UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
FIRST FINANCIAL GROUP, INC.,	)	CASE NO. BK89-81490
	)	
DEBTOR	)	A90-8009
	)	
FIRST FINANCIAL GROUP, INC.,	)	
	)	CH. 11
Plaintiff	)	
vs.	)	
	)	
AMOCO LIFE INSURANCE COMPANY, and/or its successor, NACOLAH Life Insurance Company of Texas,	)	
	)	
Defendant	)	

MEMORANDUM

This matter came before the Court on a motion for relief from the automatic stay filed by Amoco Life Insurance Company (Amoco), which was filed to obtain permission to terminate an insurance agency contract with prejudice. The hearing on motion for relief was consolidated for trial with the adversary proceeding brought by the debtor/plaintiff for a declaratory judgment concerning an interpretation of the same insurance agency contract. The motion for relief from automatic stay is a core proceeding under 28 U.S.C. § 157(b)(2)(G). The adversary proceeding requesting a declaratory judgment concerning the insurance agency contract is not a core proceeding but is otherwise related to this case filed under Title 11 of the United States Code. The parties have agreed that the Bankruptcy Court may enter final judgment on all issues.

Background

The following statement of facts is provided to set some of the scene with regard to the detailed findings of fact contained in the portion of this memorandum dealing with each specific issue.

1. First Financial Group ("FFG") is a corporation organized under the laws of the State of Nebraska and is the debtor in this action.

2. Amoco Insurance Company ("Amoco") is the insurer under certain single premium universal life insurance policies sold to consumers in the State of Texas between 1986 and 1989.

3. Total Financial Dynamics ("TFD") was, during the period when the Texas insurance policies at issue were sold, the national marketing administrator for Amoco Insurance Company under the terms of a National Administrator contract dated October 13, 1982, as amended from time to time.

4. Under the National Administrator contract, only TFD could recruit agents to sell and market Amoco universal life insurance products. Conversely, TFD could recruit a sales force and market only for Amoco universal life products.

5. FFG was a managing general agent for Amoco recruited by TFD to sell Amoco universal life products.

6. In 1986 an individual named Max Roth was recruited by FFG to be an insurance agent for Amoco in the State of Texas. Mr. Roth entered into a general agency agreement with Amoco and eventually became a Regional General Agent for Amoco in Texas with authority to recruit agents for the sale of Amoco insurance policies. All of Roth's agreements with Amoco were terminated for cause on November 2, 1988.

7. Max Roth and all subagents recruited by him had various agency agreements with Amoco, but all were independent agents, not restricted to selling only Amoco insurance products.

8. Beginning in 1987, the Texas Department of Insurance received complaints regarding Amoco insurance policies sold in Texas by Mr. Roth and agents associated with him.

9. As a result of the complaints the Texas Department of Insurance conducted an investigation of the selling practices of Max Roth and the agents associated with him.

10. As a result of its investigation, the Texas Department of Insurance found that Max Roth and agents associated with him used advertising material that contained assertions, representations and statements with respect to Amoco universal life insurance policies that were untrue, deceptive and misleading in violation of certain provisions of the Texas Insurance Code and Texas Administrative Code.

11. On June 29, 1989, the Texas Department of Insurance entered an order directing Amoco to forward to 552 individuals who had purchased Amoco universal life insurance policies sold by Max Roth and agents associated with him a letter disclosing the terms and conditions of the policies. In the same order, the Department of Insurance directed Amoco to remit the full amount of premiums paid if an individual, in response to the letter of disclosure, submitted an affidavit attesting that the terms or conditions of the policy of insurance had been misrepresented.

12. As a result of the letters written by Amoco in compliance with the order, approximately 132 policyholders submitted affidavits attesting that the terms and conditions of the policy had been misrepresented. In addition to refunding the premiums paid by those policyholders, Amoco refunded premiums to an additional 25 policyholders based on complaints made by the policyholders either to the Texas Department of Insurance or to Amoco.

13. As a result of the investigation by the Board of Insurance and Amoco, and in compliance with the terms of the order, Amoco refunded premiums of approximately $5,527,422.53 to individuals who had purchased Amoco universal life insurance policies from Max Roth or agents associated with him.

14. In connection with the sale of the policies refunded, Amoco credited approximately $1,185,853.43 in commissions to Max Roth, agents associated with him and FFG.

15. Of the total amount of commissions credited on the refunded policies, FFG received $66,246.72 as its share of the total commissions.

16. FFG had a right to receive continuing override commissions on new policies sold by its agents and commissions on renewal premiums paid by insureds. Pursuant to Amoco's interpretation of its contract rights, between September 1, 1989, and September 30, 1991, Amoco had set off against FFG commissions approximately $343,078.37 in chargeback liability for commissions paid to Max Roth, his agents, and FFG on premiums which Amoco was required to refund to insureds.

17. The mutual exclusivity agreement between Amoco and TFD as national administrator was terminated October 2, 1989, by means of a settlement agreement. Following the settlement TFD was permitted to recruit agents to sell and market other companies' universal life insurance products even if in competition with Amoco's universal life insurance products.

