

The below described is **SIGNED**.

Dated: April 26, 2006

*William J. Thurman*

WILLIAM T. THURMAN  
U.S. Bankruptcy Judge



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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

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In re:

WAYNE HENRY BECKSTEAD and  
MINDY BECKSTEAD,

Debtors.

Bankruptcy Number: 05-35213

Chapter 7

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MEMORANDUM OPINION

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The matter before the Court is the chapter 7 trustee's objection to the Debtors' claim of exemption of a real estate commission. The Court held a hearing on this matter on March 9, 2006, where the parties presented oral arguments. The Court made findings of fact and conclusions of law on the record, but reserved the right to include those findings in this Memorandum Opinion.

The issue before the Court is whether the Debtors are entitled to claim an exemption in a real estate sales commission which was earned pre-petition but received post-petition. The Court determines that the real estate commission in this case was earned pre-petition and is property of the estate. The Court also determines that under Utah law the commission is subject to an exemption.

## **I. FACTUAL BACKGROUND**

One of the Debtors in this case, Cindy Beckstead, is a licensed real estate agent associated with a principal broker, Red Rock Realty. On August 20, 2005, Mrs. Beakstead aided certain buyers (“the Buyers”) in entering into a contract to purchase a home from certain sellers (“the Sellers”). In connection with her representation of the Buyers, Mrs. Beakstead completed a substantial amount of work. She helped the Buyers make several changes to the floor plans of the home, and continued with all the necessary steps that would enable the Buyers to purchase the home. She and her husband filed a joint chapter 7 bankruptcy case on September 26, 2005.

Although Mrs. Beakstead performed most of her work for the Buyers before filing for bankruptcy relief, the sale of the home was not completed until October 28, 2005, after the bankruptcy petition was filed. She received a net commission post-petition of \$8,637.75 from her principal broker, Red Rock Realty, for personal services rendered in connection with the sale. The Debtors amended their Schedule B on January 19, 2006, to include the real estate commission, and amended Schedule C to claim an exemption for the commission in the amount of \$6,478, or 75% of the total commission. They assert this exemption pursuant to Utah Rule of Civil Procedure (“URCP”) 64D. The chapter 7 trustee assigned to the Debtors’ case objected to the claimed exemption under URCP 64D. That objection is the subject of this Memorandum Decision. The evidence presented at the hearing on this matter was that under the terms of her relationship with her principal broker, Red Rock Realty, Mrs. Beakstead’s entitlement to a commission accrued at the same time as her principal broker’s commission.

## II. JURISDICTION AND VENUE

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(b)(2)(B). Venue is appropriate under 28 U.S.C. § 1408(1).

## III. ANALYSIS

### A. The Real Estate Commission is Property of the Estate.

11 U.S.C. § 541(a)(6)<sup>1</sup> states that property of the estate includes “[p]roceeds, 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.” Thus, by the terms of § 541(a)(6) a commission is property of the estate only if it was earned pre-petition. State law governs the determination of when a debtor has earned a commission.

Under Utah law a real estate broker has earned his or her commission when he or she procures a buyer who is ready, willing and able to purchase the property at issue, and who is accepted by the seller.<sup>2</sup> Unless the parties agree otherwise, this convention applies even if the underlying real estate transaction is never consummated.<sup>3</sup>

At the same time, Utah law makes a distinction between a real estate broker and an associate broker or a real estate agent. Under Utah Code §§ 61-2 *et al.*, real estate agents and associate brokers act as agents for a principal real estate broker. Thus, commissions arising from real estate transactions are owed directly to the real estate broker even though the work

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<sup>1</sup> All statutory references hereinafter are to the Bankruptcy Code unless stated otherwise.

<sup>2</sup> Fairbourn Commercial, Inc. v. American Housing Partners, Inc., 94 P.3d 292 (Utah 2004).

<sup>3</sup> Id. at 294 (declining to adopt the holding of *Ellsworth Dobbs, Inc. v. Johnson*, 236 A.2d 843 (1967), which held that a broker is entitled to a commission only upon consummation of the sale agreement).

supporting the commission was done by an associate broker or a real estate agent.<sup>4</sup> Unlike the timing for commissions owing to real estate brokers, the timing for payments owing to associate brokers and real estate agents is not governed by a presumption. An associate broker or real estate agent is entitled to a commission upon procuring a ready, willing and able buyer, only if that is their agreement with the principal broker.<sup>5</sup>

On August 20, 2005, Mrs. Beakstead presented the Sellers with clients who were ready, willing, and able to purchase the home. The Sellers accepted the Buyers when the parties executed a real estate purchase contract. Thus, under Utah law Mrs. Beakstead's principal broker, Red Rock Realty, earned its commission for this transaction on August 20, 2005. The evidence presented at the hearing on this matter was that pursuant to the terms of her relationship with Red Rock Realty, Mrs. Beakstead was entitled to her commission as soon as Red Rock Realty was entitled to its commission. Red Rock Realty was entitled to its commission under Utah law on August 20, 2005, so Mrs. Beakstead was also entitled to her commission on August 20, 2005. Mrs. Beakstead did not file for bankruptcy relief until September 26, 2005. Because Mrs. Beakstead was entitled to collect her commission before filing for bankruptcy, the commission is property of the estate.

