

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

In Re:

Case No. 06-11697

DARYL DECORA

Debtor.

PETER F. HERRELL

In Re: Daryl DeCora

Adversary Case No. 07-00111

Plaintiff

v.

DARYL DECORA

W8949 Elk Circle

Black River Fall, WI 54615

HO-CAK FEDERAL

a division of Citizen's Community Federal

W9036 Hwy 54 East

Black River Falls, WI 54615

Defendants.

REPLY BRIEF OF PLAINTIFF-TRUSTEE

Pursuant to the Court's Scheduling Order, the Plaintiff-Trustee submits his Reply Brief.

1. The Bankruptcy Estate has a property interest in the per capita payments. Ho-Chunk Federal Bank (hereafter "HCFB") does not have a perfected security interest. HCFB makes an argument based on the Ho-Chunk Nation's tribal ordinances that the Bankruptcy Estate does not have a property interest in the per capita distributions. However, this Court has already decided this issue. The Court's decision in In Re: Kedrowski 284 BR 439, 451-452 (BCWD Wis. 2002) explicitly stated that the Ho-Chunk per capita distributions are property of the Bankruptcy Estate. The analysis leading up

to this conclusion led the Court to reason that all applicable Federal, State and tribal law compelled that conclusion.

2. HCFB is not perfected. HCFB again argues using tribal ordinances that because of those ordinances HCFB did not need to perfect in order to be in a position superior to the Bankruptcy Estate. HCFB makes no argument whatsoever that it is properly perfected. HCFB argues that the Estate can not, in essence, avoid the alleged tribal ordinance regarding what HCFB calls perfection. This argument misses the point. HCFB is a division of Citizens Community Federal Bank and not the tribe. See the parties Stipulation, paragraph 22. As such, HCFB is subject to the same statutes as any other bank. HCFB did not perfect any security interest in the per caps, nor does it even argue that it did. If HCFB is in reality a division of the tribe, that is another issue, but not an issue before the Court in this case. HCFB argument, read closely, is simply an admission that it is not perfected.

3. The effect of 11 U.S.C. Sec. 552. As HCFB is not perfected in this case, Sec. 552(b) does not come into play. If it did, it is within the authority of the Court to order that any post petition security interest be held in abeyance until the Estate is paid in full. In this case it is simply a question as to who has to wait, HCFB or the Bankruptcy Estate. Given the statutory mandate that Estates be closed expeditiously, 11 U.S.C. Sec. 704(a)(1), the Court should exercise its authority under Sec. 552 in favor of the Estate, if by some chance the Court finds HCFB is perfected.

A close reading of Sec. 552(b)(1) and Johnson v. Cottonport Bank (DCWD La. 2000 259 BR 125) shows that Cottonport does not apply in this case. In Cottonport Debtor was attempting to avail himself of the exception to Sec. 552(b)(1). This section applies only to the Bankruptcy Estate. Thus, the relief in Sec. 552(b)(1) is also available only to the Estate. This makes sense because the proceeds from any money made available to the Estate go to benefit, in practice as well as in theory, the other creditors, rather than being available strictly for the Debtor's post-discharge use. This discretionary relief should be granted for the reasons stated in this Brief.

4. 11 U.S.C. Sec. 549. The parties agree as to the effect of Sec. 549 on this case. If the question is simply which party gets paid first, the Bankruptcy Estate or HCFB, Sec. 704(a)(1) mandates that Estates be closed expeditiously, and supports the

argument that a per capita distribution be paid first to the Bankruptcy Estate and then to HCFB. It is not to be forgotten, HCFB will be paid for waiting, as its debt will continue to accrue interest. Any avoidance of HCFB's security interest only affects the relationship between the Bankruptcy Estate and HCFB, and not between the Debtor and HCFB. The Debtor will remain subject to the assignment until both the Bankruptcy Estate and HCFB are paid.

6. Conclusion:

While HCFB raises many issues regarding tribal law, it clearly is not the tribe. The issue is therefore the standard issue between a Bankruptcy Estate and a creditor. Was the creditor perfected? As set forth above and as can be seen from reading HCFB's Brief, it is not perfected.

Even if it were perfected, it is clear from the documents set forth in the Stipulation that the Bankruptcy Estate is likely to have substantial difficulty collecting from the Ho-Chunk Nation. However, given its special position with the Ho-Chunk Nation, HCFB will continue to get paid until paid in full. In this case the whole issue can be resolved by ordering all payments paid or payable under the unperfected assignment to be paid to the Bankruptcy Estate through HCFB if necessary. Once the Bankruptcy Estate is paid, HCFB is entitled to be paid with interest. HCFB could have easily prevented this problem by filing the appropriate financing statement with the proper government agency. It did not. Unlike most creditors, it will not pay the price of not getting paid, it merely has to wait.

Respectfully submitted.

Dated this 7th day of January, 2008.

_____/s/ Peter F. Herrell_____
Peter F. Herrell
Attorney for Trustee/Plaintiff