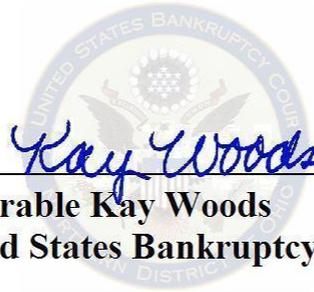


IT IS SO ORDERED.



**Dated: July 25, 2007
08:53:19 AM**

**Honorable Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

JOHN ARDUS,

Debtor.

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CASE NUMBER 03-46018

CHAPTER 7

HONORABLE KAY WOODS

MEMORANDUM OPINION
(NOT INTENDED FOR NATIONAL PUBLICATION)

The following opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnb.uscourts.gov is not the result of direct submission by this court. The opinion is available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002. (Pub. L. No. 107-347).

This cause is before the Court on a Motion for Turnover ("Motion") (Doc. # 12) filed by Andrew W. Suhar, Chapter 7 Trustee,

("Trustee") on January 17, 2007, requesting that debtor John Arduş ("Debtor") turn over certain accounts receivable represented by residual insurance commissions. Debtor's counsel filed Response to Trustee's Motion For Turnover ("Response") (Doc. # 15) on February 7, 2007. The Motion was heard on February 15, 2007. At the hearing, the Court heard arguments from Trustee and Debtor's attorney and took the Motion under advisement. Subsequently, the Court conducted a status conference. Following the status conference, Debtor's counsel filed Debtor's Further Response to Trustee's Motion for Turnover ("Further Response") (Doc. # 18). Attached to the Further Response was a sworn affidavit signed by Debtor on May 14, 2007 ("Arduş Aff."), which incorporated a letter from Debtor to his counsel detailing certain postpetition services provided by Debtor ("Time Sheets"). In addition, Trustee filed the transcript ("Transcript") (Doc. # 17) of the First Meeting of Creditors pursuant to 11 U.S.C. § 341 ("341 Meeting").

This Court has jurisdiction pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B), (E), and (O). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. FACTS

On November 21, 2003 ("Petition Date"), Debtor filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code. Debtor is currently a full-time employee for InfoCision Management Corporation, but previously, for approximately twenty years, he was an insurance broker employed by John Arduş, Inc.

(Tr. at 4-5.) Debtor testified that, on the Petition Date, John Ardus, Inc. was "for all intents and purposes, dormant." (Tr. at 5.) As of the Petition Date, the company was "strictly renewal," because Debtor had not "solicited new business in three years, four years." (Tr. at 8.) Debtor testified at the 341 Meeting that John Ardus, Inc. only received renewal commissions¹ in an amount "between four and \$600 a month." (Tr. at 4.)

According to the Response, as of the Petition Date, Debtor received renewal commissions of \$600.00 per month from three policies, as follows: (i) \$394.00 per month from Policy No. 00853, a Group Health insurance contract owned by Qualchoice (renewal date of July 1, 2004); (ii) \$28.00 per month from Policy No. 4016895, a Group Disability insurance contract owned by Fortis (renewal date of January 9, 2004); and (iii) \$168.00 per month from Policy No. 2501689, a Group Dental insurance contract also owned by Fortis (renewal date of November 11, 2004) (collectively "Renewal Commissions"). (Response at 1.)

As set forth below, Trustee sought information about how and when the commissions were earned.

TRUSTEE: Okay. And what does John Ardus, Inc. do with the money from the renewals?

[DEBTOR]²: It goes to me.

[MR. EPSTEIN]³: Income's included on Schedule I.

¹ A renewal commission is the compensation earned by an insurance broker when an existing client renews a yearly insurance contract.

² In the transcript, "The Witness" was Debtor.

³ While this person was not identified in the Transcript, it is apparent that he is Debtor's counsel, Bruce Epstein, Esq.

TRUSTEE: But how is that an income versus an account receivable?

[MR. EPSTEIN]: Depends on whether I think anything needs to be done to keep the policy open.

TRUSTEE: Right. And I think everything is dormant with the company except to -- except for their collection of the payment of the renewals, correct?

