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	)	DEFENDANT'S MOTION FOR
Trustee, and	)	SUMMARY JUDGMENT
KENDALL L. GRAY	)	
	)	
Plaintiffs,	)	
vs.	)	
	)	
CAPITOL AMERICAN LIFE	)	
INSURANCE COMPANY	)	
	)	
Defendant.	)	

The matter before the Court is the Motion for Summary Judgment filed by Defendant and Plaintiffs' response thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum and accompanying Order shall constitute findings and conclusions under F.R.Bankr.P. 7052. As set forth below more fully, the Court concludes that Defendant's Motion should be denied.

I.

Debtor Kendall L. Gray and the Chapter 7 Trustee Dennis C. Whetzal, filed a complaint on May 19, 1994 against Capitol American Life Insurance Company. Debtor and Trustee Whetzal sought an accounting of commissions owed to Debtor as a former sales representative of Capitol American, an order requiring Capitol American to pay the past-due and the future commissions as they become due, and attorneys fees, costs, and punitive damages arising

from Capitol American's alleged oppressive and vexatious refusal to pay Debtor his commissions.

Capitol American answered on June 16, 1994. It stated Debtor had been paid all commissions due and that Debtor was not entitled to future commissions because he had breached the terms of his contract with Capitol American.

On February 16, 1995, a hearing was conducted pursuant to S.D.C.L. § 21-1-4.1 to determine whether discovery under Plaintiffs' punitive damages claim should be permitted. In addition to the punitive damages claim, the Court took under advisement a jurisdictional issue raised by Defendant and Plaintiffs' request to file an amended complaint. By letter memorandum entered March 23, 1995 and Order entered May 1, 1995, the Court struck Plaintiffs' count for punitive damages and permitted Plaintiffs to amend their complaint only to clarify the breach of contract claim. The Court also found that the parties could consent to referral by the District Court under 28 U.S.C. § 157(c)(2) or that this Court would enter only proposed findings and conclusions.

Capitol American filed a Motion for Summary Judgment on April 14, 1995 and a brief in support of the motion. Capitol American argued Plaintiff could not show that the contract was enforceable because Plaintiff had admitted he violated the contract by selling insurance for a new company to Capitol American policyholders.

Plaintiffs filed their Amended Complaint on May 1, 1995. Plaintiffs filed a brief in opposition to Defendant's Motion for Summary Judgment on May 2, 1995.[1] Capitol American answered the Amended Complaint on May 3, 1995.

On May 2, 1995, Plaintiffs filed a brief in opposition to Capitol American's Motion for Summary Judgment and the affidavits of Debtor and Jon Arnold in support of their position. Plaintiffs argued that a material question of fact exists on whether Debtor violated the terms of his agreement with Capitol American. They further argue that a second issue exists on whether a violation constitutes grounds for Capitol American to withhold Debtor's commissions.

Capitol American filed a reply brief on May 12, 1995. Capitol American again argued that deposition testimony and testimony received at the punitive damages hearing show that Debtor violated his agreement with Capitol American when he sold accident income policies to current Capitol American customers holding similar policies. Capitol American also protested that Plaintiffs raised a new issue under S.D.C.L. § 53-9-8 in their brief and argued that Ohio law governed the parties' agreement.

A hearing on Capitol American's Motion for Summary Judgment was held May 15, 1995. Appearances included Robert M. Nash for Plaintiffs and Patricia A. Meyers for Defendant Capitol American.

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[1] Defendant's brief has portions of a hearing transcript attached. However, the attachment is not an official transcript and cannot be accepted as such.

Taken in a light most favorable to Plaintiffs, the present record before the Court establishes the following[2]:

On March 3, 1987, Debtor signed a Marketing Agreement with Capitol American to sell insurance. Capitol American's representative signed the Marketing Agreement on March 25, 1987. The stated effective date was February 3, 1987. Part E set forth "PROHIBITED CONDUCT." Paragraph 2 of Part E provided that a former sales representative would not sell insurance for another company for one year after leaving Capitol American. Paragraph 3 provided that a former representative would not solicit or retain a Capitol American representative or employee to work for him or another company. Paragraph 4 stated:

> The REPRESENTATIVE agrees that he will not, for himself or on behalf of another, for a period of three (3) years after the termination of this Agreement, by either party for any reason, or for a period of one (1) year after any insurance issued by CAPITOL held by the policyholder lapses or is terminated, whichever period is longer, solicit for insurance any policyholder or former policyholder of CAPITOL, or any parent, subsidiary or affiliate of CAPITOL, who was contacted by or sold insurance by the REPRESENTATIVE or any of his subordinate representatives during their association with CAPITOL.

Paragraph 5 set forth the consequence of the stated prohibited conduct:

> In the event of a breach or threatened breach of any obligation of the REPRESENTATIVE contained in this Agreement, CAPITOL may apply to any court of competent jurisdiction for the entry of an immediate order for an injunction restraining such breach; provided, however,

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[2] Since only the breach of contract cause of action remains, facts related solely to Plaintiffs' causes of action for punitive damages are not included.

> that nothing contained herein shall be construed to prohibit CAPITOL from pursuing any other remedy available to it for such breach or threatened breach.

Under the Agreement, Debtor sold only accident policies for Capitol American in South Dakota under the "Farmers Marketing Method." The Agreement stated it would be governed by and construed under Ohio law.

The Marketing Agreement incorporated several attachments: a COMMISSION SCHEDULE AND VESTING PROVISIONS, a SCHEDULE OF COMMISSIONS AND FEES, an Amendment 1, and an Amendment 2. Paragraph 9 of the COMMISSION SCHEDULE AND VESTING PROVISIONS stated (emphasis added):

> **All vested commissions shall be forfeited, and no monies otherwise payable to the REPRESENTATIVE will be paid to the REPRESENTATIVE if, for himself or on behalf of another, the 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, or any parent, subsidiary or affiliate of CAPITOL;** or, solicits, accepts or retains any services of any representative licensed to solicit applications for insurance to be issued by CAPITOL, or any parent, subsidiary or affiliate of CAPITOL, as long as such REPRESENTATIVE is so licensed or within one year after such REPRESENTATIVE has ceased to be so licensed; or, solicits, accepts or retains any services of any employee or any other person associated with CAPITOL, or any parent, subsidiary, or affiliate of CAPITOL, as long as such person is so associated or within one year after such person has ceased to be so associated; or, after the termination of this Agreement between the REPRESENTATIVE and CAPITOL, by either party for any reason, the REPRESENTATIVE, without the written consent of CAPITOL, for himself or on behalf of another, uses as stated on the first page of this AGREEMENT or as subsequently amended, the Marketing Method to engage in any life, annuity or accident and health insurance business.

The Agreement was drafted by Capitol American. Debtor had no input

regarding the Agreement's content or terms.

For a little over five years, Debtor sold only accident insurance policies for Capitol American. His commission rate increased over time.

On approximately March 27, 1992, Debtor terminated his relationship with Capitol American. He was vested in his commissions at that time. When he left, Debtor understood that he could lose his rights to renewal commissions if he sold a policy of another company that replaced a Capitol American policy. Debtor did not sell insurance for over one year thereafter. For a while, Capitol American paid Debtor his commissions as renewal premiums came in.

Debtor went to work for Aegon USA and American Republic, two other insurance companies, in the spring of 1993 and solicited business primarily in rural South Dakota. Debtor did not use any lists of Capitol American policyholders when soliciting business for Aegon. Debtor never solicited any Capitol American representative to become a sales agent for Aegon.

After leaving Capitol American, Debtor solicited present or former Capitol American policyholders to sell them insurance. In April 1993, Debtor sold a cancer policy from Aegon to Shirley Wood. Debtor knew Shirley Wood was a former Capitol American policyholder because he had sold her an accident policy in early 1988. After subsequent contact by a Capitol American representative, Shirley Wood canceled her new policies and retained her Capitol American

policies.

Sometime after July 23, 1993, Debtor sold Lawrence and Rhonda Scoffield a cancer policy from one of his new companies. At the time of the sale, he learned that they were Capitol American policy holders.

Debtor sold a cancer policy to Stanley and Glenda Matt. They already had a similar policy with Capitol American and informed Debtor of that at the time of the sale. Contrary to Debtor's advise, the Matts subsequently dropped their cancer policy with Capitol American.

Debtor sold Clark Arends cancer, disability, and major medical policies from Aegon. Debtor previously had sold Clark Arends an accident policy from Capitol American but Debtor did not know whether that policy was still in effect when he made the new sales.

Capitol American ceased paying Debtor any commissions and advised him so by letter dated June 25, 1993. As stated in the letter, Capitol American's basis for its action was that Debtor had violated paragraph 9 of Exhibit 1 by soliciting former Capitol American policyholders, by soliciting a Capitol American representative to work for Aegon, and by using confidential information about Capitol American policyholders. Capitol American based its decision on information supplied by agents in the field and on conversations that Barbara R. Bandera, a marketing manager for Capitol American, had with policyholders. The commissions withheld from Debtor by Capitol American through October 10, 1995

totaled at least $15,616.00.

II.

Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." F.R.Bankr.P. 7056 and F.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)(quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein). Although inferences may be drawn from the underlying facts, the matter must be viewed in the light most favorable to the party opposing the motion. *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992)(quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986), and cites therein). Further,

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial.

Amerinet, 972 F.2d at 1490 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161 (1970) (cite therein).

The Court must consider the actual quantum and quality of proof necessary to support liability under the applicable law. *Hartnagel*, 953 F.2d at 396. Where motive and intent may be at

issue, disposition of the matter by summary judgment may be more difficult. *Compare Amerinet*, 972 F.2d at 1490 (cite therein).

III.

A. Questions of Law.

Before the Court can determine whether a material question of fact exists, it must first address some legal questions. Only when those questions are answered can the Court determine if additional evidence is needed to determine whether Debtor breached his agreement with Capitol American and whether that breach approriately resulted in a forfeiture of his commissions.

Governing Law. Although Debtor is a South Dakota resident doing business in South Dakota, South Dakota law says Ohio law may govern pursuant to Debtor and Capitol American's Agreement except to the extent that it may be against public policy. *Overholt Crop Insurance Service Co. v. Travis*, 941 F.2d 1361, 1366 (8th Cir. 1991)(citing *State ex. rel. Meierhenry v. Spiegel, Inc.*, 277 F.2d 298, 300 (S.D. 1979)); *see also Durham v. Ciba-Geigy Corp.*, 315 N.W.2d 696, 700 (S.D. 1982), and *Green v. Clinic Masters, Inc.*, 272 N.W.2d 813, 814-15 (S.D. 1978). Debtor has raised public policy defenses of restraint of trade, enforcement of a contract of adhesion, and enforcement of a penalty clause. Each will be addressed under South Dakota law.

Ambiguities in the Agreement. A contract is ambiguous when it is reasonably capable of being understood in more than one sense. *Carr v. Benike, Inc.*, 365 N.W.2d 4, 6 (S.D. 1985). There is one

ambiguity in the Agreement that must be resolved against Capitol American. *Heinert v. Home Federal Savings & Loan Assoc.*, 444 N.W.2d 718, 720 (S.D. 1989); *Rozeboom v. Northwestern Bell Telephone Co.*, 358 N.W.2d 241, 244-45 (S.D. 1984); *Hicks v. Brookings Mall, Inc.*, 353 N.W.2d 55, 56 (S.D. 1984)(ambiguous language in form contract should be construed most stongly in favor of the non drafting party); *see also American State Bank v. Adkins*, 458 N.W.2d 807, 809 (S.D. 1990)(discussion of construing ambiguities in an contract).

The Agreement contains two distinct "prohibited conduct" sections. Part E, Paragraphs 2 and 3 of the Agreement state a former sales representative may not sell insurance for another company for one year after leaving Capitol American and that a former representative may not solicit or retain a Capitol American representative or employee to work for him or another company. Paragraph 4 of Part E prohibits a former sales representative from soliciting insurance business from a current or former Capitol American policy holder "who was contacted by or sold insurance by the REPRESENTATIVE or any of his subordinate representatives during their association with CAPITOL." Paragraph 5 states Capitol American may seek an injunction or any other available remedy in the event of a breach or threatened breach of the prohibited conduct described above.

Paragraph 9 of the COMMISSION SCHEDULE AND VESTING PROVISIONS addresses more specific prohibited conduct and sets forth a more

direct consequence for a breach. Paragraph 9 says a former sales representative will forfeit all vested commissions if he "replaces any policy written under this Agreement with a policy issued by another insurance company," "induces or attempts to induce any CAPITOL policyholder to cancel, lapse or fail to renew and [any?] issued by CAPITOL," solicits a Capitol American sales representative or employee to work for another company, or uses the Farmers Marketing Method to "engage in any life, annuity or accident and health insurance business."

The prohibited conduct described in paragraph 9 that is tied to a forfeiture of commissions is more specific than the prohibited conduct that justifies Capitol American in seeking an injunction. Mere solicitation of a former policy holder is a violation of Part E but under paragraph 9 a Capitol American policy must be replaced or the policy holder must be induced to cancel or let lapse a Capitol American policy before commissions are forfeited. Therefore, the Court finds that *only* the specific conduct described in paragraph 9 may result in a mechanical forfeiture of commissions. *Enchanted World Doll Museum v. Buskohl*, 398 N.W.2d 149, 152 (S.D. 1986). Paragraph 5 of Part E does not limit Capitol American to injunctive relief but permits it to pursue "any other remedy available to it . . . ." However, had Capitol American intended these other remedies to include a forfeiture of Commissions, it, as the drafter, could have so stated in its form agreement and eliminated any confusion for Debtor.

