UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:
Stephen and Donna Rohm,
BKY No. 96-34273

Debtors.

Michael Dietz, Trustee of the Bankruptcy Estate of Stephen and Donna Rohm,

Plaintiff, ADV No. 97-3252

v.

Stephen and Donna Rohm, and American Family Life Assurance Company of Columbus,

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Defendants.

This matter came before the Court on February 18, 1998 on Cross-Motions for Partial Summary Judgment by the Trustee and the Debtors. Appearances are as noted in the record. This order is entered pursuant to the Federal and Local Rules of Bankruptcy Procedure.

The issue presented is whether renewal commissions on insurance sales of the Debtors made prior to the filing in bankruptcy, but paid post-petition are property of the bankruptcy estate. It is the position of both the Trustee and the Debtors that the contracts entered between the Debtors and AFLAC control, and this issue is proper for summary judgment.(1)

I.
FACTS

On August 1, 1996, the Debtors filed for bankruptcy protection under Chapter 7. Both Debtors were employed by American Family Life Assurance Company of Columbus (AFLAC) prior to filing bankruptcy and are still employed by AFLAC. Donna Rohm(2) started as an Associate with AFLAC in 1993. She became District Sales Coordinator in 1994. At the time of filing, she was a Regional Sales Coordinator, having obtained that position in 1995. Stephen Rohm also started his employment with AFLAC as an Associate in 1993. At the time of filing, he was a District Sales Coordinator, having achieved that position in 1995.

Both Stephen and Donna Rohm entered into contracts at each level of their employment with AFLAC. At the time of filing, Donna Rohm was employed under both an Associates Agreement and a Regional Sales Coordinator's Agreement. At the time of filing, Stephen Rohm was employed under an Associate's Agreement and a District Sales Coordinator's Agreement.

On February 1, 1998, Donna Rohm resigned her position as Regional Sales Coordinator and is now employed as an Associate with AFLAC. On January 26, 1998, Stephen Rohm resigned his position as District Sales Coordinator and is now employed as an Associate with AFLAC.

The Trustee asserts that the contracts between AFLAC and the Rohms show that no post-petition services of the Debtors are required in order to receive renewal commissions on policies produced by Debtors pre-petition, making those renewal commissions property of the bankruptcy estate. The Debtors assert that the contracts require the Debtors to perform numerous services post-petition, making the renewal commissions property of the Debtors, not property of the bankruptcy estate.

II.
DISCUSSION

A. SUMMARY JUDGMENT IN GENERAL

> Summary judgment shall be entered if: the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

F.R.Civ.P. 56(c).

The moving party has the burden of demonstrating that there is an absence of any genuine issues as to material facts. In re Calstar, 159 B.R. 247, 251 (Bankr.D.Minn. 1993). For the reasons discussed below, partial summary judgment is appropriate in this case.

Property of the estate is defined broadly. Pursuant to 11 U.S.C. Section 541, property of the estates includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. Section 541(a)(6) provides:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property,

> wherever located and by whomever held:
> (6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

The general rule is that renewal commissions are property of the estate if those commissions were earned prior to the commencement of the case. Movitz v. Palmer, 167 B.R. 579, 586 (Bankr.D.Ariz. 1994); Williams v. Tomar, 147 B.R. 461, 472 (S.D.Ill. 1992); In re Kervin, 19 B.R. 190, 193 (Bankr.S.D.Al. 1982). "Renewal commissions which are not conditioned on future services, will be deemed property of the estate." Froid v. F.D.I.C., 109 B.R. 481, 483 (Bankr.M.D.Fl. 1989), citing In re Parker, 9 B.R. 447 (Bkrtcy.M.D.Ga.1981); In re Malloy, 2 B.R. 674 (Bkrtcy.M.D.Fla.1980). The debtor's income will become property of the bankruptcy estate if "all the acts of the debtor necessary to earn it are rooted in the pre-bankruptcy past." In re Sloan, 32 B.R. 607, 611 (Bankr.E.D.N.Y. 1983), citations omitted.