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<sup>4</sup> See Utah Code § 61-2-18 (2006) (“No sales agent or associate broker may sue in his own name for the recovery of a fee, commission, or compensation for services as a sales agent or associate broker unless the action is against the principal broker with whom he is or was licensed.”).

<sup>5</sup> See Morris v. John Price Assoc., Inc., 590 P.2d 315 (Utah 1979) (holding that a principal broker may maintain suit against a defendant seller for a commission, but the real estate agent involved in the transaction must determine his commission entitlements by looking to the terms of his relationship with the principal broker).

B. The Debtors are Entitled to Claim an Exemption for the Commission:

Because the commission is property of the estate, the Court must also determine whether Mrs. Beakstead is entitled to an exemption for the commission. She claims that the commission is exempt under Utah law as “disposable earnings,” whereas the chapter 7 trustee argues that Utah law provides an exemption for wages and salary only, and does not protect receivables or commissions owing to self-employed professionals.

URCP 64D(a) provides debtors with an exemption against a creditor’s attempts to garnish “disposable earnings,”<sup>6</sup> and defines “disposable earnings” as “that part of earnings for a pay period remaining after deduction of all amounts required by law to be withheld.” Likewise, “earnings” is defined under URCP 64D(a)(5) as “compensation, however, denominated, paid or payable to an individual for personal services, including periodic payments pursuant to a pension or retirement program. Earnings accrue on the last day of the period in which they were earned.”

As the Court is interpreting Utah law, the Court must follow conventions of statutory interpretation pursuant to the guidance of Utah courts. In interpreting a statute, the Court must look first to the plain language of a statute and may only consider other factors where the court finds an ambiguity.<sup>7</sup> If the Court does find ambiguous statutory language, it may then look to the history of a rule or statute.<sup>8</sup>

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<sup>6</sup> In re Stewart, 32 B.R. 132 (Bankr. D. Utah 1983) (Clark, C.J.).

<sup>7</sup> Macfarlane v. Utah State Tax Commission, — P.3d —, 2006 WL 744242 at \*12 (Utah March 24, 2006).

<sup>8</sup> Riddle v. Celebrity Cruises, Inc., 105 P.3d 970, 973 (Utah App. 2004).

The Court determines that the language of URCP 64D is clear and unambiguous and that it allows a self-employed debtor to claim an exemption for commissions or accounts receivable earned pre-petition. URCP 64D provides an exemption for “disposable earnings.” This term is defined broadly to include compensation payable for individual services, and makes no distinction between self-employed and employed debtors. The term “disposable earnings” refers only to compensation. Black’s Law Dictionary defines “earnings” as “[r]evenue gained from labor or services, from the investment of capital, or from assets.”<sup>9</sup> It is apparent to the Court that a commission earned from a real estate contract constitutes compensation, and consequently constitutes “disposable earnings.” Under the plain language of URCP 64D, a debtor may claim an exemption against a commission earned pre-petition.

Even if the Court were to consider the history of URCP 64D, the Court would not alter its holding. URCP 64D was repealed and reenacted in a slightly different form in 2004. The prior version of the rule provided an exemption for “earnings,” which was defined as “compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.”

As the trustee points out, it is true that in 2004 the Utah Supreme Court removed any specific reference to commissions from URCP 64D in the new rule. Nevertheless, the Court believes this history is consistent with the holding that commissions are protected by URCP 64D. The changes to URCP 64D removed examples of compensation. In doing so, the Utah Supreme Court enlarged the definition of URCP 64D to include forms of compensation not

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<sup>9</sup> Black’s Law Dictionary 414 (7th ed. abr. 2000).

originally iterated by the pre-2004 rule. The removal of a reference to commissions does not mean that commissions are no longer considered compensation. By that logic the removal of a reference to wages would also mean that a debtor's wages are no longer considered compensation under URCP 64D. Accordingly, the Court determines that the history of URCP 64D further bolsters the Court's determination that a debtor may claim an exemption for a commission earned pre-petition.

On January 19, 2006, the Debtors amended their statements and schedules to include Mrs. Beakstead's real estate commission as property of the estate, and to claim an exemption of the commission for 75% of the commission under URCP 64D. As the Court has already concluded that the commission constitutes property of the estate, Mrs. Beakstead is entitled to claim 75% of the commission as exempt.

### **III. CONCLUSION**

The chapter 7 trustee's objection to the Debtors' claim of exemption against the real estate commission is **OVERRULED**.

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End of Document

Service of the foregoing **MEMORANDUM DECISION** will be effected through the  
Bankruptcy Noticing Center to each party listed below.

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ORDER SIGNED