

1997

Strategies for Preserving the Bankruptcy Trustee's Avoidance Power against States after Seminole Tribe

Edward J. Janger
Brooklyn Law School, edward.janger@yale.edu

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Bankruptcy Law Commons](#)

Recommended Citation

23 Ohio N.U. L. Rev. 1431 (1996-1997)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

Strategies for Preserving the Bankruptcy Trustee's Avoidance Power Against States After *Seminole Tribe*

TED JANGER*

States often assert claims in private bankruptcies, sometimes for taxes, but often for other debts as well. Congress has twice made it clear that it intends states in their capacity as creditors, to be subject to the jurisdiction of Federal Bankruptcy Courts, and to the substantive provisions of the Bankruptcy Code as well. Twice, however, the Supreme Court has stood in the way. In 1978, when Congress enacted § 106 of the United States Bankruptcy Code (the Code),¹ which sought to waive sovereign immunity on behalf of the states, the Supreme Court held, in *Hoffman v. Connecticut Department of Income Maintenance*,² that Congress had not stated its intention to "abrogate" state's sovereign immunity with sufficient clarity. When, in the Bankruptcy Amendments of 1994,³ Congress responded to the Court's invitation by amending § 106 to meet the Supreme Court's "clear statement" requirement,⁴ the Supreme Court again stood in the way. The

* © 1997, Edward J. Janger.

1. 11 U.S.C. § 106 (1994).

2. 492 U.S. 96 (1989). In *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992), the Supreme Court further held that § 106 did not operate to waive federal sovereign immunity.

3. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 702(b)(2)(B), 108 Stat. 4106, 4150 (1994).

4. The legislative history specifically states Congress's intention to legislatively overrule the Supreme Court's interpretation of the statute. Indeed, to underline its position, Congress made the amendments to § 106 retroactive:

Section 113. Sovereign Immunity

This section would effectively overrule two Supreme Court cases that have held that the States and Federal Government are not deemed to have waived their sovereign immunity by virtue of enacting section 106(c) of the Bankruptcy Code. In enacting § 106(c), Congress intended to make provisions of title 11 that encompassed the words "creditor," "entity" or "governmental unit" applicable to the States. Congress also intended to make the States subject to a money judgment. But the Supreme Court in *Hoffman* . . . held that even if the State did not file a claim, the trustee in bankruptcy may not recover a money judgment from the State notwithstanding section 106(c). This holding had the effect of providing that preferences could not be recovered from the States. In using such narrow construction, the Court held that use of the "trigger words" would only bind the States, and not make them subject to a money judgment. The Court did not find in the text of the statute an "unmistakenly clear" intent of Congress to waive sovereign immunity in accordance with the language promulgated in *Atascadero State Hospital v. Scanlon*

The Court applied this reasoning in *United States v. Nordic Village* . . . in not allowing a trustee to recover a postpetition payment by a chapter 11 debtor to the Internal Revenue Service. The Court found that there was no such waiver expressly provided within the text of the statute.

This amendment expressly provides for a waiver of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief. It is the Committee's intent to make § 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978 waiving the sovereign immunity of the States and the

Supreme Court's recent holding in *Seminole Tribe v. Florida*,⁵ that private citizens may not sue states in federal court to enforce federally created rights, appears to overrule amended § 106, at least in part.⁶

In this essay I hope to do three things. First, I will sketch, in a non-technical way, the likely effect of *Seminole Tribe* on bankruptcy practice generally and on § 106 in particular. Second, I will suggest a number of possible statutory solutions which might subject states to federal bankruptcy law by recasting private enforcement actions against states as suits by the Federal Government, and articulate some principals which might help to determine how federal is federal enough. And, third, I will suggest that prosecutorial discretion, and possible conflicts of interest between the government and the bankruptcy trustee will likely impair the effectiveness of any solution that actually passes constitutional muster.

I. HOW DOES *SEMINOLE TRIBE* AFFECT BANKRUPTCY LAW?

A. *Bankruptcy Law in a Nutshell*

When a debtor files for bankruptcy, the Bankruptcy Code creates an estate consisting of all of the assets of a debtor,⁷ and a Trustee in Bankruptcy (TIB) is given the status of a hypothetical lien creditor with a lien on all of the debtor's assets as of the date of the petition.⁸ The

Federal Government in this regard.

