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***1** SURVIVING SEMINOLE: HOW TO DEAL WITH STATE TAX LIABILITIES IN BANKRUPTCY WITHOUT THE BENEFIT OF BANKRUPTCY CODE SECTION 106(A)

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I. INTRODUCTION

What protection does bankruptcy afford debtors with disputed and potentially large state tax liabilities? The Supreme Court's recent decision in Seminole Tribe of Florida v. Florida [FN1] has forced bankruptcy courts and practitioners to revisit this once relatively straightforward question, generating volumes of judicial and scholarly debate in the months following its initial publication. That debate has coalesced around two primary inquiries:

- whether Congress' abrogation of state sovereign immunity, articulated in section 106(a) [FN2] of the Bankruptcy Code, [FN3] survives the constitutional strictures imposed by the Seminole) decision; and

***2** - if Bankruptcy Code section 106(a) is not constitutional, whether and by what means state taxing agencies (or, for that matter, other state agencies with claims against a debtor) may be bound by orders issued by federal bankruptcy courts in the context of a bankruptcy case.

The question of section 106(a)'s constitutional viability remains, as of this writing, an issue unresolved by the Ninth Circuit Court of Appeals. [FN4] Those lower courts within the jurisdiction which have visited the issue, however, have concluded universally that Congress' most recent attempt to abrogate the immunity of states by operation of the Bankruptcy Code cannot pass constitutional muster. [FN5] Consequently, the discussion which ***3** follows leaves that still-unsettled inquiry for further debate [FN6] within the Circuit Court of Appeals and instead explores strategies for dealing with the potential impact of sovereign immunity, and other issues of federal law, on the administration of disputes involving state tax liabilities [FN7] in a Chapter 11 case without the statutory abrogation of sovereign immunity that section 106(a) purports to impose:

II. THE BASIC ISSUE AND THE TAXPAYER'S RESPONSE: AN OVERVIEW

In Seminole, the Supreme Court reaffirmed the longstanding doctrine that Congress cannot abrogate the sovereign immunity granted to states under the Eleventh Amendment, except through the Fourteenth Amendment's Enabling Clause. In the wake of Seminole, a substantial number of bankruptcy courts have interpreted this holding as an implicit rejection of Bankruptcy Code section 106(a), which purports to abrogate state sovereign immunity with regard to certain specified sections of Title 11. [FN8] Although the issue remains undecided by the Ninth Circuit as of this writing, these courts have consequently stricken section 106(a) as unconstitutional and have ruled that, in the absence of effective congressional abrogation, states retain their immunity from suit unless that immunity is properly waived.

But the state's immunity does not prohibit a taxpayer from filing a Chapter 11 bankruptcy case, scheduling the state tax liabilities at issue as "disputed," and confirming a Chapter 11 plan which affords little or no payment in respect of those disputed liabilities. The binding effect of such plans on state taxing entities is recognized by several recent appellate cases, including a Fourth Circuit decision issued in 1997, a Supreme Court decision issued in April 1998,

and two subsequent Ninth Circuit Bankruptcy Appellate Panel decisions issued, respectively, in August and November 1998.

Each of these decisions affirm, explicitly or implicitly, that -- notwithstanding the state's Eleventh Amendment immunity -- the bankruptcy court retains inherent ***4** jurisdiction over property of the bankruptcy estate, and over the debtor in possession of that property. These decisions consistently hold that where a proceeding is commenced "against all the world," and the property involved in that proceeding is not within the state's control, there is no "suit" for Eleventh Amendment purposes, and the court's inherent jurisdiction over that property is not disturbed.

The bankruptcy court's inherent jurisdiction over property of the estate means that its adjudication of claims and interests regarding that property is binding on "all the world" -- including state taxing authorities -- and may not be collaterally attacked. Consequently, the state is forced by the debtor's bankruptcy filing to make a strategic and legal choice: it must enter the bankruptcy case as a claimant and subject itself to the bankruptcy court's jurisdiction, or it must remain out of the bankruptcy altogether and abide by the orders of that court regarding the property of the estate.

This in rem theory of bankruptcy jurisdiction has met, and will continue to meet, stiff resistance by state attorneys general across the country. A number of attacks on this theory have been mounted by the states, both in the courts and in the academic literature. They may be distilled to the following general objections:

- The state is not obligated to choose between entering the bankruptcy as a claimant or remaining out of the case altogether. Instead, the state should be permitted to enter a "special appearance" for the sole purpose of contesting the bankruptcy court's jurisdiction, without having to subject itself to that court's jurisdiction regarding the estate property.
- The state is not bound by the court's confirmed plan, and may continue its collection activity against the debtor post-confirmation.
- Even if the court retains jurisdiction over property of the estate, the court may not adjudicate a disputed tax liability under the terms of a confirmed plan and section 505(a) where it could not do so pursuant to section 106.
- Even if the court is permitted to adjudicate a disputed tax liability, the federal Anti-Tax Injunction Act [FN9] prohibits injunctive relief against the collection of those liabilities.

As mentioned, these issues arise in connection with a number of possible bankruptcy scenarios. The following discussion focuses on these issues in the context of two such scenarios, most likely to emerge in connection with disputed state tax liabilities. After reviewing the legal merits, this discussion concludes that, in light of the developing appellate caselaw, taxpayers who face disputed state tax liabilities and wish to deal with them through the bankruptcy process should consider taking the following procedural steps:

***5** - File a voluntary Chapter 11 petition.
- Schedule the state tax liabilities at issue as "disputed."
- Obtain a prompt bar date for claims from the court.
- Propound a plan of reorganization which provides little or no payment to disputed tax claims.
- Obtain prompt confirmation of the plan, and enforce the confirmation order as binding (a) against individual state officers in federal court, under the doctrine of Ex Parte Young, or (b) against state taxing agencies directly, in state court.

A. Scenario One: The Taxpayer Files A Chapter 11 Case, Schedules The Tax Liability At Issue As "Disputed," And Propounds A Plan Affording No Payment To The Taxing Agency In Respect Of Those Disputed Claims**.**

The Eleventh Amendment, as interpreted since its enactment and most recently by Seminole, recognizes that states retain immunity from suit unless that immunity is waived. [FN10] But the state's immunity from suit does not prohibit a taxpayer from filing a Chapter 11 bankruptcy case, scheduling state tax liabilities at issue as "disputed," and confirming a Chapter 11 plan affording limited payment (or no payment) on those disputed liabilities.

Will such plans be binding on a state, even when the state has not consented to the bankruptcy court's jurisdiction or otherwise waived its immunity? Several recent decisions provide some insight on this question, and suggest a growing consensus within the appellate courts on this issue.

1. Recent Decisions

a. State of Maryland v. Antonelli Creditors' Liquidating Trust

In State of Maryland v. Antonelli Creditors' Liquidating Trust, [FN11] the Fourth Circuit reviewed an action, initiated by the State of Maryland in state court, to tax certain real property transfers designated by the debtors' Chapter 11 plan as tax-exempt. The creditors' trust for the estate removed Maryland's action to the ***6** bankruptcy court and requested that the court construe the debtors' plan as binding on the state.

Maryland moved for summary judgment in this proceeding, contending that the tax exemptions set forth in the debtors' plan did not bind the state, since the state had never consented to the bankruptcy court's jurisdiction in the debtors' underlying bankruptcy case. The bankruptcy court and district court both rejected this argument, and the Fourth Circuit agreed.

In affirming the bankruptcy and district courts, the Fourth Circuit held that entry of an order confirming the debtor's plan does not arise out of a "suit" within the meaning contemplated by the Eleventh Amendment. Specifically, the court noted that

> [t]he confirmation order in this case was not entered in a suit 'against one of the United States' filed by a private party. The state was not named a defendant, nor was it served with process mandating that it appear in a federal court. [FN12]

In reaching this conclusion, the Fourth Circuit distinguished between adversary proceedings initiated by private parties against state entities, which "depend[] on court jurisdiction over th[e] state" (and are therefore impermissible without the state's consent), and the court's inherent "power ... to enter an order confirming a plan," which "derives ... from jurisdiction over debtors and their estates," [FN13] (and is therefore independent of the state's Eleventh Amendment protection).

Based on this distinction, the Fourth Circuit concluded that the debtors' confirmation order was binding against Maryland, and remained so independent of any exercise of in personam jurisdiction over the state itself. Therefore, the state of Maryland's earlier failure to object to confirmation of the debtors' plan prevented it from attacking that plan's provisions in a subsequent state proceeding.

b. In re Mitchell

The Fourth Circuit's distinction between an impermissible adversary proceeding against the state, and a judicial proceeding which is not a "suit" within the contemplation of the Eleventh Amendment, has been applied more recently in a second appellate decision. In In re Mitchell, [FN14] the Ninth Circuit Bankruptcy Appellate Panel affirmed the dismissal of an adversary action, brought by Chapter 7 debtors to ***7** determine the dischargeability of state tax liabilities and for determination that those liabilities were discharged. In that case, the B.A.P. found that the adversary proceeding before it was a constitutionally impermissible "suit" against the state. [FN15]

In the course of its analysis, the B.A.P. distinguished the case before it from the Fourth Circuit's decision in Antonelli, [FN16] specifically recognizing the jurisdictional distinctions raised by that case, and noting specifically that the in rem theory discussed in that decision has been successfully used to reject arguments that the state is not subject to: (1) a discharge order, subsequently asserted as an affirmative defense; [FN17] (2) adjudication of dischargeability where the state itself filed an adversary proceeding; [FN18] and (3) an order confirming a chapter 11 plan to which the State did not object. [FN19] The Mitchell court's review of relevant caselaw drew a careful distinction between those decisions in which the Eleventh Amendment was not at issue, [FN20] and, those in which the state's Eleventh Amendment immunity was not waived, [FN21] or in which the court's inherent jurisdiction was improperly invoked. [FN22]

The analysis employed by the Fourth Circuit in Antonelli, and by the Ninth Circuit Bankruptcy Appellate Panel in Mitchell, suggests that, although Eleventh Amendment immunity applies to requests for relief against the state

initiated by private parties, the bankruptcy court nevertheless retains an inherent jurisdiction over the debtor's estate and its assets. That jurisdiction remains effective and is binding as to all ***8** parties, including the state, even where the state has not filed a claim, waived its immunity, or otherwise submitted to court jurisdiction.

c. In re Lapin

The Mitchell court's implicit recognition of the bankruptcy court's jurisdiction over the debtor's estate and assets has been more explicitly developed in In re Lapin, [FN23] a similar case involving a Chapter 7 debtor facing post-discharge collection activity by the California Franchise Tax Board. [FN24] In Lapin, the debtor sought to avoid Eleventh Amendment issues by moving the bankruptcy court for an order to show cause re: civil contempt and for sanctions against the FTB for its continued collection of pre- petition debt. The bankruptcy court granted the motion and the FTB appealed, claiming that Eleventh Amendment sovereign immunity precluded such an enforcement order.

