By Kelly M. Hagan

The Fate of Tribal Per Capita Payments in Bankruptcy Cases

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Federally recognized Indian tribes are sovereign nations subject only to the authority of the federal government.[1] However, state laws "may be applied to tribal Indians on their reservations if Congress has expressly so provided."[2] The Indian Gaming Regulatory Act, one such example permits states to regulate certain forms of Indian gaming.[3] In order for a tribe to offer casino gaming on Indian lands, the Indian tribe and the state must have a compact regarding such gaming.[4] The compact must require that net revenues from the tribal gaming are not used for any purpose other than to provide for the general welfare of the Indian tribe and its members.[5] Provided certain conditions are met, per capita payments to members of the Indian tribe are an acceptable means of providing for tribal members' general welfare.[6]

Per capita payments are typically made monthly, quarterly or annually, and might range from a few hundred dollars to tens of thousands of dollars per installment. Accordingly, the payments can equate to a significant asset or amount of income in a bankruptcy case filed by a member of a federally recognized tribe. However, there remains a fair amount of uncertainty in this area of the law, even within a district.[7] There seems to be a subtle distinction in how the bankruptcy courts characterize what is in dispute — the right to receive the future payments versus the right to the future payments themselves — a subtle distinction that arguably influences or suggests a court's ultimate view of the matter.

The bankruptcy courts that focus on the property interest being in the nature of the debtor's right to receive tend to look to federal and state law to reach the conclusion that it is property of the estate. On the other hand, courts that focus on the property at issue being future payments tend to focus on tribal law and the control the tribe exercises on those funds until the distribution has been determined and paid to the members. A discussion of two cases with these differing views sets the stage for a review of the decisions in one district where the answer to that central question has evolved.

Is It Property of the Estate?

In one of the most recent written opinions on this subject, *Dietz v. Barth*, the U.S. Bankruptcy Court for the District of Minnesota looked to tribal law to conclude that future per capita payments are not property of the bankruptcy estate.[8] The debtors in *Barth* were members of the Lower Sioux Indian Community in Minnesota who, at the time of their chapter 7 filing, were receiving monthly per capita payments. The chapter 7 trustee filed a motion for turnover, arguing that based on Minnesota law, the post-petition payments were "contingent property rights that existed at filing and constitute 11 U.S.C. § 541(a) property of the bankruptcy estates."[9] In response, the debtors argued that the nonbankruptcy law applicable here was tribal law, not state law.

In a relatively short opinion, the court agreed that tribal law was applicable and that the payments were not property rights, and therefore were not property of the estate. The court focused on a recent amendment to the Tribe's Revenue Allocation Ordinance, which provided, in part:

> The per capita payments are periodic payments, not a property right. The right to receive per capita payments does not accrue or vest until the Community actually makes a payment to Community Members who qualify. Additionally, no benefit, right or interest of any Community Member under his (sic) Ordinance, including per capita payments, shall be subject to anticipation, alienation, sale, transfer, assignment pledge, encumbrance or charge, seizure, attachment or other legal, equitable, or other process.[10]

Although the trustee argued that the tribe could not simply declare that the payments were not a property right — and thereby exclude them from the estate — the court disagreed, deferring to tribal sovereignty. Noting that Minnesota clearly had

1 *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987).
2 *Id.*
3 *See* 25 U.S.C. § 2701, *et seq.*
4 25 U.S.C. § 2710(d)(1) (class III gaming activities are lawful on Indian lands only if "conducted in conformance with a Tribal-State compact," *inter alia*). *See also* 25 U.S.C. § 2703 (defining "class III gaming" as "all forms of gaming that are not class I gaming or class II gaming").
5 25 U.S.C. § 2710(b).
6 25 U.S.C. § 2710(b)(3).
7 The fate of these payments in bankruptcy cases has been decided in less than a dozen reported decisions. Of the 11 bankruptcy decisions regarding this issue of which the author is aware, seven cases involve just two tribes in two states (Kansas and Wisconsin). Of those 11, two even involved the same debtors. *In re McDonald*, 353 B.R. 287 (Bankr. D. Kan. 2006), and *In re McDonald*, 519 B.R. 324, (Bankr. D. Kan. 2014). *See McDonald*, 519 B.R. at 328, fn.5.
8 *Dietz v. Barth (In re Barth)*, 485 B.R. 919 (Bankr. D. Minn. 2013). The court concurrently issued its opinion in three adversary proceedings involving this same tribe.
9 *Id.* at 920.
10 *Id.* at 921 (citing Lower Sioux Indian Revenue Allocation Ordinance § 302(G), amended Oct. 27, 2009).

the authority to define property interests within its jurisdiction, the court determined that the Lower Sioux, a sovereign nation, has no less authority to do so.