. . .

[MR. EPSTEIN]: I think the question is do you have to do anything now to receive the revenue that's still coming to you?

[DEBTOR]: I have a very few, less than five existing not clients but literally policies on the books that I still attempt to service. I'm still receiving commission from those. That's where that figure comes from. And those could go by the wayside. Any renewal --

[MR. EPSTEIN]: What do you do to service them?

[DEBTOR]: Meet with them at renewal time. Try to -- try to service the account between them and the various insurance companies.

TRUSTEE: I guess I'll need some more information on that.

TRUSTEE: It's my understanding with the renewals is if you did nothing you would get them too so long as --

[DEBTOR]: No.

TRUSTEE: -- they renew.

[DEBTOR]: As long as they renew. If you don't do anything they probably won't renew my guess would be.

(Tr. at 5-7.) Debtor stated that he continued to service the existing contracts postpetition "in order to keep them from

cancelling and thereby to continue my ability to receive compensation." (Ardus Aff. ¶ 3.)

Contending that the Renewal Commissions represent accounts receivable owed to Debtor, Trustee filed the Motion, seeking turnover of the Renewal Commissions to Debtor's bankruptcy estate. Debtor responded that the Renewal Commissions are excluded from property of the bankruptcy estate pursuant to 11 U.S.C § 541(a)(6) because they were earned from services performed postpetition.

II. ISSUE

The issue before the Court is whether the Renewal Commissions are property of Debtor's bankruptcy estate under 11 U.S.C. § 541(a)(1) or excluded as property of the estate pursuant to § 541(a)(6).

III. LAW

Pursuant to § 541(a)(1), when a debtor petitions for bankruptcy relief, an estate is created comprised of all legal and equitable interests of the debtor in property as of the commencement of the case. Proceeds or profits derived from property of the estate are also included in the debtor's estate, except that proceeds or profits earned from services performed by a debtor postpetition are excluded. 11 U.S.C. § 541(a) (West 2007). This narrow exception to the definition of "property of the estate" is often referred to as the "earnings exception," which is intended to further the fresh start policy in the Bankruptcy Code. *In re Golde*, 253 B.R. 843 (Bankr. N.D. Ohio 2000); See also 9A Am. Jur. 2d *Bankruptcy* § 1288 (2007). Section 542(a) requires Debtor to deliver to Trustee all property (or the value of such property)

that may benefit the estate, unless such property is of inconsequential value.

The Sixth Circuit Bankruptcy Appellate Panel ("BAP") in *In re Wicheff*, 215 B.R. 839 (6th Cir. BAP 1998), has addressed the issue of renewal commissions received postpetition, but under circumstances substantially different from the case at bar. The debtor in *Wicheff* received insurance renewal commissions earned by her late husband (who passed away prepetition); there was no question that such commissions were earned entirely prepetition. The BAP held that "if all of the actions required to earn the commissions were completed prepetition," commissions received postpetition became property of the estate pursuant to 11 U.S.C. § 541(a). *Id.* Under such circumstances, the earnings exception in 11 U.S.C. § 541(a)(6) did not apply because the debtor's interest in the commissions vested prior to the petition date. Other circuit courts that have analyzed similar circumstances have arrived at similar conclusions. *Accord In re Wu*, 173 B.R. 411 (9th Cir. BAP 1994); *In re Semel*, 411 F.2d 195, 197 (3rd Cir. 1969) ("All fees and commissions earned and accrued prior to bankruptcy, or relating to services already performed, even though they may be paid thereafter, are assets of the bankrupt estate.").

Unlike the facts in *Wicheff*, however, where there was no question that the commissions were earned entirely prepetition, in the instant case Debtor argues that he performed postpetition services relating to the Renewal Commissions. (Arduus Aff. ¶ 3.)

When, as here, a debtor receives commissions postpetition but performed work both pre and postpetition, the court must determine whether, and to what extent, the debtor's interest in the

commissions had vested as of the petition date. Faced with similar facts, several courts have focused on the employment or other contract between the debtor and the policy holders to determine what services were required by the debtor to earn the commissions.

All Or Nothing Approach

Some courts have followed an "all or nothing" approach, *i.e.*, the renewal commissions are either entirely included or entirely excluded as property of the bankruptcy estate. This approach is based wholly on whether receipt of renewal commissions is dependent upon postpetition services. If any commissions are dependent upon postpetition services, they do not constitute property of the estate. *In re Zahneis*, 78 B.R. 504, 505 (Bankr. S.D. Ohio 1987) ("Where a debtor derives post-petition commissions under a pre-petition contract, and such commissions are dependant upon the continued services of the debtor, they do not constitute property of the estate."). Alternatively, if postpetition services are not so required, the commissions are included as property of the bankruptcy estate.

Where renewal commissions continue after (i) death of the debtor, (ii) termination of the relevant contract, or (iii) employment as agent ceases, courts have held that postpetition services by the debtor are not necessary to generate renewal commissions. Under these circumstances, courts have found renewal commissions to be property of the chapter 7 bankruptcy estate. See *In re Tomer*, 128 B.R. 746, 753 (Bankr. S.D. Ill. 1991), *aff'd*, 147 B.R. 461 (S.D. Ill. 1992) (In the event of debtor's death, vested commissions would be paid to his estate); *In re Froid*, 109 B.R.

481, 482 (Bankr. M.D. Fla. 1989) (Debtor entitled to renewal commissions regardless of whether he remained an agent).

In contrast, where the applicable contract requires a debtor to remain employed by the insurer and to service the policies in order to receive the renewal commissions, courts have excluded such commissions from property of the bankruptcy estate on the basis that postpetition services were necessary to generate the renewal commissions. See *In re Zahneis*, 78 B.R. at 505 (Commissions dependent upon postpetition services do not constitute property of the estate; however, if all acts necessary to earn the renewal commissions occur pre-bankruptcy, then debtor's income passes to trustee as part of the bankruptcy estate.); *In re Selner*, 18 B.R. 420, 421 (Bankr. S.D. Fla. 1982) (Debtor's interest in the renewal commissions is not a vested right, but instead is dependent upon clients' continued satisfaction with the policy.) The rationale behind this analysis is that a trustee cannot compel a debtor to continue to service an account. *In re Tomer*, 128 B.R. at 761.

Allocation Approach

The second approach, highlighted in *In re Wu*, provides for allocation of the commissions based upon whether, and to what extent, debtor must perform services postpetition to earn renewal commissions. 173 B.R. at 414-15. In *Wu*, the Ninth Circuit BAP held that a Court must "first determine whether any postpetition services are necessary to obtaining (sic) the payments at issue." *Id.* at 414. If no postpetition services are required by the contract, the commissions are rooted in prepetition events and, accordingly, such commissions are included in the debtor's bankruptcy estate. On the other hand, if the debtor is required,

by the terms of the contract, to provide some postpetition services, "then courts must determine the extent to which the payments are attributable to the postpetition services and the extent to which the payments are attributable to prepetition services." *Id.* at 414-15. After making this determination, the "portion of the payments allocable to postpetition services will not be property of the estate" and the "portion of the payments allocable to prepetition services or property will be property of the estate." *Id.* at 415. One bankruptcy court in this district has noted that this approach is "more in line with the distinction the Bankruptcy Code makes between prepetition and postpetition property." *In re Golde*, 253 B.R. at 848.

IV. ANALYSIS

In the instant case, Trustee argues that, similar to *In re Wicheff*, Debtor earned the Renewal Commissions prepetition and, as a consequence, Debtor's interest in the Renewal Commissions was vested as of the Petition Date. Accordingly, Trustee urges this Court to find that the Renewal Commissions are property of the estate.

Debtor does not deny that he performed work prepetition to earn the commissions. However, Debtor asserts that in order to continue earning the Renewal Commissions, the policies require postpetition servicing because, without such service, Debtor's clients would cease to pay the commissions. (Tr. at 6-7.) Therefore, according to Debtor, because his right to the Renewal Commissions had not vested as of the Petition Date, they should be excluded from the bankruptcy estate on the basis of the earnings exception.

