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Hood's Understated Alteration of the Eleventh Amendment Landscape

*Leonard H. Gerson*¹

In May of last year, the United States Supreme Court in *Tennessee Student Assistance Corp. v. Hood*,² for the first time recognized an Article I exception to its broad statement of a state's Eleventh Amendment immunity in *Seminole Tribe of Fla. v. Florida*.³ In an opinion authored by Chief Justice Rehnquist, a critical bankruptcy exception was established by a 7-2 vote with hardly a mention of *Seminole Tribe*.⁴

By joining the majority and thereby having the right to author the Court's opinion, the Chief Justice was able to minimize the significance of the change brought about by *Hood*. The Rehnquist Court's prior claim that Congress lacks the power to abrogate a state's sovereign immunity under Article I now has a hollow ring. In contrast to its indefensibly broad statement of state sovereign immunity in *Seminole Tribe*, the Court recognized in *Hood* that a state's sovereign immunity is subordinate to Congress's exercise of the bankruptcy power in the discharge of a debt owed to a state.

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2. 124 S. Ct. 1905 (2004).

3. 517 U.S. 44 (1996). A state's sovereign immunity of which the Eleventh Amendment is a reflection, bars a non-consenting state from being sued by a private party. Although *Seminole Tribe* involved the Indian Commerce Clause, the opinion broadly states *in dictum* that Congress cannot abrogate a state's Eleventh Amendment immunity pursuant to any of its Article I powers. *Seminole Tribe*, 517 U.S. at 72-73.

4. In *Hood* the debtor commenced an adversary proceeding to obtain an "undue hardship" discharge of her \$4,169.31 in student loans. The Tennessee Student Assistance Corporation (the "TSAC"), which was a guarantor of the loans moved to dismiss on the basis of its sovereign immunity. The bankruptcy court, bankruptcy appellate panel and the Sixth Circuit Court of Appeals rejected the TSAC's claim; they ruled that the TSAC's sovereign immunity was abrogated under section 106(a) of the Bankruptcy Code, notwithstanding the *dicta* in *Seminole Tribe*, which seemingly barred such an exercise of Congressional power.

The Court attempted to accomplish this change in the law unobtrusively by simply declaring that the discharge of a student loan debt, the matter at issue in *Hood*, did not implicate the Eleventh Amendment.⁵ Drawing on the *in rem* tradition that defined a bankruptcy court's jurisdiction under the Bankruptcy Act, the Court ruled that "the court's jurisdiction [with respect to the debt] is premised on the debtor and his estate;" thus, there was no assertion of any personal jurisdiction over the state.⁶

The Court reasoned that since there was no assertion of personal jurisdiction over a state, it could avoid the "broader question" for which *certiorari* was granted: whether the Bankruptcy Clause "grants Congress the authority to abrogate state sovereign immunity from private suits."⁷ Nevertheless, for the first time since *Seminole Tribe*, the Court in *Hood* determined that the Eleventh Amendment did not generally bar a bankruptcy court's jurisdiction over a non-consenting state in a suit brought by a private party.

In addition to the historically recognized *in rem* character of a bankruptcy court's jurisdiction, the Court in *Hood* relied upon its prior recognition of a limited *in rem* exception to state sovereign immunity in *California v. Deep Sea Research, Inc.*⁸ *Deep Sea Research*, however, involved admiralty law, an Article III area not addressed in *Seminole Tribe*. In contrast, *Hood* involves an Article I power, the heart of the *Seminole Tribe* opinion.

Hood's recognition of a bankruptcy *in rem* exception is simply not reconcilable with the majority's claim in *Seminole Tribe* that "there is no established tradition in the lower federal courts of allowing enforcement of . . . [the bankruptcy laws] against the States."⁹ Similarly, the Court's assertion in *Seminole Tribe* that it "never has awarded relief against a State" under the bankruptcy laws,¹⁰ if ever defensible, appears even more strained after its opinion in *Hood*.