In comparison, other courts focus on federal and state laws to reach the opposite result — that the payments (or the right to receive those payments) — are property of the estate.[11] Prior to his bankruptcy, the debtor in *Johnson v. Cottonport Bank* (a member of the Tunica Biloxi tribe of Louisiana) had pledged his interest in future per capita distributions to Cottonport Bank as security for a loan. After he filed for chapter 7, the bank filed a motion to lift the stay as to the per capita payments, and the trustee filed a motion for the turnover of any payments not subject to the lien. The bankruptcy court granted both motions.

On appeal, the debtor argued that the future payments were not subject to the bank's lien as they were acquired after the commencement of the case. The court considered the Uniform Commercial Code and by comparison cases involving the right of a debtor insurance agent to receive commissions on post-petition policy renewals, and concluded that under Louisiana law, the security interest continued post-bankruptcy.[12] The court then turned to the trustee's claims — and again, Louisiana law. The court noted that Louisiana law recognizes intangible property (including an interest in future income) that there were no restrictions on the debtor's ability to assign his payments to another person, and that the debtor had not demonstrated any exclusion under state or federal law that prevented them from being treated as property of the estate. Accordingly, this court affirmed the bankruptcy court, deciding that the debtor's right to receive the monthly payments was a property right that existed at the time of this filing and therefore remained property of the estate.[13]

The Evolution of the Law in Wisconsin

An interesting example of the differing views of per capita payments in bankruptcy cases can be found within one district. In 2002, Hon. Thomas S. Utschig considered the nature of the debtor's interest in per capita payments received as an enrolled member of Ho-Chunk Nation.[14] In a fairly lengthy opinion, the *Kedrowski* court discussed the history of tribal gaming, tribal sovereign immunity and state law, then rejected the argument that tribal immunity was determinative of the issue.

The court discussed a 1999 decision from the Nation's Tribal Court[15] in which a member of the tribe contested the revocation of her membership, an action that occurred during a distribution period and cost her pending and future distributions. The tribal court recognized that "[t]he right to receive per capita as an equal fraction of the tribe's gaming revenues all members receive constitutes a right to share equally in money. *Money is a type of property*."[16] Relying primarily on Wisconsin law, which recognizes an extensive variety of property rights (including intangible rights), the court concluded that the right to receive payments was property of the estate, and that tribal law did not alter that.[17]

Several years later, Judge Utschig decided another case involving per capita payments and referred to his decision in *Kedrowski* as the "appropriate starting point for discussion."[18] In *DeCora*, he again concluded that state law dictated the result but was reversed on appeal, without any mention of *Kedrowski* or its reasoning.[19]

The debtor in *DeCora* was a member of the Ho-Chunk Nation, the same tribe as the debtor in *Kedrowski*. He had borrowed money from Ho-Cak Federal (not a tribal entity)[20] and granted it a security interest in his right to future per capita payments. Ho-Cak did not file a financing statement with the state, but it did send notice of its interest to the Ho-Chunk Nation. The trustee filed an adversary proceeding to avoid the lien and recover any post-petition payments to the debtor in satisfaction of the lien.[21] Relying on Wisconsin law, the bankruptcy court granted the trustee's motion for summary judgment.

On appeal, the district court reversed, instead focusing on tribal law in determining the rights of the hypothetical lien creditor under § 544(a)(1) of the Bankruptcy Code. The court discussed the Nation's Code, which recognizes certain enumerated claims against per capita shares (including any debt owed to Ho-Cak Federal) and which provides that the nation shall not recognize or enforce any claim against a per capita share. The court concluded that the "Ho-Chunk Nation creates and controls the per capita payments, and does not legally recognize a judgment lien against per capita rights, 2 HCC § 8, ¶ 6, unless the lien reflects a specific type of debt identified in ¶ 5."[22] Accordingly, the court held that under tribal law, the lien creditor's claim was subordinated to Ho-Cak's and that federal pre-emption and tribal sovereignty prevented state law from altering this result.[23]

Notably, the district court did not seem to distinguish between per capita shares (controlled by the tribe) and the per capita payments themselves or the debtor's right to receive those. Although beyond the scope of this article, there is an important distinction between a bankruptcy court's inability to compel a tribe to do something (because of tribal immunity) and that same court's ability to exercise control over the debtors that submit to its jurisdiction.

11 *Johnson v. Cottonport Bank*, 259 B.R. 125 (W.D. La. 2000).

12 *Id.* at 128-29 (citing *Towers v. Wu (In re Wu)*, 173 B.R. 411, 413-15 (B.A.P. 9th Cir. 1994), and *Smoker v. Hill Assocs.*, 204 B.R. 966, 974-75 (N.D. Ind. 1997).

13 In the four cases brought in the District of Kansas on this issue, the courts have consistently held that the payments from the Prairie Band of Potawatomi Indians of Kansas tribe are property of the estate, notwithstanding the various arguments raised by the debtors and an intervening change in the tribe's ordinance. *See In re McDonald*, 353 B.R. 287 (court rejected chapter 7 debtor's attempt to protect payments using tribal code exemptions and claim that they were protected by spendthrift provision); *In re Hutchinson*, 354 B.R. 523 (Bankr. D. Kan. 2006) (decided simultaneously with *McDonald* in 2006; payments were property of the estate, and the chapter 13 plan, which did not propose to pay any money to unsecured creditors, was not in best interests of creditors); *In re Howley*, 446 B.R. 506 (Bankr. D. Kan. 2011) (declining to follow *In re Fess*, 408 B.R. 793 (Bankr. W.D. Wis. 2009), court held that payments are property of estate); and *In re McDonald*, 519 B.R. 324 (notwithstanding amendments to Kansas tribes' ordinance, court denies confirmation of chapter 13 debtors' plan where they did not propose to pay any of wife's per capita payments into plan). *Cf. In re Meier*, 2013 WL 6135085 (Bankr. E.D.N.C. Nov. 21, 2013) (court did not have to decide "property of the estate question," because, with little evidence but much discussion, it concluded that it was only of inconsequential value in any event); *see also Brown v. Locke (In re Brown)*, 2006 WL 6810938 (B.A.P. 9th Cir. Sept. 28, 2006) (decision vacated and remanded, in part, for determination of whether future payments would be of any value to estate).

14 *In re Kedrowski*, 284 B.R. 439 (Bankr. W.D. Wis. 2002).

15 *Id.* at 448 (citing *Hendrickson v. HCN Enrollment*, CV 99-10 (Ho-Chunk Nation Trial Court 1999).

16 *Id.* at 448-49 (emphasis in original).

17 The court commented on the likelihood that the trustee could not compel the tribe to make payments. "On the other hand, it appears that as long as the tribe makes per capita distributions, the debtor is entitled to receive her share." *Id.* at 451, fn.18.

18 *Herrell v. DeCora (In re DeCora)*, Adv. No. 1-07-00111-tsu (Bankr. W.D. Wis. 2008).

19 *In re DeCora*, 396 B.R. 222 (W.D. Wis. March 28, 2008).

20 "Ho-Cak Federal is not a tribal entity." *DeCora*, Adv. No. 07-111, p. 20.

21 Previously, the chapter 7 trustee demanded future payments from the tribal nation, rather than the debtor. Ho-Chunk's attorney general refused to make those payments.

22 *DeCora*, 396 B.R. at 225.

23 *Id.* (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980)).

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Even though *DeCora* was arguably a priority dispute and did not dictate the answer to the property-of-the-estate question, the following year a bankruptcy court in that same district declined to follow *Kedrowski*.[24] In *Fess*, the court concluded, "Precedent in the [Seventh] Circuit and this district indicate that tribal law rather than state law should be consulted on this particular point," and held that per capita payments were not property of the estate.[25] Focusing on the fact that the tribe could not be compelled to make payments of a per capita payment to a non-member, the court rejected the idea that the funds could be property of the estate. Again, the court did not seem to distinguish between compelling the tribe to do something and compelling the debtor to pay out what he/she receives. The *Fess* court held that federal law and tribal law — but not state law — applied to define "property interests," and under that law debtors merely had "an expectancy to which no legal rights attach. Section 541(a)(1) is simply not broad enough to encompass her interest."[26]

Although the *DeCora* decision clearly had an impact in Wisconsin, that decision has yet to influence the bankruptcy courts in Kansas. In *Howley*,[27] the bankruptcy court discussed *Fess* and *Kedrowski*, and concluded that the conflicting outcomes rested upon differing interpretations of the Ho-Chunk Nation Code. The court stated, "While *Kedrowski* rejected the debtor's argument that per capita payments were not property because under the tribal law members had no right or entitlement to gaming distributions, the *Fess* court found this position determinative."[28] The *Howley* court distinguished *Fess* on the basis that the Kansas Tribe did not have provisions similar to those of the Ho-Chunk Nation Code that controlled the outcome in *Fess*, which provided that members had no right or entitlement to the distributions had been made.

However, in yet another twist, the Kansas tribe amended its ordinance after *Howley*, adding language that a per capita payment "is a personal benefit" and that "a periodic payment [is] not a property right," while a per capita share "is property of the [tribe] until such time as a distribution is duly made."[29] Perhaps emboldened by the amendment, the chapter 7 debtors from the first reported decision in *McDonald* (eight years prior) filed a chapter 13 case, this time asserting that the per capita payments were not property of the estate and that they should not be considered in determining their plan payments. Notwithstanding the change in the Kansas Tribe's Ordinance, the *McDonald* court still concluded that the future payments are property of the estate, placing its focus on the Bankruptcy Code rather than tribal code.[30]

Conclusion

The treatment of per capita payments in bankruptcy cases is an evolving area of law. The starting point for any analysis should be the relevant tribal law, although there is no guarantee that tribal law will dictate the result. abi

24 *In re Fess*, 408 B.R. 793 (Bankr. W.D. Wis. 2009).
25 *Id.* at 798.
26 *Id.* at 799.
27 *In re Howley*, 446 B.R. 506.
28 *Id.* at 513.
29 *In re McDonald*, 519 B.R. 324, 331.
30 *Id.*