In the instant case, the Court cannot apply either the "all or nothing approach" or the "allocation approach" because neither party has referenced or submitted any contract to this Court that covers receipt of the Renewal Commissions. Although Debtor states that he performed some postpetition services, there is no basis for this Court to find that Debtor was required to perform any postpetition services to generate the Renewal Commissions. The record only provides the renewal date for each policy and the monthly amount of each Renewal Commission. Debtor's Affidavit merely reports that Debtor "provided ongoing service to the 3 existing contracts, in order to keep them from cancelling and thereby to continue my ability to receive compensation." (Ardus Aff. ¶ 3.) This statement is ambiguous, at best, because it fails to differentiate between Debtor's continued receipt of the Renewal Commissions at issue and future compensation that could be earned by Debtor if the policies were not cancelled, but were renewed again.

Moreover, without a contract to review, the Court cannot determine if the policy holders had any right to cancel the contract or terminate Debtor's receipt of the Renewal Commissions (as opposed to simply not renewing the contracts for additional years). Although the Time Sheets provide an "itemized list of services" Debtor provided for each contract (Ardus Aff. ¶ 4), there is no indication that any of these postpetition services were required to earn the Renewal Commissions. Indeed, the Time Sheets illustrate that, while some work appears to relate exclusively to the current contracts (*i.e.*, billing issues, claim issues, benefits seminar), most of the postpetition services appear to have been

performed to get the policy holders to renew for the following year. Services relating to continued renewal of the policies would be compensated by commissions paid after such renewal (*i.e.*, in future years) and not by the Renewal Commissions at issue.

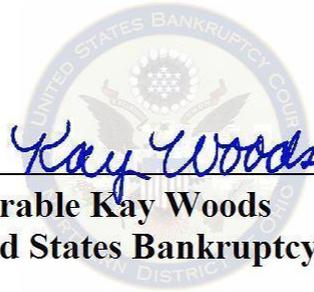
The Court finds that while Debtor did perform some postpetition services, there is no basis to find that any services were required to generate the Renewal Commissions. As a consequence, Debtor earned the Renewal Commissions from prepetition services. Accordingly, this Court agrees with Trustee's position that the Renewal Commissions represent accounts receivable rather than postpetition income. Therefore, the Renewal Commissions should be turned over to Trustee as part of the bankruptcy estate pursuant to 11 U.S.C. § 542(a).

Specifically, Debtor is required to turn over to Trustee: Renewal Commissions from Policy No. 00853 from December 2003 until July 2004 in the amount of \$3,152.00 (8 months x \$394.00 per month); Renewal Commissions from Policy No. 4016895 from December 2003 until January 2004 in the amount of \$56.00 (2 months x \$28.00 per month); and Renewal Commission from Policy No. 2501689 from December 2003 until November 2004 in the amount of \$2,016.00 (12 months x \$168.00 per month).

An appropriate order will follow.

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IT IS SO ORDERED.



**Dated: July 25, 2007
08:53:19 AM**

**Honorable Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

JOHN ARDUS,

Debtor.

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CASE NUMBER 03-46018

CHAPTER 7

HONORABLE KAY WOODS

ORDER

For the reasons set forth in the Court's Memorandum Opinion entered on this date, the Court grants Andrew W. Suhar's (Chapter 7 Trustee) Motion for Turnover filed on January 17, 2007 requesting that debtor John Ardus ("Debtor") turn over certain accounts receivable represented by residual insurance commissions. Specifically, Debtor is required to turn over to Trustee: Renewal Commissions from Policy No. 00853 from December 2003 until July 2004 in the amount of \$3,152.00 (8 months x \$394.00 per month); Renewal Commissions from Policy No. 4016895 from December 2003

until January 2004 in the amount of \$56.00 (2 months x \$28.00 per month); and Renewal Commission from Policy No. 2501689 from December 2003 until November 2004 in the amount of \$2,016.00 (12 months x \$168.00 per month).

IT IS SO ORDERED.

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