Issues

There are two issues in this case. First, does the contract between Amoco and the debtor require the debtor to be responsible for and repay to Amoco commissions that were earned by and paid to a writing agent if the premium paid by the insured was returned to the insured based upon a finding by Amoco that there was misrepresentation or misunderstanding with regard to the policy?

Second, does Amoco have grounds to terminate the managing agent agreement of the debtor for cause, which would eliminate the debtor's right to commissions, renewal or otherwise, and permit Amoco to apply said commissions as it deems appropriate?

Decision

The debtor is not responsible for repayment of commissions originally received by a writing agent under debtor's recruiting system if the premium was returned for misrepresentation made or misunderstanding had at the time of the application or delivery of the policy.

Amoco does not have sufficient grounds to terminate the managing general agency contract for cause. Relief from the automatic stay is, therefore, denied.

I. Debtor's obligation to repay writing agent's commission if premium returned for misrepresentation.

A. Findings of Fact

1. AGENCY AND COMMISSION STRUCTURE

The Amoco agency force was established beginning in 1982. Amoco contracted at that time with a National Marketing Administrator, Total Financial Dynamics (hereinafter referred to as TFD).

The initial administrator agreement was executed by Steve Wild and attested by George Grogan, who were the principals at TFD who negotiated the agreement and developed the agency force. Under the terms of that agreement, TFD was to recruit and train a field force for Amoco, coordinate Amoco's marketing efforts, and assist in the development of Amoco's products. Effectively, TFD was acting as the marketing division of Amoco.

The field force was established using a pyramid hierarchy, with TFD at the top and various levels of agencies below. The highest level agency below TFD was a Managing General Agent

(MGA). Other levels in descending order were Regional General Agents (RGA), Executive General Agents (EGA), Bonus General Agents (BGA), General Agents (GA) and Agents. The upper level agencies generally held contracts at all levels below them. All of the agency agreements were drafted to support the structure of the National Administrator Agreement with TFD.

Beginning in 1983, the debtor, First Financial Group, Inc. (FFG), entered into a series of agency agreements with Amoco Insurance Company, now known as NACOLAH Life Insurance Company of Texas. The first agreement signed January 1, 1983, was the MGA agreement. It was executed by George Grogan, who was at that time a principal in the debtor organization as well as a principal in TFD.[1]

After entering into the MGA agreement, FFG entered into contracts at other levels of the hierarchy. With the exception of the applicable percentage of commission payable to each level as set forth in the schedule of commissions, all of the contracts contain identical language. Future references will be made to the MGA agreement, which was the highest level agency agreement held by FFG.

Under the terms of the MGA agreement, FFG was authorized to recruit, organize, train and maintain an agency force to solicit Amoco policies. While each subagent signed an agreement directly with Amoco, it was the MGA who advised Amoco at which level(s) of agency and commission a particular agent would be contracted.

Compensation to agents and the National Administrator was by commissions based on the amount of premiums paid into a policy.

The overall percentage of commission to be paid on a product was determined by TFD and Amoco and set forth in the TFD commission schedules. That percentage was to be divided up among the various lower levels of agency. The percentage due to a particular level of agency was always inclusive of the percentage due to subagents.

By way of example, if TFD was allowed a total of 130%, first year commission, the MGA was allowed 115%. TFD kept 15%. The MGA would allow his GA's up to 100% to be split with subagents. The 15% MGA share was in some instances split and shared with an agent given a Bonus, Executive or Regional Contract.

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[1] This MGA agreement was initially entered into in the name of NFD, Inc., but the name was changed in 1984 to FFG. (See Exhibit 107).

As a result of this system, TFD received an override commission on every policy sold. The MGA received an override commission on every policy sold by an agent in that MGA's contract hierarchy.

2. CHARGEBACK OF COMMISSIONS

In certain instances an agent would be required to return all or part of the commission received on a policy. A "chargeback" is a commission adjustment resulting from a refund of premium under the terms of the MGA agreement. A commission adjustment is a specifically defined term in the MGA agreement at paragraph 4(i). The language of that paragraph will be discussed at Section B of this memorandum.

Paragraph 1(n) of every agreement mentions repayment of commission in connection with misrepresentation. The language of this paragraph of the agreement will also be discussed at Section B.

Each of these paragraphs is intended to provide authority to chargeback or adjust the commission received by a specific agent who received a commission at that agency level on a particular policy. Because each contract level of the agency hierarchy contains the same language relating to commissions and chargebacks, each level is charged back its own share of commissions received on the particular policy that resulted in an adjustment.

3. ASSIGNMENTS

In the event that a commission adjustment as defined in paragraph 4(i) results in a chargeback balance at a particular level of agency that is uncollectible, that agent's balance is assigned up to the next level of the hierarchy until it is paid.

The authority for this procedure is set forth in paragraph 4(j) of all of the agreements except the writing agent level.

Under Amoco's system, a debit balance was considered uncollectible if the projected credits for commissions expected over a one year period would not be sufficient to offset the amount of the debit balance.