The Ninth Circuit Bankruptcy Appellate Panel, as in Mitchell, found that the debtor's request for sanctions constituted an impermissible request for relief by a private party against the state, despite the bankruptcy court's involvement in issuing the order:

> [e]nforcement of [the bankruptcy court's] order [of discharge] necessarily advances a private right. That the [bankruptcy] court issued the order to show cause (at Lapin's behest) does not change that private right into something else, nor does it provide a distinction from a suit against a state .... [FN25]

But in reaching this conclusion, the Bankruptcy Appellate Panel again acknowledged the Fourth Circuit's analysis in Antonelli, explicitly recognizing the binding effect of an uncontested confirmation order or discharge order upon the estate's creditors, including state taxing entities. Specifically, the Lapin court acknowledged that

> [t]he analogy between the confirmation order in Antonelli and the discharge order here is appropriate, in that both orders are binding on creditors and are not subject to collateral attack .... [The FTB] does not contend that it is not bound by the terms of the discharge order ...." [FN26]

***9** In other words, while the Eleventh Amendment limits post-confirmation or post-discharge relief sought by debtors in bankruptcy court to the prospective injunctive remedies available under the doctrine of Ex Parte Young, it does not diminish the binding effect of a confirmation or discharge order on the state. Under the Ninth Circuit Bankruptcy Appellate Panel's holding in Lapin, such orders are not subject to collateral attack as a result of the state's sovereign immunity, and may not be challenged once they become final.

This conclusion is reinforced by the Lapin court's subsequent discussion of the remedies available to debtors in the face of post-discharge tax liability. In addition to the injunctive relief available under the Ex Parte Young doctrine, the Ninth Circuit Bankruptcy Appellate Panel noted that

> the Eleventh Amendment does not prevent the discharge in bankruptcy of a debt owed to a state .... [T]he ... discharge can be raised as a defense against the state's [subsequent] enforcement efforts .... Likewise, sovereign immunity does not preclude a debtor from initiating an action in state court to enforce a discharge injunction or to recover damages for a violation of that injunction. [FN27]

As was recognized by the Fourth Circuit in Antonelli, a similar analysis applies to confirmation orders, which themselves effect the discharge of debt. [FN28] Consequently, such orders are similarly binding upon state taxing entities, and may be enforced with res judicata effect under the doctrine of Ex Parte Young in bankruptcy court, or directly against the state in that state's tribunal.

d. California v. Deep Sea Research

The in rem theory espoused by the Fourth Circuit in Antonelli and subsequently acknowledged in Mitchell and Lapin has received additional support from a different quarter of jurisprudence -- federal admiralty law. In California v. Deep Sea Research, [FN29] the United States Supreme Court affirmed the Ninth Circuit in ruling that federal jurisdiction over an in rem admiralty action does not involve Eleventh Amendment immunity concerns when the res in question is not within the state's possession.

***10** Deep Sea Research involved a dispute over rights to a 130-year old shipwreck located off the California coast, brought before the federal district court for resolution as a suit in admiralty. The state of California intervened and moved to dismiss the action on the grounds that the litigation was, in fact, an action against the state and therefore violative of the Eleventh Amendment.

Writing for a unanimous Court, Justice O'Connor acknowledged the constraints on federal jurisdiction generally imposed by Seminole). However, the Deep Sea Research decision went on to note that, despite these constraints, the Eleventh Amendment could not be invoked in those instances where the state did not have possession of the res in question. The reasons for this exemption from Eleventh Amendment immunity were clear:

> [A] requirement that a State possess the disputed res [in order to invoke the protection of the Eleventh Amendment] is 'consistent with the principle which exempts the [State] from suit and its possession from disturbance by virtue of judicial process. [FN30]

In Deep Sea Research, the court recognized the principle, enunciated nearly 130 years earlier, that "'proceedings in rem to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court [FN31].'" Where the res is not in the state's possession and its title must be adjudicated, "all the world are parties, and ... are bound by the sentence" [FN32] of the federal court.

The analysis in Deep Sea Research should apply with equal force to bankruptcy cases in which the debtor's estate is under the jurisdiction of the bankruptcy court. Like the shipwreck at issue in that admiralty case, property of the bankruptcy estate is not within the state's control, and orders adjudicating competing claims to that property are therefore binding against "all the world" [FN33] -- including the state.

Moreover, the Supreme Court's analysis in Deep Sea Research closely parallels that employed by the courts in Antonelli and Mitchell. Specifically, the Supreme Court distinguished between the in rem action before it and earlier precedent ***11** which, although styled as an in rem action, was actually in the nature of an in personam action against state officials in their official capacity. [FN34]

Although it is not a bankruptcy action, Deep Sea Research provides support for the bankruptcy court's continued in rem jurisdiction in the same way that Seminole) -- another nonbankruptcy case -- has laid the groundwork for invalidation, by some courts, of Bankruptcy Code section 106(a). Deep Sea Research has not yet figured significantly in the bankruptcy caselaw, but its ultimate effect on bankruptcy court jurisdiction is likely to be explored by the courts in the near future.

2. The Practical Impact of Recent Decisions on "Sovereign Immunity" Claims

The practical effect on the state's claim of sovereign immunity created by the appellate decisions in Antonelli, Mitchell, Deep Sea Research and Lapin is significant. As noted in Antonelli, the state may, in effect, be put to a "Hobson's choice" upon the commencement of a bankruptcy filing by virtue of the bankruptcy court's jurisdiction over estate property:

> It is true that if a state wishes to challenge a bankruptcy court order of which it receives notice, it will have to submit to federal jurisdiction .... The state, of course, may well choose not to appear in federal court. But that choice carries with it the consequences of foregoing any challenge to the federal court's actions. While forcing a state to make such a choice may not be ideal from the state's perspective, it does not amount to the exercise of federal judicial power to hale a state into federal court against its will and in violation of the Eleventh Amendment. [FN35]

In light of this continued bankruptcy jurisdiction over the debtor's estate and claims which relate to it, the state has one of two options upon the commencement of a bankruptcy case:

***12 B. Response No. 1: File No Claim And Refuse To Consent To The Bankruptcy** Court's Jurisdiction**.**

The state may refrain from filing a claim in the debtor's bankruptcy case, with the objectives of (i) avoiding

submission to the bankruptcy court's jurisdiction and (ii) pursuing its own remedies against the taxpayer outside of bankruptcy court. As noted above, the obvious hazard of this "do nothing" approach is that it risks the confirmation of a plan which provides adverse treatment of the state's asserted tax liability, and which may not be collaterally attacked.

In order to avoid this result, the state may attempt to enter a "special appearance" for the sole purpose of contesting the bankruptcy court's jurisdiction. This procedural approach is based on the idea that, notwithstanding the court's jurisdiction over estate property in custodia legis, states may file special appearances to object to the jurisdiction of federal courts without waiving their Eleventh Amendment immunity. [FN36]

As discussed more fully below, this strategy misreads the Supreme Court precedent it purports to rely upon, and ignores other binding precedent which holds to the contrary. [FN37] It is also in conflict with Deep Sea Research, and with the Fourth Circuit's recent decision in Antonelli, both of which appear to be consistent with earlier Supreme Court precedent. Consequently, it will not effectively shield the state from the result contemplated by the Fourth Circuit in that case.

C. State Response No.2: File A Claim And Submit To The Bankruptcy Court's Jurisdiction For Purposes Of A Claims Dispute**.**

The alternative to abstaining from participation in the debtor's bankruptcy is no more palatable, from the state's perspective. As suggested by the Fourth Circuit in Antonelli, if the state wishes to contest the debtor's characterization or estimation of a disputed tax liability by filing its own claim, the state is required to submit to federal jurisdiction [FN38] and effectively waive its Eleventh Amendment immunity when that claim is ultimately adjudicated. At least two Supreme Court decisions support the proposition that states waive their immunity when filing a proof of claim in a bankruptcy case. [FN39]

***13** A number of considerations affect the application of this general rule, however. First, the waiver of sovereign immunity triggered by the filing of a proof of claim appears to be limited to the disputed claim itself, and does not extend to other claims or issues in the bankruptcy which may involve state entities. [FN40] Several courts, including the same Fourth Circuit Court of Appeals which decided Antonelli, have held that the broadest statutory criteria for deeming a waiver provided under Code sections 106(b) [FN41] and (c) [FN42] are constitutionally impermissible attempts to rewrite Eleventh Amendment caselaw. [FN43] Therefore, any claim of waiver based on the filing of a proof of claim must comport instead with the standards previously articulated by the prior caselaw.

Second, implicit in the issue of the waiver of sovereign immunity is the underlying issue of whether the individual purporting to file a proof of claim was vested with authority to waive the state's immunity. Even where a proof of claim has been filed, the state attorney general's office may attempt to assert that the state cannot be deemed to have waived its Eleventh Amendment immunity unless it has done so pursuant to appropriate constitutional and statutory authority. [FN44]

***14** The obvious problem with a "lack of authority" argument is that it presents as many problems for the state as it puports to solve. If the person or persons filing a proof of claim or other pleading on a state's behalf lacks authority to waive the state's immunity, then the filed claim is most likely void and not sufficient to assert entitlement to distribution from the estate or to contest the claim already scheduled by the debtor. [FN45] As suggested by the Supreme Court in Gardner v. New Jersey, [FN46] a finding that the State Comptroller lacked authority to waive the State's immunity would "imperil the claim which New Jersey so vigorously asserts." [FN47] Here again, the state is put to a "Hobson's choice" -- submit a legitimate proof of claim, or accept the debtor's characterization of the state tax claim as set forth in the debtor's bankruptcy schedules.

In summary, the bankruptcycourt's in rem jurisdiction means that the state simply cannot have it both ways. [FN48] As acknowledged by the Fourth Circuit Court of Appeals,

> [i]t would violate the fundamental fairness of judicial process to allow a state to proceed in federal court and at the same time strip the defendant of valid defenses because they might be construed to be affirmative claims against the state .... [FN49]

Under the analysis employed in Antonelli, Mitchell, Lapin and Deep Sea Research, the state must either participate in the debtor's case under color of legitimate authority and submit to the bankruptcy court's jurisdiction, or it must take its chances outside of federal court, in the face of that court's binding confirmation order.

D. Potential Issues

1. Can The State Enter A Special Appearance To Contest The Plan's Treatment?

The discussion above is not without some additional considerations. One issue, mentioned above, concerns the state's ability to enter a special appearance for the purpose of contesting the bankruptcy court's jurisdiction. At least one author, presumably writing on behalf of state attorneys general everywhere, has suggested that ***15** states can file special appearances to object to the jurisdiction of federal courts without waiving their Eleventh Amendment immunity. [FN50]

This contention arises primarily out of language found in the Supreme Court's decision in Missouri v. Fiske, [FN51] a 1933 case which purportedly "spells real trouble for those who wish to have all issues related to a bankruptcy case decided in a single bankruptcy forum." [FN52] There is apparently a growing body of attorneys-general who view the "special appearance" device as a means of effectively appearing in a bankruptcy case, while remaining exempt from the bankruptcy court's in rem jurisdiction over the debtor's estate.

Missouri v. Fiske concerned a probate proceeding in the state of Missouri, in which the state had asserted claims and a lien against the estate for inheritance taxes. Certain shares of stock, which were part of the probate estate, subsequently became embroiled in a separate federal district court action commenced by one of the heirs in order to obtain distribution of that stock. The State of Missouri intervened in this federal proceeding, asserting that it opposed distribution of the stock until the inheritance tax issue was resolved in probate court, and requesting that the federal court hold the stock until the probate litigation was resolved. The plaintiffs contended that the district court retained jurisdiction over the stock, and requested an injunction against the state's further prosecution of the state probate court action. Both the district court and the court of appeals obliged the plaintiffs' request.

The Supreme Court reversed the lower courts, noting that the need to protect the jurisdiction of the federal court was insufficient grounds for overcoming the state's Eleventh Amendment immunity:

> If the state chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the state may be permitted to do so, and in that event its rights will receive the same consideration as those of other parties in interest. But, when the state does not come in and withholds its consent, the court has no authority to issue process against the state to compel it to subject itself to the court's judgment, whatever the nature of the Suit. [FN53]

States will likely seize upon this language and attempt to employ a "special appearance" strategy as a prophylactic means of contesting the bankruptcy ***16** court's jurisdiction, while at the same time objecting to a debtor's plan. Such an appearance would no doubtquote the Supreme Court's additional observance that

> [t]he 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 nonconsenting state .... [W]hen the state does not come in and withholds its consent, the court has no authority to issue process against the state to compel it to subject itself to the court's judgment whatever the nature of the suit .... [FN54]

Based on this language, the state may attempt to exempt itself from the otherwise binding effect of a valid court order arising out of the bankruptcy court's in rem jurisdiction. For example, one writer has argued that

> [the phrase] '[w]hatever the nature of the suit' certainly seems broad enough to cover even bankruptcy suits, particularly when bankruptcy courts are hearing cases and proceedings by orders of reference from district courts. [FN55]

There are several problems with this analysis of Missouri v. Fiske, and with the state's "special appearance" argument generally. First, such an argument appears to presume the very point in issue -- i.e., whether a bankruptcy case may, in fact, be considered a "suit" for purposes of invoking the Eleventh Amendment. In contrast to the litigation in Missouri v. Fiske, which involved the "issuance of process" against the state and a corresponding

subjugation of the state to federal court jurisdiction, a bankruptcy case involves no such direct action by a private party against the state. As noted by the Fourth Circuit in Antonelli,

[t]he confirmation order in this case was not entered in a suit 'against one of the United States' filed by a private party. The state was not named a defendant, nor was it served with process mandating that it appear in a federal court. [FN56]

Consequently, the reasoning in Missouri v. Fiske is not directly applicable to the holding of Antonelli, or to the bankruptcy context generally.

Second, there is no need to pursue injunctive relief of the sort at issue in Missouri v. Fiske within the bankruptcy context -- the injunctive stay of section 362 is binding against "all entities" (including the state) and arises automatically without the necessity of any "action" directly against the state. Consequently, the application of ***17** Missouri v. Fiske to the bankruptcy context is simply inappropriate, and should not be applied to exempt the state from the bankruptcy court's in rem jurisdiction.

Third, the reading of Missouri v. Fiske advocated above is inconsistent with the Supreme Court's more recent decision in Deep Sea Research. As mentioned earlier, Deep Sea Research holds that the state's Eleventh Amendment protection against federal admiralty jurisdiction does not extend to in rem actions commenced by private parties against a res not already in the state's possession. The Supreme Court's recent holding is directly at odds with an interpretation of Eleventh Amendment immunity which allows for no exceptions, "whatever the nature of the suit." [FN57]

At least one writer has attempted to resolve this apparent conflict by suggesting that the Supreme Court in Deep Sea Research simply overlooked its earlier holding in Missouri v. Fiske, and that, in any event the holding in Deep Sea Research should not apply in bankruptcy. In a recent letter to the editors of Bankruptcy Court Decisions, Texas Assistant Attorney General Mark Browning has contended that

[b]oth the parties and the [Supreme] Court in Deep Sea Research simply missed [Missouri v. Fiske] in their legal research, briefing and oral argument. [Missouri v. Fiske]'s 'whatever the nature of the suit' language is in conflict with even the narrow admiralty circumstances of Deep Sea Research, but it is certainly broad enough to encompass suits in bankruptcy court. For now, at least, unless the Supreme Court overrules [Missouri v. Fiske], the law is that there is no in rem jurisdiction exception to the [Eleventh] Amendment outside of the sub-species of admiralty cases identified in Deep Sea Research. [FN58]

The problem with Mr. Browning's analysis of Deep Sea Research is that it completely misses the critical distinction made in that case between true in rem actions to which "all the world are parties," [FN59] and those which are effectively actions in personam against a particular state official or entity. As noted earlier, the Court was careful to distinguish its holding in Deep Sea Research from its earlier ruling in Ex Parte New York, noting that in the former case, although the suit at issue was styled as an in rem libel action seeking recovery of damages against tugboats chartered by the State, the proceedings were actually 'in the nature of an action in personam against [the Superintendent of Public Works of the State of New York], not individually, but in his official capacity.' [FN60]

***18** In Deep Sea Research, the Supreme Court looked through the form of the litigation and analyzed its nature. Rather than contradicting Missouri v. Fiske, the Deep Sea Research decision is, in fact, analytically consistent with that earlier holding. As noted by the Supreme Court in Missouri v. Fiske, the action in that case was not objectionable because of its in rem characteristics. To the contrary, it was objectionable because respondents [were] proceeding against the state itself to prevent the exercise of [the state's] authority to maintain a suit in its own court. [FN61]

This consistent distinction by the Supreme Court betweens actions commenced "against all the world" and those which amount to the issuance of process against a state entity has also been recognized and followed in the bankruptcy context by the Ninth Circuit Bankruptcy Appellate Panel. As noted earlier, the Mitchell court drew a similar distinction between those decisions in which the court's inherent, in rem jurisdiction was improperly invoked, [FN62] and those in which the Eleventh Amendment was not at issue. [FN63] Lapin has also recognized this distinction, noting the difference between the "binding effect" of a confirmation or discharge order to which the state does not object in bankruptcy court on the one hand [FN64], and impermissible efforts to invoke the court's in rem jurisdiction as a means to monetary recovery notwithstanding the state's sovereign immunity, on the other.

[FN65]

In light of this analysis, the Supreme Court's holding in Missouri v. Fiske does not contradict or modify the analysis of Deep Sea Research. Nor does it adversely impact the parallel analysis of Mitchell or Antonelli. Indeed, it is analytically consistent with those decisions and supports their consistent holding; Where a proceeding is commenced "against all the world," and the property involved in that proceeding is not ***19** within the state's control, there is no "suit" for Eleventh Amendment purposes, and the court's inherent jurisdiction over that property is not disturbed.

A fourth problem with the state's reliance on Missouri v. Fiske, and the "special appearance" argument generally, is that it contradicts long- established Supreme Court precedent which survives Seminole). In New York v. Irving Trust, [FN66] for example, the state attempted to contest the court's ruling that its late-filed claim was time-barred on the basis of a purported lack of jurisdiction. Although this case might have been decided as a "claims waiver" case, [FN67] itis interesting to note that the Supreme Court's analysis did not address the issue of waiver at all. Instead, the justices stated in categorically broad language that the bankruptcy referee was imbued with jurisdiction to adjudicate the late-filed claim since

[t]he Federal government possesses supreme power in respect of bankruptcies .... If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated. [FN68]

Significantly, it was this very language in which the Fourth Circuit found the basis of the bankruptcy court's jurisdiction in Antonelli, where the state had failed to file any proof of claim, but nevertheless sought to exempt itself from the binding provisions of the debtor's confirmed Chapter 11 plan. [FN69]

As suggested by the language of Irving Trust, and echoed by Antonelli, the jurisdiction of the bankruptcy court is not dependent upon the state's acquiescence through the filing of a proof of claim. Instead, it extends broadly to the property of the estate, or to the person bound to produce such property (i.e., the debtor). Consequently, its orders disposing of claims to estate property are binding as to all the world. The state may not "opt out" of this jurisdiction by the mere filing of a "special appearance."

***20 2. If The State Can Be Bound By The Court's In Rem Jurisdiction** Regardless Of Its Failure To Appear In The Bankruptcy Case, Does It Take A Confirmation Or Discharge Order To Bind The State**?**

Careful readers of the foregoing analysis may find themselves asking how far that analysis really goes: If the state is bound by bankruptcy court orders regarding the debtor and the estate by virtue of that court's in rem jurisdiction, does it take a confirmation or discharge order to bind the state with regard to claims against the debtor or the debtor's estate? Or will a simple claims bar date order do? Can a bankruptcy court enforce a claims bar date order as effectively as a confirmation or discharge order?

Such a question raises issues which, although perhaps not immediately obvious, have direct and practical impact on the question of whether and under what circumstances a state may be bound by bankruptcy court directives. In at least one case, for example, the California FTB has taken the extreme position that the bankruptcy court is prevented by the Eleventh Amendment from entering an order requiring the FTB to either file a claim or forego receiving any dividend from the bankruptcy estate. [FN70] Is such an order somehow different than a discharge order or an order of confirmation, which the Ninth Circuit Bankruptcy Appellate Panel has repeatedly affirmed may be binding upon the state? [FN71] Doesn't the Bankruptcy Court also have jurisdiction to enter a claims bar date order, and doesn't such an order have the same binding effect against the state that a confirmation or discharge order would have?

The answer lies in the nature of the "relief" such an order purports to provide. Typically, a claims bar date order issued by the Bankruptcy Court is just that-an order setting deadlines by which claims against the estate must be filed and after which they will be forever barred. [FN72] Under the analysis discussed above, there is little doubt that where such orders are grounded in the Bankruptcy Court's in rem jurisdiction over the debtor's estate and affect "all the world" (as, for example, a confirmation order ***21** or discharge order would do), they are binding as to the state as well, and may not be contested by state entities on Eleventh Amendment grounds.

3. But If A State Entity Elects Not To File A Claim Against The Bankruptcy Estate, Then What? Is There A "Violation" Of The Claims Bar Date Order Which Warrants The Prospective Relief Available To Taxpayers Under Ex Parte Young? Or Is The State Simply Electing, Under The Terms Of The Court's Bar Date Order, To Abstain From Filing A Proof Of Claim And To Take Its Chances Outside Of Bankruptcy Court**?**

The answer, again, is dependent upon the specific provisions of the order. If the order provides relief which is binding as to all parties to the bankruptcy case vis-a-vis the bankruptcy estate (e.g., a requirement that all creditors file claims by a date certain, or be forever barred from sharing any distribution from the estate), then it is an order properly arising from its inherent jurisdiction over the estate and is binding as to "all the world," including specific state entities. If, on the other hand, it is an order which purports to exercise jurisdiction over the state alone (such as an order specifically directing the state to file a proof of claim or be barred from participating in the estate), it may run afoul of the state's Eleventh Amendment sovereign immunity.

This distinction was suggested, indirectly, by the Ninth Circuit Bankruptcy Appellate Panel in Lapin. That case concerned a motion, brought by the taxpayer, for an "OSC re: Contempt" to enforce the bankruptcy court's order discharging the taxpayer from state tax liabilities. On appeal by the FTB from the bankruptcy court's award of sanctions against it as violative of the FTB's Eleventh Amendment immunity, the taxpayer contended that the bankruptcy court had imposed sanctions to enforce its own order - thus, the Eleventh Amendment was not implicated because it was the court, not a private party, subjecting the state entity to sanctions. The taxpayer argued that he did not subject the state to suit. Instead, he claimed he merely brought the state's conduct to the court's attention, so that the court would enforce its own order. [FN73]

In response, the Bankruptcy Appellate Panel noted that, although the argument had "surface appeal," the appellant
> cit[ed] no authority [for] this assertion, nor ... any reason why such a distinction should be made. No case law squarely addresses the propriety of such a distinction, but those sovereign immunity cases involving enforcement of a court's order use the same analysis as those in which a private party has brought a complaint against a governmental unit .... While there does not appear to be any authority directly on point, the case law does ***22** not support finding jurisdiction over a creditor properly claiming sovereign immunity, even where the violated order was within the court's jurisdiction. [FN74]

Under this reasoning, it may be difficult for the court to bind a state entity by issuing an order which purports to exercise jurisdiction over that entity (as opposed to exercising jurisdiction over the res of the debtor's bankruptcy estate), even where it is the court, and not a private party, which is attempting to enforce its own valid order. Instead, the safest method for taxpayers seeking to enforce valid court orders with regard to state obligations is to bring a complaint seeking prospective injunctive relief under the Ex Parte Young doctrine, or alternatively, to sue the state in federal court for recovery of monies already seized. [FN75]

This analysis is consistent with the Appellate Panel's earlier holding in Mitchell, [FN76] and with the Supreme Court's holding in Deep Sea Research. [FN77] Simply stated, private parties may not request affirmative relief against a state entity, regardless of how that request is framed. Similarly, bankruptcy courts may have difficulty exercising jurisdiction over state entities, whether the attempt to exercise such jurisdiction is made at the court's own instance or at the taxpayer's behest. However, these proscriptions in no way inhibit the court's jurisdiction over the bankruptcy estate and over the debtor, and do not prohibit or lessen the binding effect of orders entered pursuant to such jurisdiction. Such orders remain binding as to "all the world," including state entities, and a state may not contest such orders unless it submits to the bankruptcy court's jurisdiction. Otherwise, it must remain outside that court's jurisdiction and take its chances.

4. What Remedies Does The Debtor Retain Post-Petition Or Post-Confirmation In The Event That The State Continues To Pursue Collection**?**

***23** If a state may be bound by orders arising from the bankruptcy court's inherent jurisdiction over the bankruptcy estate and over the debtor, then what is the state taxing entity to do? The state may attempt to remove itself from this dilemma by simply ignoring the bankruptcy court's confirmation order and collecting taxes post-confirmation. A

similar practice is relatively common in Chapter 7 cases where debtors, who believe they have obtained a legitimate discharge of their tax liabilities, nevertheless find themselves subject to post-discharge collection activity on prepetition tax debt.

State taxing agencies typically commence post-discharge collection activity against a Chapter 7 debtor on the grounds that the tax liability in question is "nondischargeable," and therefore a viable debt which survives the debtor's bankruptcy. In jurisdictions outside the Fourth Circuit, where the in rem theory of jurisdiction has not been litigated at the appellate court level, it is conceivable-- indeed, likely -- that states will take a similar approach to the provisions of a debtor's confirmed Chapter 11 plan. Presumably, the theory would be that set forth in Antonelli: i.e., that the debtor's Chapter 11 plan is "not binding" on the state because the bankruptcy court lacks jurisdiction to enter such an order. In such cases, the debtor is presented with the challenge of enforcing the bankruptcy court's confirmation order in a constitutionally permissible manner.

5. Ex Parte Young Complaint Against State Officials

Perhaps the most obvious and "safest" response to impermissible post- confirmation collection activity, in the wake of Seminole, is the remedy expressly approved by the Supreme Court in Seminole itself. In that opinion, the justices expressly upheld the vitality of the Ex Parte Young exception to state immunity -- i.e., the ability of private parties to bring causes of action against state officials in their individual capacity for prospective injunctive relief against actions undertaken in violation of federal law. [FN78]

The Ex Parte Young doctrine has been recognized by numerous bankruptcy courts as a viable means of procuring relief from conduct by state officials which is violative of the automatic stay or the bankruptcy court's turnover provisions. [FN79] ***24** Most recently, the applicability of the Ex Parte Young doctrine was expressly affirmed in In re Ellett, [FN80] which involved the FTB's challenge to a complaint brought by the taxpayer to enjoin Gerald Goldberg, Executive Director of the FTB, from the impermissible collection of taxes which had been discharged pursuant to the taxpayer's confirmed Chapter 13 plan.

In Ellett, Goldberg moved for dismissal of the taxpayer's complaint under Fed.R.Civ.P. 12(h)(3), made applicable through Fed. R. Bankr. P. 7012(b), which provides that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." The basis for dismissal, alleged Goldberg, was that the action was "really against the state's tax agency and that naming [Goldberg] as the defendant [was] merely a subterfuge to avoid the subject matter limitations of the Eleventh Amendment." [FN81]

In denying Goldberg's motion, Judge Russell (who, with Judges Jones and Hagan, decided the Bankruptcy Appellate Panel's Elias case) acknowledged the general rule that "relief sought nominally against an officer is in fact against the state if the decree would operate against the latter," but also recognized that

> an action brought under Ex Parte Young can not be an actions against the state because the allegation being made is the officer is violating federal law. This strips the state officer of his official authority since the state could never have authorized the violation .... We realize, of course, that this is a fiction and that the state will ultimately bear the burden of the remedy issued against the officer .... Nevertheless, the fiction is necessary. The Young doctrine is an attempt to balance the principles of sovereign immunity with the necessity of providing federal courts the authority to vindicate federal rights and hold state officials responsible to the supreme authority of federal law .... As such, Young actions are not against the state and are not barred by the Eleventh Amendment. [FN82]

Judge Russell went on to address the concerns about Ex Parte Young raised by Seminole - in particular, the requirement that relief sought under the doctrine be limited to those cases where Congress has not otherwise "prescribed a detailed remedial ***25** scheme for the enforcement against a state of a statutory created right. [FN83] In distinguishing that case from the bankruptcy proceeding before him, Judge Russell noted that

> [t]he Bankruptcy Code ... does not contain a remedial statutory scheme available to debtors in the event that a state violates a Code provision .... This conclusion is suggested by the structure of the Bankruptcy Code itself. In [section] 105(a), Congress abrogates the states' sovereign immunity to suit in federal court .... Although that provision has recently been held to be unconstitutional ...., Congress would have had no need to abrogate immunity if it had created an alternative remedial scheme to which the states would be subject. [FN84]

Finally, Judge Russell distinguished the proceeding before him from the result in Idaho v. Coeur d'Alene Tribe of Idaho, [FN85] where the Supreme Court held that Ex Parte Young should not apply "because a forum to litigate [the claim at issue] was expressly provided for under state law." By contrast, the debtor in Ellett has no alternative forum because "the California Constitution prohibits a state court from enjoining the collection of a tax and requires the party challenging the legality of a tax assessment to first pay the amount assessed .... Thus, there is not state forum available to grant the relief that [Ellett] seeks, enjoining Goldberg's ongoing collection efforts in violation of federal law .... It is left to the court to ensure the supremacy of federal law." [FN86]

In light of the Ellett decision and earlier Bankruptcy Appellate Panel authority, the Ex Parte Young doctrine remains the surest means of invoking the federal court's continued, post-confirmation or post-discharge jurisdiction over a tax dispute. Debtors who anticipate continued collection activity post- discharge or post-confirmation and who wish to enforce their discharge or confirmation orders in federal court should be prepared to bring Ex Parte Young actions expeditiously against state officials, in order to protect themselves and preempt the unlawful seizure of assets by state officers.

6. Removal to Bankruptcy Court

Another method of obtaining relief, depending on the procedural posture of the state's post discharge or post-confirmation collection activity, may be removal of state court proceedings into bankruptcy court when those proceedings have been initiated by the state. This was the procedural approach taken by the debtor in Antonelli in response to state court proceedings, initiated by the state of Maryland against the debtor ***26** post-confirmation. [FN87] This approach has also been recognized by the Ninth Circuit B.A.P. as a legitimate means of bringing disputes before the bankruptcy court for adjudication. [FN88] Of course, the "removal strategy" is predicated on: (i) the existence of a "civil action" [FN89] commenced by the state, in state court, and (ii) the availability of a confirmation order which may be asserted. Where the debtor is facing collection activity without a pending "civil action," or where the action precedes the entry of a confirmation order in the debtor's Chapter 11 case, this approach may not be feasible.

7. Motion to Enforce Terms of Plan

A third alternative means of enforcement, at least in some jurisdictions, may be a motion to enforce the terms of the debtor's confirmed Chapter 11 plan which would constitute a "contested matter" under Bankruptcy Rule 9014. A small but growing body of bankruptcy caselaw suggests that such proceedings fall outside the parameters of "suits" to which state entities may be immune. [FN90]

However, this approach may be severely limited within the Ninth Circuit. In Mitchell, the B.A.P. devoted less attention to the precise definition of a "suit," and instead focused on the question of what relief was being requested by the debtors. In discussing the complaint filed in that case, the Mitchell court noted that the relief prayed by the debtors -- a declaratory judgment that the tax liability in question was discharged -- "would require the bankruptcy court to determine that the tax was a dischargeable debt .... [FN91] Such relief

> would render superfluous [Code] § 106(a) ... [which contemplates motions for] [d]etermination[] of ... tax liability .... Notwithstanding the unconstitutionality of § 106(a) to abrogate ***27** sovereign immunity, its provisions support a determination that Congress understood that such proceedings are 'suits' subject to the Eleventh Amendment. [FN92]

In reaching this conclusion, the Mitchell relied upon earlier Ninth Circuit authority for the general principle that the Eleventh Amendment's limitation on federal court jurisdiction extends even to an adjudication involving core jurisdiction:

> Even when Congress is vested with complete law-making authority over a particular area by the Constitution, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states. [FN93]

The Bankruptcy Appellate Panel's subsequent decision in Lapin echoes this holding, noting again that

[t]he problem with [debtor's argument that an order to show cause does not derive from its jurisdiction over the FTB or other creditors] is that it fails to address the effect of the order to show cause. That order, which was issued at [the debtor's] behest, required [the FTB] to appear before the court or risk being found in contempt, analogous to the summons in an adversary proceeding. When a plan of reorganization is submitted, creditors can choose to respond or appear or not, foregoing only the ability to contest the plan after confirmation if they do not. In contrast,the order to show cause ... required the [FTB] to appear and explain why it should not be held in civil contempt. [FN94]

Thus, where a contested matter is initiated against a state entity under the specific Bankruptcy Code sections enumerated within section 106(a), or under some other means by which the state is affirmatively hailed into federal court, it appears likely, at least in the Ninth Circuit, that courts will dismiss such matters for lack of jurisdiction. Such matters must be brought in federal court, if at all, under the Ex Parte Young doctrine and pursuant to the provisions of a previously confirmed Chapter 11 plan (or a Chapter 7 discharge order), and must request relief directly tied to the application or enforcement of that plan. [FN95]

***28 E. Scenario Two: Same as Scenario One, Except That Debtor Files A Motion** For Determination Of Tax Liability Under Section 505 Prior To Plan Confirmation As A Means Of "Forcing The Issue" Of Tax Liability With The State**.**

In a second scenario, the debtor may wish to "force the issue" of its tax liability with the state and file a preemptive motion for determination of tax liability under section 505 [FN96] of the Bankruptcy Code prior to the confirmation of its Chapter 11 plan. In such a scenario, many of the issues discussed above present themselves again, with similar results.

As mentioned, bankruptcy courts will likely entertain the determination of tax liability in connection with an objection to the state's previously filed claim (where the state has already effectively waived its sovereign immunity). However, as discussed earlier, Mitchell and Lapin make clear that, at least within the Ninth Circuit, the court should not hear a request for determination of tax liability, initiated unilaterally by the debtor as an attempt to adjudicate a pending tax dispute, unless such request arises in the context of a request for interpretation or enforcement of a previously confirmed plan of reorganization brought in context with an Ex Parte Young action, or as a defense to the state's continued post-confirmation collection activity initiated in state court.

F. Still More Issues

1. Does the Bankruptcy Court retain Jurisdiction To Determine Tax Liability Under Section 505 Where The State Has Not Consented To Jurisdiction By Filing A Proof Of Claim Or Otherwise Appearing**?**

In light of the Bankruptcy Appellate Panel's language in Mitchell, some state entities may wish to contend that the court retains no jurisdiction under any circumstance to adjudicate tax liability, since to do so represents an exercise of the bankruptcy court's jurisdiction in a core matter. Relying on the Bankruptcy Appellate Panel's recognition that

***29** [t]he Eleventh Amendment's limitation on federal court jurisdiction extends even to an adjudication involving core jurisdiction .... [FN97]

A state may attempt to take the position that the bankruptcy court is divested of any jurisdiction to adjudicate a tax liability, and that the debtor cannot accomplish through a confirmation order what is otherwise prohibited through a motion under section 505.

Such a reading of Mitchell is overbroad. A careful review of the B.A.P.'s discussion immediately following the above-quoted language, including its summary and analysis of Antonelli, indicates that an exercise of core jurisdiction over matters involving the state is prohibited only where that jurisdiction is invoked by a "suit" initiated by an individual against a nonconsenting state. [FN98] In other words, the invocation of the bankruptcy court's "core" jurisdiction vis a vis a state entity is prohibited only when it arises through the initiation of a suit against an unconsenting state by a private party. This prohibition does not apply, however, when the same jurisdiction is

invoked through other procedural means, such as a dispute concerning the debtor's plan, or a properly framed request for interpretation or enforcement of a confirmed plan brought in the context of an Ex Parte Young exception. [FN99]

2. Is The Court Deprived Of Jurisdiction By Virtue Of The Federal Anti-Tax Injunction Act**?**

The procedural posture in which bankrupt taxpayers may find themselves as a result of the Seminole decision raises an additional issue: if debtors seeking to enforce their rights under the Bankruptcy Code against states are limited to injunctive actions against state officials arising under the Ex Parte Young doctrine or other requests for declaratory relief, aren't such actions prohibited under other, applicable federal law? After all, it may be argued, the Anti-Tax Injunction Act [FN100] provides that

[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

***30** What if a state attempts to use this statute as a means of preventing the bankruptcy court's grant of injunctive relief against state officials attempting to collect disputed liabilities after a discharge has been granted or a Chapter 11 plan confirmed? Worse yet, what if the state asserts that an attempt to enforce the automatic stay arising in bankruptcy is, in fact, an impermissible attempt to "enjoin, suspend, or restrain" such assessment or collection?

