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THE INTERPLAY BETWEEN DOWER AND THE BANKRUPTCY CODE

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> " The widow of every deceased person shall be entitled to dower, or the use during her natural life, of one-third part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage, unless she is lawfully barred thereof. "

MCLA 558.1; MSA 26.221. Normally, dower resides in textbooks of law school real property classes, where it exists solely to be learned for an examination and then forgotten. Occasionally, it escapes into the real world, most notably in divorce proceedings and in the odd real estate transaction where a wife forgets to execute a deed of transfer by her husband. However, dower causes special problems in the bankruptcy context, problems that only become apparent under certain circumstances.

The Bankruptcy Court allows an individual to file a bankruptcy petition without the necessity of having his wife[1] join in the petition. See 11 USC 301 and 302. Such can cause major problems, ranging from the treatment of entireties property, see In re Grosslight, 757 F2d 773 (6th Cir. 1985), to the treatment of income, Cf. In re Dutton, 86 BR 651 (Bk. Ct., D Colo. 1988) (allocation of income between debtor and non-bankrupt spouse for chapter 12 eligibility). Yet most of these problems have at least been addressed by the courts in the 12 years since the Bankruptcy Code was enacted. The issue of dower has not.

The impact of dower rights arises primarily when property of the bankruptcy estate is to be sold. Pursuant to 11 USC 363, a trustee or debtor-in-possession can sell real estate. Specifically, under paragraph (f):

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[1]Obviously, the person filing the bankruptcy could be the wife. However, since curtesy has been abolished in Michigan, Tong v Marvin, 15 Mich 60 (1860), the remainder of this article will assume that the bankruptcy spouse is the husband.

" The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if --

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. "

Furthermore, under paragraph (g):

" Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of the section free and clear of any vested or contingent right in the nature of dower or curtesy. "

Hence, the Code provides a mechanism for selling the dower interest. However, it gives no clue as to how that interest is to be valued.

To solve this, a practitioner must resort to Michigan law. Butner v United States, 440 US 48 (1979). Michigan law makes a distinction between an estate of dower and an interest of dower. The latter is an inchoate right which a wife obtains at marriage and which is protected by law. At her husband's death, this inchoate interest vests into the estate of dower which is treated akin to other vested estates under Michigan law. Cummings v Schreur, 239 Mich 178 (1927). Consequently, in almost all bankruptcy cases, the practitioner will deal only with the inchoate right of dower.

Not all sales of real estate will involve dower. A wife does not have a dower interest in real estate held by her husband as a joint tenant. Schmidt v Jennings, 359 Mich 376 (1960). Nor does she have a dower interest in property which her husband is purchasing on land contract. Dalton v Mertz, 197 Mich 390 (1917). Furthermore, a wife has no dower interest in land contract payments made by a land contract purchaser either prior to or after the death of her husband. In re Estate of McBride, 253 Mich 305 (1931). Since dower only accrues in an estate of inheritance, it will not attach to a life estate, Spears v James, 319 Mich 341 (1947), or a leasehold interest. See Redman v Shaw, 300 Mich 314 (1942). And a dower interest does not attach to an entireties estate. Agar v Streeter, 183 Mich 600 (1914). By statute, a wife can claim no dower interest in real estate held by a partnership of which her husband is a partner. MCLA 449.25(2)(e); MSA 20.25(2)(e).

Michigan law has long recognized that in cases involving the partition of real estate, the entire property can be sold free of interest of dower, with the value of the dower interest to be set out of the proceeds. Chase v Angell, 148 Mich 1 (1907). This procedure is still recognized today. Under MCLA 600.3340; MSA 27A. 3340, upon a sale under a judgment of partition, the Court shall:

" ascertain and settle the proportional value of the inchoate [right of dower] . . . according to the principles of law

applicable to annuities and survivorships, and shall direct the proportion of the proceeds of the sale to be invested, secured, or paid over in the manner considered the best to secure the rights and interests of the parties. "

This directive is amplified by MCR 3.403(D) which specifically indicates how the dower interest is to be valued:

" 1. When premises that include a dower interest . . . are sold, the dower interest . . . shall be compensated as provided in this subrule.

a. Unless the owner consents to the alternative compensation provided in subrule (D)(1)(b), the Court shall order that the following amount be invested in interest-bearing accounts insured by an agency of the United States government, with the interest paid annually for life to the owner of the dower interest . . .

(i) in the case of dower interest, one-third of the proceeds of the sale of the premises . . . on which the claim of dower existed, after deduction of the owner's share of the expenses of the proceeding.

(ii) [omitted]

b. If, before the person conducting the sale files the report of sale, the owner of the dower interest . . . consents, the Court shall direct that the owner be paid an amount that, on the principles of law applicable to annuities, is reasonable compensation for the interest . . . To be effective the consent must be by a written instrument witnessed and acknowledged in the manner required to make a deed eligible for recording. "

The Court Rule raises numerous practical questions. First, it requires that the trustee or debtor-in-possession establish an escrow account to pay income to the wife for the remainder of her life. This may entail keeping a bankruptcy estate open for long periods beyond what is necessary to effectuate the reorganization or liquidation required by the Bankruptcy Code. The wife does have the ability to elect an alternative lump-sum payment, but this election must be made prior to the actual real estate closing.[2] Since in most cases the sale will occur (with interest transferring to proceeds) prior to the parties determining a value, this lump-sum distribution may unwittingly be waived by the wife. The trustee or debtor-in-possession is then faced with the option of keeping the estate open or selling the remainder interest for a reduced value.

The Court Rule also provides that the wife's dower interest is subject to her "share of the expenses of the proceeding." Presumably, these expenses are the normal closing costs associated with a real estate transaction -- real estate

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[2]The Court Rule refers to the filing of a report of sale. This is a requirement for state partition sale; until the sale is confirmed, it is not final. However, the Bankruptcy Code has done away with this requirement. Under the Code, the sale is final upon closing. Hence, in a bankruptcy situation, the analogous time to the filing of the report of sale under the rule would be the actual closing.

commissions, costs for the title insurance, transfer taxes and recording fe Yet determining the wife's share of these expenses can be extremely difficu especially if no election for alternative valuation is made. One potentia solution is for the Court to determine a pro-rata share as if the alternative valuation had been elected.

Similarly, the Court is faced with no guidance when selecting the interest rate to be used in this valuation. One rate that seems applicable is the federal judgment rate established by 28 USC 1961. This rate reflects interest on Treasury Bills and thus bears a relationship to the general economy at large. Alternatively, the Court could elect the state judgment rate set forth in MCLA 600.6013(6); MSA 27A.6013(6). However, this might be difficult to implement since it is a variable rate which can change at six-month intervals. As a third option, the Court could hear testimony as to investment rates generally available in the community. Cf. Memphis Bank & Trust Co. v Whitman, 692 F2d 427 (6th Cir. 1982) (interest rates on similar loans in community are applicable for interest under the chapter 13 plan).

Reorganization cases reflect one additional problem in the event that an alternative valuation is not elected: who will be the owner of the remainder interest -- the remaining sum existing at the wife's death? Since 11 USC 1141 provides that, upon confirmation all property vests in the debtor, this would presumably include the remainder interest of his wife's life estate. Although there is a similar provision for both chapter 12 and 13 (11 USC 1227[b] and 1327[b]), Courts have not agreed as to the effect of these provisions. Cf. In re Martin, 73 BR 721 (Bk. Ct., CD Cal, 1987) (debtor's chapter 13 post-confirmation earnings continue to be property of estate) and In re Littke, 105 BR 905 (Bk. Ct., ND Ind 1989) (automatic stay continues during chapter 13 plan) with Laughlin v United States, 98 Br 494 (D Neb. 1989) (undistributed and future property ceases to be property of estate at confirmation of chapter 13 plan) and In re Nicholson, 70 BR 398 (Bk. Ct. D Colo 1987) (secured creditor need not seek relief from stay after debtor's post-confirmation default in a chapter 13 plan). One solution is to have the trustee hold the remainder interest during the term of the chapter 12 or chapter 13 plan. The practical upshot, though, is that any reorganization plan which includes a dower interest valuation problem should address its impact.

Dower can also be involved as a fraudulent transfer. Assume an insolvent debtor who owns real estate and who, within the year preceding his bankruptcy, gets married. By marrying the debtor, his wife would automatically obtain a dower interest in his real estate; this transfer could very well qualify as a fraudulent transfer under 11 USC 548(a)(2). The question, of course, is whether the marriage would constitute "reasonably equivalent value" in exchange for the granting of dower.