H.R. Rep. No. 103-835, at 42 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3350-51 (citations omitted).

5. 116 S. Ct. 1114 (1996).

6. *Seminole Tribe* involved legislation under the Indian Commerce Clause, and *Union Gas* involved legislation under the Commerce Clause. Neither case involved legislation under the bankruptcy clause. However, one of the post *Union Gas* cases expressly criticized by the majority is *In re Merchants Grain, Inc.*, 59 F.3d 630 (7th Cir. 1995), a bankruptcy case involving a preference action under 11 U.S.C. § 547. The Supreme Court vacated and remanded that case at the same time that it decided *Seminole Tribe*. While the Court has not expressly held that the same rule applies in bankruptcy proceedings, a number of lower courts have so held. *Sparkman v. Department of Revenue (In re York-Hanover Dev., Inc.)*, 201 B.R. 137 (Bankr. E.D. N.C. 1996) (fraudulent conveyance action brought by TIB against Florida Department of Revenue barred by the Eleventh Amendment); *In re Martinez*, 196 B.R. 225 (Bankr. D. P.R. 1996) (Eleventh Amendment bars action by TIB seeking money damages for violation of automatic stay). While conceding that *Seminole Tribe* applies, a number of other courts have held that a state waives its sovereign immunity when it files a proof of claim in a bankruptcy action. *Burke v. Georgia (In re Burke)*, 200 B.R. 282 (Bankr. S.D. Ga. 1996); see also *Headrick v. Georgia (In re Headrick)*, 200 B.R. 963, 968 (Bankr. S.D. Ga. 1996). Indeed, at least one court has argued that the Fourteenth Amendment creates a private right of action for violations of automatic stay. *Headrick*, 200 B.R. at 967 ("Article I empowers Congress to grant debtors the privileges and immunities of the Bankruptcy Code, and the Fourteenth Amendment gives Congress the right to enforce those privileges and immunities by creating private rights of action against the States.").

7. 11 U.S.C. § 541 (1994).

8. 11 U.S.C. § 544 (1994).

automatic stay goes into effect at the moment the petition is filed, and prohibits individual creditors from seeking to collect their debts by unilateral action.⁹ In addition, the Federal Bankruptcy Code creates a number of federal rights of action, and vests enforcement power in the TIB. These causes of action include actions to avoid preferences¹⁰ and fraudulent conveyances,¹¹ and actions to avoid unperfected liens.¹² Once avoidance actions have been brought, claims allowed or disallowed, and the assets distributed, the court discharges all prepetition debts,¹³ and the discharge injunction goes into effect, barring any creditors from seeking to collect on any debts discharged by the bankruptcy.¹⁴

B. *The Effect of Seminole Tribe*

For the purposes of this discussion, two aspects of federal bankruptcy law are thus important: (1) the Court's power to enjoin state collection efforts pursuant to the automatic stay and discharge injunction,¹⁵ and (2) the TIB's power to recover money from states pursuant to its various avoidance powers. To understand these two contexts, it might be useful to keep two stories in mind: The "injunction story" and the "avoidance story."

First, the injunction story: Frank Ponzi runs an investment company called Ponzi Investments in the State of Virginia. The company owes \$1,000,000 in back taxes to the State of Virginia. As it turns out, Frank is not a very smart stock picker, or very honest, and he loses all of his investor's money and then some. The company files for bankruptcy. At the moment of the filing, the automatic stay goes into effect, and prohibits individual creditors, *including states*, from seeking to collect their debts by unilateral action.¹⁶

Second, the avoidance story: As it turns out, Ponzi also had a \$200,000 personal state tax liability. Shortly before Ponzi Investments filed for bankruptcy, Ponzi raided the corporate bank account and used the money to pay his personal state income taxes.¹⁷ Here, the Federal Bankruptcy Code creates a number of federal rights of action, and vests enforcement power

9. 11 U.S.C. § 362 (1994).

10. 11 U.S.C. § 547 (1994).

11. 11 U.S.C. § 548 (1994).

12. 11 U.S.C. § 544.

13. 11 U.S.C. §§ 727, 1141, 1328 (1994).

14. 11 U.S.C. § 524(a)(2), (3) (1994).

15. In addition to the automatic stay and discharge injunctions, the court may issue such other injunctions as are necessary to administer a bankruptcy case pursuant to 11 U.S.C. § 105.