DEFINITION OF THE *IN REM* EXCEPTION

In *Deep Sea Research*, the Court limited the case's Eleventh Amendment exception to admiralty actions in which a state does not have possession of the vessel. No comparable definition of the extent or limits of the bankruptcy *in rem* exception is found in *Hood*. Thus,

5. *Hood*, 124 S. Ct. at 1909.

6. *Id.* at 1910.

7. *Id.* at 1908-09.

8. 523 U.S. 491 (1998).

9. *Seminole Tribe*, 517 U.S. at 72 n.16.

10. *Id.*

Chief Justice Rehnquist was able to frame an opinion which imposed new limits on the breadth of a state's sovereign immunity without creating any clear rule, which might have proven even more destructive to a state's Eleventh Amendment rights.

The Court avoided that result by stating in a footnote that no definition of this *in rem* exception to a state's sovereign immunity was required, because the exercise of a bankruptcy court's jurisdiction in the discharge of a student loan "is not an affront to the sovereignty of the State."¹¹ However, the Court was quick to note that it was not holding "that every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State."¹² As Justice Thomas rightly observes in his dissent, there is "no principle in the Court's opinion to distinguish this case from any other" exercise of a bankruptcy court's *in rem* jurisdiction.¹³ Instead, the majority in *Hood* simply offered a few examples of what exercises of a bankruptcy court's *in rem* jurisdiction would be acceptable. Thus, adding to the very difficult task of defining what matters comprise a bankruptcy court's *in rem* jurisdiction, *Hood* imposes the additional burden of divining what exercises of such *in rem* jurisdiction involving a state would violate the Eleventh Amendment.

In order to know with finality whether a bankruptcy court's exercise of a particular *in rem* power is free from Eleventh Amendment constraints, *Hood's* vagueness requires that one examine whether that power was specifically addressed in the text of the opinion. A bankruptcy court's discharge of a debt owed to a state or the sale of a debtor's property free and clear of the lien of a state are the only two areas, which the majority in *Hood* explicitly identifies as falling within the *in rem* exception.¹⁴

What is most surprising is the absence from *Hood* of any clear example of what exercises of a bankruptcy court's *in rem* jurisdiction would be barred. There is some suggestion in its references to its prior opinions in *United States v. Nordic Vill. Inc.*¹⁵ and *Hoffman v. Connecticut Dep't of Income Maint.*¹⁶ that the recovery of a money judgment against a state would be excluded from *Hood's* *in rem* exception to Eleventh Amendment immunity,¹⁷ but there is no clear statement of that proposition. The absence of such an express limita-

11. *Hood*, 124 S. Ct. at 1913 n.5.

12. *Id.*

13. *Id.* at 1920.

14. *Id.* at 1911, 1912.

15. 503 U.S. 30 (1992).

16. 492 U.S. 96 (1989).

17. See *Hood*, 124 S. Ct. at 1911.

tion is particularly significant, because in *Nordic Village* the Court explicitly stated: “[W]e have never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and have suggested that no such exception exists.”¹⁸ No comparable prohibition against money judgments is contained in *Hood*. Moreover, one week after the opinion in *Hood* was issued, the Court denied *certiorari* in another Sixth Circuit bankruptcy case in which the abrogation of a state’s Eleventh Amendment immunity was affirmed in an action for a tax refund.^{19,20}

Hood states that *in personam* jurisdiction would be required to enforce the Bankruptcy Code’s section 524(a)(2) discharge injunction against a state,²¹ but the *Ex parte Young* exception to Eleventh Amendment immunity could be used to protect a debtor against such a violation.²² Given the breadth of the definition of property of a debtor’s estate in section 541(a) of the Bankruptcy Code and the absence of any statement in *Hood* that a bankruptcy court’s *in rem* jurisdiction is defined by the limits of such jurisdiction under the former Bankruptcy Act, *Hood* arguably grants a bankruptcy court extremely wide latitude in issuing orders that would affect a state’s interest.

