

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In Re:)	Bankr. No. 91-50133
)	
)	Adversary Case No. 94-5016
KENDALL L. GRAY)	
aka KEN GRAY)	Chapter 7
LAURI A. GRAY)	
Debtors.)	
)	
)	MEMORANDUM OF DECISION RE:
DENNIS C. WHETZAL, Chapter 7)	RECOVERY OF COMMISSIONS
Trustee, and)	
KENDALL L. GRAY)	
)	
Plaintiffs,)	
vs.)	
)	
CAPITOL AMERICAN LIFE)	
INSURANCE COMPANY)	
)	
Defendant.)	

The matter before the Court is the amended complaint filed May 1, 1995 by Plaintiff Kendall L. Gray and Plaintiff/Trustee Dennis C. Whetzal for an accounting and payment of certain commissions on insurance policy renewals. This is a related, non core proceeding that has been referred to this Court for entry of a final judgment pursuant to 28 U.S.C. § 157(c)(2) and an Order of the United States District Court for the District of South Dakota entered November 2, 1995. This Memorandum and subsequent judgment shall constitute findings and conclusions under F.R.Bankr.P. 7052. As set forth below more fully, the Court concludes that a judgment should be entered in favor of Plaintiffs.

I.

The Court's findings and conclusions set forth in the Court's Memorandum of Decision and Order entered August 10, 1995 regarding

Defendant's Motion for Summary Judgment are incorporated herein. In the Decision and accompanying Order, the Court ruled on several questions of law. As is relevant here, the Court concluded that

consistent with Capitol American's letter to Debtor dated June 25, 1993, only paragraph 9 of the COMMISSION SCHEDULE AND VESTING PROVISIONS will be applied in this adversary proceeding to determine whether a breach of the Agreement has occurred. Capitol American did not file a counterclaim seeking injunctive relief or another remedy for a breach of Part E.

The Court also set forth the unanswered material questions of fact that needed to be addressed at trial:

Paragraph 9 states all vested commissions are forfeited if a former sales representative "*replaces any policy written under this Agreement with a policy issued by another insurance company; or, induces or attempts to induce any CAPITOL policyholder to cancel, lapse or fail to renew and [any?] issued by CAPITOL*" (Italics added). The record to date does not show that Debtor *replaced* any policy. The Capitol American policies that the Schofield, Wood, Matt, and Arend families held are not a part of this record. The new policies that Debtor sold these families are not in the record. Moreover, the Court would need expert testimony on whether the new policies rendered the Capitol American policies superfluous or otherwise "replaced" them. Absent such information, the Court cannot find that Debtor sold policies that directly or indirectly replaced Capitol American policies. As counsel for Debtor noted, some policies pay benefits regardless of similar coverage with any company. That information is relevant to the issue at hand. Likewise, there is nothing in the present record to indicate that Debtor ever induced or attempted to induce the Schofield, Wood, Matt, and Arend families to cancel or let lapse any of their Capitol American policies.¹

Finally, the present record also does not establish

¹ Testimony received at the punitive damages hearing from Rhonda Schofield, Lawrence Schofield, and Glenda Matt indicates that Debtor did not induce them to cancel any Capitol American policy. Counsel will need to decide whether there would be any benefit in making them testify again on that issue.

that Debtor tried to persuade Matthew J. Wyman to work for Aegon. At the punitive damage hearing, both Matthew Wyman and Debtor had rather dubious recollections of his conversations with the other. There was no evidence to support either witness's testimony. Absent additional evidence at trial, the Court cannot conclude that Debtor breached paragraph 9 by trying to persuade Matthew Wyman to sell insurance for Aegon.

After Defendant's Motion for Summary Judgment was denied, a trial was held October 23, 1995. Appearances included Robert M. Nash for Plaintiffs and Patricia A. Meyers for Defendant. Testimony was received from Plaintiff Kendall Gray and Peter D. Miller, in-house counsel for Defendant. Pursuant to the parties' agreement, the Court also received by transcript after trial, the testimony of Matthew J. Wyman that he gave at a punitive damages hearing on February 16, 1995. In addition to exhibits received at previous hearings, the Court also received a summary of the unpaid commissions and interest prepared by Plaintiffs and some sample insurance policies.

II.

Based on the additional evidence presented at the trial, the Court concludes that Plaintiff-Debtor Kendall Gray did not breach Paragraph 9 of the Marketing Agreement. Therefore, Defendant Capitol American Life Insurance Company is not entitled to withhold vested commissions on policy renewal premiums that Debtor has earned to date or will earn hereafter.

Foremost, there is no evidence that Debtor sold to the Schofield, Wood, Matt, and Arend families any policies from his new companies that replaced a Capitol American policy or rendered them

superfluous. All policies that Debtor sold for Capitol American and many that he sold for Aegon USA or American Republic, his new companies, were supplemental health insurance policies. The insureds could carry as many as they wanted. While some terms of these various supplemental health insurance policies may be similar, each supplemental policy would pay regardless of coverage by another policy.

Second, there is no evidence that Debtor ever induced or attempted to induce the Schofield, Wood, Matt, or Arend families to cancel or let lapse a Capitol American policy. As Debtor explained, he never did so because he would lose his renewal commissions on some of them and because the insureds could continue to benefit from Capitol American's premium rebate program. That Debtor could collect higher first-year commissions on sales for Aegon USA or American Republic or that some policy holders dropped Capitol American policies after purchasing new ones from Debtor is not sufficient evidence that Debtor indeed induced or attempted to induce them to do so. Moreover, the families' testimony (received at the punitive damages hearing) supported Debtor's testimony.

Finally, there is no reliable evidence that Debtor recruited Matthew J. Wyman to leave Capitol American to work for Aegon. Debtor's, Peter Miller's, and Matthew Wyman's recollections of Debtor's telephone call to Matthew Wyman was hazy. None of the witnesses was more credible than the others. However, as Debtor stated, there is a possibility that Matthew Wyman recalled a

telephone conversation with his superior, not with Debtor. There was no evidence from Defendant to rebut that. Further, the evidence is clear that Debtor called Matthew Wyman principally about another matter, not specifically to recruit him to work for Aegon. Therefore, the Court concludes that the evidence more clearly shows that Debtor did not violate Paragraph 9 of the Agreement by trying to recruit Matthew Wyman to work for Aegon.

All questions of law and fact having now been addressed, the Court concludes that a judgment should be entered in favor of Plaintiffs. Defendant Capitol American shall turn over to Trustee Dennis C. Whetzal all commissions earned pre-petition plus the statutory rate of interest. Defendant Capitol American shall turn over to Plaintiff-Debtor Kendall Gray all commissions earned post-petition plus the statutory rate of interest and shall resume paying all renewal premiums hereafter earned. No punitive damages will be awarded.

Dated this _____ day of December, 1995.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk
(SEAL)

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)	ORDER GRANTING
DENNIS C. WHETZAL, Chapter 7)	JUDGMENT FOR PLAINTIFFS
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KENDALL L. GRAY)	
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Plaintiffs,)	
vs.)	
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CAPITOL AMERICAN LIFE)	
INSURANCE COMPANY)	
)	
Defendant.)	

In compliance with and recognition of the Memorandum of Decision Re: Recovery of Commissions entered this day,

IT IS HEREBY ORDERED that a judgment shall be entered in favor of Plaintiffs. Counsel for Plaintiffs shall submit a proposed judgment.

So ordered this _____ day of December, 1995.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk

(SEAL)