16. 11 U.S.C. § 362 (1994).

17. These facts are loosely modeled on *I.R.S. v. Nordic Village*, except that the tax liability in *Nordic Village* was to the federal rather than state government, and the transfer occurred post-petition.

in the TIB. These causes of action include actions to avoid preferences¹⁸ and fraudulent conveyances,¹⁹ each of which would, pre-*Seminole Tribe*, give the TIB the power to recover the \$200,000 from the state.

1. *Seminole Tribe* and the Bankruptcy Court's Injunction Power

Seminole Tribe will have little effect on the injunction story. Even after *Seminole Tribe*, the automatic stay will prevent state officials from seizing the assets of Ponzi Investments. While states themselves are immune from suit under *Seminole Tribe*, Bankruptcy Court injunctions bind state officials acting in their official capacity. Under *Ex parte Young*,²⁰ such officials are not immune, and state officials who violate the automatic stay can be held in contempt. While, in *Seminole Tribe*, the Court declared that no "*Ex parte Young*" type injunction was available under the Indian Gaming Act, this was a holding based on statutory interpretation, rather than constitutional limitation. In the Court's view, Congress enacted a detailed remedial scheme when it enacted the Indian Gaming Act, and that this remedial scheme did not include the power to enjoin state officials. However, the Court expressly stated, albeit in footnote, that such an action would have been available if Congress had intended to create it.²¹

The Bankruptcy Code differs from the Indian Gaming Act in this regard. Congress has expressly created an injunction power,²² and has expressed its intention that it apply against states.²³ Unless the Supreme Court goes further than it did in *Seminole Tribe*, the automatic stay and the discharge injunction should continue to bind state officials.

2. Avoidance Actions After *Seminole Tribe*

More troubling is the effect of *Seminole Tribe* on the avoidance powers of the TIB. After *Seminole Tribe*, the trustee of Ponzi Investments will not be able to recover the money Frank Ponzi stole from the company and handed over to the state to pay his personal taxes. While the Bankruptcy Court can prevent state action in the future, here an *Ex parte Young* type injunction will do no good. The state has the money, or the

18. 11 U.S.C. § 547 (1994).

19. 11 U.S.C. § 548 (1994).

20. 209 U.S. 123 (1908).

21. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1133 n.17 (1996) ("Contrary to the claims of the dissent, we do not hold that Congress cannot authorize federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme. We find only that Congress did not intend that result in the Indian Gaming Regulatory Act.").

22. 11 U.S.C. §§ 105, 362, 524 (1994).

23. 11 U.S.C. § 106 (1994).

asset, and the Trustee wants to sue to get it back. Prior to *Seminole Tribe* this transfer would have been avoidable as either a preference²⁴ or as a fraudulent conveyance.²⁵ However, if the TIB is viewed as a private citizen suing a state, then under *Seminole Tribe* the Eleventh Amendment would appear to bar the suit. Indeed, the Supreme Court seems to take this view as well. The majority opinion in *Seminole Tribe* expressly criticizes the Seventh Circuit's decision in *In re Merchants Grain, Inc.*,²⁶ a bankruptcy case involving a preference action under 11 U.S.C. § 547, and, in a companion case, summarily vacated that decision and remanded.²⁷ To the extent that courts have explored this question since *Seminole Tribe* they have, with one exception, concluded that *Seminole Tribe* disposes of any avoidance actions against states.²⁸ On this reading, for the reasons discussed above, *Seminole Tribe* clearly frustrates congressional intent.

C. *Distinguishing Seminole Tribe—Strategies Available Under Current Law*

This analysis raises two questions. First, in the near term, what can a TIB's lawyer do under current law to defeat a motion to dismiss when suing a state to recover a preference? Second (and discussed in the next part), what can Congress do to have its cake and eat it too? Is there a way to amend the Bankruptcy Code to satisfy the requirements of the Eleventh Amendment while allowing the TIB to recover preferences from states?

There are three *Seminole Tribe* evading strategies currently being explored by the courts:

1. Waiver

The first of these strategies is waiver. Section 106 provides that where a state or state agency files a proof of claim and seeks to participate in the

24. 11 U.S.C. § 547 (1994).

25. 11 U.S.C. § 548 (1994).

26. 59 F.3d 630 (7th Cir. 1995).

27. 116 S. Ct. 1411 (1996).

28. *Sacred Heart Hosp. v. Pennsylvania Dep't of Welfare*, 204 B.R. 132 (Bankr. E.D. Pa. 1997); *In re Martinez*, 196 B.R. 225 (Bankr. D. P.R. 1996); *Sparkman (In re York-Hannover Devs., Inc.) v. Florida Dep't of Revenue*, 201 B.R. 137 (Bankr. E.D. N.C. 1996) (fraudulent conveyance action brought by TIB against Florida Department of Revenue barred by the Eleventh Amendment). One court has suggested that an action for money damages might be available under the Fourteenth Amendment for violations of the automatic stay. *Headrick v. Georgia*, 200 B.R. 963, 967 (Bankr. S.D. Ga. 1996) ("Article I empowers Congress to grant debtors the privileges and immunities of the Bankruptcy Code, and the Fourteenth Amendment gives Congress the right to enforce those privileges and immunities by creating private rights of action against the States.").

bankruptcy, it waives sovereign immunity. Courts since *Seminole Tribe* have not found this constitutionally problematic.²⁹ Some questions remain, however, as to the scope of that waiver. Can that waiver constitutionally extend only to claims in recoupment, or can it extend to setoffs based on other causes of action?³⁰ Does the waiver allow the TIB to bring claims for amounts in excess of the amount claimed by the state?³¹ Does waiver by one state agency constitute waiver by the entire state?³²

A second set of questions arise as to what it takes for a state to waive sovereign immunity. Under the current version of § 106(b) waiver only occurs when the state files a proof of claim.³³ However, under original version of § 106, courts had held that a state might waive merely by seeking to participate in a bankruptcy distribution without filing a proof of claim. While insufficient under the current version of the statute, it might be constitutionally sufficient for conduct short of filing a claim to constitute waiver. For example, seizing assets of the state post-petition, or even (though not likely) seeking and accepting a preference in anticipation of a bankruptcy filing, might be deemed constitutionally sufficient manifestations of an intention to waive sovereign immunity.³⁴ Indeed, during the period between the Supreme Court's decision in *Hoffman* and the 1994 amendments many courts pressed the limits of waiver, and the limits of the statutory language.³⁵ Section 106 could be amended to allow these theories to reemerge.

2. State Court Actions to Enforce Federal Rights

Even where a state has not waived its sovereign immunity by filing a proof of claim, Professor Elizabeth Gibson has argued that it may still be

29. *Burke v. Georgia* (*In re Burke*), 200 B.R. 282 (Bankr. S.D. Ga. 1996); *Headrick v. Georgia* (*In re Headrick*), 200 B.R. 963 (Bankr. S.D. Ga. 1996).

30. Under 11 U.S.C. § 106(b), (c), by filing a proof of claim, a governmental unit waives sovereign immunity with regard to any claims against the state which arise out of the same transaction or occurrence, presumably, even if the counterclaim might result in an affirmative recovery against the state. In addition, the governmental unit is subject to claims of setoff against its claim regardless of whether they arise out of the same transaction or occurrence.

31. See 11 U.S.C. § 106(b), (c) (1994).

32. See *Sacred Heart Hosp. v. Pennsylvania Dep't of Public Welfare* (*In re Sacred Heart Hosp.*), 204 B.R. 132 (Bankr. E.D. Pa. 1997).

33. 11 U.S.C. § 106 (1994); *Aer-Aerotron, Inc. v. Texas Dep't of Highways & Public Transp.*, 104 F.3d 677 (4th Cir. 1997).

34. See *Parden v. Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184 (1964) (when a state engages in a federally regulated activity it subjects itself to federal regulation), *overruled in part*, *Welch v. State Dep't of Highways*, 107 S. Ct. 2941 (1987).

35. S. Elizabeth Gibson, *Congressional Response to Hoffman and Nordic Village: Amended Section 106 and Sovereign Immunity*, 69 AM. BANKR. L.J. 311, 323-25 (1995).

possible for the TIB to bring avoidance actions under federal law in state court.³⁶ She argues that where Congress clearly states an intention to make states liable for money damages, that federal cause of action against the states becomes the law of the state through the Supremacy Clause. As a result, an action could be brought in state court even where the state has not consented to suit. This argument turns on dicta in the Supreme Court's decision in *Hilton v. South Carolina Public Railways Commission*,³⁷ where the Supreme Court allowed a negligence action under the Federal Employers' Liability Act to go forward against a state owned railroad. The Court stated that when Congress speaks with sufficient clarity "so that a federal statute does impose liability upon the States the Supremacy Clause makes that statute the law in every State, fully enforceable in state court."³⁸ In *Seminole Tribe* itself, however, the Supreme Court appeared to assume that such state court litigation would be permitted only if the state consented.³⁹ So while the argument may currently be viable, it does not appear likely that it will find favor with the Supreme Court as currently constituted.

3. Privileges and Immunities

Third, one court has argued that a preference action is an incident of citizenship within the meaning of the Privileges and Immunities Clause of the Fourteenth Amendment, and therefore within Congress' power to create private rights of action to enforce rights guaranteed by the Fourteenth Amendment.⁴⁰ As I noted above, when the Supreme Court decided *Seminole Tribe* it simultaneously vacated and remanded a bankruptcy case decided on the basis of *Union Gas*.⁴¹ Most courts that have looked at the question have concluded that the Bankruptcy Clause of the Constitution is not different from the Indian Commerce Clause for these purposes.⁴²

36. S. Elizabeth Gibson, *Sovereign Immunity in Bankruptcy: The Next Chapter*, 70 AM. BANKR. L.J. 195 (1996).

37. 502 U.S. 197 (1991).

38. *Id.* at 206-07 (referring to *Howlett v. Rose*, 496 U.S. 356, 367-68 (1990)).

39. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1131 n.14 (1996). *Hilton* could be distinguished on a number of grounds, particularly on the basis that a state owned instrumentality, such as a railroad, is not the state for sovereign immunity purposes.

40. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

41. *In re Merchants Grain Inc.*, 59 F.3d 630 (7th Cir. 1995).

42. See *supra* note 26.

II. POSSIBLE AMENDMENTS—FEDERALIZING AVOIDANCE ACTIONS

A more profitable line of argument may lie in amending § 106 to capitalize on the fact that *Seminole Tribe* and the doctrine of sovereign immunity only bar actions by private citizens, not actions by the Federal Government to enforce federal rights against the states.⁴³ Thus, a number of legislative strategies might be possible which would allow avoidance actions to be brought against states. Whether an amendment will pass muster under *Seminole Tribe* will turn on whether the actor bringing suit is "federal enough."

One possibility might be to vest the power to bring preference actions in the United States Trustee.⁴⁴ The preference could be recovered by the Federal Government, and a statute could be enacted providing for the return of the proceeds of the action to the estate. While this strategy would alleviate any Eleventh Amendment concerns (the suit would be commenced and prosecuted by a federal official) it would place a significant burden and expense on the Federal Government. A second, less burdensome mechanism would be to allow the U.S. trustee to hire outside counsel, and deduct the expenses from any recovery which would otherwise be payable to the estate. A third stopping point along the spectrum would be to create a procedure under which the TIB would be required to seek approval from the U.S. Trustee before bringing an action against a state. A final and purely formal stopping point, would be to enact a *qui tam* like statute, under which Congress would simply authorize the TIB to bring an action in the name of the United States.

III. FEDERALIZING AVOIDANCE ACTIONS—HOW FEDERAL IS FEDERAL ENOUGH?

Having identified a number of ways around *Seminole Tribe*'s ban on private suits against states, it is necessary to decide which, if any of these strategies pass constitutional muster. All of these strategies seek to solve the

43. *Seminole Tribe*, 116 S. Ct. at 1131 n.14 ("the Federal Government can bring suit in federal court against a State."); *United States v. Texas*, 143 U.S. 621, 644-45 (1892). See also Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995).

44. It is important to distinguish the United States Trustee from the TIB. The TIB is a person, usually a bankruptcy attorney, appointed by the Bankruptcy Court to administer the estate of a particular debtor. The Office of the United States Trustee, by contrast, is an arm of the Department of Justice charged with supervising pending bankruptcy cases. The U.S. Trustee is frequently responsible for conducting the first meeting of creditors required under 11 U.S.C. § 341, for ensuring that creditors' committees are formed and represented by counsel, and for scrutinizing fee petitions submitted by professionals.

sovereign immunity problem by stamping an otherwise private action with a "federal" imprimatur. The question is how closely the Court's future sovereign immunity jurisprudence will scrutinize the label. Must the action be brought by and prosecuted by federal officials? Might the legal work be contracted out to private attorneys, with the expenses paid out of the recovery? Might the action merely be approved by a federal official? May Congress simply declare the private plaintiff a private attorney general?

One commentator argued, pre-*Seminole Tribe*, by analogy to the *qui tam* statute, that Congress could give private citizens the power to litigate in the name of the Federal Government.⁴⁵ However, this purely formal solution runs into two problems: One textual, one structural. First, the Eleventh Amendment, by its terms, operates as a bar to any suit, "commenced or prosecuted" by a citizen against a state. The "commenced or prosecuted" language seems to require both that the decision to bring suit, and control over its prosecution be retained by some federal official. One response to this argument is that, after *Hans*, the Eleventh Amendment has become sufficiently divorced from its text to allow for such novel solutions. Whether it is likely to succeed will turn on whether the Eleventh Amendment is read as embodying a general principal of sovereign immunity or whether the Court seeks to adhere to its text. Second, the core concept of sovereign immunity within a federal structure imposes some constraint. The distinction between citizen and federal suits would seem to embody a judgment that within a federal system, there must be some decision made by an accountable federal official to bring suit.⁴⁶ Under *Union Gas*, Congress satisfied that requirement. After *Seminole Tribe*, that official must be executive. Congressional abrogation will not do.⁴⁷

Based on this analysis, to satisfy *Seminole Tribe*, control over avoidance litigation would have to remain with the U.S. Trustee or some other executive official. The U.S. Trustee would be free to hire outside

45. Siegel, *supra* note 40.

46. Indeed, the rule in *Seminole Tribe* might be read as requiring a federal official to decide whether a particular action is to go forward. By requiring the suit to be brought in the name of the federal government, the doctrine allows the federal government to serve as a gatekeeper. A suit brought by a private individual against a state to enforce a federal right may have costs to the federal government in connection with the state/federal relationship. Indeed, the current debate over unfunded federal mandates might be seen as a political backlash to federal interference with state prerogatives. Placing the enforcement decision in the hands of unaccountable private citizens may exacerbate such disputes.

47. A third, related point is that, at least with regard to *qui tam* actions, the United States has an interest in the outcome of the litigation. The *qui tam* plaintiff retains a percentage of the recovery, but the U.S. retains the rest. The requirement of a financial interest would not seem to be essential, the federal interest might equally plausibly derive from an important federal policy interest, such as the implementation of the Constitutional Bankruptcy power.

counsel to handle the action, and the costs of the litigation to be deducted from any recovery. The remaining proceeds could then be paid over to the bankruptcy estate. Under this approach, the intent of Congress in amending § 106 could be achieved with relatively little additional expense.

IV. SOME PRACTICAL PROBLEMS REMAIN

However, two potentially large practical stumbling blocks remain to any proposed statutory solution which turns on action by the Federal Government: Conflict of interest and prosecutorial discretion. First, the United States has a conflict of interest. The United States is frequently a claimant in bankruptcy cases. Giving the United States the power to prosecute a claim which would otherwise have been a claim of the estate gives leverage to the United States in its negotiations over its own claims. For example, the U.S. Trustee might decline to bring avoidance actions unless the United States is given a priority in any recoveries, or unless its own claim is given a higher priority. A solution to this conflict of interest problem would be to give the United States a lien on, and/or priority in any avoidance recoveries against states.⁴⁸ While this does not restore the law to its status before *Seminole Tribe* it does eliminate any incentive for states to engage in a race of diligence. Second, the U.S. Trustee might limit its avoidance efforts to those necessary to satisfy the claims of the United States. To avoid this any statutory solution ought to be drafted in a way that curbs prosecutorial discretion by making it clear that the duty of the U.S. Trustee or other federal official runs to the creditors of the estate. In addition, the statute should require the bankruptcy court to approve any settlement with a state after notice to creditors and a hearing.

V. CONCLUSION

Thus, while there are a number of litigating strategies available to the Trustee under current law which may allow the Trustee to bring avoidance actions against states, it may be necessary to consider amending § 106 to place litigating authority in the hands of federal officials. If this is done, care must be taken in drafting a statute that will address the possibility of conflict of interest and prosecutorial discretion.

48. Such a priority would also ease the path of the amendment through Congress.