creative Goldsmiths*),[37] the court stated, "[w]hile 11 U.S.C § 106(b) may correctly describe those actions that, as a matter of constitutional

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[27] Justice Marshall, Justice Burger, Justice White, and Justice Blackmun left the court between the time of *Union Gas* and *Seminole*.

[28] Hauser, *supra* note 20, at 1192.

[29] *Seminole*, 517 U.S. at 72-73 (footnote omitted).

[30] 11 U.S.C § 106(a) (2006).

[31] U.S. CONST. art. I, § 8, cl. 4.

[32] Dep't of Transp. & Dev. v. PNL Asset Mgmt. Co., LLC (*In re* Fernandez), 123 F.3d 241 (5th Cir. 1997).

[33] *Id.* at 243.

[34] *Id.* at 244 (citing Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96, 105 (1989) (Scalia, J., concurring in judgment)).

[35] *Id.* at 246.

[36] Hauser, *supra* note 20, at 1188 (citing Arecibo Cmty. Health Care, Inc. v. Puerto Rico, 270 F.3d 17, 27 (1st Cir. 2001) (affirming the constitutionality of §106(b) of the Bankruptcy Code, which provides that a governmental unit waives sovereign immunity by filing a proof of claim)).

[37] 119 F.3d 1140 (4th Cir. 1997).

law, constituting a state's waiver of the Eleventh Amendment, it is nevertheless not within Congress' power to abrogate such immunity by 'deeming' a waiver."[38]

Future circuit splits and judicial confusion within the bankruptcy courts began to demonstrate why the *Seminole* Doctrine was problematic.[39] Eventually, the overwhelming majority of bankruptcy courts were rigidly applying the *Seminole* Doctrine and finding § 106(a) unconstitutional.[40] However, a few outlying cases either made cognizable arguments for the constitutionality of § 106(a) or outright held that it was a valid exercise of congressional power.[41] The majority of these cases held that the Bankruptcy Code was made pursuant to both the Article I powers and the Enforcement Clause of the Fourteenth Amendment.[42]

Although Section 5 of the Fourteenth Amendment expands "federal power at the expense of state autonomy,"[43] *Seminole* instructed the lower courts to ask the question: "was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?"[44] The logical conclusion is that Congress enacted The Bankruptcy Reform Act, including § 106(a), under "the same specifically enumerated Article I bankruptcy power that it has traditionally relied on in enacting prior incarnations of the bankruptcy law dating back to 1800—sixty-eight years before the passage of the Fourteenth Amendment."[45] No evidence exists to the contrary.[46] Since the Bankruptcy Code was not enacted specifically pursuant to the Fourteenth Amendment, abrogation of sovereign immunity is not permissible under the Enforcement Clause of the Fourteenth Amendment.

Additionally, the Rehnquist Court took steps in subsequent cases to curtail the ability to abrogate state sovereign immunity. In *City of Boerne v. Flores*[47] and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[48] the Court held that in order to utilize the powers granted under Section 5 of the Fourteenth Amendment, Congress is required to "identify con-

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[38] *Id.* at 1147.

[39] *See generally id.*; *see also In re* S. Star Foods, Inc., 190 B.R. 419 (Bankr. E.D.Okla.,1995.).

[40] *See In re* L. Luria & Sons, Inc., 282 B.R. 504 (Bankr. S.D.Fla.,1999); Nat'l Cattle Cong., Inc. v. Iowa Racing & Gaming Comm'n (*In re* Nat'l Cattle Cong., Inc.), 91 F.3d 1113 (8th Cir. 1996); *In re* Sacred Heart, 204 B.R. 132, (Bankr.E.D.Pa. 1997).

[41] *See generally* Headrick v. Georgia (*In re* Headrick), 200 B.R. 963 (Bankr. S.D.Ga. 1996); Mather v. Okla. Emp't Comm'n (*In re* S. Star Foods, Inc.), 190 B.R. 419 (Bankr. E.D.Okla.,1995.); Lees v. Tenn. Student Assistance Corp. (*In re* Lees), 252 B.R. 441 (Bankr. W.D. Tenn. 2000).

[42] U.S. CONST amend. XIV (The Fourteenth Amendment specifically states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article" and, therefore, authorizes piercing state sovereign immunity in appropriate cases.).

[43] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996).

[44] *Id*.

[45] Schlossberg v. Maryland (*In re* Creative Goldsmiths of D.C., Inc.), 119 F.3d 1140, 1146 (4th Cir. 1997).

[46] *Id.*; *See generally In re* Fernandez, 123 F.3d 241, 244 (5th Cir. 1997) *and* NVR Homes, Inc. v. Clerks of the Cir. Ct. for Anne Arundel, Cnty., Md. (*In re* NVR, L.P.), 189 F.3d 442 (4th Cir. 1999).

[47] 521 U.S. 507 (1997).

[48] 527 U.S. 627 (1999).

duct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[49]

As discussed above,[50] there is no evidence to indicate that Congress enacted the Bankruptcy Reform Act pursuant to the powers granted under the Fourteenth Amendment. However, some courts utilize the rationale that any act of Congress will implicate protections of liberty and property granted by the Fourteenth Amendment.[51] This argument is circumspect. Under its rationale, if the Enforcement Clause is construed in such breadth to encompass the Bankruptcy Code, then every act of Congress would have the heavy handed protection of the Fourteenth Amendment.[52] *Boerne* and *Prepaid*'s identification of the Enforcement Clause as a remedial power rather than a plenary one implements a heavy burden that such a catch-all form of logic cannot shoulder.

B. Core Bankruptcy Policy Concerns Emanating from the Creation of the Seminole *Doctrine*

Constitutional underpinnings aside, multiple policy rationales place state sovereign immunity in direct conflict with the power to effectuate a judicious bankruptcy court proceeding. The well-founded purpose of the Bankruptcy Code is to give honest debtors a "fresh start" by reorganizing their financial accounts and reconcile relationships with their present creditors.[53] Under bankruptcy law, the Eleventh Amendment could be used as less of a protective measure and more as a device to assert an unfair advantage over creditors who do not have such a powerful constitutional tool at their disposal.[54] Bankruptcy Judge Gregg W. Zive stated "[s]tate immunity from the authority of federal courts makes the orderly administration of bankruptcy cases untenable."[55]

The bedlam that can ensue by ensuring the immunity of an unconsenting state begins at the commencement of the bankruptcy case. Once a case is filed, all of the debtor's equitable interests become property of the bankruptcy estate.[56] Creditors then file claims seeking maximum reimbursement on the debtor's liabilities.[57] Debtors and the bankruptcy estate are afforded protection from overzealous creditors in the form of the automatic stay, which precludes any collection activity for a predetermined amount of time during the proceeding.[58] The purpose of the stay is to give the debtor a "breathing spell"[59] and have a period of time to effectively reorganize his financial situation.

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[49] *Id.* at 639.
[50] *See* text accompanying notes 38-41.
[51] *See In re* S. Star Foods, Inc., 190 B.R. 419, 426 (Bankr. E.D.Okla. 1995).
[52] *In re* Creative Goldsmiths of D.C., Inc., 119 F.3d 1140, 1146-47 (4th Cir. 1997).
[53] Grogan v. Garner, 498 U.S. 279, 286 (1991).
[54] Leonard H. Gerson, *A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the Seminole Tribe Doctrine*, 74 AM. BANKR. L.J. 1, 9 (2000).
[55] Zive, *supra* note 14, at 292.
[56] 11 U.S.C. § 541(a)(1) (2006).
[57] *See id.* § 501(a).
[58] *Id.* § 362(b)(3)(B).
[59] Credit Alliance Corp. v. Williams, 851 F.2d 119, 121 (4th Cir. 1988) ("The automatic stay is one of the fundamental protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors . . . . It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into

States often appear on the list of creditors in a bankruptcy proceeding due to liens, unpaid taxes, administrative fees, educational loans, or various other costs the state can impose on an individual or an organization. A state would quickly collect on these costs absent the protection of the automatic stay. In so doing, the state would not only disrupt the mechanics of the proceeding with respect to the debtor, but also with respect to the equitable distribution of the estate to all remaining creditors.[60] The bankruptcy system is not premised on being an elective procedure for the creditor, but "a collective, comprehensive, and *compulsory* process—binding upon *all* creditors."[61] If the state was allowed to circumvent the protection of the automatic stay through the concept of sovereign immunity, the state transforms itself into a "supercreditor" capable of enjoying the benefits of the Bankruptcy Code and susceptible to few of the liabilities of the typical creditor.[62]

The inequity created by the *Seminole* Doctrine is illustrated in *In re Sacred Heart Hospital of Norristown*.[63] Sacred Heart, a community hospital in Pennsylvania, sought relief under Chapter 11 bankruptcy, and the state filed a proof of claim for unreimbursed employment benefits.[64] Throughout the bankruptcy proceeding, Sacred Heart continually submitted invoices for payment of services rendered to the state.[65] After receiving no response, Sacred Heart eventually filed an adversary proceeding seeking a judgment for the amount owed to the hospital by the state.[66] In response, the state moved to dismiss the proceeding on the grounds that the adversary hearing violated the state's sovereign immunity.[67]

In a pre-*Seminole* era, the state would have waived its sovereign immunity by filing a proof of claim pursuant to 11 U.S.C. § 106(b).[68] The *Sacred Heart* court decided that this was not enough to abrogate sovereign immunity. *Seminole* created such a hard and fast rule that the court had no choice but to hold that Congress cannot authorize abrogation of sovereign immunity through the use of the Bankruptcy Code. "[T]here is simply no principled basis to distin-

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bankruptcy." citing S.REP. NO. 989 at 54-55 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840-41).

[60] Laura B. Bartell, *Getting to Waiver—A Legislative Solution to State Sovereign Immunity in Bankruptcy After Seminole*, 17 BANKR. DEV. J. 17, 43 (2000).

[61] Ralph Brubaker, *From Fictionalism to Functionalism on State Sovereign Immunity: The Bankruptcy Discharge as Statutory Ex Parte Young Relief After Hood*, 13 AM. BANKR. INST. L. REV. 59, 68 (2005).

[62] Steven M. Richman, *More Equal Than Others: State Sovereign Immunity Under the Bankruptcy Code*, 21 RUTGERS L.J. 603, 604 (1990).

[63] Sacred Heart Hosp. of Norristown v. Pennsylvania (*In re* Sacred Heart Hosp. of Norristown), 133 F.3d 237 (3rd Cir. 1998).

[64] *Id.* at 239.

[65] *Id.*

[66] *Id.* at 239-40.

[67] *Id.* at 240.

[68] 11 U.S.C. § 106(b) (2006) ("A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.").

guish the Bankruptcy Clause from other Article I clauses . . . [a]s such, we hold that the Bankruptcy Clause is not a valid source of abrogation power."[69]

In *Sacred Heart*, the state used the Bankruptcy Code to its advantage but sidestepped any potential liability through the use of sovereign immunity. The estate was not allowed to benefit from payment for services rendered, thereby, decreasing the amount available for the creditors as a whole. The state's benefits are two-fold: it is permitted to collect on a proof of claim while simultaneously avoiding any payment amount to the estate. Avoidance of such preferential treatment to an individual creditor and depletion of the estate are two fundamental policies of the Bankruptcy Code that are frustrated by the *Seminole* Doctrine.

Additionally, the Bankruptcy Reform Act of 1978 dealt explicitly with uniform jurisdiction to resolve the problem of split forums for different causes of action stemming from the Bankruptcy Code.[70] Enabling the state to enter various phases of bankruptcy voluntarily and to opt out of others strips down the goal of establishing one jurisdiction for bankruptcy cases.[71] If the state is not a party to the bankruptcy proceeding, the debtor will be forced to try bankruptcy issues in front of a state tribunal.[72] Fragmenting jurisdiction between commercial creditors in federal court and state creditors in state court would prove to be burdensome to all involved.[73] Creditors will be forced to wait an exorbitant amount of time to recover on their claims while the debtor is forced to live in litigation purgatory for years rather than have an expedient remedy to his financial crisis. Lastly, the judges adjudicating the matter will possess far less expertise and experience concerning the Bankruptcy Code than the appointed federal judges sitting on the bench in the Bankruptcy Courts.[74]

The delicate balance of state and federal interests that exist in bankruptcy proceedings would be thrown askew if the state was able to exempt itself from the process at will.[75] The bankruptcy court commonly defers to state law when defining property rights.[76] Absent a federal interest in deviating from the state law, the bankruptcy court should not deviate from this deference in its analysis.[77] If the state was able to pick and choose its entrances into the bankruptcy forum, the state could foreseeably only enter at the strategically appropriate times in the bankruptcy case. A state could bypass the application of some state law by claiming sovereign immunity, but enter other cases when beneficial to the state. In essence, "a state would be able to use its sovereign immunity not as

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[69] *In re Sacred Hosp. of Norristown*, 133 F.3d at 243.

[70] Ned W. Waxman & David C. Christian, *Federal Powers After Seminole Tribe: Constitutionally Bankrupt*, 47 DRAKE L. REV. 467, 484-85 (1999).

[71] *Id.* at 483-85.

[72] *Id*. at 484 (citing *In re* NVR L.P., 206 B.R. 831, 843 (Bankr. E.D. Va. 1997)) ("[T]he Court has held that the Supremacy Clause not only empowers a state court to exercise jurisdiction over a federal claim . . . but compels it to do so.").

[73] *Id.* at 484-84.

[74] *Id.* at 484.

[75] Gerson, *supra* note 54, at 8.

[76] Butner v. United States, 440 U.S. 48, 55 (1978).

[77] *Id.*

a means of protecting itself, but as a mechanism for gaining an unfair advantage at the expense of other creditors."[78]

These policy considerations have shown to be disruptive and burdensome to the bankruptcy courts.[79] In addition, the inequitable nature of the use of sovereign immunity created scenarios that were unpalatable to sitting judges.[80] After years of splintered precedents between the circuits and confusion on the application of *Seminole*, the Supreme Court finally granted certiorari to *Tennessee Student Assistance Corp. v. Hood*[81] with the intent of specifically deciding the constitutionality of § 106(a).

C. Hood *Takes a Small Step in Rectifying the* Seminole *Doctrine*

After more than ten years post-*Seminole* and with various streams of logic emanating from lower courts regarding the constitutionality of § 106(a), the Court granted certiorari to review the issue in *Tennessee Student Assistance Corp. v. Hood*[82] after repeatedly declining many other opportunities.[83]

In *Hood*, a debtor filed a Chapter 7 bankruptcy and retained a balance of roughly $4,000 on her student loans.[84] The Tennessee Student Assistance Corporation ("TSAC"), a governmental corporation created by the Tennessee legislature, did not participate in the bankruptcy proceeding, but was assigned the claim initiated by Sallie Mae for the balance on the student loans.[85] After a general discharge was issued to the debtor under 11 U.S.C. § 727(a), she realized her student loans were not included under the general discharge regulations pursuant to 11 U.S.C. § 727(b).[86] The debtor then reopened her bankruptcy proceeding and commenced an adversary proceeding against TSAC to determine if the student loans were dischargeable.[87] TSAC filed a motion to dismiss on the grounds of lack of jurisdiction and asserted its state sovereign immunity.[88] The motion was denied because § 106(a) allocated the bankruptcy court the power to abrogate sovereign immunity.[89] On appeal, the Sixth Circuit affirmed and held that § 106(a) was a constitutionally valid exercise of power.[90]

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[78] Gerson, *supra* note 54, at 9.