Cases on this issue are noticeably absent and one can only speculate as to how a court would rule. However, 11 USC 548(d)(2) may give some clue, when it defines "value" as not including an unperformed promise to furnish support to the debtor. Further, courts have held that "love and affection" is not adequate consideration in determining fraudulent transfer cases involving family members. In re Treadwell, 699 F2d 1050 (11th Cir. 1983); In re Porter, 37 BR 56 (Bk. Ct., ED Va 1984). Unfortunately, these cases involve voluntary transfers by debtors,

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[3]Real estate taxes have priority over a dower interest. See Robbins v Barron, 32 Mich 36 (1875) (valid tax title cuts off dower rights).

transfers that take place by operation of law.[4] While 11 USC 101(50) ines "transfer" in its broadest sense and includes both voluntary and voluntary transfers, the 6th Circuit has ruled that a correctly held foreclosure sale is not a fraudulent transfer under 11 USC 548, notwithstanding the literal language of the statute. In re Winshall Settlor's Trust, 758 F2d 1136 (6th Cir. 1985). Hence, it is unclear whether the 6th Circuit would adopt the strict position that the creation of the dower interest could be set aside as a fraudulent transfer.

An analysis of dower in bankruptcy cases is largely ignored, probably because most practitioners relegate it to the status of an academic exercise. Yet this anachronistic relic of feudal England still exists in modern bankruptcy practice. Bankruptcy attorneys would do well to dust off their lawbooks on occasion to re-examine the issue of dower.

RECENT BANKRUPTCY DECISIONS:

The following are summaries of recent court decisions that address important issues of bankruptcy law and procedure. These summaries were prepared by Jahel H. Nolan with the assistance of Patrick E. Mears and Larry A. Ver Merris.

In re Wolverine Radio Co., 1991 WL 45657 (6th Cir. Mich.). This opinion authored by Judge Ralph B. Guy Jr., addresses the effect of a bankruptcy case on the Michigan Employment Security Commission's ("MESC"), power to assign, to a purchaser of a Debtor's assets, the Debtors rate of contribution to Michigan's Unemployment Trust Fund. Wolverine Radio Co. Inc., ("Debtor") appealed and MESC cross appealed from an order of the District Court reversing the bankruptcy court's order prohibiting MESC from assigning the experience rating of the Debtor to the Debtor's statutory successor, JOSI Broadcasting Co., ("JOSI") or charging JOSI's experience account for unemployment compensation paid to former employees of the Debtor who were not employees of JOSI.

Examining first the jurisdictional issue raised by MESC, the Sixth Circuit held that, pursuant to 11 U.S.C. § 505(a), bankruptcy courts have jurisdiction to hear and determine the amount and legality of unemployment compensation taxes incurred by a Chapter 11 debtor. However, because the Debtor had no personal stake in the outcome of the controversy as to the contribution rate assessed to JOSI by MESC and JOSI's prospective tax liability had no practical impact on the implementation of Wolverine's reorganization plan, the rehabilitation of the Debtor or the administration of the Debtor's estate, the bankruptcy court had no jurisdiction under 11 U.S.C. § 505(a) to adjudicate the tax liability of JOSI.

Relying on In re Quattrone Accountants Inc., v. I.R.S., 895 F.2d 912 (3rd Cir. 1990) the Court concluded that the bankruptcy courts jurisdiction over a case involving non-debtors should be determined solely by 28 U.S.C. § 1334(b). The Court found that Debtor could be affected by the MESC/JOSI controversy. In

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[4]Courts are split on the analogous issue of whether a pre-petition renunciation of an inheritance can be set aside as fraudulent transfers. Cf. In re Atchison, 101 BR 556 (Bk. Ct., SD Ill 1988) (no fraudulent transfer) with In re Stevens, 112 BR 175 (Bk. Ct., SD Tex 1989) (fraudulent transfer).

addition, the MESC filed a claim in the bankruptcy and obtained creditor sta Although the Court acknowledged that there was a possibility that the MESC/J dispute could ultimately have no effect on the Debtor, it could not conclude advance that the dispute would have no conceivable effect.

The Court then analyzed at the extent of the bankruptcy court's jurisdiction starting with 28 USC § 157. The Sixth Circuit found the action to be a core proceeding because it involved the dischargeability of debts and the confirmation of a plan.