> Any doubts arising from an ambiguity of language in a contract should be resolved against the speaker or writer, because he can, by exactness of expression, more easily prevent mistakes in meaning than the one with whom he is dealing.

Production Credit Assoc. v. Wynn, 474 N.W.2d 735, 740(S.D. 1991); *see also Enchanted World Doll Museum*, 398 N.W.2d at 152. Instead, Capitol American chose in paragraph 9 of the COMMISSION SCHEDULE AND VESTING PROVISIONS to outline what specific conduct would result in the forfeiture of commissions. Therefore, 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.

Restraint of Trade or Penalty Clause. The parties dispute whether the forfeiture provision of paragraph 9 of the COMMISSION SCHEDULE AND VESTING PROVISIONS of the Agreement is an unenforceable restraint of trade clause under S.D.C.L. §§ 53-9-8 and 53-9-11, an unenforceable penalty, or an enforceable liquidated damages clause. This is a question of law on which Plaintiffs bear the burden since they challenge the Agreement on these grounds. *Safari, Inc. V. Verdoorn*, 446 N.W.2d 44, 46 (S.D. 1988); *Prentice v. Classen*, 355 N.W.2d 352, 355 (S.D. 1984). The Court need not look at such a clause with disfavor but rather must examine the Agreement as a whole, the situation of the parties, the subject matter, and the circumstances surrounding its execution. *Prentice,* 355 N.W.2d at

355. Based on that examination, the Court finds that paragraph 9 is an enforceable liquidated damages clause.

Foremost, paragraph 9 of the COMMISSION SCHEDULE AND VESTING PROVISIONS is not a noncompetition or restraint of trade clause because it did not prohibit Debtor from selling insurance. *Overholt*, 941 F.2d at 1367; *Masden v. Travelers' Insurance Co.*, 52 F.2d 75, 78 (8th Cir. 1931). Instead, paragraph 9 contained specific nondisclosure and nonsolicitation terms designed to protect Capitol American from Debtor's detrimental use of confidential information about Capitol American policyholders to further his own interests. Such nondisclosure and nonsolicitation clauses are upheld in South Dakota if they truly protect confidential information and are not unreasonable. *Id.* at 1367 (citing *American Systems v. Rezatto*, 311 N.W.2d 51, 56-59 (S.D. 1981)). A review of paragraph 9 leads the Court to conclude that it truly protects confidential information about who holds Capitol American policies and that paragraph 9 is reasonable upon application to a sales representative. See *Masden*, 52 F.2d at 77-78. The Agreement validly conditioned Debtor's right to receive commissions on his compliance with the Agreement. *Id.* at 78.

Further, S.D.C.L. § 53-9-11 does not apply in this case because Capitol American and Debtor did not have an employer/employee relationship. Unlike the litigants' employer/employee relationship in *Rezatto*, 311 N.W.2d 51, Debtor contracted with Capitol American as a sales agent, not as an

employee. Therefore, the time and territory limitations for covenants not to compete as set forth in § 53-9-11 do not apply.

Having determined that paragraph 9 is not an unenforceable restraint of trade clause, the next question is whether paragraph 9 is an unenforceable penalty. Under S.D.C.L. § 53-9-4, a pure penalty clause in a contract for nonperformance is void. The exception, stated in § 53-9-5, is if the contract includes a term that predetermines the amount of damages because ascertainment of actual damages at the time of a breach would be impracticable or extremely difficult. Under § 53-9-5 a liquidated damages clause will be upheld if (1) damages in the event of breach are incapable or very difficult of accurate estimation at the time the contract was made; (2) there was a reasonable attempt by the parties to fix compensation; and (3) the stipulated amount bears a reasonable relation to probable damages and is not disproportionate to any damages reasonably to be anticipated. *Safari, Inc.,* 446 N.W.2d at 46; *Prentice*, 355 N.W.2d at 355.

Elements 1 and 3 present little difficulty. At the time the contract was made, it virtually would have been impossible for Capitol American and Debtor to estimate accurately the damages that Capitol American would suffer if Debtor breached paragraph 9. While losses due to non renewal by present policyholders might be estimated based on current renewal rates, there is no reasonable way to calculate how much future business may be lost if Capitol American loses present policyholders to another insurance company.

Further, the Court finds that a forfeiture of Debtor's future commissions bears a reasonable relationship to Capitol's probable damages if paragraph 9 is breached. If Debtor's violations of paragraph 9 caused Capitol American to lose present and future policyholders (based on fewer referrals from present policy holders, for example) then it is reasonable that Debtor's loss of commissions would reflect Capitol American's losses. Both parties' losses under a breach of paragraph 9 would reflect on how many or how few policyholders continued their coverage with Capitol American over an indeterminable period of time.

The second element of the liquidated damages test -- whether there was a reasonable attempt by the parties to fix compensation -- is more difficult to address. Debtor had no input when the Agreement was drafted. Capitol American admits it was a form contract. However, the Court finds that the second element was satisfied also.

As the Agreement was drafted by Capitol American, Debtor's loss of his commissions was directly tied to *specific* acts by Debtor in violation of paragraph 9 of the COMMISSION SCHEDULE AND VESTING PROVISIONS. Therefore, the Court finds that Capitol American made a reasonable attempt to fix the damages in relation to its reasonably anticipated damages. The Agreement drafted by Capitol American did not state that *any* breach of *any* term of the Agreement

would result in Debtor's loss of his future commissions.[3] Instead, the Agreement provided that only the particular actions described in paragraph 9 would result in a forfeiture of commissions. *Compare Safari, Inc.*, 446 N.W.2d at 46. There is no evidence of great disparity between Capitol's damages for the alleged breach and Debtor's loss of commission. *Prentice*, 355 N.W.2d at 355. Accordingly, the Court finds that the forfeiture component of paragraph 9 constitutes an enforceable liquidated damages provision.

Contracts of Adhesion. A contract of adhesion is defined as a standardized contract form offered on essentially a "take it or leave it" basis and where the weaker party has no realistic choice as to its terms. Black Law Dictionary 38 (5th Ed. 1979). Under South Dakota case law, an adhesion contract is not enforceable if, for example, it is unconscionable. *See Rozeboom*, 358 N.W.2d at 244-45. Here, the Court finds that while the Agreement was a contract of adhesion, it was not applied in an unfair or unconscionable manner. While Debtor could not freely negotiate the terms of his contract with Capitol American, Debtor could have sold policies for another insurance company. Therefore, the Agreement will not be deemed unenforceable as a unconscionable contract of adhesion.

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[3] The forfeiture provision of paragraph 9 of the COMMISSION SCHEDULE AND VESTING PROVISIONS would not be an enforceable liquidated damages clause for a breach of the general terms of Part E because the second element of the test would not be met.

C. Questions of Material Fact.

The record shows that Debtor solicited one or more Capitol American policyholders and tried to sell them Aegon policies. However, as discussed above, Paragraph 9 of the COMMISSION SCHEDULE AND VESTING PROVISIONS requires a more particular action by Debtor if his commissions are to be forfeited. 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.[4]

Finally, the present record also does not establish 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.

An order will be entered denying Capitol American's motion for summary judgment. A trial will be scheduled to receive evidence only on the questions of material fact described above.

Dated this _____ day of August, 1995.

BY THE COURT:

_____
Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA A. JOHNSON, ACTING CLERK

By _____
Deputy Clerk

(SEAL)

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[4] 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.

UNITED STATES BANKRUPTCY COURT
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	)	Adversary Case No. 94-5016
KENDALL L. GRAY	)	
aka KEN GRAY	)	Chapter 7
LAURI A. GRAY	)	
Debtors.	)	
	)	ORDER DENYING
DENNIS C. WHETZAL, Chapter 7	)	DEFENDANT'S MOTION FOR
Trustee, and	)	SUMMARY JUDGMENT
KENDALL L. GRAY	)	AND SCHEDULING TRIAL
	)	
Plaintiffs,	)	
vs.	)	
	)	
CAPITOL AMERICAN LIFE	)	
INSURANCE COMPANY	)	
	)	
Defendant.	)	

In compliance with and recognition of the Memorandum of Decision Re: Defendant's Motion for Summary Judgment entered this day,

IT IS HEREBY ORDERED that Defendant Capitol American Life Insurance Company's Motion for Summary Judgment is DENIED; and

IT IS FURTHER ORDERED that a trial to receive evidence regarding the material questions of fact discussed in the Court's Memorandum shall be held Monday, September 11, 1995 at 1:15 p.m. in the Magistrate Courtroom, Room 312, Federal Building and U.S. Courthouse, 515 9th Street, Rapid City, South Dakota. Counsel shall be present at 1:00 p.m. to mark exhibits. **NOTE:** The trial may be rescheduled to Tuesday, September 12, 1995 at 1:15 p.m. if another trial scheduled for that time settles. The Court will advise counsel of any change in the schedule by Order.

So ordered this _____ day of August, 1995.

BY THE COURT:

_____
Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
PATRICIA A. JOHNSON, ACTING CLERK

By _____
Deputy Clerk

(SEAL)