The amount of the unpaid balance would then be applied as a debit to the next agency level and eventually to the MGA account.

B. Discussion and Conclusions of Law

Under the system described above in the agency and commission structure and assignment procedure, Amoco returned premiums and canceled the policies of numerous customers of Max Roth. Those premiums were returned and the policies canceled on the basis that the policy was issued to the customer as a result of a misunderstanding by the customer or misrepresentation by the writing agent. Amoco has been unable to collect from Max Roth and his associated writing agents the total commissions which were paid to Max Roth and his associates on the policies which were canceled and had premiums refunded. Since Max Roth was a subagent of the debtor, Amoco takes the position that the debtor is liable to Amoco for the Max Roth commissions, in excess of $1 million. The debtor disputes its liability based upon contract language. The debtor admits that it is responsible for repayment of the override commissions it received on the sales by Max Roth. The amount admitted to be due from the debtor to Amoco is approximately $66,000.00.

The parties both look to the language of the contract for their rights. There is no factual dispute over the terms of the contract. The parties simply dispute what the words of the contract mean.

The contract which is in dispute is Exhibit 102. Amoco urges the Court to find in its favor by considering paragraphs 4(i) and (j). Although referred to earlier in this memorandum, the specific language of the commission adjustment portion of paragraph 4 will be stated here:

> 4. <u>Commissions</u>.
>
> (i) <u>Commission Adjustments</u>.
>
> 1. Replacements: At our sole discretion, if an application is taken and a policy written to replace a policy written by us which (1) terminated within one year prior to a new application, or (2) terminates within one year after a new policy is issued, the commissions on the new policy shall be adjusted according to our rules then in force.
>
> 2. Lapses: Policies which lapse within the first policy year will result in a chargeback of the first year commissions, as provided in the attached

> Managing General Agent's Commission Schedule.
>
> 3. Return of Commissions--Chargebacks: You shall return to us, upon demand, all commissions received on applications on which policies are not issued, or on policies (sic) are not taken out (NTO) or returned by the policyowner under the "Free Look" provision and are subsequently canceled by us. Full chargebacks of commissions will be applicable if the entire premium is returned; otherwise, the chargeback will be based on the amount of premium retained by us, as provided in the attached Managing General Agent's Commission Schedule.

There is no evidence that any of the policies that were canceled or the premiums that were returned would fall under paragraph <u>4(i) 1. Replacements</u>. There is no evidence that any of the policies which were canceled or the premiums returned would fall under the language of paragraph <u>4(i) 2. Lapses</u>. In other words, this case is not about replacement commission adjustments nor is it about policies which lapsed in the first year.

Therefore, the only section of paragraph 4(i) which could cause a return of commission under these circumstances would be paragraph <u>4(i) 3. Return of Commissions--Chargebacks</u>. However, this case is not about commissions paid on applications on which policies were not issued or on policies not taken out or returned by the policyowner under the "Free Look" provision.

There appears to be no language under the "Commission Adjustments" section of the contract which covers the obligation of a writing agent or a managing general agent to repay commissions originally received on policies which are canceled because of a claim of misrepresentation or misunderstanding. Instead, paragraph 4(i) lists very specific reasons and circumstances under which there will be commission adjustments.

The writing agent and the managing general agent are responsible for return of commissions if there are commission adjustments. Paragraph 4(j) does not define any additional circumstances under which commission adjustments will be required, but, instead, identifies the procedure that will be used by Amoco to collect commission adjustments determined under paragraph 4(i). The specific language of paragraph 4(j) is as follows:

> Commission adjustments will first be charged back against the account of the writing agent under the supervision of the Managing General Agent and, ultimately, to the Managing General Agent if the agent has a debit balance and the chargeback is deemed by us to be uncollectible.

Had Amoco wanted the authority to require either the writing agent or the managing general agent to pay back commissions anytime the company refunded premiums, specific language to express that intent could have been used. Amoco actually used very specific language in the original contract with the national administrator, TFD. That contract, at Exhibit 101, paragraph 8(F), originally provided:

> Whenever the Company refunds any premium for any reasonable basis, the Administrator shall be responsible to the Company for repayment of commissions. In the event Administrator is required to repay Company, the Administrator will be subrogated to all of the Company's rights with respect thereto.

That contract, Exhibit 101, was executed on October 13, 1982. It was between Amoco and Total Financial Dynamics or TFD, the principals of which were George Grogan and Steven Wild. The contract which is the subject matter of this case is Exhibit 102. It was executed by Amoco and the predecessor of debtor on January 1, 1983, less than three months after the execution of Exhibit 101, the TFD contract. The president of the entity signing Exhibit 102 on behalf of the managing general agent was George Grogan, also an officer of TFD.

There is no specific language in Exhibit 102, paragraph 4(i) or (j) which requires a commission adjustment, or a chargeback, or an up-the-hierarchy assignment under the Max Roth facts.

The debtor requests the Court to determine its obligation for return of commissions under the facts of this case by referring to paragraph 1(n) of Exhibit 102, the managing general agent contract. That subparagraph is contained in the general paragraph entitled "AUTHORITY".

