

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
AMERICAN PEAK PRODUCTION, LLC	§	Case No. 13-41116
	§	(Chapter 7)
Debtor.	§	
_____	§	
IPFS CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. Proc. No. 14-4080
	§	
MICHELLE CHOW, CHAPTER 7	§	
TRUSTEE,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER
GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter is before the Court on a motion for partial summary judgment filed by IPFS Corporation (“IPFS”). IPFS asserts an interest in certain unearned premiums and unearned commissions refunded to the chapter 7 trustee for the bankruptcy estate of American Peak Production, LLC in the total amount of \$448,587. IPFS filed the motion seeking a judgment awarding it all of the unearned premiums and unearned commissions held by the trustee. In its response, the trustee admitted IPFS is entitled to the unearned premiums totaling \$399,974.27. The remaining issue before the Court is whether IPFS also is entitled to the unearned commissions totaling \$48,612.73.¹

¹ In this adversary proceeding, the trustee asserts a counterclaim against IPFS for an alleged violation of the automatic stay. IPFS has filed a separate motion for partial summary judgment with respect to the trustee’s counterclaim. This memorandum opinion does not address the question of whether IPFS violated the automatic stay.

STANDARD OF REVIEW

IPFS brings its motion for summary judgment in this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7056. Bankruptcy Rule 7056 incorporates Federal Rule of Civil Procedure 56, which provides summary judgment shall be rendered “if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). “The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses.” *Chishty v. Texas Dept. of Aging and Disability Services*, 562 F.Supp.2d 790, 800 (E.D. Tex. 2006).

The party seeking summary judgment always bears the initial responsibility of informing the Court of the basis for its motion and identifying those portions of the “pleadings, depositions, answers to interrogatories, and affidavits, if any,” which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The manner in which this showing can be made depends upon which party will bear the burden of persuasion at trial. If, as in this case, the burden of persuasion is on the moving party, that party must support its motion with credible evidence using any of the materials specified in Rule 56(c) that would entitle it to a directed verdict if not controverted at trial. *Celotex*, 477 U.S. at 331.

The parties have essentially stipulated in their pleadings that there is no factual dispute in need of resolution with respect to the unearned commissions and have presented opposing arguments based upon the application of appropriate law. For cases in which the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1326

(8th Cir. 1995). *See also, e.g., Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995) (“A federal court may resolve the legal questions between the parties as a matter of law and enter judgment accordingly.”). IPFS’s motion and the chapter 7 trustee’s response set forth the following body of uncontested facts.

UNDISPUTED FACTS

The debtor, American Peak Production, Inc., is an oil field services business. The debtor bought insurance policies for general liability, workers compensation, and other insurable risks from West Texas Insurance Exchange Inc. (the “Agent”), agent of Berkley National Insurance Company and Berkley Regional Insurance Company (the “Insurers”). The debtor entered into a Premium Finance Agreement (“Finance Agreement”) with IPFS in which IPFS would provide \$925,010 in financing for the insurance policies. The debtor agreed to pay IPFS a down payment of \$92,501, a finance charge of \$17,795.05, and 11 monthly installments equaling \$850,304.07.

The Texas Insurance Code regulates the contents of premium finance agreements, *see* TEX. INS. CODE §§ 651.151 et seq. In addition to various required contents, “[a] premium finance agreement may contain a power of attorney that enables the insurance premium finance company to cancel any or all of the insurance contracts listed in the agreement as provided by Section 651.161.” TEX. INS. CODE § 651.160. Section 651.161 regulates the manner in which a premium finance company may cancel a contract and, in the event of cancellation, § 651.162 regulates the return of unearned premiums and commissions if the premium finance agreement contains an assignment or power of attorney for the benefit of the insurance premium finance company.

Here, on page 1 of the Finance Agreement, the debtor assigned to IPFS a security interest in “all right, title and interest” to the policies, including, among other things, the right to receive any unearned premiums under each of the policies to secure payment of all amounts due and owing to IPFS under the Finance Agreement. Also on page 1 of the Finance Agreement, the debtor irrevocably appointed IPFS its attorney-in-fact with full power of substitution and full authority upon default to cancel all the policies and to receive all sums assigned to it by debtor under the Finance Agreement. IPFS mailed notice of the Finance Agreement to the Insurers on January 28, 2013.

The debtor made the down payment but failed to pay the first installment due to IPFS. Upon failure to pay, IPFS sent a notice of intent to cancel the policies to the debtor. The debtor remained delinquent so IPFS sent the debtor and the Insurers a notice of cancellation of the policies, which directed the Insurers to pay IPFS the gross unearned premiums due under the policies. The debtor subsequently filed bankruptcy. As of the petition date, the debtor owed IPFS \$836,374.02 plus interest under the Finance Agreement.

