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MEMORANDUM

TO: ELEVENTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM:

RE: DOWER RIGHTS AND MORTGAGES

DATE: May 4, 2004

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This case involves a mortgage signed by Brent Knapp and his wife, Amie Knapp, as husband and wife. The mortgage granted an interest in their home as additional collateral for the outstanding balance of a promissory note to National City Bank of Michigan/Illinois ("Bank") that Mr. Knapp's company, Grand Rapids Auto Action, Inc. had previously obtained and had defaulted upon. The mortgage was granted in exchange for the Bank agreeing to forbear from exercising its right to foreclose on the note and the underlying indebtedness.

When the Bank sought to foreclose on the mortgage, Ms. Knapp asserted that her dower rights were superior to the Bank's interest, and requested relief on that basis. The basis of her argument was that Mr. Knapp executed the Promissory Note and Forbearance Agreement in his individual capacity and not as the legal entity of Brent Knapp and Amie Knapp, husband and wife. In addition, the Mortgage references "a Note of even date herewith". Because on the date the mortgage was executed there was no Promissory Note executed (only the Forbearance Agreement) the trial court ruled that the language secured a non-existent obligation. Since there was no mutual obligation of Mr. and Mrs. Knapp on the Note or Forbearance Agreement, the trial court held that there were no sums secured under the mortgage and the mortgage was discharged.

A woman possesses an inchoate dower right in any mortgagee property. Dower is defined as a widow's right to "the use during her natural life, of one third (1/3) part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage..." A wife's inchoate right of dower is a contingent estate that vests on the death of her husband.

The appellate court ruled that although Ms. Knapp possesses an inchoate right of dower which "is entitled to protection as well before as after it has become vested, and no act of the husband alone can prejudice this right," she may, however, surrender her dower right by joining in a mortgage.

The appellate court ruled that the Mortgage is clearly describing the Forbearance Agreement and because the Forbearance Agreement contains a clause which incorporates the Loan Documents (including the Promissory Note) that Ms. Knapp's inchoate dower right is subordinate to the Bank's interests. Here, the Bank got "lucky", as the court made a decision that treating substance over form in this instance would provide injury to the Bank and a windfall to Ms. Knapp. However, the moral of the story is that lenders and lender's counsel need to be careful and particular in how an obligation and a collateral security position is defined and documented.

If you have any questions or comments regarding this decision or other similar matters, please contact me at (248) 359-6326 or by e-mail at edw@maddinhauser.com.