B. THE CONTRACTS

The Trustee asserts that the plain language of the contracts do not require any post-petition services by the Debtors. The Debtors assert that the renewal commissions are dependant upon post-petition services such as: servicing the policies; maintenance of valid licenses; and, affirmatively marketing AFLAC products. They further assert that renewal commissions are not property of the bankruptcy estate as the commissions are only received if the client: (1) renews; (2) pays premiums; and, (3) keeps the agent of record on policy. Further, they argue that remaining employed by AFLAC is necessary in order to receive full payment of the renewal commissions.

In order to determine whether the renewal commissions are property of the bankruptcy estate, it is necessary to examine the language of the contracts to evaluate whether any post-petition services are required to earn renewal commissions.

(1) Associate's Agreement(3)
"Renewal commissions" is a defined term in the Associate's Agreement.

> Renewal Commissions. A renewal commission is defined as that commission which is paid on premiums as earned by AFLAC on insurance policies previously produced by Associate, commencing with the thirteenth (13th) month's premium. Renewal commissions as provided by the

> Schedule of Commissions will be paid as earned on premiums collected after the first year premium, pursuant to the terms and subject to the conditions of Paragraphs 5, 6, and 8 of this Agreement.

Associate's Agreement, Paragraph 4(a)(3)(iii).

Paragraph Five is entitled "Contingent Payment of Renewal Commissions Prior to Termination of this Agreement". It provides that prior to termination of the contract renewal commissions will only be paid if monthly and annual production requirements are met. However, it also gives an Associate a vested right to receive all renewal commissions if the Associate becomes permanently disabled after two years of service with AFLAC. In addition, Paragraph Five states:

> Associate shall be entitled to receive renewal commissions payable under the terms of this Agreement unless Associate who is otherwise entitled to receive renewal commissions engages in any of the conduct prohibited under Paragraph Eight, or should Associate engage in conduct in the performance of Associate's duties and covenants hereunder involving moral turpitude, dishonesty, fraud, deceit, willful misrepresentation, or willful concealment of material facts. Should Associate who is otherwise entitled to receive renewal commissions engage in any such conduct, then, and in such event, the renewal commissions which would otherwise be payable to Associate hereunder shall immediately and automatically become non-payable, and Associate fore (sic) forfeits any right to receive the payment of any renewal commissions as provided for under this Agreement.

Associate's Agreement, Paragraph 5(f).

Paragraph Eight is entitled "Prohibited Conduct". It provides:

> Associate shall not (1) engage in any conduct in the performance of the Associate's duties and covenants hereunder involving moral turpitude, dishonesty, fraud, deceit, willful misrepresentation or willful concealment of a material fact; (2) wrongfully misappropriate or withhold any funds, policies, premiums, receipts, vouchers or other property belonging to AFLAC or to an applicant for insurance; (3) violate any insurance laws or regulation of any state, the violation of which involved

> moral turpitude; or (4) make or knowingly allow to be made any false or misleading statements on any applications or claim or other documents submitted to AFLAC.

Associate's Agreement, Paragraph 8(a).

Paragraph Eight also prohibits the Associate from both changing his/her business address without prior approval from AFLAC and from competition with AFLAC after the termination of the agreement. Engaging in any of the conduct prohibited in Paragraph Eight will result in a forfeiture of renewal commissions.

Paragraph Six is entitled "Contingent Payment of Renewal Commissions At and After Termination of this Agreement". It provides:

> Upon the effective date of termination and after termination of this Agreement, AFLAC's obligation to pay renewal commissions (as defined herein) shall be contingent upon Associate's faithful performance or observance of his or her obligations and covenants hereunder, and Associate shall be entitled to be paid renewal commissions at and after termination ONLY under conditions as follows:
>
> (a) Vesting After Two Years. After two (2) years of service with AFLAC, Associate, upon termination, shall have a vested right to receive 50% of the renewal commissions as earned payable on policies Associate produced so long as a minimum of $25,000 in annualized premium on policies written by Associate remains in force, for life, unless forfeited as hereinafter provided.

Associate's Agreement, Paragraph 6(a).

The Associate's Agreement also provides that: "[e]ither party may terminate this Agreement at will, without cause, upon giving thirty (30) days prior written notice to the other party. Associate's Agreement, Paragraph 9(b).

