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Sean R. McFarland

BANKRUPTCY COURT JURISDICTION OVER TRIBAL CREDITORS: *LOWER BRULE CONSTRUCTION CO. V. SHEESLEY'S PLUMBING & HEATING CO.*

*Sean R. McFarland**

Introduction

As Indian tribes have pursued a goal of economic development and self-determination, engaging in commercial transactions with non-Indians has become a necessity. Because these transactions between tribe and non-Indian nearly always occur on tribal land, they present special legal questions. One such question is the status of the tribe in the event the non-Indian declares bankruptcy, and whether in such event the bankruptcy court has jurisdiction over a tribe which is a creditor in the bankruptcy proceeding. Congress has the power to enact "uniform laws on the subject of bankruptcies throughout the United States".[1] A conflict has emerged between Congress' manifestation of this power in the Bankruptcy Code[2] and tribal sovereignty. This article will explore the manner and varying circumstances in which courts have resolved this conflict and whether the manner of resolution was correct in each case. It will also examine whether there is an alternative argument to sovereign immunity available to a tribal creditor to extricate itself from bankruptcy court jurisdiction, and under what circumstances that argument should succeed.

Sovereign Immunity and the Tribal Individual

The earliest case in this area, which dealt indirectly with the issue of bankruptcy court jurisdiction over tribal creditors, was *In re Colgrove*.[3] There, plaintiffs-debtors contracted with the Hoopa Timber Corporation, a subsidiary entity of the Hoopa Valley Indian Tribe, to engage in logging operations on tribal lands. In their complaint commencing an adversary proceeding

* B.A., 1986, J.D., 1989, University of Oklahoma. Assistant Managing Editor, 1988-89 *American Indian Law Review* staff. Now in private practice in Oklahoma City, Okla.

1. U.S. CONST. art. I, § 8, cl. 4.
2. 11 U.S.C. §§ 101-1330 (1982 & Supp. IV 1986).
3. 9 Bankr. 337 (Bankr. N.D. Cal. 1981).

in bankruptcy,[4] the debtors alleged that the Timber Corporation had breached the contract and that such breach was responsible for the debtors filing for relief under Chapter 11 of the Bankruptcy Code.[5] The question was whether the tribe's sovereign immunity extended to its subsidiary, the Hoopa Timber Corporation.[6] Resolution of this issue depended upon the court's interpretation of the charter of the Timber Corporation. The original version of the "purposes and powers" paragraph of the charter read, "The purpose for which this corporation is formed is to engage in any commercial . . . enterprise, having as its object the development of natural resources *of the tribe* . . . ."[7] As amended two years later, the charter read, "The purpose for which the corporation is formed is to engage in [any] commercial . . . enterprise having as its objective the development and disposition of assets of the corporation which [it] has acquired . . . ."[8]

The court reasoned that because of the alteration of the "purpose and powers" paragraph of the Timber Corporation charter, the Timber Corporation was no longer "a corporation subordinate to the tribe dealing in tribal property," but had been transformed into "an entity which is now dealing in its own acquired assets."[9] It was argued that because the Timber Corporation was dealing in timber, a tribal asset, during the course of transactions with the debtors it was acting as a subsidiary of the tribe. However, the court observed that the tribe had sold the timber in question to the Timber Corporation.[10] Thus, the Timber Corporation was functionally as well as theoretically dealing in its own assets at the time of the alleged breach. The court held that it had jurisdiction to proceed with the case.[11] Had the tribe not amended the Timber Corporation charter, that entity would have been able to interpose the tribe's sovereign immunity as a defense to jurisdiction, under the court's reasoning.

4. An adversary proceeding is "a proceeding . . . to recover money or property . . . ." BANKR. R. 7001. An adversary proceeding is commenced pursuant to FED. R. CIV. P. 3, BANKR. R. 7003.

5. 11 U.S.C. §§ 1104-1174 (1982).

6. *Colgrove*, 9 Bankr. at 338.

7. *Id.* (quoting the charter of the Hoopa Timber Corporation, effective Nov. 11, 1976).

