



U. S. Department of Justice

Office of the Solicitor General

Solicitor General

Washington, D.C. 20530

April 1, 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 the Matter of Estate of Fernandez, No. 96-31013, 97-30529 (5th 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 district 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, an adversary proceeding was brought against the State of Louisiana and its Department of Transportation and Development, claiming title to certain property. The bankruptcy court held that the State was subject to suit under Section 106(a), but the district court held Section 106(a) unconstitutional. The United States intervened on appeal to defend the constitutionality of Section 106(a).

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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, § 8, 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.

The decision below is consistent with the Fourth Circuit's decision in Schlossberg v. State of Maryland, 119 F.3d 1140 (1997), and the Third Circuit's decision in In re Sacred Heart Hospital, 1998 WL 3627 (Jan. 8, 1998). 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.).

By letter dated March 6, 1998, I informed you that I did not intend to file a petition for a writ of certiorari in Schlossberg and that I was strongly disinclined to file a certiorari petition in this case. I also informed you that I was still considering whether to intervene in Sacred Heart, Straight, or Burke. I have now decided not to file a certiorari petition in the present case and not to intervene in any of the other three cases in which the issue is now pending. The trustee in bankruptcy has filed his own petition in Schlossberg, and the government's response is due on April 22, 1998. I have not foreclosed participation at a later stage in these cases in light of any further developments.

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 April 9, 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