

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
FAX (605) 224-9020

June 3, 1996

Dennis C. Whetzal, Esq.
Plaintiff-Chapter 7 Trustee
Post Office Box 8285
Rapid City, South Dakota 57701

Mr. Kendall L. Gray
Plaintiff-Debtor
4349 Meadowwood Drive
Rapid City, South Dakota 57702

Robert M. Nash, Esq.
Counsel for Plaintiffs
Post Office Box 1552
Rapid City, South Dakota 57709

Subject: **Whetzal v. Capital American Life Insurance Co.,
(In re Kendall L. and Lauri A. Gray),**
Adversary No. 94-5016;
Chapter 7; Bankr. No. 91-50133

Dear Gentlemen:

The matter before the Court is the application for compensation filed by Plaintiffs' counsel, Robert M. Nash, and the objection thereto filed by Plaintiff-Debtor Kendall L. Gray. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court will approve Attorney Nash's compensation only to the extent that it relates to compensation from the bankruptcy estate, not from Plaintiff-Debtor Kendall Gray.

Brief Summary of Facts. Kendall L. and Lauri A. Gray filed a Chapter 13 petition on April 24, 1991. The case was converted to a Chapter 7 proceeding by Order entered August 12, 1993.

On April 19, 1996, Chapter 7 Trustee Dennis C. Whetzal filed an application to employ Attorney Robert M. Nash to "represent the bankruptcy estate's interests" in an adversary proceeding against Capitol American Insurance Company regarding commissions due Debtor Kendall Gray. The application to employ stated compensation would be:

Twenty-five percent (25%) of amounts recovered, plus twelve percent (12%) of any amounts realized from future renewals, plus sales tax and costs, if this matter is

settled prior to trial.

Forty percent (40%) of amounts recovered, plus twenty-five percent (25%) of any amounts realized from future renewals, plus sales tax and costs, if resolved at trial.

The application to employ was reviewed by the United States Trustee and approved by the Court on April 19, 1996. The case file indicates that the application to employ was not served on Debtor Kendall Gray and that he was not given an opportunity to object to it.

On May 19, 1994, Trustee Whetzal and Debtor Kendall Gray filed a complaint against Capitol American. The matter went to trial. The Court entered a Memorandum of Decision on December 21, 1995 that awarded to Trustee Whetzal, on behalf of the bankruptcy estate, all commissions earned pre-petition and awarded to Debtor personally all commissions earned post-petition. Interest was allowed but the Court did not award any punitive damages.¹ The bankruptcy estate was to receive approximately \$33,392.80 plus accruing interest.

On April 30, 1996, Attorney Nash filed a notice and an application for compensation of services and reimbursement of expenses related to the adversary proceeding against Capitol American. He sought \$15,086.47 in compensation (40% of \$37,716.18), sales tax of \$905.19, and costs of \$920.95 for a total award of \$16,912.61. Attorney Nash also sought approval "that the Trustee, or Debtor Kendall L. Gray, shall disburse 25% of each future monthly payment, plus sales tax, without the necessity of future fee applications as provided in the Application and Order Approving Employment of Attorney[.]" Objections to the fee application were due May 20, 1996.

Debtor Kendall Gray filed a late objection on May 28, 1996. Therein, he stated that he had not agreed that Attorney Nash should get 40% of the judgment or 25% percent of the renewals commissions. He said he first learned of this fee arrangement when he received the fee application. He also said he had tried unsuccessfully to work something out with Attorney Nash.

Discussion. Attorney Nash was representing two different interests in the adversary against Capitol American. He

¹ Following the Memorandum of Decision, Attorney Nash submitted and the Court entered a judgment and an amended judgment that provided that all commissions would be paid through Trustee Whetzal pending further notification to Capitol American. That payment scheme was not part of the Court's Memorandum of Decision and may be deleted by the Court in a second amended judgment unless Trustee Whetzal or Attorney Nash can justify why post-petition commissions should not be paid directly to Debtor Kendall Gray.

Re: Kendall L. Gray
June 3, 1996
Page 3

represented Trustee Whetzal and the bankruptcy estate regarding the commissions that were bankruptcy estate property. Attorney Nash also represented Debtor Kendall Gray personally regarding the commissions that would not be estate property, that is, those commissions that were earned after the bankruptcy petition date. Trustee Whetzal had authority to employ Attorney Nash for the bankruptcy estate but he did not have authority to employ Attorney Nash to represent Debtor Kendall Gray's personal interests. Consequently, the Order authorizing Attorney Nash's employment could extend only to the estate's interest in the lawsuit. The employment order did not serve as a contract between Debtor Kendall Gray and Attorney Nash.

The fee application will be approved to the extent that it allows compensation and reimbursement from estate funds. Therefore, the estate shall pay Attorney Nash the \$16,912.61 due from the estate's award from the adversary proceeding. However, Kendall Gray will have to pay Attorney Nash based on whatever fee arrangement they had regarding the post-petition commissions that Debtor may earn.

The Court's jurisdiction over the fee arrangement between Attorney Nash and Plaintiff-Debtor Kendall Gray is limited to a question of reasonableness under 11 U.S.C. § 329(b). Attorney Nash was not employed by Plaintiff-Debtor Kendall Gray as an estate professional under §§ 327(a) or (b).² Further, the post-petition commissions are not estate property.

An order will be entered allowing Attorney Nash \$16,912.61 from the bankruptcy estate. No order will be entered regarding what fees Plaintiff-Debtor Kendall Gray must pay Attorney Nash from post-petition commissions he receives from Capitol American. Pursuant to § 329(a) and F.R.Bankr.P. 2017(b), Attorney Nash must disclose the compensation arrangement between himself and Plaintiff-Debtor Kendall Gray. That arrangement will be examined under § 329(b) and F.R.Bankr.P. 2017(b) only if questioned as unreasonable by Debtors, the United States Trustee, or the Court *sua sponte*.

Sincerely,

Irvin N. Hoyt
Chief Bankruptcy Judge

INH:sh

² The adversary was a related, non core matter that the District Court referred to this Court under 28 U.S.C. § 157(c)(2).

Re: Kendall L. Gray

June 3, 1996

Page 4

CC: case file (docket original; copies to parties in interest)
United States Trustee