While the Court in *Hood*, at least on its face, was able to sidestep the conflict between allowing a bankruptcy court jurisdiction over a non-consenting state and the broad statement of state sovereign immunity in *Seminole Tribe*, it could not avoid the fact that *Hood* was an adversary proceeding, an action commenced by service of a summons and complaint. As recognized in *Hood* itself, the Court in *Seminole Tribe* had made service of process an independent basis for recognizing the applicability of the Eleventh Amendment in order to prevent a state from suffering the indignity of being hauled into court.²³ The Court in *Hood* overcame this obstacle by ruling that because the

18. *Nordic Vill.*, 503 U.S. at 38.

19. See *Comm’r of Revenue v. H.J. Wilson Co.*, 124 S. Ct. 2388 (2004). The Sixth Circuit’s opinion in *H. J. Wilson* simply adopts its sister panel’s analysis in *Hood*.

20. At the end of the majority opinion in *Hood*, there also is a suggestion that preference actions would not be encompassed by a bankruptcy court’s *in rem* jurisdiction. *Hood*, 124 S. Ct. at 1914. This observation came as no surprise, as this issue was alluded to by Chief Justice Rehnquist at oral argument. As recognized by the Chief Justice, preference actions, unlike other core bankruptcy proceedings, were adjudicated in the district court rather than in the bankruptcy court under the former Bankruptcy Act. *Tr. of Oral Argument in Hood*, 2004 U.S. TRANS LEXIS 16 at *33.

21. *Hood*, 124 S. Ct. at 1911 n.4.

22. See, e.g., *Ellett v. Goldberg*, 254 F.3d 1135 (9th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002) (*Seminole Tribe* does not bar use of *Ex parte Young* exception against state official who violates discharge injunction).

23. *Hood*, 124 S. Ct. at 1914.

bankruptcy court's power arose from its *in rem* jurisdiction, service of process was not of constitutional import in the case.²⁴ Instead, it simply was a product of the requirements of Bankruptcy Rule 7001(6). Such a procedural requirement, the Court reasoned, should not "be given dispositive weight,"²⁵ particularly as 28 U.S.C. § 2075 explicitly provides that the Bankruptcy Rules should not alter any substantive right granted under the Bankruptcy Code.

This willingness to overlook service of process against a non-consenting state was the most prominent objection in Justice Thomas's dissenting opinion in *Hood*. However, rather than being hostile to the majority's understanding of a bankruptcy court's jurisdiction, Justice Thomas recognized that an *in rem* exception to Eleventh Amendment immunity may be appropriate. Justice Thomas wrote:

I do not contest the assertion that in bankruptcy, like admiralty, there might be a limited *in rem* exception to state sovereign immunity from suit. Nor do I necessarily reject the argument that this proceeding could have been resolved by motion without offending the dignity of the State. However, because this case did not proceed by motion, I cannot resolve the merits based solely upon what might have, but did not, occur.²⁶

Ironically, the great significance accorded to service of process in Eleventh Amendment jurisprudence is reflected in the post-*Seminole Tribe* bankruptcy cases cited by the majority in *Hood*. Prior to *Hood*, when circuit courts of appeal sought to insulate bankruptcy from the full implications of the *Seminole Tribe* doctrine, the test often used to determine whether the Eleventh Amendment governed was (i) whether a bankruptcy court's *in rem* jurisdiction was applicable, and (ii) whether service of process against a non-consenting state was involved. Thus, the three circuit court of appeals cases which the majority in *Hood* cited for the proposition that a bankruptcy court's power to discharge a debt arose from its jurisdiction over the debtor and its estate, rather than personal jurisdiction over a state, were opinions in which the circuit courts stressed that there was no adversary proceeding (summons and complaint) involved.²⁷

24. *Id.*

25. *Id.*

26. *Id.* at 1918.

