



U. S. Department of Justice

Office of the Solicitor General

Solicitor General

Washington, D.C. 20530

March 6, 1998

By Hand Delivery

Thomas B. Griffith, Esq.
Senate Legal Counsel
United States Senate
Senate Hart Office Building
Room 642
Washington, D.C. 20510-7250

Re: In re Creative Goldsmiths, No. 96-1895 (4th Cir.)

Dear Mr. Griffith:

I am writing to advise you that I have determined not to file a petition for a writ of certiorari in the Supreme Court seeking review in the above-referenced case. See 2 U.S.C. 288k(b).

This case concerns the constitutionality of Section 106(a) of the Bankruptcy Code, 11 U.S.C. 106(a). Section 106(a) provides that, with respect to certain sections of the Bankruptcy Code, "sovereign immunity is abrogated as to a governmental unit." 11 U.S.C. 106(a). Consistent with that abrogation of immunity, Congress has authorized a federal court to hear and determine any issue with respect to the application of the specified sections to governmental units, id. at § 106(a)(2), and to issue a judgment awarding monetary recovery against governmental units, except that such an award may not include punitive damages, id. at § 106(a)(3).

In this case, a trustee in bankruptcy filed suit against the Maryland Comptroller of the Treasury, seeking to avoid as a preference a debtor's payment of taxes to the State. See 11 U.S.C. 547. The bankruptcy court and the district court held that the tax payment was not a preference. In the Fourth Circuit, the State argued for the first time that it was immune from suit under the Eleventh Amendment of the Constitution, and the United States intervened to defend the constitutionality of Section 106(a) as applied to the State.

Thomas B. Griffith, Esq.
March 6, 1998
Page Two

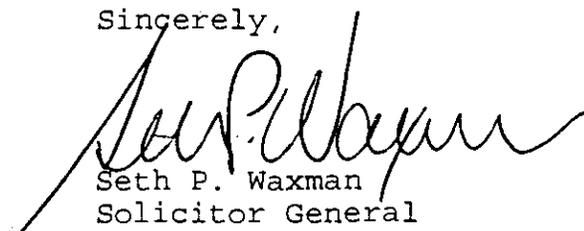
The court of appeals held Section 106(a) unconstitutional. The court read Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996), to hold that Congress does not have authority under any of its Article I powers to abrogate a State's immunity from suit. The court of appeals therefore concluded that Congress lacked power under the Bankruptcy Clause, Art. I, § , cl. 4, to enact Section 106(a). The court also concluded that Section 106(a) could not be upheld as an appropriate exercise of Congress's power under Section 5 of the Fourteenth Amendment.

Although I have decided not to file a petition for a writ of certiorari in this case, there will be other opportunities for the question of the constitutionality of Section 106(a) to be presented to the Supreme Court. The Fifth Circuit recently held Section 106(a) unconstitutional in In re Fernandez, 130 F.3d 1138 (1977), and the United States has been granted an extension of time until April 9, 1998, in which to petition for a writ of certiorari in that case. I have not yet made a final decision with respect to the filing of a petition in that case, but I am strongly inclined not to do so.

The Third Circuit also has recently held Section 106(a) unconstitutional, see In re Sacred Heart Hospital, 1998 WL 3627 (Jan. 8, 1998), and that issue is also pending in both the Tenth and Eleventh Circuits. Wyoming v. Straight, No. 97-8053 (10th Cir.); Georgia v. Burke, No. 97-9817 (11th Cir.). I am presently considering whether to authorize intervention in any of those cases.

A copy of the court of appeals' decision in this case is enclosed. The time for filing a petition for a writ of certiorari expires on March 20, 1998. The trustee in bankruptcy has filed his own petition, see Schlossberg v. Maryland, No. 97-1363 (filed Feb. 18, 1998) (copy enclosed) and the government's response to that petition is due on March 23, 1998. Please let me know if I can be of further assistance in this matter.

Sincerely,



Seth P. Waxman
Solicitor General

Enclosure

cc: Geraldine R. Gennet, Esq.
General Counsel
United States House of Representatives
Cannon House Office Building
Room 219
Washington, D.C. 20515