8. *Id.* (quoting the charter of the Hoopa Timber Corporation, effective Apr. 20, 1978 (as amended)).

9. *Id.*

10. *Id.*

11. *Id.* at 339.

From *Colgrove* it may be concluded that when a tribe creates a business entity and grants it the power to deal in its own assets rather than those of the tribe, the tribe has evinced an intent that the entity operate independently of the tribe. The entity may not then claim the protection of the tribe's sovereign immunity. This result is sound. When a tribal entity acts in the much freer capacity of an individual, rather than the capacity of a tribe, that entity should be treated as an individual and not an Indian tribe.[12] The result otherwise would be to grant it the benefits of the status of an individual without the corresponding downside risks.

Implicit Divestiture of Sovereign Immunity

Even if the Hoopa Valley Indian Tribe in *Colgrove* had maintained the requisite amount of control over its subsidiary, it is doubtful that the result would have been different. *In re Sandmar Corp.*[13] held that the Bankruptcy Code applied to Indian tribes and that a bankruptcy court has jurisdiction to determine all bankruptcy issues between a tribal creditor and a non-Indian debtor. In *Sandmar*, a New Mexico corporation leased improvements on land within the Navajo Reservation from the Navajo Tribe. Sandmar Corporation entered into possession of the property in September of 1975 but failed to keep current its lease obligations with the tribe. A notice demanding cure of the lease and threatening termination was sent to Sandmar on December 30, 1980. On January 8, 1981, Sandmar filed a petition in Chapter 11 with the bankruptcy court. Because of rumors among tribe members that Sandmar had filed a Chapter 11 petition, the Advisory Committee of the Navajo Tribal Council met on January 14 to discuss whether the bankruptcy court would have jurisdiction over the tribe should it violate the automatic stay.[14] Late in the evening of January 19, the tribe's staff attorney and ten or twelve others, including armed Navajo Tribal Police, arrived at the premises of the debtor and physically took possession of the premises and all assets of the debtor.[15]

12. *Accord* Choteau v. Burnet, 283 U.S. 691 (1931) (individual income of tribal member is subject to federal income taxation); *see also* Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960).

13. 12 Bankr. 910 (Bankr. D.N.M. 1981).

14. *See* 11 U.S.C. § 362(a) (1982).

15. When tribal officials took possession of the debtor's premises and personal property, they performed an "act to obtain possession of property of the [bankruptcy estate]," violating the automatic stay provisions of 11 U.S.C. § 362(a)(3).

Pointing out that the leased premises and personal property seized by the tribe were the sole assets of the debtor, and that such assets were necessary to the development of an effective plan of reorganization under Chapter 11, the court took up the issue of whether it had jurisdiction over the Navajo Tribe in light of the tribe's retained sovereign immunity.[16] The court noted that, in general, Indian tribes were recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers, and that without Congressional authorization Indian tribes were exempt from suit.[17] Under this analysis the bankruptcy court could not have had jurisdiction over the Navajo Tribe in light of the tribe's sovereign immunity. The Bankruptcy Code defines "creditor" in broad terms as an "entity that has a claim against the debtor that arose at the time of or before [the filing of the petition]."[18] Because this definition contains no reference to Indian tribes, it is arguable that Congress did not intend that Indian tribes be considered "creditors" under the Bankruptcy Code.

The court was forced to assert jurisdiction on grounds other than express statutory authorization. It stated that while Indian tribes still possessed those aspects of sovereignty not withdrawn by treaty or statute, a tribe's sovereign immunity might be withdrawn by implication as a necessary result of its dependent status.[19] For this proposition the court cited *Oliphant v. Suquamish Indian Tribe*[20] and *United States v. Wheeler*.[21] Both of these decisions involved tribal prosecution of non-Indians for

16. *Sandmar*, 12 Bankr. at 912.

17. *Id.* at 913 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)); *accord* Turner v. United States, 248 U.S. 354 (1919); Puyallup Tribe, Inc. v. Washington Dep't of Game, 433 U.S. 165 (1977). *Martinez* involved an action for declaratory relief brought by a female member of the Santa Clara Pueblo against a tribal ordinance denying tribal membership to the children of female members of the tribe who married outside the tribe but not to similarly situated children of male members of the tribe, under the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1982). In reversing the Court of Appeals, the Supreme Court reasoned that because nothing in the provisions of the Act purported to subject Indian tribes to federal jurisdiction in civil actions for declaratory relief, the Act contained no waiver of sovereign immunity. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).

Both Choteau v. Burnet, 283 U.S. 691 (1931), and Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960), involved statutes expressly providing for federal jurisdiction over Indian tribes in circumstances limited to the coverage of those statutes.

18. 11 U.S.C. § 101(9)(a) (1982 & Supp. IV 1986).

19. *Sandmar*, 12 Bankr. at 913.

20. 435 U.S. 191 (1978).

21. 435 U.S. 313 (1978).

misdemeanors committed on tribal lands. Setting out what may be called the doctrine of "implicit divestiture," the Court in *Wheeler* reasoned that because tribes had been implicitly divested of sovereignty in matters such as alienation of land and ability to enter into relations with foreign governments, it was not incongruous to limit tribes' ability to prosecute nontribal individuals for crimes committed on tribal lands.[22] The reason given for this extension was that tribal jurisdiction should not extend to matters purely external to the tribe or beyond what was necessary to protect tribal self-government or control over internal relations.[23] Another reason behind the extension of "implicit divestiture" was announced in *Oliphant*. There it was reasoned that the United States, as the overriding sovereign in relation to the Indian tribes, had manifested an intent that its citizens be protected from "unwarranted intrusions" upon their personal liberty. Because the power to prosecute and punish individuals represents an important intrusion upon personal liberty, tribes were deemed to have given up such power by virtue of their dependent status.[24]

Based upon these underlying policy considerations, the rule announced in *Oliphant* and *Wheeler* has been extended beyond the criminal and into the civil context. Those cases have been limited to situations of tort liability[25] and violation of a civil statute.[26] In no case has "implicit divestiture" been extended to situations involving consensual, commercial transactions. Reasoning by negative implication, the bankruptcy court in *Sandmar* stated that "it has never been held that a consensual relationship with an Indian or a tribe will subject a non-Indian to civil liability in a tribal court."[27] The court reasoned that liability arising out of commercial transactions should be treated no differently from liability in tort. In doing so the court ignored

22. *Id.* at 326.

23. *Id. Accord* Williams v. Lee, 358 U.S. 217 (1959); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

24. *Oliphant*, 435 U.S. at 194 n.3.

25. U.N.C. Resources, Inc. v. Benally, 514 F. Supp. 358 (D.N.M. 1981) (injunctive relief against assertion of tribal court jurisdiction over tort claim against uranium processor for injury occurring on tribal land is proper inasmuch as tribal court jurisdiction would result in application of tribal standards of behavior off the reservation).

26. Dry Creek Lodge, Inc. v. Arapaho & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980) (district court had jurisdiction over action brought under the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1982) arising on land within the territorial boundaries of the reservation but owned in fee by non-Indians).

27. *Sandmar*, 12 Bankr. at 914; *Benally*, 514 F. Supp. at 363.

the rule in *Williams v. Lee*[28] that a non-Indian who knowingly deals with an Indian tribe is held to have implicitly consented to tribal court jurisdiction. Because Sandmar entered into a consensual transaction with the Navajo Tribe when it leased improvements on tribal land, it consented to tribal court jurisdiction over any claim against it arising out of its lease agreement.

