

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF TENNESSEE  
SOUTHERN DIVISION

In re:

No. 01-17271

NORTH AMERICAN ROYALTIES, INC.,  
ET. AL.

Chapter 7

Debtors

DOUGLAS R. JOHNSON, TRUSTEE

Plaintiff

vs.

Adversary Proceeding  
No. 03-1351

UNIVERSITY OF TENNESSEE, dba  
THE UT CENTER FOR INDUSTRIAL  
SERVICES

Defendant

**MEMORANDUM**

Appearances: Lex A. Coleman, Johnson, Mulroony & Coleman, P.C.,  
Chattanooga, Tennessee, Attorney for Trustee/Plaintiff

J. Robert Walker, Assistant General Counsel, The University of  
Tennessee, Knoxville, Tennessee, Attorney for Defendant

HONORABLE R. THOMAS STINNETT  
UNITED STATES BANKRUPTCY JUDGE

The bankruptcy trustee for North American Royalties filed this suit against the University of Tennessee to recover the amount of a payment that North American made to the University within 90 days before North American's bankruptcy. The complaint alleges the payment can be recovered as a preferential transfer under Bankruptcy Code § 547. 11 U.S.C. § 547. The University's answer asks for dismissal of the complaint on the ground that the state's sovereign immunity deprives the federal courts of jurisdiction.

Before the trustee filed this suit, the Sixth Circuit's decision in *Hood* had eliminated the sovereign immunity defense for actions, such as this one, that come within the terms of Bankruptcy Code § 106(a). *Hood v. Tennessee Student Assistance Corp. (In re Hood)*, 319 F.3d 755 (6th Cir. 2003); 11 U.S.C. § 106(a) & § 547. When the trustee filed this suit, however, the *Hood* decision was on appeal to the Supreme Court. *Hood v. Tennessee Student Assistance Corp.*, 539 U.S. 986, 124 S.Ct. 45, 156 L.Ed.2d 703 (2003). The court entered an order delaying proceedings on the trustee's complaint until after the Supreme Court decided *Hood*. The Supreme Court affirmed the Sixth Circuit's decision in *Hood* but on different grounds. *Hood v. Tennessee Student Assistance Corp.*, 541 U.S. 440, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004) (cited below as *Hood*, 124 S.Ct. 1905). The University then filed a motion to dismiss on the basis of sovereign immunity. This memorandum deals with the University's motion to dismiss.

The parties do not dispute that the University is entitled to sovereign immunity to the same extent as the state.

The plaintiff in *Hood* was the debtor in a Chapter 7 bankruptcy case. She filed a complaint to determine whether her debt for student loans could be discharged under § 523(a)(8) of the Bankruptcy Code. 11 U.S.C. § 523(a)(8). The defendant argued that sovereign immunity prevented the bankruptcy court from having jurisdiction despite § 106 of the Bankruptcy Code. Section 106(a) was clearly intended to waive a state's sovereign immunity for many kinds of bankruptcy disputes and bankruptcy related disputes, including the dischargeability dispute in *Hood*. 11 U.S.C. § 106(a) & § 523; *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96, 109 S.Ct. 2818, 106 L.Ed.2d 76 (1989) (requiring an unmistakably clear waiver by congress). The defendant in *Hood* argued that § 106(a) was not effective because congress could not constitutionally waive the state's sovereign immunity. The Sixth Circuit disagreed. It reasoned that when the states adopted the constitution, they authorized congress to enact uniform national bankruptcy laws including a waiver of the states' sovereign immunity for the purpose of administering bankruptcy cases. *Hood v. Tennessee Student Assistance Corp. (In re Hood)*, 319 F.3d 755 (6th Cir. 2003); U. S. Const. Art. I, § 8, cl. 4.

The waiver in § 106(a) specifically applies to suits to recover preferential transfers under Bankruptcy Code § 547. 11 U.S.C. § 106(a). The Sixth Circuit's reasoning in *Hood* is not limited to suits to determine whether a particular debt can be discharged. It applies to all the kinds of proceedings listed in § 106(a). Thus, the Sixth Circuit's decision in *Hood*, if it is still the law of this circuit, requires the court to reject the University's argument and deny its motion. The University

contends this result is not required because the Supreme Court's decision in *Hood* made the Sixth Circuit's decision no longer binding precedent within this circuit.

The Supreme Court's decision in *Hood* treated the debtor's suit to determine dischargeability of her debt as an *in rem* proceeding. The Supreme Court then relied on earlier decisions holding that *in rem* proceedings do not infringe upon a state's sovereign immunity. *Hood*, 124 S.Ct. 1905.

The Supreme Court majority carefully avoided saying that the Sixth Circuit was correct when it held that § 106(a) is a constitutional waiver of sovereign immunity. Indeed, the Supreme Court said that it did not reach the question of whether § 106(a) is a constitutional waiver of sovereign immunity. *Hood*, 124 S.Ct. 1905, 1914-1915. Nevertheless, the University argues that the Supreme Court's decision made the Sixth Circuit's reasoning unnecessary *obiter dicta* that is not binding precedent in this circuit.