Paragraph 1(n) states:

> In the case of misrepresentation made or misunderstanding had at the time of application for any policy or upon delivery thereof, we may return the premium paid thereon and cancel the policy. Any commissions received by you shall be refunded to us.

The language of paragraph 1(n) describes an additional circumstance under which commissions may be required to be returned. In addition to the actions such as replacement, lapses, policies not issued, policies not taken out, or premiums returned under the "Free Look" provisions, paragraph 1(n) permits the company to return a premium and cancel a policy if there is misrepresentation at the time of application or upon delivery of the policy.

The misrepresentation or misunderstanding listed in paragraph 1(n) is not limited to misrepresentation or misunderstanding by the customer, nor is it limited to misrepresentation or misunderstanding by the writing agent. By the terms of paragraph 1(n), the company could return a premium and cancel a policy if it determined that the customer had made a misrepresentation on the application or at the time the policy was to be delivered. The company could return a premium and cancel a policy if it was determined by the company that the customer misunderstood the terms of the policy either at the time the policy was applied for or at the time it was delivered. In addition, the company could determine that there was misrepresentation by the writing agent at the time of the application or the delivery of the policy. Finally, it appears from the language that the company could determine, in its discretion, and perhaps subject to the contractual terms of the policy, that the company had misunderstood some significant fact at the time of the application or at the time of delivery of the policy, thereby giving it a right to cancel the policy and return the premiums.

The evidence presented in this case shows that the parties understood the meaning of paragraph 4(i). Over the years that the MGA contract had been in effect, the debtor was "assigned" commission repayment obligations due from lower level writing agents as a result of circumstances outlined in paragraph 4(i) 1, 2 and 3.

In all the years this contract was in effect, there had been only one other "misrepresentation" case. The writing agent's commission repayment obligation was assigned to the debtor in that case and was paid without objection. Exhibits 208 and 209 are documents and correspondence relating to that case. There is nothing in the correspondence between Amoco and debtor which states that policy was canceled and the premium returned for misrepresentation. A letter from Amoco to the writing agent dated May 21, 1986, says "The insured stated in her correspondence that she was misrepresented." A copy of the insured's complaint was provided to the writing agent and to the debtor.

Amoco claims this information put debtor on notice that the premium was returned for misrepresentation. However, whether the debtor paid the commission chargeback without objection because, as the president of the debtor testified, he either was not informed it was a misrepresentation case, or as he testified alternatively, whether it was paid by the debtor because it was not a significant amount (approximately $1,000) and was not worth fighting with Amoco about, or whether it was paid for any other reason, such payment does not represent a course of dealing, a business practice, an interpretation of the contract, or a waiver of any rights the debtor may have under the contract.

To interpret the contract in the manner requested by Amoco would be to add to paragraph 4(i) an unwritten and implied "Commission Adjustment" provision dealing with misrepresentation. It would also require the Court to find that paragraph 1(n) was unnecessary because it was duplicative of the (now) implied provision in paragraph 4(i).

Amoco argues and presented some testimony that one of the purposes of the hierarchy structure was to create a system of supervisory responsibility. The agent agreements were developed to support the structure of the National Administrator Agreement, under which TFD was ultimately responsible for unpaid chargebacks.

That may have been the intention of Amoco. However, Amoco did not write its contracts to express that purpose. The contract with TFD initially had broad language requiring a return of commission each time there was a reasonable return of premium. Such return of commission language was not used at any time in the managing general agent agreement and was eventually deleted from the TFD agreement.

A contract must be viewed as a whole. Bass v. Dalton, 213 Neb. 360, 329 N.W.2d 115 (1983). A contract should be considered as a whole and effect given to every part. Fisbeck v. Scherbarth, Inc., 229 Neb. 453, 428 N.W.2d 141 (1988). A contract should be construed to give meaning to all parts, and interpretations which render meaningless parts of a contract should be avoided. Beister v. John Hancock Mutual Life Ins. Co., 356 F.2d 634 (8th Cir. 1966). A party may not pick and choose among the clauses of a contract, accepting only those which are to its advantage. Dockendorf v. Orner, 206 Neb. 456, 293 N.W.2d 395 (1980).

Viewing the contract as a whole, Amoco's interpretation would enhance the language of paragraph 4(i) and require the Court to ignore the language of paragraph 1(n).

Amoco suggests that paragraph 1(f) of the MGA agreement which provides ". . .You [MGA] shall be responsible to us for the fidelity and honesty of all agents recruited by you" means that the MGA is responsible for commission returns due from the writing agent to Amoco. However, there is nothing in paragraph 1(f) that deals with commissions. In contrast, paragraph 1(n) specifically deals with return of commission. In addition, there is no evidence that Max Roth's activities were such that paragraph 1(f) would need to be invoked. There is no evidence that Max Roth was dishonest or disloyal to the company. He sold $16 million in premium income policies in a very short period of time. Because of actions by the Texas Insurance Department, Amoco was required to refund premiums to customers of Max Roth who claimed they did not understand the terms of their policy or that the terms were misrepresented at the time of sale or delivery. Amoco did refund more than $5 million in premiums. Amoco presented no evidence that the refunds were a result of dishonesty or disloyalty by Max Roth.

Conclusion

Amoco does not have the right to collect the Max Roth commission obligations from debtor.

C. Ruling on Exhibits

To aid the Court in determining the intent of the parties to the MGA agreement, Amoco has offered into evidence Exhibits 210 through 227. These are documents representing correspondence between Amoco and managing general agents other than the debtor concerning return of premiums for misrepresentation and a chargeback of the commissions up through the managing general agent and TFD levels. The objections to the admission of these exhibits were hearsay and relevancy. The Court reserved ruling on the admissibility and requested the parties to brief and argue the issue in the written final arguments.

Amoco suggests in its written final argument that the documents are not hearsay because they are not offered "for the truth of the matters contained in the statements. Stated differently, the statements are not being offered to prove they were in fact misrepresentations or misunderstandings. . . . Instead, the statements are being offered to show Amoco Life's response to that information and how it handled the assignment of chargebacks for premiums refunded due to misrepresentation or misunderstanding."

If the exhibits are offered to show that some agents, not related to the debtor, misrepresented policies and, therefore, the premiums were returned, the exhibits are hearsay. They include letters from insureds outlining their complaints against the agent. They include letters from various state insurance commissions. They include letters from various people employed by Amoco to various other people. They include correspondence from employees of TFD to Amoco and some of the exhibits include correspondence from agents to Amoco. All of these exhibits are hearsay.

On the other hand, if they are not offered to show that some premiums were returned and commissions charged back as a result of misrepresentation, then they are not relevant to this case. This case is about contract language and the obligation of a managing general agent to pay to Amoco an amount equivalent to commissions paid to lower level agents when a misrepresentation has actually occurred. If the exhibits are not offered to show that misrepresentations <u>actually</u> occurred and then a procedure was followed concerning chargeback of commissions, the exhibits have nothing to do with the issues in this case.

The fact that Amoco treated each refund of premium as an event triggering a chargeback of commission, whether there was or was not a misrepresentation or misunderstanding, is simply not relevant to the issues in this case because the contract language is clear and there is no evidence of a course of dealing between Amoco and the debtor different from the contract language.

To assure that such a decision on the admissibility of the exhibits has not been made in a vacuum, the Court has reviewed Exhibits 210 through 227. In those exhibits, there are a few, including Exhibit 213, 215 and 216, which use the term "misrepresentation." In most of the other exhibits, there is a complaint, a refund of premium, and a notice of chargeback. There is no specific notification to the agent or to the MGA that the refund of premium was based upon misrepresentation or misunderstanding. Therefore, even if admitted, the exhibits would not support the position of Amoco that there was a longstanding practice or procedure with regard to all managing general agents requiring a chargeback of commissions all the way to the managing general agent level in the case of misrepresentation or misunderstanding.

The exhibits are not admitted.

II. Termination for Cause

This Chapter 11 case was filed in October of 1989. In December, 1989, Amoco filed a motion for relief from the automatic stay requesting such relief to enable it to terminate the agency relationship for cause. Such a termination for cause would "divest" the debtor of any right to future payments for commissions earned on policies sold by the debtor or its subagents, whether such premiums were paid on renewals of old policies or commissions earned on new business. Since the contract right to receive such commissions is an asset of the estate, relief from the stay is necessary.

The Amoco termination notice to the debtor stated that termination was being made for cause. The testimony was to the effect that the termination was pursuant to Section 7(c) of Managing General Agent Agreement which provides in part: "This agreement shall be terminated for cause if you have willfully and knowingly failed to comply with the terms of this Agreement or our rules and regulations currently in force in any manner; or if you defraud or attempt to defraud us; or if you at any time without written consent of an officer of the Company endeavor to induce any agent or employee of the Company to discontinue his or her association with the Company. . . ."

A. Defraud Amoco

At trial, Amoco's witnesses testified that the debtor attempted to defraud Amoco by soliciting Amoco agents in the debtor's hierarchy to sell other insurance products for other companies. In addition, Amoco claims the debtor acted fraudulently as to Amoco because the debtor denied doing such solicitation when the president of the debtor was questioned under oath at the Section 341 meeting. The final fraud allegation is that the debtor transferred its assets to a separate corporation to put them beyond the reach of Amoco's collection efforts.

The evidence is clear that after October 2, 1989, the debtor had an absolute right to sell policies of other companies and to solicit its hierarchy of agents to sell such policies. Prior to October 2, 1989, the debtor had an agreement with TFD which limited the debtor's right to sell any product other than that of Amoco. The debtor did not have a contract with Amoco which limited the debtor's ability to sell policies of other companies or solicit its hierarchy of agents to do so. However, TFD had such an exclusive arrangement with Amoco and TFD bound all of its lower level agents to the Amoco exclusivity provisions of its own contract.

On or about October 2, 1989, TFD and Amoco terminated their relationship and TFD was no longer bound exclusively to Amoco. Therefore, after the termination of such agreement, the debtor was not bound. The parties all agree on this fact.

Max Roth was terminated for cause in November of 1988. Thereafter, commissions which normally would have been his were held by Amoco to offset his obligation for the repayments to Texas insureds as discussed in the first part of this memorandum. Since Max Roth was such a large producer of premium and commission income, his production was also a large percentage of the revenue earned by the debtor through overrides on the Max Roth commissions. As the refunds to the Texas insureds increased in amount and Amoco offset commission income to satisfy the Roth obligation, the revenue stream to the debtor decreased significantly. The debtor and Amoco worked out an arrangement over the summer of 1989 whereby Amoco permitted the debtor to continue to receive commission revenue on the basis that any obligation of the debtor to Amoco for the Max Roth commissions would be spread over time.

Once the TFD/Amoco agreement was terminated on October 2, 1989, Amoco immediately stopped all commission payments to the debtor and treated such stoppage as a setoff or chargeback resulting from the Texas refunds.

In September of 1989, in anticipation of continuing reduction of commission revenue from Amoco, Richard Waterworth, the president of the debtor, set up a new corporation called First Financial Equities (FFE). FFE is not a subsidiary of the debtor, but is a separate entity. However, the debtor, with or without consideration, transferred its limited assets such as office equipment and lists of agents to FFE. It obtained an operating loan of approximately $25,000.00 a month up to a maximum of $250,000.00 from Steve Wild, one of the shareholders of FFE. FFE then arranged with New Jersey Life Insurance Company and Safeco to become a managing general agent for those companies. The managing general agent contracts with the companies were signed after the first of October, and perhaps were signed after the bankruptcy of the debtor.

Mr. Waterworth, who was president of the debtor and president of FFE, then began preparing advertising material and set up seminars for the solicitation of agents. Some of the material sent to Amoco agents by FFE were sent on the stationery of the debtor. Some of the advertising materials did not make it clear that the soliciting party was not FFG, the debtor, as managing general agent of the various subagents, but was FFE, a completely new company.

Seminars were held at various locations around the country and materials were submitted to the invited agents, many of whom were Amoco agents.

At the first meeting of creditors, the Section 341 meeting, Mr. Waterworth was asked whether or not FFG had participated in the seminars and whether or not FFG was selling for New Jersey Life or Safeco or attempting to get Amoco agents to sell for those companies. Mr. Waterworth denied that FFG was involved at all.

The only evidence that FFG was involved in the seminars or the solicitation of Amoco agents to sell business for other companies is the logo of the debtor on some pieces of advertising used to get the attention of the Amoco agents and some pieces of advertising used at the seminars. Mr. Waterworth explained at trial that the use of some of the material was inadvertent and that the use of some of the material was intentional. It was intentional in that during some period of time the new company had no stationery or advertising materials and used the old company's logo and letterhead to get the business started.

Under questioning by counsel for Amoco, Mr. Waterworth admitted that the purpose of setting up FFE was to avoid problems with Amoco. It was clear to Mr. Waterworth that Amoco was going to insist that over $1 million in debtor revenue would be withheld to take care of the Max Roth Texas commission refunds. With no revenue coming in and with all revenue that was earned in the future by the debtor being setoff by Amoco, Mr. Waterworth felt that he was out of business and that there was absolutely no reason to continue with Amoco sales. In addition, he felt that if he began selling policies for other companies, which he was permitted to do pursuant to his Amoco contract, Amoco would somehow obtain the right to take those commissions also.

His opinion is supported by the fact that immediately after the TFD agreement was terminated, Amoco filed suit in Texas against Max Roth and the debtor and the subject of the suit was the commission refunds and the obligation of debtor to Amoco.

There is no evidence of fraud by the debtor. The debtor had no contractual obligation to sell only Amoco products. The debtor had no contractual obligation to deal with the agent hierarchy only with Amoco products. Therefore, whether it was FFE that solicited agents to sell products other than Amoco's or it was FFG which did so makes absolutely no difference. The act by FFG or FFE is not fraud on Amoco. Although Mr. Waterworth used some of FFG's advertising materials and letterhead for the benefit of FFE, such actions are not fraud as to Amoco, but may have been a breach of duty to the debtor, both before and after the bankruptcy filing. Such breach of duty and any damages therefrom do not necessarily inure to the benefit of Amoco under its contractual right to terminate for cause.

B. Induce Agents to Discontinue Association with Amoco

In addition to the allegations of fraud concerning the solicitation of Amoco sales agents to sell other products, Amoco claims that the debtor violated its contractual obligations by its action "to induce any agent or employee of the company to discontinue his or her association with the Company."

The only evidence of such inducement to discontinue an association with the company was presented on behalf of Amoco through the deposition of Mr. Michael Zaccaro, an Amoco agent in Texas. Prior to the termination letter being sent to the debtor, Mr. Zaccaro had given a written statement to counsel for Amoco in which he stated that it was his strong understanding that Dick Waterworth and FFG were not only attempting to induce agents to sell other policies, but were attempting to induce agents to discontinue selling Amoco products. In his deposition testimony, which was presented at trial along with the earlier written statement, it is clear that Mr. Zaccaro has no evidence that FFG or Mr. Waterworth wrote to, told or asked any Amoco agent to quit selling Amoco products. Instead, he testified that it was his "feeling" that that is what FFG intended, although no one ever said it.