Roughly one month after the debtor filed for bankruptcy, the Agent refunded \$329,398 of the unearned premiums directly to IPFS for the policies other than the workers compensation and general liability policies. The workers compensation policies and the general liability policy were subject to audit and post-term premium adjustment. After the audit and adjustment, the unearned premiums totaled \$483,438. The Agent transferred \$399,974.27 to the chapter 7 trustee and kept \$48,612.73 as its “commissions.” The Agent later transferred its commissions in the amount of \$48,612.73 to the chapter 7 trustee as well.

In the motion for summary judgment, IPFS seeks to receive the full \$483,438 from the trustee. The trustee has agreed to pay \$399,974.27 to IPFS. However, the trustee disputes that IPFS is entitled to receive the portion of the unearned premiums initially retained by the Agent as “commissions” in the amount of \$48,612.73.

DISCUSSION

The issue before the court is whether IPFS is entitled to the \$48,612.72 held by the chapter 7 trustee. The chapter 7 trustee does not dispute that IPFS has a security interest in the unearned premiums under the Finance Agreement but asserts the Finance Agreement does not provide IPFS with a security interest in the unearned commissions. IPFS maintains that the commissions are part and parcel of the unearned premiums as a matter of statute and, further, IPFS foreclosed all interest of the future debtor in the unearned premiums prior to bankruptcy. Thus, IPFS seeks a summary judgment awarding it the unearned commissions just as it was refunded the unearned premiums.

Texas regulates insurance premium financing in its Insurance Code, § 651.001 *et seq.* When an insurance contract is financed, the lender pays the premium to the insurance company and the agent receives a commission. If the insurance policy is later canceled, the insurance company must return the unearned premium to the lender. TEX. INS. CODE § 651.162(b) (“If an insurance contract listed in a premium finance agreement is canceled, the insurer **shall** return all unearned premiums that are due under the contract directly to the insurance premium finance company before the 61st day after the cancellation date.”) (emphasis added). With respect to the unearned commission on a canceled policy, § 651.162(c) of the Texas Insurance Code states in relevant part:

The insurer may deduct from the unearned premiums returned to the insurance premium finance company the amount of any unearned

commission due from the agent writing the insurance if the insurer notifies the agent to return the unearned commission to the insurance premium finance company. If the agent does not return the unearned commission to the insurance premium finance company before the 91st day after the cancellation date, the insurer shall remit the unearned commission to the insurance premium finance company before the 121st day after the cancellation date.

TEX. INS. CODE § 651.162(c). Thus, by allowing unearned commissions to be deducted from unearned premiums, the plain language of § 651.162(c) makes clear that unearned premiums encompass unearned commissions.

Cases addressing the refund of unearned premiums have included the unearned commissions in the gross unearned premiums. *See S. Cnty. Mut. Ins. v. Sur. Bank*, 270 S.W.3d 684 (Tex. App. -- Fort Worth 2008) (requiring insurer to refund all unearned premiums, including unearned commissions, to premium finance company). *See also AICCO, Ins. v. Lisowski (In re Silver State Helicopters, LLC)*, 403 B.R. 849, 853 n. 8 (Bankr. D. Nev. 2009) (security interest in unearned premiums included the retained commissions). These courts agree the unearned commission due is part of the unearned premium. *See Hager v. Anderson-Hutchinson Ins. Agency*, CIV. 86-841-E, 1989 WL 449697, at *15 (S.D. Iowa July 19, 1989) (“The unearned commission due is nothing more than a part of the unearned premium refundable to policyholders.”). For all the foregoing reasons, this Court concludes IPFS has established as a matter of law that either the unearned commissions are not property of the debtor’s estate or that it has a valid, first-priority security interest in the \$48,612.73 in unearned commissions currently held by the chapter 7 trustee.

IT IS THEREFORE ORDERED that the IPFS Corporation’s Motion for Summary Judgment (Doc. No. 5) is **GRANTED** as set forth herein.

IT IS FURTHER ORDERED that the chapter 7 trustee shall turnover to IPFS all unearned premiums, including all unearned commissions, the chapter 7 trustee has received from the Insurers or Agent.

IT IS FURTHER ORDERED that the automatic stay imposed by 11 U.S.C. § 362(a) is lifted to the extent necessary to allow IPFS to collect and apply the unearned commissions and reduce the indebtedness owed to IPFS by the debtor.

Signed on 6/4/2015

Brenda T. Rhoades MD

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE