Steven C. Krause and Andrew Zatz, “Section 106(a) of the Bankruptcy Code – Recent Developments in the Law Regarding Sovereign Immunity Under the Bankruptcy Code,” Norton Annual Survey of Bankruptcy Law (2009), (New York: ThomsonReuters/West), 371-388.

SECTION 106(a) OF THE BANKRUPTCY CODE—RECENT DEVELOPMENTS IN THE LAW REGARDING SOVEREIGN IMMUNITY UNDER THE BANKRUPTCY CODE

By Steven C. Krause and Andrew Zatz

This article provides a brief overview of recent cases discussing the intersection of sovereign immunity and bankruptcy, and other areas of law arguably similar to bankruptcy, in connection with section 106(a) of the Bankruptcy Code and the Supreme Court's precedent in *Tennessee Student Assistance Corporation v. Hood*[1] and *Central Virginia Community College v. Katz*.[2]

I. OVERVIEW OF SOVEREIGN IMMUNITY

The Supremacy Clause of the Constitution leaves no question that federal laws are the "supreme Law of the Land."[3] Yet states have always had some measure of sovereignty, following English common law, under which suits against the government were not allowed.[4] While the Constitution implicitly recognizes the independent powers of the individual states, shortly after its enactment there was disagreement whether it recognizes states' sovereign immunity.[5] In 1794, the Supreme Court resolved this issue and held that Article III of the Constitution permits suits against a state in federal court.[6] Shortly thereafter, in 1798, the Eleventh Amendment to the Constitution was enacted, reversing the decision in *Chisholm*.[7] The Eleventh Amendment provides that: "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."[8] Although the text of the Eleventh Amendment refers only to suits against a state by citizens of another state, it has been interpreted to mean that an unconsenting state is protected against suits by its own citizens.[9] The extent of the states' sovereign immunity has been addressed and contested many times over the course of the country's history.[10]

Early cases heard in the Supreme Court reinforced the broad powers of the federal government, as agreed at the Constitutional Convention and enumerated in the Consti-

Steven C. Krause is an associate in the Insolvency and Restructuring practice at Davis Polk & Wardwell in its New York office. He received his J.D. from the Columbia University School of Law and his M.B.A. from the Anderson Graduate School of Management at UCLA. Prior to practicing law, he served in managerial and operational positions for a variety of companies. Andrew Zatz is an associate in the Financial Restructuring and Insolvency practice group at White & Case LLP in its New York office. He received his J.D. from the Fordham University School of Law where he served on the Fordham Urban Law Journal.

tution.[11] However, more recent cases have brought into question the powers of Article I federal courts over the states.

In 1996, the Supreme Court signaled a change in its posture on sovereign immunity in the case of *Seminole Tribe of Florida v. Florida*, ruling that Article I of the Constitution does not grant Congress the power to enact laws abrogating state sovereign immunity.[12] In *Seminole Tribe*, the Court stated that there are two questions clarifying whether Congress has abrogated state sovereign immunity: "whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity'" and "whether Congress has acted 'pursuant to a valid exercise of power.'"[13] This limitation on abrogating state sovereign immunity was directly applicable to the Indian Commerce Clause, but the Court, in dicta, indicated that other Article I powers were implicated as well, including Congress's powers to enact and enforce bankruptcy, copyright, and antitrust laws.[14]

While the Supreme Court in *Seminole Tribe* held that Congress cannot, through its Article I powers, abrogate state sovereign immunity, the Court has long held that state sovereign immunity can be abrogated by the Fourteenth Amendment.[15] It had generally been accepted that such congressional grants of power could only abrogate state sovereign immunity if they were enacted after the Eleventh Amendment, as the Fourteenth Amendment clearly was.[16]

II. OVERVIEW OF SECTION 106(a) OF THE BANKRUPTCY CODE

A. The Historical Background of Bankruptcy Code Section 106(a)

Article I of the U.S. Constitution states that Congress has the power "[t]o establish… uniform Laws on the subject of Bankruptcies throughout the United States."[17] The framers of the Constitution recognized the need for a strong federal government and, specifically, a national bankruptcy law.[18] In the Federalist Papers, Alexander Hamilton noted the importance of a common bankruptcy standard across the U.S.[19] In deciding *In re Hood*, the Sixth Circuit held that the states had intended to "cede their immunity by granting Congress the power to make uniform laws."[20] In his analysis of *In re Hood*, Judge Randolph J. Haines observed: "The structure of Article I also implies the uniformity provision in the Bankruptcy Clause was intended as a grant of power, rather than a limitation. It appears in Section 8, entitled 'Powers of Congress.' It does not appear in Section 9, 'Prohibited Powers.'"[21] Chief Justice John Marshall, expanding on this foundation, observed: "Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to *establish* uniform laws on the subject throughout the United States."[22] Acting within it powers under the Constitution, Congress enacted the Bankruptcy Code, including section 106(a), which provides for the abrogation of sovereign immunity with respect to certain enumerated provisions of the Bankruptcy Code.[23]

B. *Hood* and *Katz* Reversing Direction on State Sovereign Immunity

Section 106(a) of the Bankruptcy Code was at odds with the holding in *Seminole Tribe* and the Supreme Court's long-standing position that only congressional powers granted after the Eleventh Amendment permitted the abrogation of state sovereign immunity. In 2004, the Court decided *Hood*, which addressed this conflict and allowed a

bankruptcy action against a state.[24] Rather than justify its decision by holding section 106(a) of the Bankruptcy Code to be constitutional, the Court held that the determination of the dischargeability of a student loan debt to the State of Tennessee was an in rem action and, as such, did not implicate the Eleventh Amendment.[25] Hence, the dicta discussed above in *Seminole Tribe* did not constrain federal action through the bankruptcy court, and the action was allowed to proceed against the state.[26] The Court stated: "A debtor does not seek monetary damages or any affirmative relief from a State by seeking to discharge a debt; nor does he subject an unwilling State to a coercive judicial process. He seeks only a discharge of his debts."[27]

Following a similar line of reasoning, the Supreme Court in *Katz* expanded the breadth of the *Hood* decision and determined that, for proceedings ancillary to in rem actions, the bankruptcy courts can also abrogate state sovereign immunity.[28] In *Katz*, the Court allowed a preference action for money judgment to proceed against an "arm" of the State of Virginia.[29] There, the Court explicitly denounced the dicta of *Seminole Tribe*, stating that the states were protected by sovereign immunity in bankruptcy cases.[30] In *Katz*, the Court stated: "In ratifying the Bankruptcy Clause, 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."[31] As the Fifth Circuit noted, in considering the holding of *Katz*, the Supreme Court:

> Describe[d] three crucial facets of the exercise of in rem jurisdiction that prevent it from interfering with state sovereign immunity:
>
> (1) exercise of jurisdiction over the estate of the debtor,
>
> (2) equitable distribution of the estate's property among creditors, and
>
> (3) discharge.[32]

III. Case Law Developments—Section 106(a) of the Bankruptcy Code

Generally, courts have followed the Supreme Court's example in *Hood* and *Katz* by avoiding the issue of the constitutionality of section 106(a) of the Bankruptcy Code. Only a few cases have revisited the question of the constitutionality of section 106(a). However, courts have considered various other bankruptcy scenarios where section 106(a) of the Bankruptcy Code has been argued to apply, such as recovery of a debtor's assets, actions on assets of the estate, and discharge. Courts have also considered the implications of the treatment of sovereign immunity under the Bankruptcy Code to situations outside of bankruptcy and have generally concluded that, because bankruptcy is unique, the reasoning of *Hood* and *Katz* does not apply in such cases. Additionally, in the wake of *Hood* and *Katz*, several cases have reinforced the proposition that Congress has full power to abrogate the sovereign immunity of the federal government, as opposed to state or local governments, under Article I of the Constitution.

A. The Constitutionality of Section 106(a) of the Bankruptcy Code

In both *Hood* and *Katz*, the Supreme Court granted certiorari to determine whether section 106(a) is constitutional, but in both cases, the Court did not reach this question and, rather, focused its holdings on the in rem jurisdiction of bankruptcy courts.[33] *Hood* and *Katz* required relief only under the bankruptcy court's in rem jurisdiction as neither case involved a direct suit against the state.[34] In *Katz*, the Court stated that it was "persuaded that the enactment of [section 106(a) of the Bankruptcy Code] was not necessary to authorize the Bankruptcy Court's jurisdiction over these preference avoidance proceedings."[35] Despite this statement by the Supreme Court, in several cases decided after *Katz*, lower courts have articulated their views as to whether or not section 106(a) of the Bankruptcy Code is constitutional.

Shortly after the Supreme Court considered *Katz*, the District Court for the Eastern District of Tennessee faced an issue similar to that in *Katz* in the case of *In re North American Royalties*, which is discussed in more detail below.[36] The bankruptcy court in the underlying case, "following *Hood*, concluded that '[s]ection 106(a) constitutionally abrogates the state's sovereign immunity in this lawsuit.'"[37] However, the district court stated that *Katz* stands for the proposition that state sovereignty was abrogated under these circumstances not because of the constitutionality of section 106(a) of the Bankruptcy Code but because the state had ceded sovereign immunity under the Constitution.[38]

The Western District of Michigan addressed the constitutionality of section 106(a) of the Bankruptcy Code shortly thereafter in *In re Quality Stores, Inc.*[39] In that case, Chapter 11 debtors sought a refund of alleged sales tax overpayments from the State of Vermont.[40] Prior to *Katz*, the bankruptcy court had denied the state's motion to dismiss on the basis of sovereign immunity.[41] The district court then determined that because the Supreme Court had declined to reach the constitutionality of section 106(a) in both *Katz* and *Hood*, the district court was bound by the Sixth Circuit's precedent on the issue as set forth in *Hood*.[42] In *Hood*, the Sixth Circuit had permitted the abrogation of state sovereign immunity pursuant to section 106(a), determining that section 106(a) was a "valid exercise of Congressional power."[43] The *Quality Stores* court also observed that a Sixth Circuit case subsequent to *Hood* had explicitly held that the State of Massachusetts was not immune from a suit regarding the refund of corporate excise taxes.[44] Consistent with these precedents, the court held that the State of Vermont was not immune from the action in pursuit of a refund of tax overpayments.[45]

More recently, however, a Kansas bankruptcy court observed that section 106(a) is likely unconstitutional.[46] In this case, a creditor solicited state court assistance to enforce a collection action against a Chapter 13 debtor.[47] This was a violation of the automatic stay, and due to the creditor's active, knowing involvement, the bankruptcy court deemed it a willful violation by the creditor.[48] The court further ruled that the debtor was entitled to reimbursement for legal fees for this willful violation of the stay.[49] However, the court determined that the creditor was not completely at fault and that some blame was attributable to the state court judge's willful actions.[50] The court awarded damages to the debtors for the portion of the harm attributable to the creditor.[51] The debtors did not seek compensation from the state court as well, so the bankruptcy court did not need to reach the question of assessing an award for damages against the state.[52] However, the court noted in dicta that any action against the

state court would rely on abrogation of state sovereign immunity pursuant to section 106(a) of the Bankruptcy Code and that "most federal courts of appeals have ruled such abrogation to be invalid and have found § 106(a) to be unconstitutional."[53] The court did not provide substantive support for this statement as the cases that it cited for this proposition were decided before *Hood*, and the court made no mention of *Hood* or *Katz* despite deciding the case after both decisions were handed down.[54]

A comparison of *North American Royalties*, *Quality Stores*, and *Reynolds* reveals that the decisions of *Hood* and *Katz* did little to resolve the conflicting views of the constitutionality of section 106(a) of the Bankruptcy Code. Cases such as these that highlight the split among courts on this issue may bring the question of the constitutionality of section 106(a) of the Bankruptcy Code before the Supreme Court once again. However, as the Supreme Court in *Katz* held that the question of whether state sovereign immunity can be abrogated rested not with section 106(a) of the Bankruptcy Code but with Congress's authority under Article I of the Constitution, the Supreme Court may continue to avoid this issue if presented with it again.[55]

B. The Breadth of Bankruptcy Actions and Ancillary Matters Subject to Bankruptcy Code Section 106(a)

Most courts have followed the path taken in *Hood* and *Katz* and have avoided the direct constitutionality issue regarding section 106(a) of the Bankruptcy Code, while focusing on ways in which the constitutionality of section 106(a) is not implicated. In a footnote in *Hood*, the Supreme Court stated that a bankruptcy court's in rem jurisdiction is not a challenge to state sovereign immunity "but rather that a court's exercise of its in rem jurisdiction to discharge a student loan debt is not an affront to the sovereignty of the State."[56] The Court continued: "Nor do we hold that every exercise of a bankruptcy court's in rem jurisdiction will not offend the sovereignty of the State. No such concerns are present here, and we do not address them."[57] In a footnote in *Katz*, the Supreme Court stated: "We do not mean to suggest that every law labeled a 'bankruptcy' law could, consistent with the Bankruptcy Clause, properly impinge upon state sovereign immunity."[58] The Supreme Court did not specify in *Hood* what exercise of a bankruptcy court's in rem jurisdiction will not offend the sovereignty of the State nor did it elaborate in *Katz* as to what bankruptcy laws would wrongly impinge upon state sovereign immunity. Therefore, it has been up to courts addressing sovereign immunity defenses in bankruptcy cases to navigate this grey area of what actions in a bankruptcy proceeding improperly violate state sovereignty.

1. Actions to Recover Preferential Transfers Do Not Implicate State Sovereign Immunity

Perhaps the easiest situation for a court to consider after *Katz* has been whether an action to recover a preferential transfer violates a state's sovereign immunity as this mirrors the facts in *Katz*. In *North American Royalties*, the trustee for the estate in a bankruptcy case had sought to recover from Chattanooga State Technical Community College in a preference action pursuant to section 547 of the Bankruptcy Code.[59] The creditor filed a motion to dismiss based on sovereign immunity as it was an arm of the

state.[60] The bankruptcy court, prior to *Hood* and *Katz*, denied the motion on the basis that section 106(a) of the Bankruptcy Code is constitutional.[61] The creditor appealed.[62] In its de novo proceeding, the district court stated: "Applying *Katz* to the instant case, it is clear that the bankruptcy court's refusal to dismiss the trustee's complaint against [the creditor] was proper, though for slightly different reasons than relied upon by the bankruptcy court."[63] The district court continued: "After *Katz*, the appropriate conclusion is that [the creditor is] not permitted to assert the defense of sovereign immunity to suits under the sections listed in §106(a), including §547, because the State of Tennessee, in ratifying the Bankruptcy Clause, gave up the right to do so."[64] The court also held that section 106(a) simply identified other sections of the Bankruptcy Code for which such abrogation applied.[65]

Similarly, in *In re Kids World of America, Inc.*, a debtor sought to recover funds from a state actor that gave grants for child care programs.[66] The defendants claimed sovereign immunity, asserting that the debtor's claim was essentially a contract action.[67] The court disagreed, stating that it was an action for turnover, which was a core proceeding under the Bankruptcy Code.[68] Therefore, the court held that this fit the *Katz* exception for sovereign immunity.[69]

2. Actions to Recover Assets Are Not Barred by State Sovereign Immunity

An action to recover assets is not far removed from a preference action, and as such, it is unsurprising that courts have held such recovery actions against the states to be permissible after *Hood* and *Katz*. In *In re Automotive Professionals, Inc.*, the debtor, a service contract provider, attempted to assign its business, but the State Director of Insurance froze the transaction and sought to liquidate the debtor under state law.[70] The debtor then filed for bankruptcy, and in response, the state filed a motion to dismiss grounded on the debtor's ineligibility to file for bankruptcy.[71] Part of the state's argument was that sovereign immunity protected the state from turning over the assets that it seized, and hence, the debtor had no assets.[72] The court relied on *Katz* for the general proposition "that the power granted to Congress to enact bankruptcy legislation carried with it a power to subordinate state sovereignty."[73] Applying this reasoning, the court held that "the obligation to obtain control of assets of the estate is a bankruptcy power even more fundamental than the right to retrieve preferential payments," and thus the debtor was entitled to the return of its seized assets to the debtor's estate.[74]

3. Discharge Applicable to a State Actor Creditor Is Not Barred by Sovereign Immunity

In *Soileau*, a bail bondsman had filed for Chapter 7 to, inter alia, discharge debts that she owed to the state.[75] Texas moved to dismiss the discharge action on sovereign immunity grounds, refusing to be a party to the bankruptcy.[76] On appeal in the Fifth Circuit, the court stated:

> Whatever uncertainty there may be as to the outer limits of the holdings of *Katz* and *Hood*, at the very least they together establish beyond cavil that an *in rem* bankruptcy proceeding brought merely to obtain the discharge a debt or debts by determining the rights of various creditors in a debtor's estate—such as is brought here—in no way infringes the sovereignty of a state as a creditor.[77]

The bankruptcy court's exercise of its jurisdiction focused only on the debtor's estate, which was clearly an in rem proceeding.[78] Therefore, under *Katz* and *Hood*, the court determined that the debtor could abrogate state sovereign immunity.[79] The court considered the dicta in *Hood* stating that "some exercise of in rem jurisdiction conceivably might offend the sovereignty of the state" and concluded that the facts of the case were not such an instance.[80] The court observed that the debtor had neither entered into an adversarial proceeding involving a state, as in *Hood*, nor attempted to recover preferential transfers from the state, as in *Katz*.[81] Rather, the debtor simply sought the bankruptcy court's exercise of "its in rem jurisdiction over [the] estate by adjudicating the rights of the State as a creditor."[82] Thus the court allowed the discharge to proceed despite the state's claims of sovereign immunity.[83]

In *In re Mini*, a state actor creditor tried to recover a tax liability after confirmation of the Chapter 13 debtor's plan in a case in which the creditor had not filed a proof of claim.[84] The debtor filed an adversary proceeding to bar the creditor's collection efforts.[85] Citing *Hood* and *Katz*, the court held that it had in rem jurisdiction over the case and that the creditor could not claim sovereign immunity.[86]

4. State Actor's Violation of the Automatic Stay Is Not Protected by Sovereign Immunity

In *In re Omine*, the Fifth Circuit held that state sovereign immunity protection does not excuse violations of the automatic stay.[87] In response to the State of Texas's attempt to collect an alleged prepetition "support" debt from a Chapter 13 debtor's postpetition income, the debtor filed a motion for sanctions against the state for violation of the automatic stay.[88] The debtor essentially argued that the holding of *Katz* was broad enough to defeat the defense of state sovereign immunity for "any proceeding grounded on a provision of the Bankruptcy Code or that affects property of the debtor estate."[89] The court responded:

> A bankruptcy court's authority to issue compulsory orders to facilitate the administration and distribution of the res flows from that jurisdiction and, as such, does not implicate a State's sovereignty in the same way as other kinds of jurisdiction, even where the orders take the form of money damage awards against a State. While motions for contempt and seeking sanctions that include attorney's fees and costs for violating the automatic stay may resemble money damage lawsuits in *form*, it is their *function* that is critical, and their *function* is to facilitate the *in rem* proceedings that form the foundation of bankruptcy.[90]

The court noted that, in *Katz*, the Supreme Court did not limit its decision by singling out ancillary bankruptcy proceedings other than the one at hand.[91] Therefore, the court

held that a violation of the automatic stay, "which is one of the fundamental debtor protections provided by the bankruptcy laws," abrogates state sovereign immunity.[92]

In *In re El Comandante Management Company, LLC*, a Chapter 11 debtor claimed that the state violated the automatic stay by planning to seize its property through eminent domain.[93] The court held that, under *Katz*, it had jurisdiction over the action and thus a sovereign immunity defense was inappropriate.[94]

5. State Regulatory Authority over License Is Allowed Under Sovereign Immunity

In *Village of Rosemont v. Jaffe*, the Seventh Circuit Court of Appeals considered whether a bankruptcy court should have compelled a state actor to comply with a confirmed plan of reorganization.[95] The court considered the argument that, in this case, the state actor had waived its sovereign immunity by asserting its regulatory authority over a gambling license.[96] The court distinguished *Katz* as addressing, "who gets the money, the bankruptcy estate or the state agency?"[97] In this case, the court observed, the state actor had no claim against the appellant and was not the appellant's creditor.[98] As to whether the license constituted part of the res that was under the bankruptcy court's jurisdiction, the court said that argument would be valid if the question was who was entitled to a license that was not subject to revocation.[99] However, in *Rosemont*, any property right conferred by the license was always subject to the regulatory powers of the state agency.[100] The court continued: "Nothing in the bankruptcy laws permits the court to enjoin the [state actor] from exercising the police powers of the state to regulate the gambling industry."[101]

C. The Limited Impact of *Hood* and *Katz* Outside the Context of Bankruptcy

Courts have generally been reluctant to apply precedent related to section 106(a) of the Bankruptcy Code to sovereign immunity questions beyond the sphere of bankruptcy. A number of cases have drawn parallels between the construction and basis of bankruptcy law and other provisions of the Constitution, yet courts have consistently held bankruptcy law to be distinct. However, at least one case has affirmed the abrogation of state sovereign immunity outside the bankruptcy context where the court held that the exception was based in the Constitution itself, as with bankruptcy law, rather than based on Congress's powers arising from the Constitution.

1. Patent and Copyright

In *Biomedical Patent Management Corp. v. California, Department of Health*, the holder of a patent filed a lawsuit against a state actor alleging patent infringement.[102] The state actor claimed that it was protected from the suit by sovereign immunity.[103] The plaintiff argued that the Court in *Katz* had overruled its previous holding in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[104] in which the Court held that Congress does not have the authority to abrogate state sovereign immunity under Article I of the Constitution and that patent infringement suits against a state actor are barred by sovereign immunity under the Eleventh

Amendment.[105] The district court described the holding in *Katz* as "carefully circumscribed [to] not extend beyond the realm of federal bankruptcy law, which the Court apparently regards as *sui generis* based on the history of the Bankruptcy Clause."[106] The court held that "[w]hile *Katz* may signal a retreat from the rigid distinction between Congressional authority under Article I and the Fourteenth Amendment, [the plaintiff's] interpretation of the decision is far broader than its actual language will permit."[107] On appeal, the Federal Circuit Court of Appeals affirmed the district court's interpretation, stating that "[t]he holding in *Katz* was so closely tied to the history of the Bankruptcy Clause and the unique aspects of bankruptcy jurisdiction that it cannot be read to extend to actions for patent infringement."[108]

Similarly, in *National Association of Boards of Pharmacy v. Board of Regents of University System of Georgia*, the plaintiff argued that the Copyright Clause of Article I of the Constitution gives Congress the power to abrogate the states' sovereign immunity with regards to a copyright infringement suit.[109] The plaintiff highlighted the similarities between the Copyright Clause and the Bankruptcy Clause, noting that both were included in the Constitution to promote uniform laws that are of national significance.[110] The plaintiff also argued that the framers of the Constitution must have understood that the states surrendered their sovereign immunity with regards to copyright infringement actions because the Constitution barred states from formulating their own copyright laws.[111] The court held that the plaintiff failed to submit proof that the framers had contemplated "surrender by the States of their sovereign immunity in certain federal proceedings" with regard to copyright infringement suits.[112] The court also noted that, in *Katz*, the Supreme Court made a "careful distinction" between Congress's powers granted by the Bankruptcy Clause and other Article I powers.[113] Therefore, the court, turning to the holding in *Seminole Tribe*, concluded that the Copyright Clause does not provide Congress with the authority to abrogate state sovereign immunity.[114]

2. State Versus State

In *St. Charles County, Missouri v. Wisconsin*, the appellant, St. Charles County, challenged the lower court's holding that sovereign immunity barred its suit against the State of Wisconsin for costs incurred in detaining a woman for violating her probation in Wisconsin.[115] The court recognized the holding in *Katz* but stated that the "exception for bankruptcy cases is a narrow one."[116] The court held that, because the case was not in the bankruptcy arena, the "narrow exception" did not apply.[117]

3. State Employment

In *Toeller v. Wisconsin Department of Corrections*, the plaintiff sued a state department for wrongful termination, and the defendant made a motion to dismiss based on sovereign immunity.[118] The district court denied the motion, and the state of Wisconsin appealed.[119] The appellate court held that *Katz* stands for the proposition that provisions of the Constitution other than the Fourteenth Amendment "might also provide a source of authority for Congress" to abrogate state sovereign immunity.[120] Despite

its reliance on the holding in *Katz*, the Seventh Circuit held that there was no relevant congressional grant of power abrogating state sovereign immunity in *Toeller*.[121]

In *Risner v. Ohio Department of Rehabilitation and Correction*, the plaintiff sued his employer, a state actor, alleging discrimination because he was passed over for a promotion due to his military involvement.[122] The defendant sought to dismiss on sovereign immunity grounds.[123] The plaintiff claimed that, much like the states' waivers of sovereign immunity under the bankruptcy clause as described in *Katz*, the states had waived their sovereign immunity under the war powers clauses of the Constitution.[124] The court rejected this argument, holding that the exception recognized in *Katz* was a narrow one.[125] The court stated that "the holding in *Katz* was made after extensive review of the [bankruptcy] clause's history, the reasons it was adopted, and the legislation proposed and enacted under it immediately following ratification of the Constitution."[126] The court determined that the plaintiff had not made a similar showing with regard to the War Powers Clauses of Article I of the Constitution.[127]

4. Challenges to State Laws

In *Manning v. Mining & Minerals Division of the Energy, Minerals & Natural Resources Department*, a debtor challenged a state law requiring the debtor to submit bonding and reclamation requirements in order to operate under the Takings Clause of the Constitution.[128] The debtor claimed that the law was circular, as the debtor could not determine bonding and reclamation requirements for its mining operation unless it was allowed to operate.[129] New Mexico's brief cited *Alden v. Maine*[130] for the proposition that an individual may not sue an unconsenting state under a law passed by Congress under its Article I powers, such as the Fair Labor Standards Act.[131] The Supreme Court of New Mexico distinguished *Alden* because just compensation stems from the Fifth and Fourteenth Amendments, which are given different treatment than laws passed under Article I.[132] The court stated: "Although sovereign immunity may shield states from liability under certain Article I obligations created by Congress, the balance of power shifts when 'the obligation arises from the Constitution itself.'"[133] The court distinguished *Katz*, where Congress acted under the Bankruptcy Clause, which was not applicable in the case at hand.[134] However, the majority opinion made clear that the question it addressed was not "whether Congress has abrogated States' immunity" but rather if Congress's decision to subject states to such laws was within its power under the Bankruptcy Clause.[135] The court continued: "*Alden*, therefore, lends encouragement to the concept before us now that a right and a remedy textually rooted in the Constitution supersedes or 'trumps' state constitutional sovereign immunity, although Congressional remedies fashioned under the Commerce Clause powers of Article I, Section 8 do not."[136] Therefore, the court held that sovereign immunity did not apply.[137]

D. The Applicability of Section 106(a) of the Bankruptcy Code to Federal Issues

The applicability of section 106(a) of the Bankruptcy Code to the federal government has also been addressed in the courts. Generally, "[t]he United States is immune from suit except as it has consented to be sued."[138] However, for the other sections of

the Bankruptcy Code explicitly enumerated in section 106(a), Congress has explicitly waived the federal government's right to sovereign immunity.[139]

In *In re Supreme Beef Processors, Inc.*, the debtor filed for bankruptcy after a failed inspection prompted a federal regulatory agency not to renew its contract to supply food for schools.[140] The debtor brought claims against the agency under the Federal Tort Claims Act (FTCA).[141] The agency claimed that it was protected from such suit by sovereign immunity.[142] The court held that section 106 of the Bankruptcy Code governed this issue but not *Katz*, which covers only state and local governments, because the agency in question was a federal agency. Although the Fifth Circuit eventually decided the case on section 106(b) and (c) grounds, it first considered the implications of section 106(a) of the Bankruptcy Code.[143] The court observed that section 541 of the Bankruptcy Code is not one of the enumerated sections under section 106(a), and thus "property of the estate" remains subject to sovereign immunity.[144] Hence, "[b]ecause counterclaims or offset claims against governmental entities must be 'property of the estate,' they are not freestanding and divorced from the substantive limitations that would be imposed outside of bankruptcy."[145]

In *In re Szwyd*, the U.S. federal government sought to collect on its tax claim, not from the debtor's valuable real estate but first from the proceeds of the sale of other unrelated real estate.[146] The trustee claimed that, under the marshaling doctrine, the government should be forced to look to the valuable real estate first.[147] The government claimed that the doctrine of sovereign immunity protected it from the marshaling doctrine.[148] The court held that section 106 of the Bankruptcy Code clearly precludes such a defense, stating: "Any suggestion that, notwithstanding the plain meaning of the statute, Congress did not intend to waive sovereign immunity with respect to an equitable and common law doctrine grounded in § 105(a) and to which the Trustee has standing under § 544(a), despite the plain words of the statute abrogating sovereign immunity with respect to both, is groundless."[149]

In *In re Rocor International, Inc.*, the IRS appealed a bankruptcy court decision requiring the IRS to refund two quarterly tax credits to a Chapter 11 debtor and holding that the IRS could not setoff the refund against a larger, unpaid tax.[150] The IRS argued that sovereign immunity protected its right to setoff.[151] The court held that section 106(a) of the Bankruptcy Code specifically authorized bankruptcy courts to enter orders against government units for a monetary recovery through a cross-reference to section 542 of the Bankruptcy Code.[152]

In *In re King*, a Chapter 13 debtor sued agents of the IRS for violating the automatic stay and causing the debtor extreme emotional distress in their collection efforts.[153] The IRS argued that the emotional distress claim should be dismissed because of sovereign immunity.[154] The IRS relied on the case of *In re Rivera Torres*[155] for the proposition that emotional distress damages are not excluded from sovereign immunity under section 106(a) of the Bankruptcy Code.[156] The debtor claimed that *Torres* did not apply because, in that case, emotional damages were not available against the government under the court's sanction powers of section 105(a) of the Bankruptcy Code where, here, the debtor sought emotional distress damages pursuant to a violation of the automatic stay under section 362(k)(1) of the Bankruptcy Code.[157] The

court stated: "Although the Plaintiffs are correct in pointing out that *Torres* did not specifically hold that emotional distress damages are not available against the government in actions brought pursuant to § 362(k)(1), the language in *Torres* compels such a conclusion."[158] The court further held that the government had not "definitely and unequivocally" waived its sovereign immunity under the facts at hand and, therefore, barred the emotional distress claim due to sovereign immunity.[159]

E. Future Considerations Facing the Court with Respect to Sovereign Immunity

Upcoming cases are likely to refine the Supreme Court's approach to the abrogation of state sovereign immunity. If presented with a historical analysis similar to that enunciated in the *Katz* opinion, the Supreme Court or a lower court may hold that other areas of law specified in the Constitution properly abrogate sovereign immunity. It is also possible that the Supreme Court will eventually address the constitutionality of section 106(a) of the Bankruptcy Code directly. Until such time, the Supreme Court and lower courts may continue to consider cases applying section 106(a) of the Bankruptcy Code in a broader array of matters, thus clarifying the scope of ancillary issues which fall within the ambit of section 106(a). The Court may also grant certiorari to cases in which its jurisprudence in *Hood* and *Katz* may be argued to apply in areas of the law outside of bankruptcy. Furthermore, questions of sovereign immunity in other cases may have collateral effect on section 106(a) and other sections of the Bankruptcy Code.

NOTES

1. Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 124 S. Ct. 1905, 158 L. Ed. 2d 764, 43 Bankr. Ct. Dec. (CRR) 1, 51 Collier Bankr. Cas. 2d (MB) 627, Bankr. L. Rep. (CCH) P 80098 (2004) (hereinafter Hood).

2. Central Virginia Community College v. Katz, 546 U.S. 356, 126 S. Ct. 990, 163 L. Ed. 2d 945, 45 Bankr. Ct. Dec. (CRR) 254, 54 Collier Bankr. Cas. 2d (MB) 1233, Bankr. L. Rep. (CCH) P 80443 (2006) (hereinafter Katz).

3. U.S. Const. art. VI.

4. Richard Lieb, Eleventh Amendment Immunity of a State in Bankruptcy Cases: A New Jurisprudential Approach, 7 Am. Bankr. Inst. L. Rev. 269, 273 (1999) ("The ancient doctrine of sovereign immunity has its roots in the maxim that the King can do no wrong" (internal quotations and citations omitted)); see also Richard Lieb, Federal Supremacy and State Sovereignty: The Supreme Court's Early Jurisprudence, 15 Am. Bankr. Inst. L. Rev. 3, 3 (2007).

5. Erwin Chemerinsky, Constitutional Law: Principles and Policies 180 (2d ed. 2002).

6. Chisholm v. Georgia, 2 U.S. 419, 2 Dall. 419, 1 L. Ed. 440, 1793 WL 685 (1793) (holding that citizens of one state can sue another state in federal court).

7. Chemerinsky at 185. Scholars have differing theories on the scope and effect of the Eleventh Amendment. Chemerinsky at 185. Some interpret the Eleventh Amendment as a restriction on the subject matter jurisdiction of the federal courts that bars all suits against state governments. Chemerinsky at 185. Others believe that the Eleventh Amendment restricts the subject matter jurisdiction of the federal courts only in cases where suits against a state are founded solely on diversity jurisdiction. Chemerinsky at 185. A third theory posits that the Eleventh Amendment did not create or enlarge any immunities so, if the states lacked immunity from bankruptcy discharge or from proceedings ancillary to the bankruptcy court's in rem

jurisdiction at the time the Constitution was ratified, they still lacked such immunity after the Eleventh Amendment was enacted. Chemerinsky at 185 (citing Vicki C. Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 Yale L.J. 1 (1988)); see also Martin H. Reddish and Daniel M. Greenfield, Bankruptcy, Sovereign Immunity and the Dilemma of Principled Decision Making: The Curious Case of *Central Virginia Community College v. Katz*, 15 Am. Bankr. Inst. L. Rev. 13, 20 (2007).

8. U.S. Const. amend. XI.

9. Hood, 541 U.S. at 446.

10. See, e.g., M'Culloch v. State, 17 U.S. 316, 4 L. Ed. 579, 42 Cont. Cas. Fed. (CCH) P 77296, 4 A.F.T.R. (P-H) P 4491, 1819 WL 2135 (1819) (holding that Congress may enact laws creating a national bank); Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890) (interpreting the Eleventh Amendment to prohibit suits against the states by either in-state citizens or outsiders); Hanover Nat. Bank v. Moyses, 186 U.S. 181, 22 S. Ct. 857, 46 L. Ed. 1113 (1902) (holding that the Bankruptcy Law of 1898, as a uniform codification of bankruptcy laws for the U.S., was constitutional); Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636, 5 Wage & Hour Cas. 2d (BNA) 609, 138 Lab. Cas. (CCH) P 33890 (1999) (holding that Congress lacks the power to abrogate the states' sovereign immunity from private suits in their own courts).

11. See, e.g., Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60, 1803 WL 893 (1803); M'Culloch v. State, 17 U.S. 316; Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 4 L. Ed. 629, 1819 WL 2201 (1819).

12. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env't. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) P 43952 (1996).

13. Seminole Tribe, 517 U.S. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985)).

14. Seminole Tribe, 517 U.S. at 72 n.16.

15. Bankruptcy Estate of Elliott v. Oklahoma ex rel. Dept. of Corrections, 104 Fair Empl. Prac. Cas. (BNA) 1100, 2008 WL 4620406, *4-*5 (W.D. Okla. 2008). A grant of congressional authority through section 5 of the Fourteenth Amendment must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 728, 123 S. Ct. 1972, 155 L. Ed. 2d 953, 8 Wage & Hour Cas. 2d (BNA) 1221, 84 Empl. Prac. Dec. (CCH) P 41391, 148 Lab. Cas. (CCH) P 34704 (2003) (quoting City of Boerne v. Flores, 521 U.S. 507, 520, 117 S. Ct. 2157, 138 L. Ed. 2d 624, 74 Fair Empl. Prac. Cas. (BNA) 62, 70 Empl. Prac. Dec. (CCH) P 44785 (1997)).

16. Toeller v. Wisconsin Dept. of Corrections, 461 F.3d 871, 876, 11 Wage & Hour Cas. 2d (BNA) 1380, 153 Lab. Cas. (CCH) P 35185 (7th Cir. 2006).

17. U.S. Const., art. I.

18. Katz, 546 U.S. at 369 ("The absence of extensive debate over the text of the Bankruptcy Clause or its insertion indicates that there was general agreement on the importance of authorizing a uniform federal response to [bankruptcy issues]").

19. Katz, 546 U.S. at 377 (citing The Federalist Nos. 32 and 81, 197-201, 481-491 (C. Rossiter ed. 1961) (A. Hamilton)) (noting that the Federalist papers highlighted "the 'uniform[ity]' language of the Naturalization Clause, which appears in the same clause of Article I as the bankruptcy provision, as an example of an instance where the Framers contemplated a 'surrender of [States'] immunity in the plan of the convention'").

20. In re Hood, 319 F.3d 755, 766, 40 Bankr. Ct. Dec. (CRR) 225, 49 Collier Bankr. Cas. 2d (MB) 1875, Bankr. L. Rep. (CCH) P 78790, 190 A.L.R. Fed. 767 (6th Cir. 2003), aff'd and remanded, 541 U.S. 440, 124 S. Ct. 1905, 158 L. Ed. 2d 764, 43 Bankr. Ct. Dec. (CRR) 1, 51 Collier Bankr. Cas. 2d (MB) 627, Bankr. L. Rep. (CCH) P 80098 (2004).

21. Hon. Randolph J. Haines, The Uniformity of Power: Why Bankruptcy is Different, 77 Am. Bankr. L.J. 129, 167 (2003). See also Ralph Brubaker, Explaining *Katz*'s New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power, 15 Am. Bankr. Inst. L. Rev. 95, 104 (2007) (discussing Judge Haines' reasoning in the Uniformity of Power article and his earlier decision in In re Bliemeister, 251 B.R. 383, 36 Bankr. Ct. Dec. (CRR) 151 (Bankr. D. Ariz. 2000), subsequently aff'd on other grounds, 296 F.3d 858, 39 Bankr. Ct. Dec. (CRR) 230, Bankr. L. Rep. (CCH) P 78695 (9th Cir. 2002)).

22. Sturges v. Crowninshield, 17 U.S. 122, 193-94, 4 L. Ed. 529, 1819 WL 2136 (1819) (emphasis in the original).

23. Congress has granted federal courts "jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C.A. § 1334(b). 11 U.S.C.A. § 106(a) provides:

> 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, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412 (d)(2)(A) of title 28.
>
> (4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.
>
> (5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

24. Hood, 541 U.S. 440.

25. Hood, 541 U.S. at 451.

26. Hood, 541 U.S. at 454-55.

27. Hood, 541 U.S. at 450.

28. Katz, 546 U.S. 356. See Richard Lieb, State Sovereign Immunity: Bankruptcy Is Special, 14 Am. Bankr. Inst. L.R. 201, 210 (2006) ("*Katz* analysis may be applied to preclude the States from asserting sovereign immunity in most bankruptcy proceedings").

29. Katz, 546 U.S. at 379.

30. Katz, 546 U.S. at 363.

31. Katz, 546 U.S. at 378.

32. In re Soileau, 488 F.3d 302, 307-8, 48 Bankr. Ct. Dec. (CRR) 68, Bankr. L. Rep. (CCH) P 80970 (5th Cir. 2007), cert. denied, 128 S. Ct. 1220, 170 L. Ed. 2d 60 (2008) (citing Katz, 546 U.S. at 363-64).

33. Hood, 541 U.S. at 450-51; Katz, 546 U.S. at 370-73.

34. Hood, 541 U.S. at 446-52; see Lieb, State Sovereign Immunity, 14 Am. Bankr. Inst. L.R. at 226; Katz, 546 U.S. at 362-80; see Lieb, State Sovereign Immunity, 14 Am. Bankr. Inst. L.R. at 231.

35. Katz, 546 U.S. at 361-62.

36. In re North American Royalties, Inc., 2006 WL 587597 (E.D. Tenn. 2006).

37. North American Royalties, 2006 WL 587597 at *3 (quoting Johnson v. Chattanooga State Technical Cmty. Coll. (In re N. Am. Royalties, Inc.), No. 01-17271, slip op. at 3 (E.D. Bankr. Feb. 2, 2005)).

38. North American Royalties, 2006 WL 587597 at *3.

39. In re Quality Stores, Inc., 354 B.R. 840, 56 Collier Bankr. Cas. 2d (MB) 1302 (W.D. Mich. 2006).

40. Quality Stores, 354 B.R. at 841.

41. Quality Stores, 354 B.R. at 841.

42. Quality Stores, 354 B.R. at 841 (citing Hood, 319 F.3d at 767).

43. Quality Stores, 354 B.R. at 843 (citing Hood, 319 F.3d at 767).

44. Quality Stores, 354 B.R. at 843 (citing In re Service Merchandise Co., Inc., 333 F.3d 666, 688-89, 50 Collier Bankr. Cas. 2d (MB) 807 (6th Cir. 2003)).

45. Quality Stores, 354 B.R. at 843.

46. In re Reynolds, 2008 WL 373521 (Bankr. D. Kan. 2008).

47. Reynolds, 2008 WL 373521 at *2.

48. Reynolds, 2008 WL 373521 at *10.

49. Reynolds, 2008 WL 373521 at *10.

50. Reynolds, 2008 WL 373521 at *10.

51. Reynolds, 2008 WL 373521 at *10.

52. Reynolds, 2008 WL 373521 at *10.

53. Reynolds, 2008 WL 373521 at *10, n.46.

54. Reynolds, 2008 WL 373521 at *10, n.46.

55. Katz, 546 U.S. at 361-62.

56. Hood, 541 U.S. at 451 n.5.

57. Hood, 541 U.S. at 451 n.5.

58. Katz, 546 U.S. at 378 n.15.

59. North American Royalties, 2006 WL 587597 at *1.

60. North American Royalties, 2006 WL 587597 at *1.

61. North American Royalties, 2006 WL 587597 at *1-3.

62. North American Royalties, 2006 WL 587597 at *1-3.

63. North American Royalties, 2006 WL 587597 at *4.

64. North American Royalties, 2006 WL 587597 at *3.

65. North American Royalties, 2006 WL 587597 at *3.

66. In re Kids World of America, Inc., 349 B.R. 152 (Bankr. W.D. Ky. 2006).

67. Kids World, 349 B.R. at 165.

68. Kids World, 349 B.R. at 165-66.

69. Kids World, 349 B.R. at 166.

70. In re Automotive Professionals, Inc., 370 B.R. 161, 48 Bankr. Ct. Dec. (CRR) 120 (Bankr. N.D. Ill. 2007), leave to appeal denied, 379 B.R. 746 (N.D. Ill. 2007).

71. Automotive Professionals, 370 B.R. at 167.

72. Automotive Professionals, 370 B.R. at 180, 182-83.

73. Automotive Professionals, 370 B.R. at 182.

74. Automotive Professionals, 370 B.R. at 182-83.

75. Soileau, 488 F.3d 302.

76. Soileau, 488 F.3d at 304-05.

77. Soileau, 488 F.3d at 307.

78. Soileau, 488 F.3d at 307.

79. Soileau, 488 F.3d at 307-08.

80. Soileau, 488 F.3d at 308 (citing Hood, 541 U.S. at 451 n.5).

81. Soileau, 488 F.3d at 308 (citing Hood, 541 U.S. at 451 n.5).

82. Soileau, 488 F.3d at 308 (citing Hood, 541 U.S. at 451 n.5).

83. Soileau, 488 F.3d at 308 (citing Hood, 541 U.S. at 451 n.5).

84. In re Mini, 2007 WL 2223820 (Bankr. N.D. Cal. 2007).

85. Mini, 2007 WL 2223820 at *2.

86. Mini, 2007 WL 2223820 at *5. The court also awarded the debtors the recovery of attorney's fees and the costs of resisting the creditor's collection efforts, including those incurred by virtue of the adversary proceeding. Mini, 2007 WL 2223820 at *5.

87. In re Omine, 485 F.3d 1305, 57 Collier Bankr. Cas. 2d (MB) 1825, Bankr. L. Rep. (CCH) P 97733 (11th Cir. 2007).

88. Omine, 485 F.3d at 1309.

89. Omine, 485 F.3d at 1313.

90. Omine, 485 F.3d at 1313 (emphasis in original).

91. Omine, 485 F.3d at 1314.

92. Omine, 485 F.3d at 1314.

93. In re El Comandante Management Co., LLC, 358 B.R. 1, 6-7 (Bankr. D. P.R. 2006).

94. El Comandante, 358 B.R. at 13. The court then turned to whether sovereign immunity was abrogated by the state's exercise of its police powers and determined that, in this case, it was not warranted on that basis either. El Comandante, 358 B.R. at 13.

95. Village of Rosemont v. Jaffe, 482 F.3d 926, 934, 48 Bankr. Ct. Dec. (CRR) 4, Bankr. L. Rep. (CCH) P 80907 (7th Cir. 2007).

96. Rosemont, 482 F.3d at 936.

97. Rosemont, 482 F.3d at 936.

98. Rosemont, 482 F.3d at 936 (holding that the fact that the state would benefit financially from revoking the license did not make it a creditor).

99. Rosemont, 482 F.3d at 936-37.

100. Rosemont, 482 F.3d at 937.

101. Rosemont, 482 F.3d at 937.

102. Biomedical Patent Management Corp. v. California, Dept. of Health, 2006 WL 1530177, *1 (N.D. Cal. 2006), decision aff'd, 505 F.3d 1328, 85 U.S.P.Q.2d 1074 (Fed. Cir. 2007), cert. denied, 129 S. Ct. 895 (2009).

103. Biomedical Patent Mgmt., 2006 WL 1530177 at *1.

104. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 119 S. Ct. 2199, 144 L. Ed. 2d 575, 135 Ed. Law Rep. 342, 51 U.S.P.Q.2d 1081 (1999).

105. Biomedical Patent Mgmt., 2006 WL 1530177 at *6.

106. Biomedical Patent Mgmt., 2006 WL 1530177 at *6.

107. Biomedical Patent Mgmt., 2006 WL 1530177 at *6.

108. Biomedical Patent Management Corp. v. California, Dept. of Health Services, 505 F.3d 1328, 1343, 85 U.S.P.Q.2d 1074 (Fed. Cir. 2007), cert. denied, 129 S. Ct. 895 (2009).

109. National Ass'n of Boards of Pharmacy v. Board of Regents of University System of Georgia, 86 U.S.P.Q.2d 1683, 2008 WL 1805439, at *4 (M.D. Ga. 2008).

110. Boards of Pharmacy, 86 U.S.P.Q.2d 1683, 2008 WL 1805439 at *5.

111. Boards of Pharmacy, 86 U.S.P.Q.2d 1683, 2008 WL 1805439 at *5.

112. Boards of Pharmacy, 86 U.S.P.Q.2d 1683, 2008 WL 1805439 at *5 (citing Katz, 546 U.S. at 369 n.9).

113. Boards of Pharmacy, 86 U.S.P.Q.2d 1683, 2008 WL 1805439 at *5.

114. Boards of Pharmacy, 86 U.S.P.Q.2d 1683, 2008 WL 1805439 at *6.

115. St. Charles County, Mo. v. Wisconsin, 447 F.3d 1055, 1057 (8th Cir. 2006).

116. St. Charles County, 447 F.3d at 1058 n.4.

117. St. Charles County, 447 F.3d at 1058 n.4.

118. Toeller v. Wisconsin Dept. of Corrections, 461 F.3d 871, 873, 11 Wage & Hour Cas. 2d (BNA) 1380, 153 Lab. Cas. (CCH) P 35185 (7th Cir. 2006).

119. Toeller, 461 F.3d 871, 873.

120. Toeller, 461 F.3d at 876.

121. Toeller, 461 F.3d at 876.

122. Risner v. Ohio Dept. of Rehabilitation and Correction, 577 F. Supp. 2d 953, 957 (N.D. Ohio 2008).

123. Risner, 577 F. Supp. 2d 953, 957.

124. Risner, 577 F. Supp. 2d at 962.

125. Risner, 577 F. Supp. 2d at 963.

126. Risner, 577 F. Supp. 2d at 963.

127. Risner, 577 F. Supp. 2d at 963.

128. Manning v. N.M. Energy, Minerals & Natural Resources Dept., 2006-NMSC-027, 140 N.M. 528, 144 P.3d 87, 88, 63 Env't. Rep. Cas. (BNA) 1397 (2006).

129. Manning, 2006-NMSC-027, 140 N.M. 528, 144 P.3d at 88.

130. Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636, 5 Wage & Hour Cas. 2d (BNA) 609, 138 Lab. Cas. (CCH) P 33890 (1999).

131. Manning, 2006-NMSC-027, 140 N.M. 528, 144 P.3d at 92.

132. Manning, 2006-NMSC-027, 140 N.M. 528, 144 P.3d at 93.

133. Manning, 2006-NMSC-027, 140 N.M. 528, 144 P.3d at 93 (quoting Alden, 527 U.S. at 740).

134. Manning, 2006-NMSC-027, 140 N.M. 528, 144 P.3d at 93 n.5.

135. Manning, 2006-NMSC-027, 140 N.M. 528, 144 P.3d at 93 n.5 (citing Katz, 546 U.S. at 378).

136. Manning, 2006-NMSC-027, 140 N.M. 528, 144 P.3d at 93 n.5.

137. Manning, 2006-NMSC-027, 140 N.M. 528, 144 P.3d at 93-94.

138. In re Rocor Intern., Inc., 2007-2 U.S. Tax Cas. (CCH) P 70267, 99 A.F.T.R.2d 2007-3419, 2007 WL 1814658, at *6 (W.D. Okla. 2007) (citing In re Talbot, 124 F.3d 1201, 1205, Bankr. L. Rep. (CCH) P 77479, 97-2 U.S. Tax Cas. (CCH) P 50624, 80 A.F.T.R.2d 97-6330 (10th Cir. 1997) (citing U. S. v. Testan, 424 U.S. 392, 399, 96 S. Ct. 948, 47 L. Ed. 2d 114, 11 Empl. Prac. Dec. (CCH) P 10729 (1976))).

139. See 11 U.S.C.A. § 106(a).

140. In re Supreme Beef Processors, Inc., 468 F.3d 248, 47 Bankr. Ct. Dec. (CRR) 56, Bankr. L. Rep. (CCH) P 80752 (5th Cir. 2006).

141. Supreme Beef, 468 F.3d at 251.

142. Supreme Beef, 468 F.3d at 251.

143. Supreme Beef, 468 F.3d at 253-54.

144. Supreme Beef, 468 F.3d at 254. The court then went into a detailed discussion of section 106(b) and (c) and determined that because the debtor would not have a claim outside of bankruptcy, such a claim was not property of the estate and therefore was barred.

145. Supreme Beef, 468 F.3d at 255.

146. In re Szwyd, 394 B.R. 242, 245-46 (Bankr. D. Mass. 2008).

147. Szwyd, 394 B.R. 242 , 245-46.

148. Szwyd, 394 B.R. at 246.

149. Szwyd, 394 B.R. at 246.

150. Rocor, 2007-2 U.S. Tax Cas. (CCH) P 70267, 99 A.F.T.R.2d 2007-3419, 2007 WL 1814658 at *1.

151. Rocor, 2007-2 U.S. Tax Cas. (CCH) P 70267, 99 A.F.T.R.2d 2007-3419, 2007 WL 1814658 at *6.

152. Rocor, 2007-2 U.S. Tax Cas. (CCH) P 70267, 99 A.F.T.R.2d 2007-3419, 2007 WL 1814658 at *6; see also In re Harchar, Bankr. L. Rep. (CCH) P 80834, 2007-1 U.S. Tax Cas. (CCH) P 50174, 98 A.F.T.R.2d 2006-7136, 2006 WL 3196846, at *3 (Bankr. N.D. Ohio 2006), decision aff'd, 371 B.R. 254, 99 A.F.T.R.2d 2007-3204 (N.D. Ohio 2007) ("For the purpose of determining whether this court has jurisdiction over the bankruptcy code claims… it is clear that § 106(a) by its terms waives the IRS's immunity from suit based on those claims").

153. In re King, 396 B.R. 242, 244-45, 102 A.F.T.R.2d 2008-6765 (Bankr. D. Mass. 2008).

154. King, 396 B.R. at 251.

155. In re Rivera Torres, 432 F.3d 20, Bankr. L. Rep. (CCH) P 80421, 2006-1 U.S. Tax Cas. (CCH) P 50112, 96 A.F.T.R.2d 2005-7398 (1st Cir. 2005).

156. King, 396 B.R. at 250.

157. King, 396 B.R. at 251.

158. King, 396 B.R. at 250-51.

159. King, 396 B.R. at 251.