The Court then addressed Wolverine's argument that MESC may not assign the Debtor's experience rating, including the Debtor's negative reserve balance and liability for former employees, to the purchaser of assets in a sale free and clear of liens, claims, and interests under 11 U.S.C. § 363(f). The Court found that MESC's assignment of successor liability to JOSI via MESC's transfer of Wolverine's experience rating did not violate the reorganization plan nor clearly conflict with any provisions of the Bankruptcy Code. The transfer of Wolverine's experience rating applied also to MESC's use of unemployment compensation payments to former Wolverine employees. The transfer of the chargeable benefits components were merely one of the three factors provided by statute for establishing an employer's experience rating. Finding no frustration of federal law in MESC's transfer of Wolverine's experience rating, the Sixth Circuit likewise found no prohibition against MESC's utilizing the chargeable benefits component.

The Court's holding with regard to the transferability of Wolverine's experience rating applied not only to the chargeable benefits component but also to the account building component which the Court found was directly related to the employer's employment history and was merely another component in calculating the experience rating. However, the Court modified its holding in the same manner as the District Court and found that the negative reserve balance should be reduced by the amount of MESC's allowed claim for unpaid taxes against the Debtor. The Court stated that through 11 U.S.C. §§ 101(4), (11), 1129(a)(9)(C), and 1141(d) Congress legislated the equivalent of payment as of the date the bankruptcy petition was filed that discharges the debt by virtue of confirmation of a plan. Therefore, it would be in conflict with those provisions to allow MESC to charge JOSI a higher contribution rate based on a debt discharged by a plan to which MESC was bound.

In re Corango Resources Ltd., Adv. Pro. No. 90-72456. (E.D. Mich. March 1, 1991). This decision authored by District Judge Avern Cohn arose from an appeal by certain shareholders of a Michigan corporation from an order of the bankruptcy court for the Eastern District of Michigan regarding a preference claim brought by a Chapter 7 trustee. Robert H. Golden, Armand D. Kunz, and Robert Cohenour were shareholders of Corango Resources Ltd., the Debtor in the initial bankruptcy action. Golden, Kunz, and Cohenour filed appeals arguing that the United States Bankruptcy Court erroneously ruled that certain real property located in Pentwater, Michigan, belonged to Corango and that payments of $3,336.06 to Robert Golden; $7,027.78 to Kunz; $7,000 to Cohenour out of the proceeds of the sale of the Pentwater property were preferential payments and avoidable under 11 U.S.C. § 547(b). Appellants, Golden and Kunz, a partnership, also contested the Courts ruling that a $10,000 payment made to the partnership was on account of an antecedent debt and also avoidable.

The facts underlying this adversary proceeding involved the execution of a quit claim deed conveying Pentwater property to Corango from Channel View Company on April 20, 1981. In exchange for 10,350 shares of Class B Common Stock in Corango, Channel View Company executed and recorded with the Oceana County Register of Deeds the quit claim deed for the Pentwater property on April 20, 1981. The deed contained no limiting language indicating that

conveyance of the Pentwater property was subject to any type of agency or ust agreement between Channel View and Corango. On July 17, 1981, Channel iew and Corango entered into a stock subscription agreement in which Corango agreed to sell the Pentwater property and to issue to Channel View Class B Common Stock in the amount of the net proceeds received from the sale minus expenses. This agreement was never recorded. Corango never carried the property on its books as an asset. Rather, this realty was listed as an asset held for the benefit of Channel View.

On February 14, 1986, Channel View was dissolved by order of the Oakland County Circuit Court. The order designated A. F. Kamer et. al. as assignees of Channel View entitled to its remaining assets subject to a judgment in favor of A & A Properties, Ltd. In the same case, Corango entered into a consent judgment with A & A on December 9, 1985, which granted A & A judgment against Corango in the amount of $72,500 at 12% interest from the date of its entry. Satisfaction of the judgment was to be made solely from the proceeds received by Corango from the sale or mortgage of the Pentwater property. At a Board meeting held on December 21, 1987, it was revealed that both Kunz and Golden as individuals had advanced funds to Corango to pay expenses related to the Pentwater Property.

In order to continue to meet expenses and protect their investment in the property, Kunz and Golden executed a $25,000 mortgage with Corango on the Pentwater property, which mortgage was never recorded. The minutes also reflected that the directors decided to sell the Pentwater property and to pay Golden and Kunz, the partnership, $10,000 to effectuate the closing. The property was sold on June 30, 1988. Once closing costs and the A & A judgment were paid, Kunz directed that the balance of the proceeds of the sale be paid to Corango. There was no indication from the meetings minutes that Channel View or its assignees received any compensation from the sale in accordance with the subscription agreement.