(2) District Sales Coordinator's Agreement(4)

At the time of filing, a District Sales Coordinator's Agreement between AFLAC and Mr. Rohm was in place. It expressly provided that the terms of the Associate's Agreement were incorporated by reference.

> The duties of a District Sales Coordinator are as follows:
>
> The DC shall recruit and train Associates for the sale of all AFLAC insurance policies and coordinate the activities of

> the Associates assigned to the DC in writing by AFLAC.

District Sales Coordinator's Agreement, Paragraph 3.

The agreement also provides:

> As full compensation for the performance of the DC's duties, the DC shall be paid first year and renewal override commissions on sales of all AFLAC insurance policies made by the DC, and by Associates while assigned in writing to the DC.

District Sales Coordinator's Agreement, Paragraph 5.

Paragraph Six sets out the conditions of vesting. It states:

> (a) Prior to Termination. During the term of this Agreement, first year and renewal commissions shall be paid pursuant to Paragraph Five herein. No production or premium minimum is required as a condition for payment.
> (b) After Termination. After termination of this Agreement, vesting of renewal commissions shall be paid in accordance with the conditions set forth in said Associate's Agreement.

District Sales Coordinator's Agreement, Paragraph 6.

Termination of the District Sales Coordinator's Agreement has no effect on the Associate's Agreement.

(3) Regional Sales Coordinator's Agreement(5)

At the time of filing, a Regional Sales Coordinator's Agreement was in effect between AFLAC and Mrs. Rohm. It provides that the terms of the Associate's Agreement were incorporated by reference in the Regional Sales Coordinator's Agreement. The Regional Sales Coordinator's Agreement superseded any existing District Sales Coordinator's Agreement.

Paragraph Three sets out the duties of the Regional Sales Coordinator. It provides that:

> The RC shall recruit and train Associates for the sale of all AFLAC insurance policies and coordinate the activities of the Associates and the District Sales Coordinators assigned to the RC in

> writing by AFLAC.

Regional Sales Coordinator's Agreement, Paragraph 3.

> Paragraph Five is entitled "First Year and Renewal Override Commissions". It provides:
>
> As full compensation for the performance of the RC's duties, the RC shall be paid first year and renewal override commissions on sales of all AFLAC insurance policies made by the RC, and by District Sales Coordinators, and Associates while assigned in writing to the RC.

Regional Sales Coordinator's Agreement, Paragraph 5.

> Paragraph Six sets out the "Vesting Conditions".
>
> (a) Prior to Termination. During the term of this Agreement, first year and renewal commissions shall be paid pursuant to Paragraph Five herein. No production or premium minimum is required as a condition for payment.
> (b) After Termination. After termination of this Agreement, vesting of renewal commissions shall be paid in accordance with the conditions set forth in said Associate's Agreement.

Regional Sales Coordinator's Agreement, Paragraph 6.

Termination of the Regional Sales Coordinator's Agreement has no effect on the Associate's Agreement.

C. VESTED COMMISSIONS PROPERTY OF THE ESTATE

In evaluating whether post-petition services are required on policies sold by the Debtors, a starting point is the determination of the Rohms entitlements under the contract if they failed to perform any services. During the period where the Rohms were acting as Regional or District Sales Coordinators and when they were acting as only Associates, the Associate's Agreement controlled the vesting of renewal commissions at termination. The Associate's Agreement provides that upon termination an Associate has a:

> vested right to receive 50% of the renewal commissions as earned payable on policies Associate produced so long as a

> minimum of $25,000 in annualized premium on policies written by Associate remains in force, for life. . .

Associate's Agreement, Paragraph 6(a).

At a minimum, each of the Rohms would receive 50% of their renewal commissions on policies sold by them if either they or AFLAC terminated the agreement.