The courts have not adopted the rule that when the Supreme Court affirms or reverses a circuit court's decision on different grounds, the circuit court's decision becomes *obiter dicta* that is no longer binding precedent within the circuit. *Central Pines Land Co. v. United States*, 274 F.3d 881 (5th Cir. 2001) (decision reversed on other grounds was still binding precedent on question not addressed by Supreme Court); *Hilton v. City of Wheeling*, 209 F.3d 1005 (7th Cir. 2000) (legal rule established by circuit court's earlier decision though Supreme Court affirmed it without ruling on the point); *Cuban American Bar Ass'n v. Christopher*, 43 F.3d 1412 footnote 20 (11th Cir. 1995) (circuit court's decision on constitutional question was

law of the circuit though Supreme Court affirmed on other grounds and stated that circuit court should not have reached the constitutional question).

A more general rule apparently determines the effect of the Supreme Court's decision. A Supreme Court decision can change the law in a circuit without expressly stating that it overrules any of the relevant decisions by the circuit court. The federal courts have developed a general rule for deciding whether a Supreme Court decision has that effect. The same rule can be applied when the Supreme Court decides an appeal from a circuit court on different grounds and does not explain the effect of its decision on the circuit court's decision. The rule can be stated as a question. Does the legal rule announced by the Supreme Court or the Supreme Court's reasoning clearly undermine the circuit court's decision to the extent that it can no longer be the law? *Moore v. Detroit School Reform Board*, 293 F.3d 352 (6th Cir. 2002); *Kovacevich v. Kent State University*, 224 F.3d 806 (6th Cir. 2000); *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003); *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988).

The Supreme Court's result in *Hood* does not establish a legal rule that is incompatible with the Sixth Circuit's decision in *Hood*. As to the Supreme Court's reasoning, the majority carefully avoided saying anything to undermine (or support) the Sixth Circuit's decision. In summary, the Supreme Court's decision in *Hood* does not have the effect of vacating, reversing, or overruling the Sixth Circuit's decision in *Hood*. Thus, the Sixth Circuit's decision in *Hood* is the law in this circuit: § 106(a) is a constitutional waiver of the state's sovereign immunity.

After the Supreme Court's decision in *Hood*, the Sixth Circuit apparently reached the same conclusion in an unreported opinion. *Katz v. Central Virginia Military College (In re Wallace's Bookstore, Inc.)*, 106 Fed.Appx. 341, 2004 WL 1763229 (6th Cir. Aug. 20, 2003). The opinion is unclear on that point, however, because it does not say whether the suits were under § 523(a)(8). If they were, then the Supreme Court's decision in *Hood* controlled without regard to the Sixth Circuit's reasoning.

Since the Sixth Circuit's decision in *Hood* is still controlling law in this circuit, the court must reject the University's argument and deny its motion to dismiss.

For the purpose of argument, however, the court will assume that the Supreme Court's decision in *Hood* somehow nullified the Sixth Circuit's decision in *Hood* as to the constitutionality of § 106(a). The court still reaches the same result. The Sixth Circuit's decision in *Hood* is persuasive authority as to the constitutionality of § 106(a), and the court chooses to follow it. *Cf. Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002); *Los Angeles County v. Davis*, 440 U.S. 625, 99 S.Ct. 1379, 1391 footnote 10, 59 L.Ed.2d 642 (1979) (Powell, J., & Burger, C.J., dissenting). According to the Sixth Circuit's decision in *Hood*, § 106(a) effectively waives the state's sovereign immunity in this suit.

This suit to recover a preferential transfer might possibly come within the Supreme Court's reasoning in *Hood*. That is, it might be an *in rem* proceeding that does not raise a sovereign immunity problem. The Supreme Court suggested in

*Hood* that a suit to recover a preferential transfer would not be an *in rem* proceeding. *Hood*, 124 S.Ct. 1905, 1914-1915. At least one court has reached the opposite conclusion, and it did so after the Supreme Court's decision in *Hood*. *Official Committee of Unsecured Creditors v. Public Utilities Commission (In re 360networks (USA), Inc.)*, 316 B.R. 797 (Bankr. S. D. N. Y. 2004). The parties have not argued the point in depth. Furthermore, the court's reasoning means that it need not answer the question. The court merely points out that a proceeding to recover a preferential transfer may be an *in rem* proceeding within the meaning of the Supreme Court's decision in *Hood* because it would be property of the bankruptcy estate. 11 U.S.C. § 541(a)(3).

The court will enter an order denying the University's motion to dismiss on the ground that the doctrine of sovereign immunity deprives the court of jurisdiction.

This memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052.

ENTER:

BY THE COURT

Entered 1/21/05

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R. Thomas Stinnett  
United States Bankruptcy Judge