Due to joint pretrial statements stipulating to the receipt of money by the appellees within 90 days of bankruptcy, the bankruptcy court determined that it would decide only whether the property transferred was the property of the Debtor in order to resolve the trustee's preference claim.

The District Court was satisfied that the bankruptcy court did not err when it determined that the Pentwater property belonged to Corango. Judge Cohn stated that the deed transferring the property from Channel View to Corango was executed almost three months prior to the subscription agreement and recorded. That deed reflected no intention to establish a trust or agency relationship. In order to effectively alter the nature of Corango's ownership interests as expressed in a recorded deed Corango and Channel View would have had to record the subscription agreement as well.

In addition, the Court found that even if a trust or agency relationship did exist between Corango and Channel View in 1981, that relationship ended by early 1986. By that time Corango had entered into a consent judgment with A & A in which it agreed to pay $72,500 plus interest obtained solely from the proceeds of the sale of the Pentwater property. The language of the consent judgment led to the conclusion that Corango decided that the property could be used to satisfy its own debts and not those of Channel View. Most importantly, the Court concluded, on February 14, 1986, Channel View ceased to exist as a legal entity. At that point it was doubtful that the subscription agreement remained binding on Corango. Even if it did, the minutes of the February 2, 1988, Corango board meeting revealed no interest on the part of Corango in compensating Channel View or its assignees out of the proceeds of the sale.

The Court went on to analyze Golden and Kunz's claim that the $10,000 received for legal services relating to the closing on the Pentwater proper was a contemporaneous exchange. The Court found that the $10,000 payment wa intended to satisfy an antecedent debt thus the bankruptcy courts ruling was not clearly erroneous.

In re Doors and More, Inc., Case No. 90-20155-R (E.D. Mich. April 5, 1991). This opinion was rendered by Judge Steven Rhodes. On November 16, 1990, Attorney J. Michael Hill filed a Chapter 11 petition on behalf of Doors and More, Inc. (the "Debtor"). On January 22, 1991, Hill filed an application for an order authorizing the Debtor to retain him accompanied by a biography of J. Michael Hill, P.C. The United States Trustee objected to the application stating that it was not signed by the Debtor and it did not comply with the 11 U.S.C. § 327(a), Bankruptcy Rule 2014(a), and local Bankruptcy Rule 3.01 (E.D.M.). In addition, it was not accompanied by the necessary verified statement from the professional to be employed. The United States Trustee also noted that the grammatical, typographical, and spelling errors appearing throughout the application and biography obscured the meaning and the possible import of the application.

The objection was set for hearing on February 25, 1991. On February 22, 1991, Hill filed an amended application to appoint attorneys for Debtor in possession again accompanied by a biography of J. Michael Hill, P.C.

At the hearing the Court sustained the United States Trustee's objections and denied the application. It also found that Hill was not competent to represent the Debtor in a Chapter 11 proceeding. The Court recognized that only under the rarest of circumstances would the Trustee be deprived of the privilege of selecting his own counsel. Nevertheless, the Trustee selection of counsel was subject to some restrictions.

The Court relied in 11 USC § 327(a) and stated that in bankruptcy cases, the interests of parties other than the party selecting the attorney are directly at stake. Thus the court must consider whether the selection is in the best interest of the estate and whether it will aid in the estate's administration.

In a Chapter 11 case, an attorney must be familiar with the bankruptcy code, bankruptcy rules, and the local rules. The Court believed that Hill had demonstrated in several different instances that he could not provide competent representation of the estate and that it would not be in the best interests of the estate to approve his appointment.

In re Barnes, 1991 WL 42692 (Bkrtcy. E. D. Mich.) This opinion authored by Judge Arthur Spector involved a motion for relief from stay filed by General Motors Acceptance Corporation ("GMAC"). A voluntary Chapter 13 petition was filed on June 11, 1990, by Floyd Barnes, Jr. ("Debtor"). Debtor's plan was confirmed without objection on October 19, 1990. The plan provided that the Debtor would continue land contract payments on his home through the Chapter 13 Trustee's Office. The plan further provided that after the land contract default had been cured, GMAC would begin receiving payments on its loan to the Debtor for the purchase of a 1989 Oldsmobile automobile.

On January 4, 1991, GMAC filed a motion for relief from the stay and/or adequate protection. In its motion, GMAC contended that it had agreed to the plan with the understanding that it would receive monthly payments from the Chapter 13 Trustee. It had recently been informed by the Chapter 13 Trustee that it would not be receiving any funds for another five months. It also alleged that the 1989 Oldsmobile was depreciating in value due to use or misuse.

ne Court found that the plan clearly explained the payments to GMAC would be made for several months. In addition, there was an attachment to the plan which set forth in great detail the effect of the plan upon individual creditors clearly explaining that GMAC would receive 28 monthly payments commencing on the 7th month after confirmation.

The Court went on to say that upon confirmation the terms of the plan became binding on GMAC and all other creditors. GMAC had made no allegations of fraud, deceit, or trickery on the part of the Debtor in proposing the plan and obtaining confirmation. Thus, the Court concluded that there was nothing unfair or inequitable about holding GMAC to the terms of the plan.

The Court also stated that it had recently seen many motions of this type, with the disproportionate number emanating from GMAC, and wanted to alert counsel that this was not an issue which was subject to serious debate. Therefore, unless GMAC could offer a good faith argument for the extension modification or reversal of existing law, Bankruptcy Rule 9011(a) sanctions would be considered in the event a similar motion was filed in the future. Nevertheless, Judge Spector granted GMAC's motion due to the fact that the vehicle was not insured.

In re Sanglier, 124 BR 511 (Bankr. E.D. Mich. 1991). This opinion, also authored by Bankruptcy Judge Spector, involved the filing of a voluntary Chapter 7 petition by Thomas and Diane Sanglier ("the Debtors"). In their schedules, the Debtors disclosed that they owned a home valued at $51,000 subject to a mortgage of $36,000. The Debtors claimed an exemption under 11 U.S.C. 522(d)(1) of $10,430 in the home. Lombardi Food Company filed a proof of secured claim in the amount of $33,830.18 to which no objection was filed. The Debtors received their discharge on June 2, 1989. On July 3, 1990, the Debtors filed a motion to reopen their case to permit them to seek to avoid Lombardi's judicial lien pursuant to 11 U.S.C. 522(f)(1).

First, the Court found that exemptions are fixed as of the date of the bankruptcy petition and the Debtors were correct in asserting that the value of their residence on that date was the appropriate inquiry for purposes of determining the extent to which their right of exemption was impaired by Lombardi's lien.

Judge Spector concluded that Lombardi's lien remained valid to the extent of $23,400.15. The Court looked to Section 522(f)(1) which states that a judicial lien may be avoided to the extent that such lien impairs an exemption to which the Debtor would have been entitled. The Court said the limiting language implies that to the extent a judicial lien does not impair Debtor's exemption, there is no avoidance.

Judge Spector did not believe that the "Debtor takes all" reasoning used in other cases constituted sufficient justification to ignore the express limitations in Section 522(f). It stated that the cases in support of the Debtor engrafted a Section 506-style lien avoidance option on to Section 522(f) which was a result completely at odds with the language of the statute. Therefore, the Court held that Section 522(f)(1) did not permit a Debtor to avoid a judicial lien to the extent it exceeded the amount by which a Debtor's otherwise available exemption would be impaired.

In re Voelker, 123 BR 749 (Bankr. E.D. Mich. 1990). This opinion, rendered by Bankruptcy Judge Spector, addresses the issue of whether farm land rental income constitutes farm income in order to determine whether Debtors qualify for Chapter 12 relief. Otto and Anita Voelker ("Debtors") filed for relief under Chapter 12 on June 16, 1989. The case was dismissed on April 4, 1990, on motion of the McCormicks ("Creditors") who claimed that the Debtors were ineligible for

Chapter 12 relief. The Debtors then filed another Chapter 12 petition on Au 31, 1990. The Creditors subsequently filed a motion to dismiss the Chapter case pursuant to 11 U.S.C. § 1208(c) on the grounds that the Debtors were n "family farmers" and therefore not eligible for Chapter 12 relief.