27. See *In re Ellett*, 254 F.3d 1135, 1139 (9th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002) (a non-consenting state may be bound by chapter 13 discharge order, which discharges pre-petition state income tax claim); *In re Collins*, 173 F.3d 924, 930 (4th Cir. 1999), *cert. denied*, 528 U.S. 1073 (2000) (Eleventh Amendment did not bar bankruptcy court ruling that bail bond debt not exempted from discharge under section 523(a)(7)); *Texas v. Walker*, 142 F.3d 813, 822 (5th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999) (a non-consenting state may be bound by order dis-

These circuit courts' reliance upon the fact that an action was not commenced with service of process was never sustainable.²⁸ Nor was these circuit courts' reliance upon the Supremacy Clause justifiable.²⁹ The decision in *Hood* eliminates the need for false claims of supremacy based upon Article VI. Instead, the Court in *Hood* rightly found the requisite supremacy in the bankruptcy power itself. These circuit courts recognized that a bankruptcy court's jurisdiction to discharge a debt should not be controlled by *Seminole Tribe*. In *Hood* the Court affirmed that view and eliminated the contradictions required by *Seminole Tribe*.

THE SEMINAL CHANGE FROM *SEMINOLE TRIBE*

The opinion in *Seminole Tribe* was notable for its unqualified subordination of Congress's Article I powers to a state's Eleventh Amendment immunity. The Court wrote:

Even when the Constitution vests in Congress complete law-making 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.³⁰

After *Hood* such a statement must be accompanied with a wink; it can no longer be said that the Eleventh Amendment trumps Congress's bankruptcy power under Article I.

At the very least a bankruptcy court's jurisdiction over a non-consenting state is no longer solely defined by *Seminole Tribe*, assuming it ever was. *Hood* means that bankruptcy courts have the power to issue decisions which alter the legal rights of a non-consenting state.³¹

The Supreme Court precedent relied upon in *Hood* could easily have been distinguished. For example, Justice Thomas observed in his dissent in *Hood* that in the two cases relied upon by the majority, *New York v. Irving Trust Co.*³² and *Van Huffel v. Harkelrode*,³³ the Court did not "attempt to undertake a sovereign immunity analysis."³⁴

charging claims for breach of contract and conversion against chapter 7 debtor) (cited in *Hood* at 1910-1911).

28. See Leonard H. Gerson, *A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the Seminole Tribe Doctrine*, 74 AM. BANKR. L.J. 1, 19-20 (2000) [hereinafter *A Bankruptcy Exception to Eleventh Amendment Immunity*].

29. *Id.*

30. *Seminole Tribe*, 517 U.S. at 72-73.

31. *Hood*, 124 S. Ct. at 1917.

32. 288 U.S. 329 (1933).

33. 284 U.S. 225 (1931).

34. *Hood*, 124 S. Ct. at 1919.

Moreover, in expanding the breadth of Eleventh Amendment immunity in *Alden v. Maine*³⁵ to encompass actions in state court, the Court had distinguished much more powerful precedent in reaching its desired outcome. Finally, as also observed by Justice Thomas, the Court previously stated in *Missouri v. Fiske*³⁶ that “‘the fact that a suit in a federal court is *in rem* or *quasi in rem*, furnishes no ground for the issue of process against a non-consenting State.’”³⁷ In total, the Court’s opinion in *Hood* reflects a decision not to allow an essential requirement of the bankruptcy system – jurisdiction over a non-consenting state – to be sacrificed in furtherance of the *Seminole Tribe* ideal.