However, the bankruptcy court advanced a more compelling argument than extension of "implicit divestiture." It pointed out that had Sandmar somehow consented to tribal court jurisdiction, that jurisdiction could not be exercised because the tribe had no body of bankruptcy law. The court believed that this would result in an unfair adjudication of the rights of the parties involved, and concluded that there was no legal basis upon which to rest tribal court jurisdiction over the matter.[29]

It should be noted at this point that this last argument advanced by the bankruptcy court is compelling only on the facts of *Sandmar*. As the bankruptcy court observed, the leasehold and personal property seized by the tribe comprised the sole assets of the bankruptcy estate and so were vital to an effective reorganization plan. Because those assets would be in the hands of the tribe at the time of any tribal court action, it is possible to understand how such tribal court action might bring about an unfair adjudication of the rights of all parties to the bankruptcy proceeding. Furthermore, the federal policies favoring comprehensive determination of creditors' rights and equitable treatment of all parties to the bankruptcy proceeding would be violated. These larger policy considerations are what drove the court to its result in *Sandmar*. As the court noted, the Bankruptcy Code embodies the totality of bankruptcy law in the United States,[30] as enacted by Congress pursuant to its powers under the Constitution.[31] The federal policies discussed above thus supersede any federal policy favoring tribal self-determination, and jurisdiction over the bankruptcy proceeding itself must be vested in the bankruptcy court.[32] Moreover, when one considers the procedural difficulties a tribal court would encounter in its attempt to administer a Chapter 11 case, the

28. 358 U.S. 217 (1959).

29. *Sandmar*, 12 Bankr. at 915.

30. *Id.*

31. *See supra* note 1.

32. 28 U.S.C. § 1471 (1982). *Sandmar* was decided prior to the 1984 amendments to the Bankruptcy Code. *See* 28 U.S.C. §§ 151, 157, 1334 (Supp. II 1984).

practicality of tribal court jurisdiction over a bankruptcy proceeding is indeed called into question. The result in *Sandmar* is therefore sound. However, it is not certain whether the same result should entail in a case involving a dispute which is less inclusive of the entire bankruptcy proceeding.

Sandmar has been followed in one case. *In re Shape*[33] involved a "lease and option to purchase" of land situated on the Fort Belknap Indian Reservation. When defendants-lessees filed for relief under Chapter 11 of the Bankruptcy Code, plaintiffs-lessors brought an action for relief from the automatic stay.[34] The court dealt with two issues. First, did it have jurisdiction over Indian trust lands constituting part of the bankruptcy estate? Second, was the agreement involved a valid "lease-option" so as to constitute a part of the bankruptcy estate?[35] Citing *Sandmar* as directly controlling, the court found that it had jurisdiction.[36] It dealt with the second issue quite differently. The court noted that the lands subject to the "lease-option" were restricted, allotted Indian lands located on the Fort Belknap Indian Reservation and were held in trust for the benefit of the plaintiffs, members of the Gros Ventre Tribe.[37] By act of Congress,[38] the approval of the Secretary of the Interior was specifically required before there could be an alienation of restricted Indian allotments. Because no such approval had been sought, the court concluded that plaintiffs could not have transferred the land on their own. The most that passed to the bankruptcy estate was the debtors' interest in a void contract.[39]

Shape might be viewed as creating an exception to the *Sandmar* rule in cases involving a "lease-option" of Indian trust lands. If it does represent such an exception it is certainly *de minimus*. In order to escape the jurisdiction of the bankruptcy court it would be necessary for a tribal creditor to enter into a lease agreement which would be declared void. This is presumably just the opposite result desired by a creditor such as the one in *Shape*, who seeks relief from the automatic stay. The rule of *Sandmar* that a tribal creditor in a bankruptcy proceeding

33. 25 Bankr. 356 (Bankr. D. Mont. 1982).
34. 11 U.S.C. § 362 (1982).
35. *Shape*, 25 Bankr. at 358.
36. *Id.* at 358-59.
37. *Id.* at 359. Because no "patent in fee" had been issued to plaintiffs, *Colgrove* was not controlling.
38. 25 U.S.C. § 392 (1982).
39. *Shape*, 25 Bankr. at 360.

may not interpose tribal sovereign immunity as a defense to bankruptcy court jurisdiction is thus firmly established.

Lower Brule Const. Co. v. Sheesley's Plumbing & Heating Co.

A situation in which the rationale of *Sandmar* should not apply was presented in *Lower Brule Construction Co. v. Sheesley's Plumbing & Heating Co.*[40] The Lower Brule Construction Company entered into a construction contract with the Standing Rock Housing Authority for the renovation of a housing project on the Rock Sioux Indian Reservation. To guarantee Lower Brule's performance under the contract, an irrevocable standby letter of credit was procured from Tri-County State Bank with the Housing Authority as beneficiary. Following commencement of construction the Housing Authority notified Lower Brule of a material default on the construction contract and made a demand on the bank for payment under the letter of credit. The bank had received an earlier demand for payment from Sheesley's, a subcontractor claiming to be a third party beneficiary under the letter of credit. The bank responded to these demands by filing an action for declaratory relief in state court. Following commencement of the state court action, Lower Brule filed for relief under Chapter 11.

Four days later the Housing Authority filed an action in federal district court against the bank alleging wrongful dishonor of the letter of credit. Lower Brule then commenced an adversary proceeding in the bankruptcy court to enjoin payment under the letter of credit.[41] The Housing Authority then filed a petition in district court to remove the state court action. Following a hearing on Lower Brule's application for a preliminary injunction, the bankruptcy court ordered that each of the actions in the district court be enjoined from further proceedings, and enjoined payment under the letter of credit. The adversary proceeding was remanded to district court. The bankruptcy court had determined that it was precluded from hearing the adversary proceeding because the action was not a "core proceeding."[42]

40. 84 Bankr. 638 (D.S.D. 1988).

41. 11 U.S.C. § 105(a) (1982) states that "the [bankruptcy court] may issue any order, process, or judgment that is necessary . . . to carry out the provisions of this title."

42. 11 U.S.C. § 157(b)(2) (1982 & Supp. II 1984) provides that "[b]ankruptcy judges may hear and determine all . . . core proceedings . . . ." In general, state law claims, such as an action to enjoin payment under a letter of credit, are not "core" proceedings.

However, the district court held on remand that the bankruptcy court was not precluded from hearing the adversary proceeding unless another court had exclusive jurisdiction.[43] The Housing Authority argued that the bankruptcy court lacked jurisdiction over the adversary proceeding because exclusive jurisdiction over the matter resided in tribal court.

Exhaustion of Tribal Remedies

The Housing Authority invoked the "exhaustion rule," which states that in a dispute between a tribe and a non-Indian, the issue of jurisdiction must be decided in the first instance by the tribal court, and cited *Iowa Mutual Insurance Co. v. La Plante*.[44] *La Plante* involved a dispute over an insurer's duty to insure members of the Blackfeet Indian Tribe against liability in tort arising out of an accident which occurred on the Blackfeet Reservation. The insurer alleged federal district court jurisdiction under diversity of citizenship. The Supreme Court approved the principle of *National Farmers Union Insurance Co. v. Crow Tribe*[45]—that the question of jurisdiction in such cases must be decided in the first instance by the tribal court. In articulating the "exhaustion rule" the Court indicated that deference to tribal courts was a matter of comity and was analogous to abstention. It stated that "even where there is concurrent jurisdiction . . . deference to state proceedings renders it appropriate for federal courts to decline jurisdiction in certain circumstances."[46] Such circumstances would include any in which a strong federal policy favors resolution in a nonfederal forum. In any case where exhaustion of tribal court remedies would be proper, unconditional federal court jurisdiction would infringe on tribal court authority, thereby impairing tribal government authority over tribal matters. Thus, the strong federal policy of promoting tribal self-government would be frustrated.

The court in *Lower Brule* did not correctly deal with the issue before it. Despite the fact that several lower federal courts had followed the "exhaustion rule,"[47] the court in *Lower Brule* phrased the issue before it as "[w]hether the exhaustion requirement . . . is applicable to an action for relief filed in a bankruptcy court."[48] With only passing attention to *La Plante* and

43. *Lower Brule*, 84 Bankr. at 640.
44. 480 U.S. 9 (1987).
45. 471 U.S. 845 (1985).
46. *La Plante*, 480 U.S. at 16, n.8.
47. *Lower Brule*, 84 Bankr. at 641.
48. *Id.*

Crow Tribe, the court followed the incongruous rule of *Sandmar* and held that the "exhaustion rule" did not apply in bankruptcy proceedings.[49] In its oversimplification of the jurisdictional issue, the *Lower Brule* court forgot that the case before it was an adversary proceeding and not the bankruptcy proceeding itself. As mentioned earlier,[50] an adversary proceeding is much narrower in scope than the bankruptcy proceeding of which it is a part. Because it often resembles a state court action, an adversary proceeding raises the same considerations of comity and deference to nonfederal tribunals raised in *La Plante* and *Crow Tribe*.[51] If an adversary proceeding finds its way into federal district court, the statutory and judge-made rules which govern jurisdiction there must apply to the adversary proceeding. The adversary proceeding in *Lower Brule* presented a clear case for application of the "exhaustion rule." If one examines the instances in which federal courts have been willing to recognize the "exhaustion rule," this conclusion is obvious. Those instances included breach of contract claims,[52] a trespass action,[53] an action to collect on a promissory note,[54] and a mortgage foreclosure action.[55] Each of these, with the exception of the trespass action, involved disputes arising out of consensual, commercial transactions with Indian tribes. The dispute in *Lower Brule* over the right to payment under a letter of credit is indistinguishable. In each of these cases the strong federal policies of tribal self-government and self-determination, represented by comity and deference to tribal authority, outweighed any policy favoring federal jurisdiction.

The *La Plante* and *Crow Tribe* opinions also noted possible exceptions to the "exhaustion rule." The Court in either case stated that exhaustion of tribal court remedies is not required where "motivated by a desire to harass . . . conducted in bad faith . . . patently violative of jurisdictional prohibitions, or

49. *Id.*

50. *See supra* note 4.

51. An adversary proceeding may be commenced in the district court in which the bankruptcy proceeding is pending. 28 U.S.C. § 1409(a) (1982). While commenced in the bankruptcy court, the adversary proceeding in *Lower Brule* was remanded to the district court.

52. Brown v. Washoe Hous. Auth., 835 F.2d 1327 (10th Cir. 1988); Wellman v. Chevron U.S.A., Inc., 815 F.2d 577 (9th Cir. 1987).

53. United States v. Turtle Mountain Hous. Auth., 816 F.2d 1273 (8th Cir. 1987).

54. Palmer v. Yankton Sioux Tribe, 15 Indian L. Rep. (Am. Indian Law. Training Program) 3001 (D.S.D. 1987).

55. Fed. Land Bank of Omaha v. Reeves, 14 Indian L. Rep. (Am. Indian Law. Training Program) 3071 (D.S.D. 1987).

where . . . futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."[56] Nothing in the facts of *Lower Brule* indicated bad faith or a desire to harass, and there were no express prohibitions on tribal court jurisdiction.[57] Because of the broad civil jurisdiction of the Standing Rock Sioux tribal courts, there could be no lack of an adequate opportunity to challenge such jurisdiction.[58] *Lower Brule* thus did not fit into any of the exceptions to the "exhaustion rule."

Mandatory Abstention: Section 1334(c)(2)

Additionally, the court in *Lower Brule* did not pay attention to the jurisdictional provisions of the Bankruptcy Code. The abstention provisions of the 1984 Amendments provide that "[u]pon timely motion of a party in a proceeding based upon a state law claim . . . related to . . . but not arising under [the Bankruptcy Code] . . . the district court shall abstain from hearing such proceeding . . . ."[59] Lower Brule's claim to proceeds of the letter of credit was certainly "based on a state law claim." Because this claim arose out of the agreement of the parties to the construction contract and not a provision of the Bankruptcy Code, it was a "related to" rather than an "arising under" action. Had the Housing Authority filed in a timely fashion a motion to abstain, the district court would have been required to abstain from hearing the action. The tribal court would have then have had jurisdiction over the matter.

Misplaced Reliance on the Sovereign Immunity Cases

Another fault in the reasoning of *Lower Brule* was its express reliance on the sovereign immunity cases, discussed above. The court cited *Oliphant* for its holding that there existed inherent limits on tribal sovereignty. It stated that "protection of non-Indian debtors by operation of the automatic stay . . . [limits] the sovereignty of Indian tribes to assert jurisdiction over bankruptcy proceedings."[60] Observing that the Standing Rock Sioux Code of Justice made no reference to bankruptcy jurisdiction, the court reasoned that to grant the tribe jurisdiction over the bankruptcy proceeding would represent an "unwarranted intru-

56. *Crow Tribe*, 471 U.S. at 856 n.21 (quoting in part Judice v. Vail, 430 U.S. 327, 338 (1977)).

57. *See infra* note 59.

58. *See infra* note 62.

59. 28 U.S.C. § 1334(c)(2) (1982 & Supp. II 1984).

60. *Lower Brule*, 84 Bankr. at 642.

sion" upon the personal liberty of a United States citizen, thus bringing the case before it into the realm of *Oliphant*.[61] Again, the court in *Lower Brule* was incorrect. The fact that the tribal code made no reference to bankruptcy jurisdiction was irrelevant. The case before it was an adversary proceeding and not the bankruptcy proceeding itself. Thus the federal policy favoring uniform bankruptcy laws could not outweigh the federal policy favoring tribal self-government and self-determination. The tribal code did provide that tribal courts "shall have civil jurisdiction over any matter where one party shall be an Indian . . . and . . . [t]he transaction occurs on [tribal lands]."[62] For precisely the same reason the *Lower Brule* court should have dealt more adequately with the "exhaustion rule" argument, it mistakenly relied on the reasoning of the sovereign immunity cases.

Conclusion

The following conclusions may be drawn concerning bankruptcy court jurisdiction over tribal creditors. First, when a tribe creates a subsidiary business entity and empowers it to deal in its own assets, the tribe has evinced an intent that the entity operate independently of the tribe. The entity then may not claim protection of its creator's sovereign immunity. The entity must expect to be subject to bankruptcy court jurisdiction as would any non-Indian business entity. This result is sound. By being empowered to deal in its own assets, the entity enjoys greater freedom to act in the marketplace than if it could deal only in restricted tribal assets. It must be subject to the same downside risks, such as finding itself a creditor in a bankruptcy proceeding, as any non-Indian business entity. Second, an Indian tribe which is a creditor in a bankruptcy proceeding cannot claim the protection of its own retained sovereign immunity. The broad federal policy of uniformity of bankruptcy laws outweighs the policy of tribal self-government and self-determination.

A different result should entail in a case involving an adversary proceeding, which is necessarily narrower in scope than an entire bankruptcy proceeding. In an adversary proceeding the federal policy favoring uniform national bankruptcy laws is not present. Therefore, the policy favoring tribal self-government

61. *See supra* note 20.

62. STANDING ROCK SIOUX TRIBE CODE OF JUSTICE § 1-107(b) (rev. 1982).

and self-determination must take precedence. Non-Indian parties must be subject to court-made doctrines such as the "exhaustion rule" and statutory provisions mandating abstention. In an adversary proceeding which is subject to either of these rules, the tribal court must have jurisdiction. This places no greater burden on the non-Indian party than would be placed on it were the action not related to a bankruptcy proceeding. It makes no commercial sense for a court to grant a party to a transaction such an unbargained-for benefit.

Each of the principal cases discussed above involved consensual, commercial transactions between tribes and non-Indians. For a court to seize jurisdiction, absent an overriding policy such as that manifested in the Bankruptcy Code, flies in the face of commercial reality. As stated in *Palmer v. Yankton Sioux Tribe*,[63] "[t]he rules giving Indian tribes sovereign immunity have been in existence for a long time, and persons doing business with Indian tribes either have been or should be aware of the doctrine."[64] Only when such rules are followed will the goal of tribal self-government and economic self-determination be served.

63. Palmer v. Yankton Sioux Tribe, 15 Indian L. Rep. (Am. Indian Law. Training Program) 3001 (D.S.D. 1987).

64. *Id.*