In contrast to the "feeling" of Mr. Zaccaro, the debtor presented the testimony of several agents who had attended seminars and received the same information package as had Mr. Zaccaro. Each of the witnesses testified both on direct and cross examination that they were not solicited to quit selling Amoco products. The purpose of the seminar from the point of view of each of them was informational. Mr. Waterworth, whether operating as FFG or FFE, was presenting information to agents in his hierarchy concerning products which they could sell and which may be of benefit to them and their customers. None of them thought the procedure to be unusual and each of them understood that insurance agents must be provided comparative information about different policies from different companies in order to make a decision on what is best for them and their customers. Some of the agents even testified that they would have been surprised and disappointed had they not received comparative information with regard to the Amoco product that they all liked and others that Mr. Waterworth was presenting.

The debtor also presented the testimony of an officer of Amoco who agreed that the comparison of companies and policies is a time-honored practice in the insurance industry when soliciting agents. He concluded that there is nothing wrong with the practice and it is a necessary sales and marketing technique in the industry.

There is no evidence that the debtor attempted to induce agents to discontinue their association with the company.

C. Failure to Follow the Rules and Directions of Amoco

The final reason Amoco gives for terminating FFG for cause is that FFG failed to follow the rules, regulations and directions of Amoco with regard to advertising materials being used by Max Roth and his agents.

Amoco had received complaints from some customers and from some insurance commissions, including Texas, that advertising materials were being used to sell Amoco products and that such advertising materials were not correctly describing the product. Max Roth and various of his agents were accused by the complaining parties and by Amoco of using the Amoco logo, the "torch", on advertising materials without permission. They were also accused of using materials which failed to identify the product as an insurance policy, which made it appear that the customer was making a deposit or an investment and would receive interest at a rate much higher than the guaranteed rate on the insurance policy. The MGA contract, Exhibit 102, at paragraph 3, states:

> 3. Advertising. We will furnish to you all blanks, advertising materials, circulars and other printed matter required by you at our discretion. No other advertising material may be used by you unless we have first given you our written approval. Upon termination of this Agreement, all unused supplies shall be returned to us.

Notwithstanding such provision in the contract, it is undisputed that until the late summer of 1988 Amoco provided no advertising material to the debtor or to any of the subagents. Various materials were developed by subagents, sometimes with and sometimes without the knowledge of Amoco and were used for the sale of Amoco products.

However, each time Amoco received information that its products were being sold with the use of unauthorized advertising materials, it attempted to take some action. Amoco would contact TFD which would inform the debtor of the problem. With regard to the interest rates and the "torch", Mr. Waterworth, on behalf of the debtor, testified that he did not order Max Roth or his subordinates to quit using the advertising material, but inquired of them about the material. He was informed in 1987 and early 1988 that the advertising material with interest rate statements and other statements which would violate the Amoco contract were not being used to sell Amoco products, but instead, were being used to sell other products which the agents had a right to sell.

When the debtor determined that the Amoco "torch" was being improperly used, the order was given to stop using it.

The record is replete with Amoco's concerns about the use of unapproved advertising and the debtor's actions and responses. In general, prior to the summer of 1988, the debtor would respond to Amoco by obtaining information from the offending agents and passing that information on to Amoco. In almost every case, the information would be that the Amoco product was not being sold with the use of the offensive advertising and that neither Amoco nor the debtor could prohibit subagents from using any advertising with regard to non-Amoco products.

Beginning in the spring of 1988, however, it became clear that Max Roth was actually using inaccurate advertising to sell Amoco products. At the request of Amoco relayed to Roth by the debtor, Roth submitted various brochures for approval. Amoco informed Roth that the brochures were not approved and were not accurate and that he should no longer use them. It was at that point in time that the debtor finally ordered Roth to quit using the advertising materials. Roth, the debtor and Amoco then worked together over the summer of 1988 to correct the advertising brochures and to create an Amoco-approved brochure. That brochure was finally approved by Amoco for use after August 15, 1988. Within one month of the approved usage date, the Texas Department of Insurance objected to the use of the original Roth materials and objected to the use of the approved materials. Amoco then ordered the debtor and Roth to withdraw all of the materials from the market, which was done.

As a result of the sales techniques used by Max Roth and his agents during 1987 and 1988, the Texas Department of Insurance began an investigation. That investigation eventually resulted in the order to Amoco to refund premiums to customers who believed that the product had been misrepresented. That investigation also led to the findings by the Insurance Commission that Max Roth had violated the rules of the Texas Department of Insurance. For these and other reasons, Max Roth and various of his agents were terminated for cause in November of 1988.

Mr. Waterworth, the president of the debtor, worked closely with Amoco during the summer of 1988 to develop an approved advertising brochure. When the problems with Max Roth in Texas developed and when Max Roth was terminated, Mr. Waterworth worked closely with Amoco in dealing with the Texas Insurance Commission and in dealing with the agents in Texas to keep them on board with Amoco. He and representatives of Amoco traveled to Texas and met with the representatives of the Insurance Department in 1988. He worked with Amoco all though 1988 and the early months of 1989 to preserve the Texas hierarchy. He continued, through the debtor and the hierarchy, to promote the Amoco products.

In late 1988, Amoco decided to get out of the insurance business and put itself up for sale. Its agents were informed that a sale was to occur and many of them became concerned. They contacted Mr. Waterworth at various times in 1988 and 1989 requesting information. The testimony of the various agents at trial was that they were concerned about their ability to continue to sell the Amoco product if the company was sold and about their ability to serve their customers who had purchased the Amoco product prior to the sale. Mr. Waterworth apparently worked with Amoco to calm the waters with the agents and kept them informed as he was kept informed by Amoco.

In the summer of 1989, Amoco determined that its salability was impaired because of its exclusive contract with TFD. It, therefore, negotiated with TFD and, on approximately October 2, 1989, the contract was terminated. Mr. Waterworth became aware that the contract termination negotiations were going on and had discussions with an officer of Amoco about the future of the debtor and its relationship with Amoco.

Mr. Waterworth testified that he spoke to Mr. Charles Haskins, an officer of Amoco, in August or September of 1989, about their future relationship. The uncontroverted testimony of Mr. Waterworth is that Mr. Haskins, on behalf of Amoco, requested the debtor to remain an exclusive agent of Amoco after the termination of the TFD/Amoco agreement. Mr. Haskins informed Mr.

Waterworth that keeping the Amoco sales force and the various hierarchies in place during the pendency of the sale was very important to the sale and would contribute value to the sale of the company.

Notwithstanding all of the above indications of a friendly relationship and a relationship which indicated compliance with the contractual obligations of the parties, shortly after the contract with TFD was terminated, Amoco filed suit against the debtor, set off all commissions due the debtor and refused to compromise on the issue of continuing to allow commissions to be paid to the debtor.

Approximately two months later, Amoco filed the motion for relief and sent the termination for cause letter alleging violations of the contract, including failure to monitor the use of unapproved advertising material and failing to direct subagents to discontinue using such advertising material even after the debtor had been directed by Amoco to provide such notification to the subagents.

The complaint by Amoco concerning failure to monitor Max Roth with regard to the use of his advertising materials and the manner in which he sold Amoco products is a pretext for terminating this contract for cause. All of the actions complained of occurred more than a year before the termination for cause letter was sent. The evidence is overwhelming that Amoco was well satisfied with the debtor and the debtor's compliance with its contractual obligations until it learned that the debtor was serious about challenging Amoco's right to set off commissions for the Max Roth misrepresentations and until the TFD contract was terminated in early October of 1989.

Although there was definitely a disagreement between the parties in 1987 and 1988 over the appropriate use of advertising and the type of advertising that should be allowed to be used in selling Amoco products, it was not mentioned at that time that the debtor was in violation of its contractual obligations. It was not mentioned at the time Max Roth was terminated for cause. It was not mentioned during the time Mr. Waterworth was working with Amoco to preserve the Texas hierarchy and deal with the Texas Insurance Department. It was not mentioned in the late summer of 1989 when Charles Haskins invited the debtor to remain as an exclusive agent for Amoco so that the hierarchy would remain in effect during the attempt to sell the business.

The failure to monitor the activities of Max Roth, under the circumstances described above, is not a valid ground for termination of the contract for cause. Amoco does not have grounds for termination of the contract for cause and the motion for relief should be denied.

Conclusion

Amoco does not have sufficient grounds to terminate the debtor's contracts for cause.

Judgment

Separate journal entry shall be filed contemporaneously.

DATED: February 1, 1993.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies to:

Michael Washburn, Attorney for debtor
Gerald Friedrichsen, Attorney for Amoco

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
FIRST FINANCIAL GROUP, INC.,	)	
	CASE NO. BK89-81490	
	)	
DEBTOR	)	
		A90-8009
	)	
FIRST FINANCIAL GROUP, INC.,	)	
	)	CH. 11
Plaintiff	)	
vs.	)	Filing No.
	)	
AMOCO LIFE INSURANCE COMPANY,	)	JOURNAL ENTRY
and/or its successor, NACOLAH	)	
Life Insurance Company of Texas,	)	DATE: February 1, 1993
	)	HEARING DATE:
Defendant	)	

Before a United States Bankruptcy Judge for the District of Nebraska regarding motion for relief filed by Amoco and complaint filed by debtor.

APPEARANCES

Michael Washburn, Attorney for debtor
Gerald Friedrichsen, Attorney for Amoco

IT IS ORDERED:

Motion for relief from the automatic stay is denied. Amoco does not have the right to terminate the contract for cause.

Debtor is not obligated to pay Amoco for commissions received by lower level agents as a result of misrepresentation or misunderstanding.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge