

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WISCONSIN

In re:

DARYL DECORA

Debtor.

[Court stamp]

Case no. 06-11697

PETER F. HERRELL,  
Plaintiff,

Adversary Proceeding no.

vs.

07-111

DARYL DECORA and HO-CAK FEDERAL,  
Defendant.

**BRIEF OF DEFENDANT HO-CHUNK FEDERAL BANK**

No Property Interest / Properly Perfected

The Trustee first asserts that the assignment of Ho-Chunk Federal Bank (HCFB)<sup>1</sup> is not perfected under Wisconsin state law. Hence, the Trustee concludes, under Wisconsin law a lien creditor or *bona fide* purchaser would take a superior interest in Mr. Decora's right to receive per capita payments. There are two problems with this argument.

No Property Interest. The first problem is that under tribal law Mr. Decora has no interest in the per capita payments assigned to HCFB. To see why this is so we begin with the interest Mr. Decora does have: the right to

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<sup>1</sup> Ho-Chunk Federal Bank is the successor-in-interest to Ho-Cak Federal Credit Union.

receive distributions from the tribe. *In re Kedrowski*, 284 BR 439 (Bankr.W.D.Wis. 2002). The Claims Against Per Capita Ordinance, 2 Ho-Chunk Nation Code (HCC) §8,<sup>2</sup> shows that this right is not unlimited:

No Tribal Member, nor any person claiming any right derived from a Tribal Member, including creditors of a Tribal Member, shall have any right, title, interest or entitlements in any Per Capita Share unless and until Payment of Per Capita Distribution to which it relates occurs, **and any right, title interest and / or entitlement accruing at Payment shall be subject to Section 5 hereof.**

2 HCC §8.4 (emphasis added).<sup>3</sup> “Section 5” reads in pertinent part:

a. The following claims shall be recognized and enforced by the Nation against a Per Capita Share at the time of Payment of the Per Capita Distribution of which it is a part and **prior to the distribution** of such Per Capita Share to a Tribal Member:

...

(4) Any debt or monetary obligation then due and owing by the Tribal Member to [HCFB], which is stated in writing signed by the Tribal Member and which the Tribal Member has agreed in writing may be recovered from his Per Capita Share (i) upon delinquency, default or other event or (ii) as periodic payments for obligations incurred by the Tribal Member. ...

*Id.* at §8.5 (emphasis added).<sup>4</sup> Thus, as the tribe’s attorney general informed the Trustee in this case, the per capita allocation “remains the property of the Ho-Chunk Nation until released directly to the Tribal Member...” *Letter*

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<sup>2</sup> A copy of this ordinance is attached to the parties’ fact stipulation. The legislative history printed at the foot of the ordinance indicates that the current version of §8 dates from June 9, 2004.

<sup>3</sup> The current §8.4 seems to correspond to the prior §102. *Compare Kedrowski, supra*, at page 450. (The bold text appears to have been added after *Kedrowski* was decided.)

<sup>4</sup> The current §8.5 seems to correspond to the prior §103. *Compare Kedrowski, supra*, at footnote 16. (Paragraph a(4) of §8.5 was evidently added after the *Kedrowski* decision.)

from Attorney General to Trustee dated February 8, 2007 (a copy of which is attached to the parties' fact stipulation). So when the tribe pays a §8.5 creditor the tribe is making payment out of funds in which the member has no interest. The tribal member is entitled only to the net remaining after the §8.5 distributions are complete.

The facts of this case show §8.5a(4) in action: The Tribe deducted the HCFB assignment "prior to" making any distribution to Mr. Decora. Under the Ho-Chunk Code Mr. Decora had no "right, title, interest and / or entitlement" to the funds assigned to HCFB. Accordingly, Mr. Decora had no right, title, interest, or entitlement to the funds assigned to HCFB that could pass to a hypothetical lien creditor or *bona fide* purchaser (or to the Trustee).

Properly Perfected. The second problem with the Trustee's argument is that the tribe has its own system of priority and perfection with regard to its per capita distributions, and that system does not recognize any claim of a purchaser or lien creditor with regard to the interest Mr. Decora does have in per capita payments. To understand why this is so we start by taking another look at the introductory text of §8.5 (emphasis added):

a. The following claims shall be recognized and **enforced by the Nation** against a Per Capita Share at the time of Payment of the Per Capita Distribution of which it is a part and prior to the distribution of such Per Capita Share to a Tribal Member:

In §8.6<sup>5</sup> the Code provides, in pertinent part (emphasis added):

Except as specifically provided in Section 5, **the Nation shall not recognize or enforce any claim, garnishment, levy, attachment, assignment or other legal right or interest** in a

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<sup>5</sup> The current §8.6 seems to correspond to the prior §104. Compare *Kedrowski, supra*, at pages 451-2.

Per Capita Share. The Nation shall pay the full amount of the Per Capita Share, less any claim recognized under Section 5, to the Tribal Member whose interest in the Per Capita Distribution is represented thereby at the time of Payment, ...

*Id.* §8.6 (emphasis added).

To graft the terminology of the Uniform Commercial Code onto the Ho-Chunk Nation Code, the HCFB lien is “perfected” under the provisions of the §8.5a(4). Any lien creditor or purchaser would be on notice of the possibility of the senior claims of those creditors listed at §8.5 and could not take an interest superior to the listed creditors. (Perhaps, as the Trustee argues, creditors not listed in §8.5 would have to file financing statements to protect their priority in the net per capita funds distributed to a tribal member. But that does not affect the outcome in this case.)

Not proceeds, products, offspring, or profits of other property.

The Trustee next contends that 11 U.S.C. §552 terminated HCFB’s assignment effective the day the bankruptcy was filed. This assertion, as the Trustee notes, runs contrary to the well-reasoned opinion in *In re Johnson*, 259 B.R. 125 (W.D.La. 2000). The *Johnson* court explained that the right to receive per capita payments – the right assigned to HCFB in this case – is not the “proceeds, products, offspring, or profits” of property. Rather, it is the property. *Id.* at 128-131; see also *In re Kedrowski*, 284 BR 439, 451-2 (Bankr.W.D.Wis. 2002) (“the Court finds that the debtors’ ‘right’ to receive a per capita distribution from the gaming revenues of the Ho-Chunk Nation does constitute property of her bankruptcy estate”). The Trustee does not provide any rationale for his disagreement with the *Johnson* analysis.

No preference issue.

The Trustee next notes that there is an issue of fact regarding whether the petition day payment HCFB received from the Ho-Chunk Tribe was made before or after the moment Mr. Decora filed for bankruptcy relief. However, given the relatively small amount in dispute and the cost of resolving that factual issue, HCFB is willing to accept the Trustee's offer to treat that payment as having been made post-petition.

No §549 issue.

HCFB agrees with the Trustee that HCFB is obligated to turnover the post-petition monies HCFB received from the Tribe IF the Court finds that (a) Mr. Decora does have a property interest in the assigned funds and (b) HCFB's assignment is avoided. HCFB does not understand the Trustee to be making an argument that 11 U.S.C. §549 provides an independent basis to avoid HCFB's lien.

No balancing the hardships claim.

The Trustee's penultimate argument is that HCFB's lien should be avoided to make it easier for the bankruptcy estate to collect the per capita distributions in which Mr. Decora does have an interest. Whether or not the bankruptcy estate would find it difficult to collect,<sup>6</sup> the Trustee points to no authority to support the voiding of a creditor's lien on that basis. On the other hand, if the HCFB lien is avoided then HCFB cannot collect its

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<sup>6</sup> See 11 U.S.C. §105(a) (contempt powers); *compare U.S. v. Lambert & Eastern Band of Cherokee Indians*, case no. 2:05CR214, 2007 U.S. Dist. LEXIS 87297 (W.D.N.C. November 16, 2007) (tribe subject to garnishment under Federal Debt Collection Procedure Act) *with* 11 U.S.C. §106(a)(abrogation of sovereign immunity).

secured claim because its collateral will become the property of the bankruptcy estate. So, while preserving the lien will allow both the estate and HCFB to collect, avoiding the lien will allow only the estate to collect.

Finally, the Trustee concludes by suggesting the he should prevail because the amount in dispute is *de minimus*. Whether or not this is true with regard to the dollars involved in this case, the decision of this Court will affect countless transactions in the future. So, for HCFB, this is by no means a small case.

### CONCLUSION

The petition in this adversary proceeding should be dismissed because HCFB's assignment is not avoidable. This result will leave the estate free to collect in full from the portion of the per capita payments that remain payable to Mr. Decora.

Dated December 17, 2007

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