

FILED

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

DEC 06 1984

CLERK
U.S. BANKRUPTCY COURT

In re:

Case Number:

ROBERT J. GASIOR
CONSTANCE L. GASIOR

EF7-84-00539

Debtor.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND
ORDER DECLARING MILK DIVERSION PAYMENTS
NOT TO BE A PART OF THE ESTATE

Debtors Robert J. and Constance L. Gasior, by Attorney Steven R. Cray, having filed a Motion for Determination of Property of the Estate; and a hearing having been held; and the Debtors appearing by counsel; and Attorney Peter F. Herrell, Trustee of the above captioned estate, appearing on behalf of said estate; and the matter being submitted on briefs; the Court, being fully advised in the premises, FINDS THAT:

1. In January, 1984, the dairy herd of Debtors Constance L. and Robert J. Gasior was sold. The proceeds of the sale were paid to a creditor with a security interest in the herd.

2. On January 31, 1984, the Debtors and the United States Department of Agriculture Commodity Credit Corporation (CCC) entered into a "Contract to Participate in the Milk Diversion Program". (The Debtors signed the contract on January 18 and CCC signed on January 31).

3. Only those who were actively engaged in the production of milk on November 29, 1983, and who could provide evidence of milk production during the 1982 calendar year were eligible to participate in the Milk Diversion Program (the Program).

4. Under the participation contract the Debtors agreed, inter alia, to reduce the amount of milk they marketed for commercial use, to not sell cows except in limited ways and to complete certain paperwork; CCC agreed to make future cash payments to the Debtors. Payments made prior to March 31, 1985, are "preliminary payments" which may be recovered if the terms of the contract have not been fulfilled.

5. On March 23, 1984, the Debtors filed for relief under Chapter 7 of the Bankruptcy Code.

6. The Debtors' "Joint Statement of Financial Affairs" reveals that they received \$1,800 a year from non-farm employment in 1982 and 1983, and that Mr. Gasior is a student and Ms. Gasior is a housewife and part-time church secretary.

7. On July 11, 1984--and after the Bankruptcy Trustee asserted an interest in Program payments--the Debtors filed amended schedules which listed "Income to be received from Milk Diversion Program" on Schedules B-2 (personal property) & B-4 (property claimed as exempt).

8. Election of Remedies. In the absence of express legislative declaration to the contrary, courts have been reluctant to extend the "relatively harsh" election of remedies

doctrine to statutory causes of action. Newport News Shipbuilding & Dry Dock v. Director, 583 F.2d 1273, 1277 (4th Cir. 1978), cert. denied, 440 U.S. 915 (1979).

9. Even assuming that the Debtors, who acted under economic duress, Paragraph 6 supra, can be said to have "elected" a remedy by claiming some of the Program payments as exempt, this Court will not apply the election of remedies doctrine in this case to prohibit a determination of the Trustee's interest under the Bankruptcy Code.

10. Property of the Estate. The Debtors argue that the Program payments are not property of the estate because they are "earnings from services performed by an individual debtor after the commencement of the case". 11 U.S.C. sec. 541(6); see In re Hammond, 35 B.R. 219 (Bankr.W.D.Okla. 1983) (payments due under anti-competition agreement are not property of the estate).

11. The Trustee joins issue on the question of whether the payments are made for post-petition services. The crux of the Trustee's response is found at page 3 of his reply brief:

In this case, it appears that the paperwork required by the Milk Diversion Program must be completed by someone.

However, the agreement not to market milk in excess of a reduced limit and not to sell cows except in limited ways appears to have been completed as debtors have set forth in their stipulated facts that their dairy herd was sold. Thus, it is highly unlikely, if not impossible, for the debtors to market milk from cows which have already been sold.

12. However, the terms of the participation contract are not limited to milk produced by the cows available to the Debtors on

November 29, 1983. The Debtors must forbear, for example, from leasing a fresh herd and marketing more than the agreed upon quantity of milk.

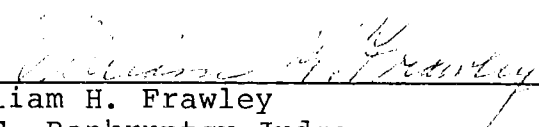
CONCLUSION OF LAW

Payments made under the Contract to Participate in the Milk Diversion Program are earnings from services performed by the Debtors after the commencement of the above captioned bankruptcy proceeding.

ORDER

IT IS ORDERED THAT payments made under the January 31, 1984, Contract to Participate in the Milk Diversion Program should be, and the same hereby are, declared not to be a part of the above captioned bankruptcy estate.

Dated: December 6, 1984.



William H. Frawley
U. S. Bankruptcy Judge