As the Rohms are currently employed with AFLAC, they argue that vesting is not an issue.(6) However, the fact that upon termination the Debtors are entitled to receive 50% of their renewal commissions shows that, at a minimum, half of their commissions are not dependent upon post-petition services. Other courts have also relied on a review of the vesting provisions when determining whether post-petition services are required. In Tomar, the court looked to the fact that: "if the debtor was to terminate the contract or die, and could not possibly perform any future personal services, the payment of commissions would still be made to the debtor or his estate." Williams v. Tomar, 147 B.R. 461, 472 (S.D.Ill. 1992). Based on this finding, the court held that "the entitlement to the commissions is not contingent upon the performance of any future personal services of the debtor." Tomar, 147 B.R. at 473. In Froid, the court acknowledged that post-petition services may help the debtor earn additional renewal commissions, but used the fact that "renewal commissions would still be paid even if the Debtor terminated his relationship with NML" as a factor in holding that no post-petition services were required. Tomar, 147 B.R. at 483.

Therefore, 50% of the renewal commissions earned by the Debtors are not based on post-petition services, as the Debtors would be entitled to those commissions even if they were no longer working for AFLAC.

D. POST-PETITION SERVICES- REMAINING 50% OF RENEWAL COMMISSIONS

In order to examine whether post-petition services are required to obtain the remaining 50% of the renewal commissions, the commissions must be separated into categories. Involved are renewal commissions from two sources: those earned by the Rohms from the sales of others pursuant to the Regional Sales Coordinator's Agreement and the District Sales Coordinator's Agreement; and, those earned from sales made by the Rohms personally.

(1) Renewal Commissions Earned from the Sales of Others are Property of the Debtors

Pursuant to the Regional Sales Coordinator's Agreement, full compensation for Mrs. Rohm while acting as the Regional Sales Coordinator was "first year and renewal override commissions on sales of all AFLAC insurance policies made by the RC, and by District Sales Coordinators, and Associates while assigned in writing to the RC." Regional Sales Coordinator's Agreement, Paragraph 5. In order to receive this compensation, Mrs. Rohm was required to "recruit and train Associates for the sale of all AFLAC insurance policies and coordinate the activities of the Associates and the District Sales Coordinators assigned to the RC in writing by AFLAC." Regional Sales Coordinator's Agreement, Paragraph 3.

Pursuant to the District Sales Coordinator's Agreement, full compensation for Mr. Rohm while acting as the District Sales Coordinator was "first year and renewal override commissions on sales of all AFLAC insurance policies made by the DC, and by Associates while assigned in writing to the DC." District Sales Coordinator's Agreement, Paragraph 5. In order to receive this compensation, Mr. Rohm was required to "recruit and train Associates for the sale of all AFLAC insurance policies and coordinate the activities of the Associates assigned to the DC in writing by AFLAC." District Sales Coordinator's Agreement, Paragraph 3.

It is clear that post-petition services of the Rohms were required under both the District Sales Coordinator's Agreement and the Regional Sales Coordinator's Agreement, with respect to those renewal commissions earned from the sales of those supervised by the Rohms. According to the contracts, the Rohms were required to supervise and train other AFLAC employees. As compensation, they would receive a portion of first year and renewal commissions from those they supervised and trained.(7) Failure to perform their duties under their respective District Sales Coordinator's Agreement or Regional Sales Coordinator's Agreement could result in termination of the contracts, as both agreements could be terminated with 30 days notice by either party. If either agreement were terminated, the Associate's Agreement would remain in full force. The Associate's Agreement does not include a provision for renewal commissions to be earned from sales made by others. Renewal commissions on sales made by others are additional compensation paid to a Regional or District Sales Coordinator for the additional responsibilities of supervising and training that were not required of an Associate. Therefore, all renewal commissions earned by the Rohms while acting as District or Regional Sales Coordinator, which were based on the renewal commissions of those they supervised, are not property of the bankruptcy estate.

(2) Renewal Commissions Earned from Debtors' Sales are Property of the Debtors

The remaining renewal commissions consist of 50% of those commissions earned from the Rohms' individual sales on policies sold pre-petition.

In support of their position that the renewal commissions are based on post-petition services, the Debtors make five arguments. The arguments are: they are required to perform the duties enumerated in Paragraph Two of the Associate's Agreement; renewal commissions are based on actions of the clients; they must meet certain moral requirements; they must meet minimum sales and production requirements; and they must remain employed with AFLAC.

(a) Duties in Paragraph Two Do Not Require Post-Petition Services

> Paragraph Two sets out the duties of the Associate.
> (a) Procure and Maintain Licenses. Associate shall be responsible for procuring and maintaining any resident license. . .
> (b) Solicit Applications. Associate shall solicit applications for insurance polices offered for sale by AFLAC. . .
> (c) Service Accounts. Associate shall service all payroll deduction accounts ("accounts") that Associate initially sells or that are assigned to the Associate by AFLAC. . .
> (d) Other Duties. Associate shall use only promotional material which is furnished to Associate by AFLAC. . .
> (e) Return Policies and Monies. Associate shall return to AFLAC on demand all undelivered policies. . .

Associate's Agreement, Paragraph 2.

This is the paragraph from which the Debtors argue that their renewal commissions are based on post-petition services such as: servicing; maintenance of valid licenses; and, affirmatively marketing AFLAC products. However, Paragraph Two does not make the performance of the duties enumerated in it a contingency upon which renewal commissions are dependant. Pursuant to the Associate's Agreement, the payment of renewal commissions are dependant upon the conditions set out in Paragraph Five which provides:

> Associate shall be entitled to be paid renewal commissions prior to termination ONLY under conditions as follows:
> (a) Monthly Production. In order to receive renewal commissions on premiums from policies produced by Associate, Associate must produce during that month $750 in annualized premium on new policies issued by AFLAC. . .
> . . .
> (d)(8) Annual Production. Upon the

> production by Associate of at least $10,000 of annualized premium on all new policies issued by AFLAC during a calendar year, Associate shall be entitled to receive renewal commissions on premium payments received. . .
>
> . . .
>
> (f) Associate shall be entitled to receive renewal commissions payable under the terms of this Agreement unless Associate who is otherwise entitled to receive renewal commissions engages in any of the conduct prohibited under Paragraph Eight, or should Associate engage in conduct in the performance of Associate's duties and covenants hereunder involving moral turpitude, dishonesty, fraud, deceit, willful misrepresentation, or willful concealment of material facts. Should Associate who is otherwise entitled to receive renewal commissions engage in any such conduct, then, and in such event, the renewal commissions which would otherwise be payable to Associate hereunder shall immediately and automatically become non-payable, and Associate fore (sic) forfeits any right to receive the payment of any renewal commissions as provided for under this Agreement.

Associate's Agreement, Paragraph 5.

Paragraph Five, in conjunction with Paragraph Eight, provides the only requirements in order to receive renewal commissions. The agreement does not explicitly require the performance of those duties mentioned in Paragraph Two in order to receive renewal commissions. Therefore, maintaining licenses and marketing products are not post-petition services required to obtain renewal commissions.

Servicing of payroll deduction accounts is also a duty set out in Paragraph Two. While servicing of payroll deduction accounts is required, the failure to do so does not, pursuant to the language of the agreement, result in the forfeiture of renewal commissions. In fact, an Associate will still receive renewal commissions if the account is assigned to another Associate to service. If servicing of accounts is not a prerequisite to a debtor receiving renewal commissions, such servicing does not constitute post-petition services. Palmer, 167 B.R. at 586; Tomar, 147 B.R. at 472. The natural consequence of failing to service the accounts is not the forfeiture of renewal commissions pursuant to the plain language of the contract. Therefore, servicing is not a condition to receiving renewal commissions.

(b) Actions of Client

The Debtors argue that renewal commissions will only be paid if the client: (1) renews; (2) pays premiums; and (3) keeps the agent of record on the policy. While personal service to clientele post-petition may increase the value of the renewal commissions, if renewal commissions are not conditioned upon those post-petition services, the commissions will be deemed property of the estate. Froid, 109 B.R. at 483; Palmer, 167 B.R. at 583; Tomar, 147 B.R. at 472. It is clear that the work performed to earn the commissions was completed pre-petition. Action by a client do not constitute post-petition services by the Debtors. While additional client contact may result in increased renewals, such contact is not necessary to receiving the renewal commissions.