Such policy concerns, however, are absent from the text in *Hood*. In oral argument, the question of how a bankruptcy court would be able to discharge a debt if Tennessee’s position were upheld, was a repeated refrain in the questioning of Tennessee’s counsel. Similarly, in *Collins*, the first circuit court opinion cited in *Hood*, the central importance of the power to discharge a debt was stressed:

The power of bankruptcy courts to discharge debt is fundamental to our bankruptcy system. If a state could assert Eleventh Amendment immunity to avoid the effect of a discharge order, the bankruptcy system would be seriously undermined. A person owing debts to a state could never have those debts discharged by a bankruptcy court unless the state agreed.³⁸

Given the prominence of this issue in oral argument, the absence of comparable statements of policy in *Hood* is surprising, but does not foreclose the use of such policy considerations in later lower court opinions. Such an absence probably reflects the inability of the Court to agree upon any statement of policy, given its deep divisions on the Eleventh Amendment. This continuing division within the Court was reflected in Justice Souter’s one sentence concurring opinion in which Justice Ginsburg joined: “I join in the Court’s opinion, save for any implicit approval of the holding in *Seminole Tribe*.”³⁹

The narrowness of the opinion in *Hood* was mirrored in another Eleventh Amendment opinion issued by the Supreme Court on the same day, *Tennessee v. Lane*.⁴⁰ In contrast to its earlier opinion in

35. 527 U.S. 706, 736-40 (1999).

36. 290 U.S. 18 (1933).

37. *Hood*, 124 S. Ct. at 1918 (quoting *Missouri v. Fiske*, 290 U.S. 18, 28 (1933)).

38. *Collins*, 173 F.3d at 930.

39. *Hood*, 124 S. Ct. at 1915.

40. 124 S. Ct. 1978 (2004).

Board of Trustees of Univ. of Ala. v. Garrett,⁴¹ the Court in *Lane* upheld Congress's abrogation of Eleventh Amendment immunity under Title II of the Americans with Disabilities Act ("ADA").⁴² However, over the objections of four dissenting justices, *Lane* only addressed Title II's applicability to providing access for the disabled to judicial services.⁴³ It failed to address the constitutionality of Title II's applicability to other public services covered by Title II, which unlike providing individuals access to the courts, are not fundamental rights under the Constitution.⁴⁴

The opinion in *Lane* also is noteworthy for its less rigorous application of the stringent evidentiary standard that the Court previously had imposed in considering abrogation of Eleventh Amendment immunity under the Fourteenth Amendment. In *Garrett* and other post-*Seminole Tribe* opinions, such as *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*,⁴⁵ the Court repeatedly had found that the legislative record did not evidence a sufficient pattern of state violations of constitutional rights to warrant abrogation of state sovereign immunity under the Fourteenth Amendment. However, the same legislative record deemed insufficient in *Garrett* to validate the abrogation of state sovereign immunity in Title I of the ADA was found sufficient to validate the abrogation of state sovereign immunity in Title II in *Lane*.^{46,47}

Taken together the opinions in *Lane* and *Hood* reflect an obvious stepping back from the very aggressive expansion of state Eleventh Amendment rights heralded by the Rehnquist Court in *Seminole Tribe*. Opponents of a state's Eleventh Amendment rights involving Article I powers, other than bankruptcy, will now seek to construct their own exceptions to *Seminole Tribe* using *Hood's in rem* exception as precedent. For example, *in rem* actions now are brought to protect trademarks from domain name violations.⁴⁸

41. 531 U.S. 356 (2001) (abrogation of Eleventh Amendment immunity with respect to employment discrimination suits under Title I of Americans with Disabilities Act invalid).

42. Title II of the ADA bars individuals from being denied the benefits from programs, services or activities of a public entity, because of a disability. *Lane*, 124 S. Ct. at 1982. The plaintiffs in *Lane* were two paraplegics, a criminal defendant and court stenographer, both of whom claimed that their physical disabilities prevented them from gaining access to the courtroom. *Id.*

43. *Id.* at 1993.

44. *Id.* at 2004.

45. 527 U.S. 627, 645-47 (1999).

46. *Lane*, 124 S. Ct. at 1999-00.

47. A lessening of the evidentiary standard was presaged in *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

48. See, e.g., *Cable News Network L.P. v. Cnews.com*, 162 F. Supp. 2d 484 (E.D. Va. 2001). The initial response to such an attempted expansion undoubtedly will be that admiralty and

Finally, the Court's decision in *Hood* not to decide the abrogation question means that the Sixth Circuit's opinion, which recognizes the power of Congress under the Bankruptcy Clause to abrogate a state's sovereign immunity, remains good law. It also means that a rejection of that understanding by the Third, Fourth, Fifth, Seventh and Ninth Circuit Courts of Appeal also remains intact, albeit on a possible crumbling foundation.⁴⁹ But what does that acceptance or rejection mean in light of the Court's opinion in *Hood*? The more broadly a bankruptcy court's *in rem* jurisdiction is defined, the less need there is for abrogation.

SOME LESSONS FROM *HOOD*

Outside of the opinion itself, the most illuminating aspect of my Supreme Court experience in *Hood* is the fact that I made it there. Fourteen months after the Supreme Court issued its opinion in *Seminole Tribe*, I filed my first *amicus* brief in the Fifth Circuit Court of Appeals on behalf of the Business Bankruptcy Law Committee of the New York County Lawyers' Association challenging the applicability of the *Seminole Tribe* doctrine in bankruptcy. Ironically, it was a former assistant New York State assistant attorney general and judge, Amy Juviler, who told me "stop complaining about *Seminole Tribe*, and file an *amicus* brief." Never did I dream that I would be the attorney arguing the issue before the Supreme Court.

At the time that I started it was widely believed that the only way to challenge *Seminole Tribe* was to assert that the Bankruptcy Code or at least the Code provision at issue was enacted pursuant to Congress's powers under the Fourteenth Amendment. That was the only alternative that the Court stated was still available for the abrogation of a state's sovereign immunity. By continuing to argue that Congress retained the power of abrogation under the Bankruptcy Clause, I received a very cool reception from almost everyone except my colleagues at my firm and the New York County Lawyers' Associa-

bankruptcy are specialized areas of the law with a long history of using *in rem* jurisdiction. See *Hood*, 124 S. Ct. at 1912.

49. See *In re Nelson*, 301 F.3d 820, 832 (7th Cir. 2002); *In re Mitchell*, 209 F.3d 1111, 1118-21 (9th Cir. 2000); *In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237, 243 (3d Cir. 1998); *In re Fernandez*, 123 F.3d 241, 243-44 (5th Cir.), amended by 130 F.3d 1138, 1139 (5th Cir. 1997); *In re Creative Goldsmiths of Washington, D.C.*, 119 F.3d 1140, 1145-46 (4th Cir. 1997), cert. denied, 523 U.S. 1075 (1998). In each of these cases, other than *Nelson*, the circuit courts summarily relied upon the applicability of the *Seminole Tribe* doctrine in bankruptcy. Interestingly, while *Nelson* held that Congress lacked the power to abrogate a state's sovereign immunity under the Bankruptcy Clause, it recognized that a bankruptcy court may alter a state's legal rights by exercising its *in rem* jurisdiction, where applicable. *Nelson*, 301 F.3d at 837-38.

tion, and those others who most mattered—the circuit court judges before whom I argued. The willingness of the judicial system to consider what was perceived as a maverick view of the law is reflective of an unparalleled openness, which is a tribute to our system.

Ultimately, the crucial factor in reaching the Supreme Court was the publication of my article, *A Bankruptcy Exception to Eleventh Amendment Immunity* in the American Bankruptcy Law Journal. Although I had published numerous newspaper articles on the abrogation question prior to such time in the New York Law Journal, it appears that the detailed analysis that a law review article allows and the audience that the American Bankruptcy Law Journal reaches were critical in giving the abrogation argument the needed prominence. It was immediately picked up by Judge Haines in his opinion in *In re Bliemeister*⁵⁰ and then by the bankruptcy judge and bankruptcy appellate panel in *Hood*.

Once the Court granted *certiorari* in *Hood*, the assistance provided by the bankruptcy community in the form of *amicus* briefs and moot courts were vital to the outcome of this case. It was paramount that the Court realize that the application of the *Seminole Tribe* doctrine in bankruptcy posed a major threat to the bankruptcy system's operation. A critical factor in making that argument was the presence of a wide range of interests - consumers, business and academia - which stood behind me. The breadth and acumen of their arguments were invaluable.

Unless you have had prior experience before the Court, some guidance from seasoned Supreme Court practitioners is necessary. For example, when you are briefing an issue for the Supreme Court, there is much less of a need to describe the existing law — the members of the Court are the people who made it. Also, particularly with respect to the Eleventh Amendment, the Justices are the most knowledgeable people in the world; what they are less knowledgeable about is the workings of the bankruptcy system.

Also critical is the need to have your views challenged and refined at a series of moot courts; I would recommend at least three. There simply is no other way of anticipating the different points of view with which you may be confronted at oral argument. In my case, the moot courts ultimately convinced me to make the secondary argument in my brief, a bankruptcy court's *in rem* jurisdiction, the opening point in my oral argument.

50. 251 B.R. 383 (Bankr. D. Az. 2000), *aff'd on other grounds*, 296 F.3d 858 (9th Cir. 2002).

As it turned out, there was no need for me to have decided which approach was best. The first question posed to Tennessee's counsel by Justice O'Connor indicated that she was partial to recognizing an *in rem* exception to a state's Eleventh Amendment immunity, and subsequent questions by other members of the Court generally suggested a similar cast of mind. My job was simply to make the Court comfortable with that choice.

The Court decided in *Hood* to limit its virtually unqualified expansion of Eleventh Amendment immunity in *Seminole Tribe* to avoid crippling the bankruptcy system. It chose to accomplish that goal by adopting a traditional *in rem* view of bankruptcy court jurisdiction, which allowed the Court to retreat from *Seminole Tribe* without any explicit recognition of that change in its Eleventh Amendment jurisprudence in the opinion in *Hood* itself.

The decentralized nature of our legal system played a critical role in providing the openness and flexibility, which allowed for the change from *Seminole Tribe*. Now the system has the task of making workable the *in rem* exception to Eleventh Amendment immunity provided in *Hood*. The decentralized character of our judicial system and the multitude of issues which arise in bankruptcy means that the fulfillment of this task will not be quick or simple.⁵¹

51. In April of this year, after this article was written, the Supreme Court decided to take a second look at the Sixth Circuit's opinion in *Hood*, when it granted *certiorari* in *Cent. Va. Cmty. College v. Katz*, 125 S. Ct. 1727 (U.S. 2005). In the lower court opinion in *Katz*, the Sixth Circuit simply adopted its sister panel's opinion in *Hood*. *Katz v. Cent. Va. Cmty. College (In re Wallace's Bookstore)*, 106 Fed. Appx. 341 (6th Cir. 2004). In fact, *Katz*' attorneys filed an *amicus* brief in *Hood*, when it was before the Supreme Court last year. *Katz* involves a preference action, which would constitute a money judgment against a state. Chief Justice Rehnquist may have concluded last year that it would be preferable to affirm *Hood* on a narrow *in rem* basis, and then reassert the *Seminole Tribe* doctrine in the more hospitable context that *Katz* provides. For example, at oral argument in *Hood*, the Chief Justice demonstrated the depth of his knowledge on the issue by planting this seed in anticipation of barring a bankruptcy court from using *in rem* jurisdiction to hear a preference action against a state.

QUESTION: Well, before the Bankruptcy Act in 1978, bankruptcy courts couldn't try voidable preferences. That had to be in the district court I believe.

MR. GERSON: That's correct, Justice Rehnquist.
2004 U.S. Trans LEXIS 16, *33, *Hood* (No. 02-1606).

