

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PRESSMAN-GUTMAN CO., INC.	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
FIRST UNION NATIONAL BANK, et al.	:	No. 02-8442

MEMORANDUM

For the fourth time in this case, the court is asked to consider the question of the disqualification of plaintiff's counsel. This time, the court is asked to reconsider the court's November 30, 2004 order disqualifying plaintiff's counsel and the court's December 15, 2004 order appointing a guardian ad litem to assist the plaintiff in retaining new counsel.

Plaintiff contends that the court's order of December 15, 2004 is in direct conflict with Section 409(a) of the Employee Retirement and Income Security Act of 1974 (ERISA) in that the order bars Alvin P. Gutman and James C. Gutman from acting as fiduciaries for the plaintiff Plan. The order of November 30, 2004 disqualified Hamburg and Golden, plaintiff's attorneys, from representation of the plaintiff in this case. The order of December 15, 2004 did not direct that Alvin P. Gutman and James C. Gutman be removed from the Plan's Administrative Committee, nor did it require that they be removed as fiduciaries. The orders simply removed Hamburg and Golden as counsel and appointed a guardian ad litem to assist the Plan in retaining new counsel for this case. The Gutmans may continue to act as fiduciaries for the Plan for ERISA purposes unless and until newly retained counsel or the guardian ad litem requests otherwise. If there is a request for the Gutmans' removal as ERISA fiduciaries, the court will consider this request with the benefit of argument from all affected parties.

At most, the December 15 order limits the ability of the Gutmans to direct the efforts of the Plan in this discreet lawsuit because they have themselves been sued in their capacities as managers or fiduciaries of the Plan. The Gutmans' decision to retain Hamburg and Golden to represent them as third-party defendants, in addition to Hamburg and Golden's representation of the plaintiff Plan, created the conflict of interest in the first place.

Plaintiff argues that the November 30 order was incorrectly based on Pennsylvania Rule of Professional Conduct 1.7, which governs conflicts of interest arising from the joint representation of clients, instead of Rule 1.9, which governs conflicts of interest presented by the representation of former clients. According to plaintiff, Rule 1.9 requires the consent of the "former client" to waive the conflict, and the Gutmans, Hamburg and Golden's "former clients," have consented to Hamburg and Golden's continued representation of the plaintiff Plan.

The November 30 order was in response to a motion to reconsider the court's August 30, 2004 order disqualifying Hamburg and Golden from representing the Gutmans. The August 30 order, in turn, was based on defendant Forefront Capital Advisors, LLC's renewed motion to disqualify Hamburg and Golden from jointly representing its then joint clients, the Plan and the Gutmans. Although Hamburg and Golden no longer represented the Gutmans when the November 30 order was filed, the issue before the court was whether the court's August 30, 2004 order should have completely disqualified Hamburg and Golden from jointly representing the Plan and the Gutmans. Rule 1.7 requires the consent of both clients, and, as the court previously explained, Hamburg and Golden did not demonstrate that it received consent from both the Plan and the Gutmans. Plaintiff's argument that the November 30, 2004 order incorrectly relied on Rule 1.7 must fail.

Much of the present motion for reconsideration concerns the legality of removing a fiduciary under ERISA. These arguments are based on a misunderstanding of the November 30 and December 15 orders. The November 30 order disqualified counsel. The December 15 order did not remove any fiduciary.

The suggestion that the court revise its order to allow the company to appoint additional members of the Plan's Administrative Committee was never before the court. This may be a valid course of action, but the court never had the benefit of considering this alternative. Plaintiff and Hamburg and Golden did not respond in substance to the requests heard earlier by this court to disqualify counsel and appoint an independent party to represent the plan. Rather than suggest an alternative to resolve the conflict of interest, the plaintiff and its then counsel attacked the motives of the defendants and vehemently denied the existence of any conflict of interest.

The court has no present concern regarding the makeup of the Administrative Committee of the Plan. The guardian ad litem can work with the Administrative Committee to hire a new attorney. If necessary, the guardian ad litem is certainly free to suggest additional members of the Plan's Administrative Committee if, in his judgment, he believes that to be one possible way to approach the hiring of new counsel. The motion for reconsideration of the court's orders of November 30 and December 15, 2004 is denied. The parties shall proceed in accordance with this court's order of November 30, 2004 completely disqualifying Hamburg and Golden and with this court's order of December 15, 2004 appointing a guardian ad litem and staying further filings pending the retaining of new counsel by the plaintiff, with the assistance of the guardian ad litem.

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ORDER

AND NOW, this 22nd day of December, 2004, it is hereby ORDERED that plaintiff's motion for reconsideration (Doc. # 101) is DENIED.

/s/

LAWRENCE F. STENGEL, J.