[79] *See* Hauser, *supra* note 20, at 1196-1202.

[80] *Id*.

[81] Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 443 (2004) [hereinafter Hood].

[82] *Id.*

[83] Joseph Pace, *Bankruptcy as Constitutional Property: Using Statutory Entitlement Theory to Abrogate State Sovereign Immunity*, 119 YALE L.J. 1568, 1586 (2010) (citing many denials of certiorari to decide 11 U.S.C. § 106(a)'s constitutionality).

[84] *Hood*, 541 U.S. at 444.

[85] *Id.* at 443-44.

[86] *Id.* at 444. (11 U.S.C. § 727(b) states that all prepetition debts are discharged except those listed under 11 U.S.C. § 523(a). Section 523(a)(8) instructs the court that student loans secured by a governmental unit are not dischargeable unless the loan places an "undue hardship" on the debtor.)

[87] *Id.*

[88] *Id.* at 445.

[89] *Id.*

[90] Hood v. Tenn. Student Assistance Corp. (*In re* Hood), 319 F.3d 755, 767 (2003).

In a voting configuration uncommon to sovereign immunity issues, seven Justices joined the majority opinion authored by Justice Rehnquist.[91] The Court drew an analogous line between the practice of admiralty and bankruptcy law emphasizing the *in rem* nature of the two.[92] In an *in rem* jurisdiction such as admiralty or bankruptcy law, a state maintains its sovereign immunity as long as the state is not in possession of the res.[93] In bankruptcy proceedings, the state will never be in control of the res because bankruptcy courts have exclusive jurisdiction over all of the debtor's property and the estate.[94] Therefore, the discharge of a debtor's liabilities under § 727(a) is a constitutionally permissible exercise of power and does not infringe on the state's immunity.[95]

However, the underlying constitutional issue of concern in *Hood* was not the discharge itself, but the commencement of an adversary proceeding against the state.[96] The Court deftly distinguished an adversary proceeding for the purposes of determining a discharge of student loans from one based on *in personam* jurisdiction. The Court pointed to the lack of money damages sought by the debtor and the absence of a "coercive judicial process."[97] By finding that an undue hardship determination was an adversary proceeding focused primarily on the res and not the persona, the Court narrowly held that this specific type of adversary proceeding was a constitutionally valid exercise of *in rem* jurisdiction.[98] Consequently, and more importantly, the Court avoided the issue of § 106(a)'s constitutionality on the principle that the Court should not anticipate questions of constitutional law, and that the present "constitutional concern is merely hypothetical."[99]

D. Katz *Restores Order to Bankruptcy Proceedings*

Central Virginia Community College v. Katz[100] presented the Court, once again, with a prime opportunity to finally resolve the suspect constitutionality of § 106(a). The facts set in *Katz* were strikingly similar to *Hood*, yet, in this scenario, the adversary proceeding was brought to litigate a preference avoidance claim.[101] In *Katz*, the debtor was a chain of bookstores, which made a series of payments to state educational institutions before filing for Chapter 11 under 11 U.S.C. § 101.[102] Bernard Katz, the court-appointed liquidating supervisor, sought to recover the payments on the grounds that the payments had

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[91] Hauser, *supra* note 20, at 1202 n.138.
[92] *Hood*, 541 U.S. at 446-47.
[93] *Id.*
[94] 28 U.S.C. § 1334(e) (2006) (Since the Federal Bankruptcy Court shall have exclusive jurisdiction over "all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate," the state will never be in control of the property of the estate and therefore not have its sovereign immunity affected.).
[95] *Hood*, 541 U.S. at 447-48 (citing *In re* Collins, 173 F.3d 924, 929 (4th Cir. 1999)).
[96] Hauser, *supra* note 20, at 1204.
[97] *Hood*, 541 U.S. at 450.
[98] *Id*. at 450-455.
[99] *Id.* at 455.
[100] 546 U.S. 356 (2006).
[101] *Id.* at 360 (11 U.S.C. §§ 547(b) and 550(a) allows a trustee to avoid certain transfers made within 90 days before the commencement of the bankruptcy proceeding).
[102] *Id.*

been preferential payments on the eve of the bankruptcy.[103] The key distinction between *Hood* and *Katz* was that the recovery on a preference avoidance claim against the state would result in a judgment of money damages. Therefore, unlike the adversary proceeding in *Hood*, which could be painted as an extension of the *in rem* jurisdiction due to the absence of monetary remedies, *Katz* posed a more challenging question to the Court.[104]

The opinion was authored by Justice Stevens and joined by four other Justices.[105] Initially, the Court retreated from *Seminole*.[106] While the Court recognized that the prior Courts assumed the *Seminole* holding would apply to bankruptcy courts, the Court declared that this "assumption was erroneous."[107] However, the Court once again sidestepped the direct question, the constitutionality of § 106(a), by reflecting back to the Constitutional Convention and holding that all states consented to a limited waiver of sovereign immunity regarding the bankruptcy court.[108] To bolster its rationale, the Court focused on the unique uniformity requirement in the bankruptcy clause.[109]

The contrast between the Articles of Confederation's various inconsistent rules concerning rights of a debtor and the states' cession to a uniform code of bankruptcy in the Constitution persuaded the Court that the states had voluntarily relinquished a small piece of their sovereign immunity.[110] The Court's analysis revealed that the waiver permitted a narrow scope to only include "a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts."[111] Therefore, *Katz* held that a state is not allowed to assert sovereign immunity when a bankruptcy court is acting pursuant to *in rem* jurisdiction or effectuating matters that are ancillary to a bankruptcy court's *in rem* jurisdiction.[112]

Scholars sympathetic to the outcome have criticized the *Katz* ruling as preconceived results searching for a principled rationale.[113] Thus, despite the criticism of the path *Katz* took, there is support for the destination it reached. Where *Hood* had pried open the issue of abrogating state sovereign immunity in respect to a narrowly tailored scenario, *Katz* "appeared to carve out a gaping bankruptcy-sized hole."[114]

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[103] *Id.*; *see also* 11 U.S.C. § 547(b) (2006); *Id.* § 550(a).

[104] Pace, *supra* note 83, at 1588.

[105] The 5-4 voting configuration marked a return to the normal trend concerning states sovereign immunity issues.

[106] *Cent. Va. Cmty. Coll.*, 546 U.S. at 363.

[107] *Id.*

[108] *Id.* at 377-78.

[109] U.S. CONST. art. I, § 8, cl. 4 ("To establish . . . *uniform* Laws on the subject of Bankruptcies throughout the United States") (emphasis added).

[110] *See Cent. Va. Cmty. Coll.*, 546 U.S. at 373-77.

[111] *Id.* at 378 (emphasis omitted).

[112] *Id.* at 373.

[113] Pace, *supra* note 83, at 1590 n. 116.

[114] *Id.* at 1590.

III. Gambling License Revocation of a Casino Debtor

One of the major friction points pitting sovereign immunity against the protections afforded by the Bankruptcy Code is the scope of the regulatory body to make administrative decisions concerning the gaming license versus the automatic stay.[115] The Nevada Gaming Control Board has regulations that permit the administrative unit to investigate and deny or revoke licensure due to unsuitable conditions of the casino,[116] unsavory affiliates,[117] inadequate financial qualifications,[118] or a host of other reasons. However, the breadth of the regulatory body's scope of power comes under scrutiny at the commencement of a bankruptcy proceeding because of the automatic stay.

The automatic stay arises at the commencement of the bankruptcy proceeding and prohibits any creditor from taking any action to collect on a pre-petition claim such as: enforcing pre-petition judgments against property of the estate, enforcing or perfecting any liens against the property of the estate, or taking any action to obtain possession of property of the estate.[119] However, the Code does permit exceptions to the stay on the grounds of public policy.[120] One such exception is the allowance of a commencement of a suit by a governmental unit to enforce its police and regulatory powers.[121]

A three-pronged analysis arises when a regulatory agency attempts to revoke or limit a casino debtor's gaming license during bankruptcy: 1) whether the license fits under the definition of property of the estate and, therefore, qualifies for protection under the automatic stay; 2) whether the gaming control board is acting under its police and regulatory power by trying to revoke the license; and 3) whether the state agency has the ability to claim sovereign immunity against the bankruptcy court under the *Seminole*/*Hood*/*Katz* line of cases.

A. Does the Gaming License Qualify as Property?

11 U.S.C. § 541(a) states in relevant part:

> (a) The commencement of a case . . . of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) [A]ll legal or equitable interests of the debtor in property as of the commencement of the case.[122]

The legislative history on the Bankruptcy Code, including both the Senate and House Reports, evidences the congressional intent that courts should construe property of the estate under § 541(a) to encompass a broad scope of legal and equitable interests.[123] The Eighth Circuit Bankruptcy Court of Northern

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[115] John M. Czarnetzky, *When the Dealer Goes Bust: Issues in Casino Bankruptcies*, 18 Miss. C. L. Rev. 459, 462 (1998).
[116] Nev. Gaming Comm'n Reg. § 3.010 (2011).
[117] *Id.* § 3.080.
[118] *Id.* § 3.050.
[119] 11 U.S.C. § 362(a) (2006).
[120] *Id.* § 362(b).
[121] *Id.* § 362(b)(4).
[122] *Id.* § 541.
[123] United States v. Whiting Pools, Inc., 462 U.S. 198, 204-05 (1983) (citing H.R.Rep. No. 95-595, at 367 (1977)).

Iowa engaged in a lengthy analysis of whether or not a dog racing license was property of the estate in *In re National Cattle Congress, Inc*.[124] The court examined a string of cases that examined propriety interests in airport landing slots under the regulatory control of the Federal Aviation Administration,[125] a broadcasting license regulated by the Federal Communications Commission,[126] and a certificate of approval to operate a school.[127] In each of these cases, the license or propriety right was held to be property of the estate even though the property was subject to regulation and considered a privilege in the eyes of the state. After examining these cases, the *Cattle Congress* court decided that a dog racing license was considered property of the estate.[128]

Additionally, the Seventh Circuit made a similar determination concerning a liquor license in *In re Barnes*.[129] Albeit not a gaming license, the *Barnes* court highlighted points that are applicable to both types of licensure. The court spoke to the breadth of § 541's interpretation and how a license easily fits within the large scope provided by the Bankruptcy Code.[130] The court also dismissed the notion that a license is not property simply because it is revocable, "the sale of many goods require government approval and of course property can be taken away from a person for various reasons . . . ."[131]

Courts have held that even if a state court or statute does not consider a license to qualify as property, a federal court may decide differently.[132] Furthermore, other gaming license related issues litigated in the bankruptcy courts have also held that the gaming license qualified as property of the estate.[133] The creditor arguing that a gaming license does not qualify as property under § 541 will face an uphill battle. As evidenced by the large amounts of case law, the gaming license will most likely be considered property, and therefore, fall under the protection of the automatic stay required by 11 U.S.C. § 362(a).

B. Does the Regulatory Agency Revocation of a Gaming License Fall Within the Police and Regulatory Power Exception to the Automatic Stay?

There has been much debate between scholars as to whether or not the revocation of a gaming license falls within 11 U.S.C. § 362(b)(4)'s exception to the automatic stay based on a governmental unit bringing a suit under the police and regulatory powers.[134] The long-standing view has been to examine

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[124] 179 B.R. 588, 592-93 (Bankr. N.D.Iowa 1995).
[125] Fed. Aviation Admin. v. Gull Air, Inc. (*In re* Gull Air, Inc.), 890 F.2d 1255, 1260 (1st Cir. 1989).
[126] *In re* Cent. Ark. Broad. Co., 170 B.R. 143, 146 (Bankr. E.D.Ark. 1994).
[127] *In re* Draughon Training Inst., Inc., 119 B.R. 921, 926 (Bankr. W.D.La. 1990).
[128] *Id.* at 59.
[129] 276 F.3d 927 (7th Cir. 2002).
[130] *Id*. at 928.
[131] *Id.*
[132] *See* United States v. Cleveland, 951 F.Supp. 1249, 1263 (D.LA. 1997); *see also In re* Barnes, 276 F.3d at 928.
[133] *See* Elsinore Shore Assoc. (*In re* Elsinore Shore Assoc.), 66 B.R. 723 (Bankr. D.N.J. 1986); Vill. of Rosemont v. Jaffe, 482 F.3d 926 (7th Cir. 2007); *In re* NVR, L.P., 189 F.3d 442 (4th Cir. 1999).
[134] Czarnetzky, *supra* note 115, at 462-67; Stocker, *supra* note 7, at 375.

the motives behind the revocation of the license.[135] The state does not enjoy a blanket protection by claiming coverage under the police and regulatory powers exemption, but must demonstrate that there is some threat to the safety and general welfare of public interest at hand.[136]

In re Elsinore Shore Associates[137] stressed the difference between a state acting out of purely pecuniary interests and a state seeking to ensure the safety of its citizens.[138] The *Elsinore* court held a state statute that conditioned renewal of a gaming license on the payment of prepetition fees "stands as a clear obstacle to the purposes and objectives of Congress as contained in the Bankruptcy Code[.]"[139] The court came to this conclusion by examining a lengthy string of cases regarding the use of police and regulatory powers and the pivotal differences between nonmonetary and monetary motivation.[140] The *Elsinore* court observed that, in some instances, even when valid public safety policies protect state pecuniary interests only indirectly, the state's use of police power could nonetheless be in conflict with the Bankruptcy Code.[141] Conversely, the *Elsinore* court examined a case where leeway was given to the state's use of police power in environmental regulations even though the use of the debtor's assets to rectify the violations would substantially deplete the debtor's assets.[142] In that case, the court chose to allow the exemption over the protestations of the debtor.[143]

Elsinore and the following commentary by various scholars surmise that the bankruptcy court has to examine the validity of the state regulatory agency's purpose and evaluate the level of pecuniary interest.[144] Finally, the court must decide on a case-by-case basis whether the agency is authorizing a valid exercise of police power or disguising their motivation to obtain superpriority within the rank and file of creditors.

Village of Rosemont v. Jaffe,[145] a case decided twenty-one years later by the Seventh Circuit, is the latest case on point with license revocation in bankruptcy proceedings. Two scholars, Robert Stocker and Peter Kulick, consider *Rosemont* to possibly enlarge the scope of § 362(b)(4) and the regulatory body's power to conduct license revocation hearings against a casino debtor.[146] In *Rosemont*, the debtor was engaged in an on-again, off-again disciplinary hearing.[147] Ultimately, the Illinois Gaming Board ("IGB") issued an order revoking the gaming license based on the ineligibility of its associates, the incompleteness of the application process, and the debtor's dishonest behav-

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135 *See In re Elsinore Assoc.*, 66 B.R. at 723.
136 Czarnetzky, *supra* note 115, at 466-67.
137 66 B.R. 723.
138 *Id.* at 723.
139 *Id.* at 743.
140 *See id.* at 734-743.
141 *Id.* at 734 (citing *In re* Jacobsmeyer, 13 B.R. 298 (Bankr. W.D.Mo. 1981)).
142 *Id.* at 735.
143 *Id.*
144 Czarnetzky, *supra* note 115, at 466-67.
145 482 F.3d 926 (7th Cir. 2007).
146 Stocker, *supra* note 7, at 375.
147 *Jaffe*, 482 F.3d at 930-32.

ior.[148] Stocker and Kulick point to an enigmatic statement[149] in *Rosemont*, which proclaims:

> Nor do we accept the argument that we should treat Emerald's license as a res with respect to which the bankruptcy court had the authority to displace the state's police power. If the question were merely who was entitled to a license that was not subject to revocation, we would have a different case. But whatever property right the license conferred has always been subject to, or conditioned on, the regulatory powers of the state. Nothing in the bankruptcy laws permits the court to enjoin the Board, a state regulatory agency, from exercising the police powers of the state to regulate the gambling industry.[150]

While the strong language of the opinion may lead a reader to believe the court was enlarging the scope of the police power exemption, the court did not accord § 362(b)(4) more power than is traditionally given. Instead, the analysis mirrored *Elsinore*'s examination of the underlying motive behind the license revocation. The paramount question remained whether the state had monetary interests at stake or whether the state was acting in furtherance of public safety. Ultimately, the court analogized IGB's actions to that of a criminal proceeding rather than an act of a creditor seeking compensation. Therefore, taken as a whole, *Rosemont* likely stands in support of the same precedent that has existed since *Elsinore*.

On its face, this statement could also stand for the view that the gaming license is not property of the estate, and the bankruptcy court lacks the power to enjoin the IGB from conducting any regulatory hearings.[151] However, the court specifically states, "that even though Emerald's license is for some purposes 'property of the estate,' . . . the Code forbids the bankruptcy court from interfering with the government's police and regulatory powers."[152] Additionally, the court later points to § 362(b)(4) as the basis supporting the bankruptcy court's lack of power to enjoin IGB.[153] The court would not have needed to reach § 362(b)(4) if it disqualified the license from being property of the estate.

C. Can a State Use the Seminole*/*Hood*/*Katz *Line of Cases to Claim Sovereign Immunity?*

The beauty of the *Katz* decision is that it struck a fine balance between the valid use of state police power and the impermissibility of a state's desire to obtain a superpriority status by requiring fees and taxes to be paid in order to renew a gaming license. Initially, under § 106(a), the bankruptcy court could abrogate state sovereign immunity by merely stating that a state policy or an action frustrated the Bankruptcy Code. This heavy-handed preemption is precisely the type of policy that *Seminole* wanted to avoid. However, *Seminole*'s overreaching led to absurd results inconsistent with the core policies of the Bankruptcy Code. As criticism and confusion mounted, *Katz* was decided and

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148 *Id.* at 932.
149 Stocker, *supra* note 7, at 375.
150 *Jaffe*, 482 F.3d at 936-37.
151 *Id.* at 938.
152 *Id.* (citation omitted).
153 *Id*.

subsequently restored order to the analysis of police power with regard to license revocation during the period of the automatic stay.

Legislative history concerning the automatic stay states:

> [W]here a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.[154]

However, as illustrated by *In re Elsinore*'s lengthy analysis, if a state's motivation is pecuniary, then the use of police power in the form of license revocation is in violation of the stay. After *Seminole* was decided, states no longer needed to fear this analysis.

Although not a case concerning a license revocation, *In re Fernandez*[155] dealt with the obvious pecuniary interest of whether the debtor or the state held valid title to two parcels of land.[156] The bankruptcy court initially used § 106(a) to abrogate state sovereign immunity and allowed an adversary proceeding to be brought against the state to resolve the conflict of ownership.[157] However, the federal district court reversed the bankruptcy court.[158] On appeal, the Fifth Circuit affirmed the district court's ruling and held that due to the recent *Seminole* opinion, § 106(a) was unconstitutional, and the bankruptcy court could not abrogate state sovereign immunity pursuant to an Article I power and, therefore, lacked jurisdiction over the state.[159]

If *Fernandez* was heard after *Katz* was decided, the court would have most likely come to a different outcome. *Katz* dealt with avoidance of preferential transfers, which directly affect the property and value of the estate. In the same vein, resolution of title disputes over assets included in the estate has the same effect. If the state is allowed to claim sovereign immunity, the value of the estate lowers, while the state escapes the liability of the bankruptcy code. In a post *Katz* era, sovereign immunity would likely have been abrogated.

Even more on point with *Katz* is *In re Creative Goldsmiths*.[160] *Goldsmiths* is another example of the inequity resulting from a state acquiring superpriority status. The Fourth Circuit held that an avoidance of preferential transfer against a tax collection agency was not permitted under the *Seminole* doctrine.[161] *Goldsmiths* is the stark opposite of the decision in *Katz* and demonstrated the inherent danger to the purpose of bankruptcy. Although the original bankruptcy court's ruling was conducted in the "ordinary course of business" and, therefore, exempt from avoidance,[162] the state raised the Eleventh Amendment argument of state sovereignty on appeal,[163] and the Fourth Circuit set a dangerous

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[154] Midlantic Nat.'l Bank v. N.J. Dep't of Envtl. Prot., 474 U.S. 494, 504 (1986) (citing H.R.REP. NO. 95-595; S.Rep. No. 95-989, at 343 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5838, 6299; S. REP. NO. 95-989, at 52 (1978)) (emphasis omitted).
[155] *In re* Fernandez, 123 F.3d 241 (5th Cir. 1997).
[156] *Id.* at 243.
[157] *Id.* at 242.
[158] *Id.*
[159] *Id.* at 246.
[160] *In re* Creative Goldsmiths of D.C., Inc., 119 F.3d 1140 (4th Cir. 1997).
[161] *See id.* at 1143-47.
[162] *Id*. at 1143.
[163] *Id.*

precedent. By allowing the state to succeed on its immunity argument, the court enabled the state to become an all-powerful creditor in future bankruptcy litigation. No more would the state have to submit to the jurisdiction of the bankruptcy court. The state could easily sit on the sidelines and use enforcement measures, such as license revocation, to collect their debt and leave the debtor impotent without the fundamental protections provided by the bankruptcy code.

Goldsmiths would have likely taken a different turn in a post-*Katz* era. *Katz* deemed preferential transfers "ancillary to and in the furtherance of the court's *in rem* jurisdiction."[164] Therefore, while the Court ordered turnover of property involves *in personam* jurisdiction, the states have given a limited waiver to sovereign immunity for precisely these types of situations.[165]

Turning to the process of license revocation, *Katz* has brought the entire analysis full circle. Before the *Seminole* holding, *Elsinore* and other similar cases studied the state's motive for license revocation. The focus was centralized on whether the state was revoking the license based on pecuniary interests or societal benefit. After *Seminole*, the ability to conduct this inquiry was stifled by the state's ability to claim sovereign immunity. As demonstrated in *Fernandez* and *Goldsmiths*, motive was irrelevant, and the state could assume the most beneficial stance possible when dealing with the bankruptcy court.

After *Katz*, the focus is once again back on the status of the state as a monetary player in the proceeding. While the case history for license revocation in a post-*Katz* era is small, *Village of Rosemont v. Jaffe*[166] addressed the implication of *Katz* on the license revocation and sovereign immunity issues. The *Rosemont* court specifically examined whether the license revocation was an act of a creditor or an act of the state exercising its police and regulatory powers.[167] The court distinguished *Katz* from the facts in *Rosemont* by pointing to the state's lack of monetary benefit from revoking the gaming license.[168] "[In *Katz*] the question was simple: who gets the money, the bankruptcy estate or the state agency? The Board here had no claim against [the casino]; it was not [the casino's] creditor."[169]

The *Rosemont* court held that the license revocation was permissible during a bankruptcy proceeding under § 362(b)(4)'s police and regulatory powers exemption to the automatic stay.[170] However, the analysis used was much different from that of *In re National Cattle Congress*,[171] a pre-*Katz*/post-*Seminole* era case. The *Cattle Congress* court failed to conduct much of an analysis whatsoever because *Seminole* did not give much room for latitude concerning abrogation of state sovereign immunity under an Article I power. The Eighth Circuit Court of Appeals merely stated "[t]here is much to indicate that [the Eleventh Amendment argument] may be a complex and serious issue," and

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[164] Cent. Va. Comty. Coll. v. Katz, 546 U.S. 356, 372 (2006).
[165] *Id.* at 377-78.
[166] 482 F.3d 926 (7th Cir. 2007).
[167] *Id.* at 936.
[168] *Id.*
[169] *Id.*
[170] *Id.* at 937.
[171] Nat'l Cattle Cong., Inc. v. Iowa Racing & Gaming Comm'n (*In re* Nat'l Cattle Cong., Inc.), 91 F.3d 1113 (8th Cir. 1996).

remanded it back to the district court for further proceedings in light of the *Seminole* holding.[172] The case was never brought in front of a court again. However, given the trends of that era, the court would have likely upheld the state sovereign immunity like many other courts presented with similar arguments.

At the end of this long and circuitous road, the bankruptcy court is approximately at the same place it started. States may still claim sovereign immunity and utilize the police and regulatory exemption of the automatic stay if the motive is appropriate. Enforcement of the automatic stay is ancillary to bankruptcy proceedings, and *Katz* has returned the power to the court to retrieve property of the estate due to an inherent limited waiver of sovereign immunity.

IV. Conclusion

At the end of the day, the question of § 106's constitutionality has yet to be answered. However, the Supreme Court has provided some clarity for the bankruptcy courts. *Katz* struck a fine balance by allowing the gaming regulators to conduct their investigations and hearings under state authorized power while prohibiting the regulatory board from obtaining superpriority status amongst creditors.

While hindsight is always an accurate lens to analyze situations through, the Supreme Court decided *Katz* at the most opportune time. If the Supreme Court had waited another five years to tackle—or at least attempt to tackle the constitutionality of § 106—the country would have weathered the Great Recession in a *Seminole* era. Casino bankruptcies are on the rise and more are expected. Gaming regulatory bodies would have enjoyed carte blanche power with the trump card of sovereign immunity. According to Bankruptcy Court Judge Gregg Zive, this would create an "untenable" situation.[173] States are feeling the economic crunch as much as any private organization, and would have understandably done what was within their legal rights in order to recover funds from casino debtors.

The bankruptcy court is back where it started. The *Elsinore* analysis continues to be the hallmark of litigating sovereign immunity issues with respect to gaming license revocation in a bankruptcy setting. The doctrine is sound, fair, and affords both the casino debtor and state governmental unit their inherent rights under the Bankruptcy Code.

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[172] *Id.* at 1114.

[173] Zive, *supra* note 14, at 292.