11 USC § 101(17)(a) requires that the Court look to the taxable year preceding the taxable year in which the case was filed. Thus, in the prior motion, the Court focused on whether the Debtors owned or operated a farming operation in 1988 because the petition had been filed in 1989. However, since the present case was commenced in 1990, the Court was required to determine whether the Voelkers owned or operated a farming operation in 1989.

The Court also found that the fact that the Debtors operated a family farm in 1989 did not suffice to qualify them to file a Chapter 12 petition in 1990. The Debtors were also required to prove that they received more than 50% of their 1989 gross income from farming operations.

After listing the sources of the Debtors' gross income, the Court stated that the critical question was whether $31,200 in rentals, which comprised over 50% of the Debtors' 1989 gross income, constituted farm income. The factors used by the Court to determine whether cash rent farm land may be considered income from farming operations were: 1) whether the Debtors' operation was a continuing one; 2) whether there was a physical presence of family members on the farm; 3) whether the Debtor owned traditional farm assets; 4) whether leasing out land is a form of scaling down previous farm operations; 5) the form of the lease; and 6) whether the Debtor ceased all of its own investment of labor and assets to produce crops or livestock. The Court found in favor of the Debtors in regard to all of the necessary factors and accordingly held that the Debtors were family farmers and were eligible for Chapter 12 relief.

In re Fletcher Oil Company, Inc., 124 BR 501 (Bankr. E.D. Mich. 1990). In this bankruptcy decision rendered by Judge Arthur J. Spector, Fletcher Oil Company, Inc. (the "Debtor), leased property to Second National Bank on August 5, 1977. On August 2, 1982, the Debtor sold the property by land contract to the Elm Lawn Cemetery Perpetual Care Fund. Frederick Fletcher and Richard Fletcher were each shareholders, officers, and directors of both the Debtor and the Cemetery Fund. The Debtor deeded the property to the Fund on August 22, 1984, after receiving $170,000. The deed was executed on behalf of the Debtor by the Fletchers and delivered to themselves in their capacity as Fund Trustees. The Bank was advised of this conveyance and made monthly rental payments to the Fund starting in August of 1982. The lease, the land contract, and the deed were never recorded. The Debtor filed for relief under Chapter 11 on September 13, 1988. Shortly thereafter, the Debtor commenced an adversary proceeding against the Cemetery Company, the Elm Lawn Cemetery Perpetual Care Fund, the Fletchers, and the Trustees of the Fund. Count 1 of the complaint sought to avoid the unrecorded conveyance from the Debtor to the Fund pursuant to 11 U.S.C. § 544(a)(3). Cross motions and counter motions for summary judgment were thereafter filed.

The Court began its analysis by looking at 11 U.S.C. § 544(a) which provides that a trustee shall have the rights and powers of, a bona fide purchaser of real property. Pursuant to 11 U.S.C. § 1107(a), this strong-arm power of the Trustee also vests in the debtor in possession.

The Court identified the issue as whether the plaintiff could use this power to set aside the conveyance of the property to the Fund. The answer turned on whether a subsequent purchaser of the property could have attained "bona fide purchaser" status under Michigan law. The Court noted that Michigan has a race notice statute and that the case law in Michigan clearly holds that a subsequent purchaser is not protected against those interests of which he is held to have constructive notice. The Fund argued that a subsequent purchaser would have

n charged with constructive notice by virtue of the Bank's open possession the property. The Debtor conceded that the Bank's possession would have served as constructive notice but argued that it would not have constituted constructive notice of the Fund's interest and it is only the Fund's interest which the plaintiff sought to prime.

The Court stated that Michigan law clearly holds that open possession may put a subsequent purchaser on notice regarding the rights of someone other than the possessor. To support its conclusion, the Court cited Corey v. Smalley, 106 Mich. 257 (1895). The Corey case concluded that one who purchases land occupied by another is chargeable with notice of the rights of the occupant. The Court then looked to Spring v. Raymond, 134 Mich. 84 (1903). The Supreme Court in Spring, concluded that possession by a tenant served as constructive notice of the rights of the landlord since an inquiry directed to the tenant would reveal the landlord's interest in the property. Judge Spector concluded that constructive notice applied to such facts as a reasonable, diligent inquiry would have disclosed and that possession of property may constitute constructive notice of the rights of someone other than the person in possession.

The next issue the Court decided was whether the facts of the present case warranted the conclusion that a subsequent purchaser would have been chargeable with notice of the Fund's interest. The Court concluded that the Debtor had offered no evidence to contradict the contention that the Bank would have advised a prospective purchaser that the Fund was its landlord and owner of the property. Thus, an inquiry directed to appropriate officials of the Bank would have disclosed the Fund's interest in the property.

The Court's next question was whether a reasonably diligent inquiry by a prospective purchaser would necessarily have included questions directed to the Bank. Citing Converse v. Blumrich, 14 Mich. 108 (1866), the Court concluded that a person is chargeable with constructive notice where having the means of knowledge, he does not use them. The Court continued by saying the potential purchaser cannot be bound to do more than apply to the party and interest for information and will not be responsible for not pushing his inquiries further unless the answer which he receives corroborates the prior statements or reveals the existence of other sources of information.

After a detailed analysis of the Converse case, the Court concluded that a potential purchaser could not have conducted a reasonable inquiry regarding the Bank's rights without contacting the Bank directly. The Court went on to say that the duty to inquire of the tenant is more clearly defined when, as in the present case, there was no recorded lease. The Court held that a prudent purchaser would have sought to obtain information directly from the Bank regarding the Bank's rights in the property and that such an inquiry would have disclosed the Fund's interests. Therefore, the conveyance to the Fund would prevail over the claim of a subsequent purchaser from the Debtor and the plaintiff could not avoid the Debtor's conveyance to the Fund pursuant to Section 544(a)(3). The Fund's Motion for Summary Judgment as to Count 1 of the complaint was granted and Debtor's Motion for Summary Judgment was denied.

STEERING COMMITTEE MEETING MINUTES:

A meeting was held on April 19, 1991 at noon at the Peninsular Club.

1. A financial update was given concerning the Attorney Lounge. To date there are total pledges of $3,200.00, of which $2,650.00 has been collected so far. Mark Van Allsburg indicated that he should shortly be in a position to start ordering furniture.

2. An update was given concerning the Third Annual Bankruptcy Section Seminar to be held at Shanty Creek on August 15 - 17, 1991, and the proposed brochure was approved.

3. A brief update was given concerning the Sixth Circuit Judicial Conference to be held at the Grand Traverse Resort in June, 1991, and a reception to be sponsored by the Bankruptcy Section of the Federal Bar Association.

4. A brief report was given by your Editor concerning the possibility of going to a bi-monthly (every 2 months) format for the Newsletter in light of the continuing difficulty in obtaining lead articles. It was the consensus of the Committee that they would prefer to keep the Newsletter a monthly publication and, if necessary, publish the same without a lead article. Any persons who are interested in contributing to this publication, please contact me.

5. Under new business, Mark Van Allsburg advised that Maury Root has now retired and that Michael Ley is the new Deputy Clerk. Also, as of May 1, 1991, the Bankruptcy Court will be closed to the public at 4:30 p.m.

6. Also under new business, Mark Van Allsburg advised that the new official bankruptcy filing forms have just come out and will become effective August 1, 1991. Although he had not had a chance to compare such forms with those presently being used, he indicated that unless there were substantial substantive changes in the new forms that the Court would probably continue to accept the forms presently being used (petition, schedules, statement of financial affairs, etc.) for a short period of time after August 1.

7. The next Steering Committee meeting, per the January, 1991 Newsletter, will be held on the 3rd Friday in May, that being May 17, 1991, in the Gold Room at noon at the Peninsular Club.

Larry A. Ver Merris

LOCAL BANKRUPTCY STATISTICS

The following is a summary of the number of bankruptcy cases commenced in the United States Bankruptcy Court for the Western District of Michigan during the period from January 1, 1991 through March 31, 1991. These filings are compared to those made during the same period one year ago, and two years ago.

	1/1/91 - 3/31/91	1/1/90-3/31/90	1/1/89-3/31/89
Chapter 7	1,335	983	825
Chapter 11	47	34	31
Chapter 12	3	6	3
Chapter 13	472	397	342
Totals	1,857	1,420	1,201

EDITOR'S NOTEBOOK:

It was recently announced that Bankruptcy Judge Ray Reynolds Graves has been appointed Chief Bankruptcy Judge for the United States Bankruptcy Court for the Eastern District of Michigan for a 4-year term commencing April 14, 1991. Judge Graves succeeds Judge Steven W. Rhodes as Chief Judge for the Eastern District. Congratulations to Judge Graves on this appointment.

Larry A. Ver Merris