(c) Moral Requirements

The Debtors also claim that the right to receive commissions is dependent upon the Debtors meeting certain moral and ethical requirements such as not: competing; divulging information; engaging in fraud; and, misappropriating funds. Engaging in any of these acts will result in the Debtors not being paid the renewal commissions to which they otherwise may be entitled. These enumerated divesting events are all affirmative acts that the Debtor is prohibited from engaging in, some of which are criminal. They can not be categorized as post-petition services. See, Williams v. Tomar, 128 B.R. 746, 761 (Bankr.S.D.Ill. 1991).

(d) Minimum Sales and Production Requirements.

The Debtors assert that minimum sales and production requirements exist in order to receive the renewal commissions. This argument does not apply to the Regional and District Sales Coordinator Agreements, as those agreements do not contain any production or premium minimums in order to receive renewal commissions.

While employed as Associates, minimum monthly and yearly sales are required in order to earn renewal commissions. Meeting mandatory production requirements is a post-petition service required in order to collect the full amount of renewal commissions. Because these production requirements are post-petition services, the remaining 50% of the renewal commissions earned by the Rohms under the Associate's Agreement are not property of the bankruptcy estate.

(e) Remaining Employed

The Debtors argue that continued employment is necessary in order to receive the full amount of the renewal commissions. The only renewal commissions remaining to be considered are 50% of the renewal commissions under the Regional and District Sales Coordinator Agreements. If the Rohms do not stay employed by AFLAC, they will clearly not be entitled to 50% of their renewal commissions. Remaining employed by AFLAC is a post-petition service required to obtain a portion of the renewal commissions. Therefore, 50% of the renewal commissions earned by the Rohms under the Regional and District Sales Coordinator Agreements are not property of the bankruptcy estate.

III.
DISPOSITION

Based on the foregoing analysis,

IT IS HEREBY ORDERED THAT: Partial Summary Judgment is GRANTED in part to the Trustee and GRANTED in part to the Debtors.

1. Partial Summary Judgment is GRANTED to the Trustee. The following property is property of the bankruptcy estate:

    a) 50% of the renewal commissions earned from the sales the Debtors made personally under the Associate's Agreement, District Sales Coordinator's Agreement, and Regional Sales Coordinator's Agreement.

2. Partial Summary Judgment is GRANTED to the Debtors. The following property is not property of the bankruptcy estate:

    a) All pre-petition renewal commissions earned from the sales of others under the District Sales Coordinator's Agreement or Regional Sales Coordinator's Agreement;
    b) 50% of the renewal commissions earned from sales the Debtors made personally under the Associate's Agreement; and
    c) 50% of the renewal commissions earned from the sales the Debtors made personally under the District Sales Coordinator's Agreement or Regional Sales Coordinator's Agreement.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: By the Court:

Dennis D. O'Brien
Chief United States
Bankruptcy Judge

(1). AFLAC does not take a position on the cross-motions for summary judgment.

(2). Since the filing of the bankruptcy petition, the Rohms have divorced. Donna Rohm has changed her name to Donn Holden. However, for the purpose of the opinion she will be referred to as Donna Rohm.

(3). Two Associate's Agreements are involved. The first Agreement was entered into by Donna Rohm on 12/10/92. The second Agreement was entered into by Stephen Rohm on 7/2/93. The Agreements are identical.

(4). The District Sales Coordinator's Agreement was signed by Stephen Rohm on 1/1/95.

(5). The Regional Sales Coordinator's Agreement was signed by Donna Rohm on 1/1/95.

(6). The Debtors also argue that the right to receive even these commissions are contingent upon the Debtors meeting certain moral requirements. This argument is not valid, as addressed later in this opinion.

(7). They would also receive renewal commissions earned from their own sales. However, the Rohms were entitled renewal commissions earned from their own sales under the Associate's Agreement, therefore such commissions were not payable as a result of supervising or training other employees of AFLAC.

(8). Subpart (b) is entitled "Temporary Disability" and provides that if an Associate has a temporary disability, renewal commissions will be paid for a period of up to 3 months. Subpart (c) is entitled "Permanent Disability" and provides that, if after 2 years of service, an Associate becomes permanently disabled that Associate will become vested and receive all renewal commissions on policies sold by the Associate. Subpart (e) provides that an Associate is vested after 10 years.