The answer to this potential problem is that the general jurisdictional bar set forth in the Anti-Tax Injunction Act of 28 U.S.C. 1341 does not override the specific grant of jurisdiction to enforce an automatic stay, adjudicate tax liability, or enforce the terms of a discharge order or confirmed Chapter 11 plan. As noted by the bankruptcy court in El Tropicano v. Garza (In re E1 Tropicano), [FN101] the bankruptcy court's jurisdiction

is defined not by Title 11 but by Title 28 [of the U.S. Code] .... [D]istrict courts have original subject matter jurisdiction over 'all civil proceedings arising under Title 11' .... 28 U.S.C. 1334(a). Section 157(a) of Title 28 in turn permits the reference of all matters over which the district court has original jurisdiction over the bankruptcy courts. 28 U.S.C. 157(a). [FN102]

In applying this rationale to the court's jurisdiction to adjudicate tax liabilities under Code section 505, Judge Clark noted that, despite the general proscription of the Anti-Tax Injunction Act,

[s]ection 505 of Title 11 specifically grants the district court (and by virtue of Section 157(a) of Title 28, the bankruptcy court) jurisdiction in a bankruptcy case to determine the amount or legality of any tax, whether or not previously assessed and whether or not paid including any right of the estate to a tax refund. '[S]ection 1341 has been held not to divest bankruptcy courts of their specifically granted power to adjudicate state tax assessments. [FN103]

A similar rationale applies to the bankruptcy court's jurisdiction in connection with enforcement of confirmation orders. The general prohibitions of section 1341, Title 28, are obviated by the very specific jurisdictional grant of sections 157(a) and 1334(a), provided under the same title. Consequently, the state may not raise the Anti-Tax Injunction Act to prevent bankruptcy courts from affording injunctive relief to ***31** debtor-taxpayers under the Ex Parte Young doctrine, or pursuant to a request for interpretation of a plan or confirmation order.

III. CONCLUSION

Here, then, are the "dance steps" for avoiding jurisdictional challenges to the adjudication of disputed state tax liabilities in bankruptcy, laid out again in accordance with the preceding discussion:

- File a voluntary Chapter 11 petition.
- Schedule the tax liabilities at issue as "disputed."
- Obtain a prompt claims bar date from the court.
- Propound a plan of reorganization which provides no payment to disputed tax claims.
- Obtain prompt confirmation of the plan, and enforce the confirmation order as binding against state officers and appropriate taxing authorities (a) in federal court, under the doctrine of Ex Parte Young, or (b) directly against the state taxing entity in state court.

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[FN1]. 517 U.S. 44 (1996).

[FN2]. 11 U.S.C. § 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 of 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.

[FN3]. For purposes of this article, all references to the "Bankruptcy Code" in this article refer to the applicable section of Title 11, United States Code.

[FN4]. But see In re Light, 87 F.3d 1320 (9th Cir. 1996), cert. denied, 117 S. Ct. 976, 136 L. Ed. 2d 859 (1997) (involving an action to enforce Bankruptcy Code § § 362, 524 and 525 against the State Bar Association, which the court found to be an arm of the state). This opinion was not reported, and therefore does not constitute binding precedent except as the law of the case under Circuit Rule 36-3. More recently, the Eleventh Amendment defense was raised after the appeal in In re Jerauld, 208 B.R. 183 (B.A.P. 9th Cir. 1997), which was argued before the Ninth Circuit Court of Appeals in December 1998. The holding in Jerauld on the Eleventh Amendment issue may govern the appeals in prior rulings by the Ninth Circuit Bankruptcy Appellate Panel on this issue. See n.5, infra, and cases cited therein.

[FN5]. See In re Elias, 218 B.R. 80 (B.A.P. 9th Cir. 1998); In re Mitchell, 222 B.R. 877 (B.A.P. 9th Cir. 1998); and In re Lapin, 226 B.R. 637 (B.A.P. 9th Cir. 1998). In addition, at least four appellate courts and a substantial number of lower courts which have addressed the issue have concluded, similarly, that section 106(a), in its present iteration, cannot survive constitutional scrutiny under the Eleventh Amendment. See, e.g., In re Sacred Heart Hosp. of Norristown, 133 F.3d 237 (3d Cir. 1998), as amended (February 19, 1998) (involving an adversary proceeding under Bankruptcy Code § 108(a) in which the debtor sought to compel the state to accept invoices filed by the debtor after the state-law deadline); AER-Aerotron, Inc. v. Texas Dep't. of Transp., 104 F.3d 677 (4th Cir. 1997) (involving an adversary proceeding by the debtor to recover on various contract claims); In re Estate of Fernandez, 123 F.2d 241 (5th Cir. 1997), amended on denial of reh'g., 13 F.3d 1138 (5th Cir. 1997) (involving an adversary proceeding contesting state's claim of title to property); In re Creative Goldsmiths of Washington D.C., Inc., 119 F.3d 1140 (4th Cir. 1997), cert. denied, 118 S. Ct. 1517, 140 L. Ed.2d 670 (1998) (involving an adversary proceeding under Bankruptcy Code § 547 to recover preferential tax payments); In re Kish, 212 B.R. 808 (Bankr. D.N.J. 1997)

(involving an adversary proceeding seeking a determination that surcharges from motor vehicle offenses were discharged); New Jersey v. Mocco, 206 B.R. 691 (Bankr. D.N.J. 1997) (involving the discharge of a state's claim); In re Martinez, 196 B.R. 225 (Bankr. D.P.R. 1996) (involving an action to enforce Bankruptcy Code § 362); In re Schmitt, 220 B.R. 68 (Bankr. W.D. Mo. 1998) (involving an adversary proceeding to determine the dischargeability of a student loan obligation); In re Christie, 218 B.R. 27 (Bankr. D.N.J. 1998), order vacated on reconsideration, 222 B.R. 64 (Bankr. D.N.J. 1998) (involving a motion to avoid a lien securing the debtor's past-due child support obligation); In re Koehler, 204 B.R. 210 (Bankr. D. Minn. 1997) (involving an action seeking to enforce Bankruptcy Code § 362 end to declare a debt to have been discharged); In re Morrell, 213 B.R. 87 (Bankr. C.D. Cal. 1997) (involving a complaint to determine dischargeability of a debt); In re Mueller, 211 B.R. 737 (Bankr. D. Mont. 1997) (involving an adversary proceeding to determine the debtor's liability for corporate taxes); In re NVR L.P., 206 B.R. 831 (Bankr. E.D. Va. 1997), aff'd., 222 B.R. 514 (E.D. Va. 1998) (involving an action against states to recover tax overpayments); In re Rose, 214 B.R. 372 (Bankr. W.D. Mo. 1997) (involving an adversary proceeding to determine dischargeability of a student loan debt); In re Midland Mechanical Contractors, Inc., 200 B.R. 453 (Bankr. N.D. Ga. 1996) (involving a suit to enforce contract violations); In re Lush Lawns, Inc., 203 B.R. 418 (Bankr. N.D. Ohio 1996) (involving an action seeking contempt sanctions for violation of Bankruptcy Code § 362); In re Charter Oak Associates, 203 B.R. 17 (Bankr. D. Conn. 1996) (involving a suit to enforce contract obligations); In re Lazar, 200 B.R. 358, 382 (Bankr. C.D. Cal. 1996) (involving claims against a state for reimbursement from a state fund); In re York-Hannover Developments, Inc., 201 B.R. 137 (Bankr. E.D.N.C. 1996) (involving suit under Bankruptcy Code § 548); In re Tri-City Turf Club, Inc., 203 B.R. 617 (Bankr. E.D. Ky. 1996) (involving an adversary proceeding alleging that the state racing commission had violated the automatic stay by revoking the debtor's racing license). See also In re National Cattle Congress, Inc., 91 F.3d 1113 (8th Cir. 1996) (remanding for reconsideration in light of the Seminole case in which a Chapter 11 debtor sought to enforce the automatic stay against a state commission after the commission had revoked the debtor's dog racing license).

[FN6]. For a brief but comprehensive discussion of the current status of that debate within the Ninth Circuit, see E. Martin III, Determination of State Rights in Bankruptcy Court After Seminole, 7 Nevada Lawyer 13 (January 1999).

[FN7]. The focus, for purposes of this article, is on the issue of tax liability. However, a similar analysis applies to claims by state entities for other types of liability as well.

[FN8]. See n. 4, supra, and accompanying text.

[FN9]. 28 U.S.C. § 1341.

[FN10]. See Craig H. Averch and Blake L. Berryman, Seminole Tribe and Suing the State in Bankruptcy, 7 J. Bankr. Law and Practice 195, 196 (1998).

[FN11]. 123 F.3d 777, 786-87 (4th Cir. 1997) ("Antonelli").

[FN12]. Id. at 786.

[FN13]. Id.

[FN14]. 222 B.R. 877 (B.A.P. 9th Cir. 1998).

[FN15]. 222 B.R. at 884 (citing In re Morrell, 218 B.R. 87, 89-90 (Bankr. C.D. Cal. 1997) (chapter 7 debtor's

complaint to determine dischargeability of tax debt was barred by Eleventh Amendment); In re Kish, 212 B.R. 808, 812 (Bankr. D.N.J. 1997) (chapter 7 debtor's complaint to determine that state surcharges were discharged was barred by Eleventh Amendment); In re Rose 214 B.R. 372, 376 (Bankr. W.D. Mo. 1997) (granting state agency's motion to dismiss debtor's complaint to determine dischargeability of student loan debt).

[FN16]. 222 B.R. at 883 ("Construing a discharge order in the case at bar is distinguishable from interpreting the plan confirmation order in Antonelli.").

[FN17]. State of Texas v. Walker, 142 F.3d 813, 820-22 (5th Cir. 1998), cert denied. 119 S. Ct. 865 (1999).

[FN18]. In re Platter, 140 F.3d 676, 679-80 (7th Cir. 1998).

[FN19]. Antonelli, 123 F.3d at 786-87.

[FN20]. Mitchell, 222 B.R. at 883 (citing, e.g., Texas v. Walker, 142 F.3d 813, 820-22 (5th Cir. 1998); In re Platter, 140 F.3d 676, 679-80 (7th Cir. 1998)).

[FN21]. Mitchell, 222 B.R. at 881 (citing In re Creative Goldsmiths of Washington D.C., Inc., 119 F.3d 1140, 1149 (4th Cir. 1997)), cert. denied sub nom. Schlossberg v. Maryland Comptroller of Treasury, U.S. , 118 S. Ct. 1517, 140 L. Ed. 2d 670 (1998) (even where the State filed a proof of claim for one type of past due tax, it did not waive Eleventh Amendment immunity against an adversary proceeding to determine a different type of tax).

[FN22]. Mitchell, 222 B.R. at 883 (citing United States v. Nordic Village, Inc., 503 U.S. 30, 38 (1992) ("The Supreme Court has rejected an exception to sovereign immunity for an action seeking a monetary recovery by a bankruptcy trustee on the basis of the bankruptcy court's broad jurisdictional grant found in 28 U.S.C. § 1334 or its unique in rem jurisdiction"), In re ABEPP Acquisition Corp., 215 B.R. 513, 516-17 (B.A.P. 6th Cir. 1997) (rejecting Chapter 7 trustee's position that bankruptcy court could assert in rem jurisdiction over State to recover payment of sales tax).

[FN23]. 226 B.R. 637 (B.A.P. 9th Cir. 1998) ("Lapin").

[FN24]. Hereinafter, the "FTB."

[FN25]. Lapin, 226 B.R. at 646.

[FN26]. Id. at 645.

[FN27]. Id. at 647 (citing Texas v. Walker, 142 F.3d 813, 823 (5th Cir. 1998)) (emphasis added).

[FN28]. See 11 U.S.C. § 1141(d)(1):
Except as otherwise provided ... the confirmation of a plan -- (A) discharges the debtor from any debt that arose before the date of such confirmation ....

[FN29]. ___ U.S. ___, 118 S. Ct. 1464, 149 L. Ed. 2d 626 (1998).

[FN30]. 118 S. Ct. at 1473.

[FN31]. Id. (quoting The Davis, 10 Wall. 15, 19 L. Ed. 875 (1869)).

[FN32]. 118 S. Ct. at 1471 (citations omitted).

[FN33]. It is worth noting that the applicability of this case to bankruptcy decisions was the subject of several justices' questions at oral argument on December 1, 1997. See 1997 WL 751917. See also M. Browning, Tough Issues Under the Eleventh Amendment, 7 J. Bankr. Law & Prac. 219, 228 (1998) ("Tough Issues").

[FN34]. Deep Sea Research, 118 S. Ct. at 1471 (citing Ex Parte New York, 256 U.S. at 501, 41 S. Ct. at 591).

[FN35]. Antonelli, 123 F.3d at 786 (citing New York v. Irving Trust Co., 228 U.S. 329, 333, 53 S. Ct. 389, 391, 77 L. Ed. 815 (1933)):

The federal government possesses supreme power in respect of bankruptcies. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy [Code] would be frustrated.

[FN36]. See Tough Issues, 7 J. Bankr. Law & Prac. at 237 (citing In re Secretary of Dept. Crime Control & Public Safety, 7 F.3d 1140, 1148 (4th Cir. 1993), cert. denied, 114 S. Ct. 2106 (1994) (state can intervene for limited purpose of contesting federal court jurisdiction without waiving immunity); American Int'l. Specialty Lines Inc. Co. v. Reimer & Koger Assoc., 874 F. Supp. 324, 327 (D. Kan. 1995) (in view of State of Kansas' status as necessary party and its immunity under Eleventh Amendment, suit could not continue in Federal Court).

[FN37]. See, e.g., New York v. Irving Trust Co., 288 U.S. 329, 53 S. Ct. 389 (1933); Van Huffel v. Harkelrode, 284 U.S. 225, 52 S. Ct. 114 (1931); Clark v. Barnard, 108 U.S. 436, 2 S. Ct. 878 (1883).

[FN38]. Antonelli, 123 F.3d at 786.

[FN39]. See, e.g., Gardner v. New Jersey, 329 U.S. 565, 67 S. Ct. 467 (1947); Clark v. Barnard, 108 U.S. 436, 2 S. Ct. 878 (1883); accord, In re Burke, 146 F.3d 1313, 1317-19 (11th Cir. 1998).

[FN40]. Mitchell, 222 B.R. at 881 (citing In re Creative Goldsmiths of Washington D.C., Inc., 119 F.3d 1140, 1149 (4th Cir. 1997), cert. denied sub nom Schlossberg v. Maryland Comptroller of Treasury, U.S. , 118 S. Ct. 1517, 140 L. Ed. 2d 670 (1998) (even where the State filed a proof of claim for one type of past due tax, it did not waive Eleventh Amendment immunity against an adversary proceeding to determine a different type of tax).

[FN41]. 11 U.S.C. § 106(b) provides:

A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and arises out of the same transaction

or occurrence out of which the claimof such governmental unit arose.

[FN42]. 11 U.S.C. § 106(c) provides:
Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

[FN43]. See Schlossberg v. Maryland (In re Creative Goldsmiths of Washington D.C., Inc.), 119 F.3d at 1146 (holding section 106(b) unconstitutional because "it is ... not within Congress' power to abrogate [Eleventh Amendment] immunity by 'deeming a waiver."). See also In re NVR, L.P., 206 B.R. 831, 839 (Bankr. E.D. Va. 1997) ("NVR I"); Grabscheid v. Michigan (In re C. J. Rogers, Inc.), 212 B.R. 265, 272-73 (Bankr. E.D. Mich. 1997).

[FN44]. See, e.g., In re Burke, 146 F.3d 1313, 1317 (11th Cir. 1998) ("The State of Georgia contends that, under its constitution, only the Georgia General Assembly may waive the state's sovereign immunity, and that waiver is limited to the extent provided in the Georgia constitution."). Waiver of sovereign immunity is similarly limited in California, and has been narrowly construed. See Yuan Jen Cuk v. Lackner, 448 F. Supp. 4, 8 (N.D. Cal. 1977) (noting that Cal. Gov. Code 945 (providing that public entities may be sued) and section 5 of Article 3 of the California constitution, providing that "suits may be brought against the state in such manner and in such cases as shall be directed by law," did not waive Eleventh Amendment immunity).

[FN45]. Tough Issues, 7 J. Bankr. Law & Prac. at 234-5.

[FN46]. 329 U.S. 565, 67 S. Ct. 467 (1947).

[FN47]. 67 S. Ct. at 472.

[FN48]. See Cobb v. Cain Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 549 F. Supp. 540, 555 (S.D. Fla. 1982) (another admiralty case) ("The State cannot have it both ways; it is either in the suit as a claimant subjecting its rights to decision or else it is out of the suit altogether.").

[FN49]. Creative Goldsmiths, 119 F.3d at 1148.

[FN50]. Tough Issues, 7 J. Bankr. Law & Prac. at 235-39.

[FN51]. 290 U.S. 18, 54 S. Ct. 18 (1933).

[FN52]. Tough Issues, 7 Bankr. Law & Prac. at p.236.

[FN53]. Missouri v. Fiske, 54 S. Ct. at 21.

[FN54]. Id.

[FN55]. M. Browning, A Magic Bullet to Beat Seminole?, A.B.I. Journal (Feb. 1998) at p. 10.

[FN56]. Antonelli, 123 F.3d at 786.

[FN57]. Missouri v. Fiske, 54 S. Ct. at 21.

[FN58]. Bankruptcy Court Decisions (Sept. 1, 1998).

[FN59]. Deep Sea Research, 118 S. Ct. at 1471.

[FN60]. Deep Sea Research, 118 S. Ct. at 1471 (citing Ex Parte New York, 256 U.S. at 501, 41 S. Ct. at 591).

[FN61]. Missouri v. Fiske, 290 U.S. at 26, 54 S. Ct. at 21.

[FN62]. Mitchell, 222 B.R. at 883 (citing United States v. Nordic Village, Inc., 503 U.S. 30, 38 (1992) ("The Supreme Court has rejected an exception to sovereign immunity for an action seeking a monetary recovery by a bankruptcy trustee on the basis of the bankruptcy court's broad jurisdictional grant found in 28 U.S.C. § 1334 or its unique in rem jurisdiction"); In re ABEPP Acquisition Corp., 215 B.R. 513, 516-17 (B.A.P. 6th Cir. 1997) (rejecting Chapter 7 trustee's position that bankruptcy court could assert in rem jurisdiction over State to recover payment of sales tax).

[FN63]. Mitchell, 222 B.R. at 883 (citing, e.g., Texas v. Walker, 142 F.3d 813, 820-22 (5th Cir. 1998); In re Platter, 140 F.3d 676, 679-80 (7th Cir. 1998)).

[FN64]. Lapin, 226 B.R. at 645, 647 (citing Antonelli, 123 F.3d at 786-87; Texas v. Walker, 142 F.3d 813, 823 (5th Cir. 1998) and noting that: "The analogy between the confirmation order in Antonelli and the discharge order here is appropriate, in that both orders are binding on creditors and are not subject to collateral attack .... The Fifth Circuit has recently held that the Eleventh Amendment does not prevent the discharge in bankruptcy of a debt owed to a state and that the discharge order can be raised as a defense against the state's [subsequent] enforcement efforts.").

[FN65]. Lapin, 226 B.R. at 645 (citing French v. Georgia Dep't. of Revenue (In re Abepp Acquisition Corp.), 215 B.R. 513, 516-17 (B.A.P. 6th Cir. 1997); United States v. Nordic Village, Inc., 503 U.S. 30, 38, 112 S. Ct. 1011, 1017, 117 L. Ed. 2d 181 (1992): "For one thing, the idea that a bankruptcy court can bypass the sovereign immunity bar to monetary recovery by exercising in rem jurisdiction has been rejected.")

[FN66]. 288 U.S. 329, 53 S. Ct. 389 (1933).

[FN67]. See Tough Issues, 7 J.Bankr. Law & Prac. at 238 ("In Irving Trust, ... the State of New York had filed a proof of claim and was only seeking to challenge the effectiveness of the bankruptcy court's bar date order and thereby participate in estate distributions ....").

[FN68]. New York v. Irving Trust, 288 U.S. at 333, 53 S. Ct. at 391.

[FN69]. Antonelli, 123 F.3d at 786.

[FN70]. Hollingsworth v. California, Adv. No. 90-02018 (Bankr. C.D. Cal. 1998) (cited in E. Martin III, Determination of State Rights in Bankruptcy Court after Seminole, 7 Nevada Lawyer 13 (January 1999)). The author is informed that in that case, the court agreed, in an unpublished order, that the state may not be bound by such a directive.

[FN71]. See, e.g. Lapin, 226 B.R. at 647 (citing Texas v. Walker, 142 F.3d 813, 823 (5th Cir. 1998) ("the Eleventh Amendment does not prevent the discharge in bankruptcy of a debt owed to a state .... [T]he ... discharge can be raised as a defense against the state's [subsequent] enforcement efforts ....")).

[FN72]. See Fed. R. Bankr. P. 3003(c)(3), which provides simply that, subject to the provisions of Fed. R. Bankr. P. 3002(c)(2), (3), and (4): "[t]he court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." Similarly, Fed. R. Bankr. P. 3002(c) provides specified deadlines within which the filing of claims are "timely." Nothing within either of these rules provides expressly for the disallowance of claims which are not filed in accordance with the deadlines or other requirements set forth therein. Disallowance of such claims is accomplished through the claims objection procedure, brought pursuant to Fed. R. Bankr. P. 3007 and Bankruptcy Code section 502(b)(9).

[FN73]. Lapin, 226 B.R. at 644.

[FN74]. Id. at 645-46 (citing Coleman v. Espy, 986 F.2d 1184 (8th Cir. 1993), cert. denied, 510 U.S. 913 (1993); California State University v. Gustafson, 934 F.2d 216, 217-18 (9th Cir. 1991) (pre-1994) version of § 106(c) did not abrogate California's Eleventh Amendment immunity for sanctions for violation of discharge injunction).

[FN75]. Lapin, 226 B.R. at 646 (citing Scmitt v. Missouri Western State College (In re Schmitt), 220 B.R. 68, 72 (Bankr. W.D. Mo. 1998); S. Elizabeth Gibson, Sovereign Immunity in Bankruptcy: The Next Chapter, 70 Am. Bankr. L.J. 195, 203-08 (1996) (discussing state court litigation against states as a bankruptcy remedy still available after Seminole)).

[FN76]. Mitchell, 222 B.R. at 882-83 (focusing on the question of what relief was being requested by the debtor and noting that the declaratory judgment in that case "would require the bankruptcy court to determine that the tax was a dischargeable debt .... [Such relief] would render superfluous [Code] § 106(a) ... [which contemplates motions for] [d]eterminations of ... tax liability ....").

[FN77]. Deep Sea Research, 118 S. Ct. at 1471 (citing Ex Parte New York, 256 U.S. at 501, 41 S. Ct. at 591, and distinguishing that case on the grounds that "although the suit at issue [in Ex Parte New York] was styled as an in rem libel action seeking recovery of damages against tugboats chartered by the State, the proceedings were actually 'in the nature of an action in personam against [the Superintendent of Public Works of the State of New York], not individually, but in his official capacity'").

[FN78]. Seminole, 116 S. Ct. at 1132, 1133 n.17 ("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.").

[FN79]. See, e.g. Guiding Light Corporation v. State of Louisiana (In re Guiding Light Corporation), 213 B.R. 489, 492 (Bankr. E.D. La. 1997) ("Unlike the Indian Gaming Regulatory Act, the Bankruptcy Code does not contain a detailed remedial scheme for enforcement against states. Accordingly, this court concludes that Guiding Light may bring an action under Ex Parte Young for enforcement of provisions under the Bankruptcy Code."). See also In re Lazar, 200 B.R. 358, 382-83 (Bankr. C.D. Cal. 1996) (trustee could bring an action against a state official under Ex Parte Young, but that under the facts such an action was not necessary because the state had waived its sovereign immunity defense); In re Zywicynski, 210 B.R. 924 (Bankr. W.D.N.Y. 1997) (Statutory command under Bankruptcy Code that one in possession of state property turn over such property to the trustee, implicates the doctrine of Ex Parte Young whenever a state officer refuses to obey a turnover command); Lapin, 226 B.R. at 647 ("Under the Ex Parte Young doctrine, a federal court may, consistent with the Eleventh Amendment, enjoin state officials to conform their future conduct to the requirements of federal law.").

[FN80]. 229 B.R. 202 (Bankr. E.D. Cal. 1999).

[FN81]. Id. at 206, n.5.

[FN82]. Id. at 206, n.5 (citing Pennhurst State Sch. & Hosp. V. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)).

[FN83]. Id. at 206 (quoting Seminole, 517 U.S. at 74, 116 S. Ct. at 1132).

[FN84]. Id. at 206-07 (citations omitted).

[FN85]. 117 S. Ct. 2028, 2036, 138 L. Ed. 2d 438 (1997).

[FN86]. Ellett, 229 B.R. at 209 (citations omitted).

[FN87]. Antonelli, 123 F.3d at 778.

[FN88].Mitchell, 222 B.R. at 883 (citing caselaw and recognizing applicability of in rem jurisdiction where to (1) discharge order is asserted as an affirmative defense; (2) adjudication of dischargeability where the state has filed an adversary proceeding; and (3) order confirming Chapter 11 plan).

[FN89]. See 28 U.S.C. § 1452(a) (permitting removal of "any claim or cause of action in a civil action ... to the district court ... if such district court has jurisdiction of such claim or cause of action under section 1334 ....").

[FN90]. See, e.g., NVR II, 222 B.R. at 520 (citing Antonelli, 123 F.3d at 786; Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 407-12, 51 L. Ed. 257 (1821) (a suit entails demanding something by the institution of process that compels the attendance of the parties subject to the demand), and noting that "a review of ... NVR's motion for a declaration that its real property transfers were exempt from taxation reveals that the proceeding lacked the fundamental attributes that commonly identify a 'suit.'"). See also In re Barrett Refining Corporation, 221 B.R. 795, 803 (Bankr. W.D. Ok. 1998) ("Barrett") (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) at 407-12 and noting that "a suit consists of: 1) an adversarial proceeding, 2) which arises as a result of a deprivation or injury, 3) which involves at least two parties, 4) which compels the attendance of the parties, 5) which asserts and prosecutes a claim against one of the parties, and 6) which demands the restoration of some thing from the defending party.").

[FN91]. Mitchell, 222 B.R. at 882.

[FN92]. Id. at 883.

[FN93]. Id. (quoting Sofamore Danek Group v. Brown, 123 F.3d 1179, 1183 (9th Cir. 1997)).

[FN94]. Lapin, 226 B.R. at 645.

[FN95]. See Mitchell, 222 B.R. at 884 (distinguishing the adversary before it from Antonelli, and noting that in Antonelli, "the issue of tax exemption had been decided by the plan confirmation order."). See also Ellett, 229 B.R. at 209 n.8 ("Before this court can enjoin Goldberg's collection efforts, we must determine the dischargeability of the tax because only if the debt was dischargeable would Goldberg be violating 11 U.S.C. § 524(a)(2). This creates the situation where this court could not issue a judgment holding a state tax debt to be dischargeable when the state is sued directly ..., but must make that determination before issuing an injunction under Ex Parte Young. Thus, absent some post-discharge collection effort, a debtor can not seek a determination of the dischargeability of a state tax debt in this court").

[FN96]. That section provides, in pertinent part:
(a)(1) ... [T]he court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

[FN97]. Mitchell, 222 B.R. at 883 (citing Sofamore Danek Group v. Brown, 123 F.3d 1179, 1183 (9th Cir. 1997)).

[FN98]. Mitchell, 222 B.R. at 883 (quoting Sofamore Danek Group v. Brown, 123 F.3d 1179, 1183 (9th Cir. 1997) ("Even when Congress is vested with complete law-making authority over a particular area by the Constitution, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states.") (emphasis added).

[FN99]. See n.94, supra, and accompanying text.

[FN100]. 28 U.S.C. § 1341.

[FN101]. 128 B.R. 153, 156 (Bankr. W.D. Tex. 1991) ("Tropicano").

[FN102]. Tropicano, 128 B.R. at 156-57.

[FN103]. Tropicano, 128 B.R. at 156 (citing Carrolton-Farmers Branch v. Johnson & Cravens, 858 F.2d 1010, 1014 (5th Cir. 1988), modified, 867 F.2 dd 1517, vacated on other grounds, 889 F.2d 571 (1989); City Vending of Muskogee v. Oklahoma Tax Comm'n., 898 F.2d 122, 123 (10th Cir. 1990), cert. denied, 498 U.S. 823, 111 S. Ct. 75, 112 L. Ed. 2d 48 (1990); Adams v. State of Indiana, 795 F.2d 27, 29 (7th Cir. 1986)).

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