

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

I.B.E.W. LOCAL 1448 HEALTH AND : CIVIL ACTION  
WELFARE FUND :  
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 :  
 v. :  
 :  
 THORNDYKE INTERNATIONAL, INC., :  
 JOHN HYDE, MICHAEL BALICE, :  
 and RON OTTAVIANO : NO. 97-cv-5718

**Decision Under Fed. R. Civ. P. 52(a)**

Ludwig, J.

October 26, 1998

This non-jury decision is entered following hearings held on April 23 and May 13, 1998. Fed. R. Civ. P. 52(a). The complaint sets forth claims under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1109(a), and the Racketeering in Corrupt Organizations Act (RICO), 18 U.S.C. § 1965.<sup>1</sup> The issue to be decided is whether defendant Ron Ottaviano entered into a prohibited transaction under ERISA § 406(a) by accepting a \$13,400 commission from defendant Michael Balice.<sup>2</sup>

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<sup>1</sup>According to the complaint, Thorndyke International, Inc. failed to process health insurance benefit claims (Count I); John Hyde (Thorndyke's principal) converted plan assets for himself, Michael Balice, and Ron Ottaviano (Count II); Michael Balice engaged in a prohibited transaction by collecting undisclosed and unreasonable fees (Count III); Ronald Ottaviano engaged in a prohibited transaction by collecting fees from Michael Balice (Count IV); and the defendants entered into a secret agreement to siphon premiums from the health plan (Count V). Jurisdiction is federal question. 28 U.S.C. § 1331; 29 U.S.C. § 1132 (ERISA); 18 U.S.C. § 1964© (RICO).

<sup>2</sup>On March 24, 1998, default judgment was entered against defendant Balice. Defendants Hyde and Thorndyke settled on the eve  
(continued...)

I.

Facts Based on Stipulation

The following, which are part of the pretrial stipulation, are approved as findings of fact.

The International Brotherhood of Electrical Workers Local 1448 (I.B.E.W.) is a collective bargaining representative of certain employees with their respective employers.

Plaintiff I.B.E.W. Local 1448 Health and Welfare Plan is an employee benefit plan jointly administered by a Board of Trustees comprised of representatives of both management and labor. When the plan was established in 1996, the Union Trustee was Edward Dasch, former business manager of Local 1448. The current Union Trustee is Donald Seigel. The Employer Trustee of the plan has been Joseph Walsh, President of TriComm Communications, from the inception of the plan through the present.

The plan is financed by contributions from various employers who are parties to collective bargaining agreements with Local 1448. Participating employers contribute a monthly premium on behalf of their employees who are represented by Local 1448 and their eligible dependents.

Defendant Ron Ottaviano was at all relevant times a life insurance salesman engaged in part by the Union Labor Life Insurance Company (ULLICO).

Pursuant to an agreement between ULLICO and the Union, defendant Ottaviano sold life insurance and disability insurance to members of the Union who wished such coverage.

During the time defendant Ottaviano was approved to sell life insurance and disability

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<sup>2</sup>(...continued)  
of trial. At trial, plaintiff withdrew the RICO claim against Ottaviano. Tr. at 137, Apr. 23, 1998.

insurance to members of the Union, he became acquainted with Ed Dasch who later became a Trustee of the I.B.E.W. Local 1448 Health and Welfare Fund.

Sometime in 1995 Ed Dasch told defendant Ottaviano that, as some members of the Union were not otherwise covered under a health plan, he wished to provide an employer paid health and welfare benefits plan for them.

Apparently believing that defendant Ottaviano had the knowledge and ability, Ed Dasch requested him to set up such a plan. However, defendant Ottaviano told Ed Dasch that he was not familiar with such matters and could not do as requested; however, defendant Ottaviano did recommend to Ed Dasch at least three (3) identifiable health and welfare plan providers including ULLICO, a Dr. Bennett, and defendant Michael Balice, among others, for him to contact.

From January 1, 1996 through November 30, 1996, defendant Thorndyke International was the plan administrator for the I.B.E.W. 1448 Local Health and Welfare Plan.

As plan administrator, defendant Thorndyke was responsible for performing all administrative functions of the plan, including processing claims in accordance with the plan documents.

On October 8, 1996, the plan directed Ottaviano to stop collecting employer contributions and to return all amounts collected directly to the plan Trustees.

Pretr. stip., at 1-3.

## II.

### Facts Based on Evidence

1. In 1995, the union's then business manager, Ed Dasch, and its board of directors decided to establish a health and welfare plan for members of Local 1448. Tr. at 5, May, 13, 1998. Dasch had no prior experience in this area. Id. at 92.

2. Dasch inquired about health and welfare coverage from a representative of the Union Labor Life Insurance Company (ULLICO) at an AFL-CIO convention in Hershey, Pennsylvania. Id. at 9-10.

3. In response, defendant Ottaviano, a representative of ULLICO, contacted Dasch. Id. at 10. Ottaviano told Dasch that self-funded health and welfare plans were not his specialty and arranged for him to meet defendant Balice, who was engaged in that business. Tr. at 72-74, Apr. 23, 1998; tr. at 11-12, May 13, 1998.

4. Balice informed Dasch that Thorndyke International, a company located in California, could provide a cost-effective program for Local 1448 members. Tr. at 15, 93, May 13, 1998. In late 1995, Dasch and Walsh entered into an agreement with Thorndyke to administer a health and welfare plan for the union. Tr. at 57, Apr. 23, 1998; tr. at 16, May 13, 1998. The agreement was not reduced to writing. Tr. at 16, May 13, 1998.

5. From January 1, 1996 to November 30, 1996, Thorndyke served as administrator for the I.B.E.W. Local 1448 Health and Welfare Plan. Tr. at 38, 116, Apr. 23, 1998; pl. ex. 20, at 19-22.

6. Ottaviano visited three employers and explained the benefits offered by the plan. Tr. at 130-31, Apr. 23, 1998.

7. Payments to the plan were arranged to occur as follows. Local 1448 gave Thorndyke its membership roster. Tr. at 19, May 13, 1998. Participating employers remitted monthly contributions on behalf of eligible participants and beneficiaries to Progress Bank, in Norristown, Pa. Tr. at 29, Apr. 23, 1998; tr.

at 17, May 13, 1998. Thorndyke billed the union for the monthly premium. Tr. at 17, May 13, 1998. Dasch would then notify Progress Bank to wire the funds to Thorndyke. Tr. at 29, Apr. 23, 1998; tr. at 17, May 13, 1998.

8. Despite the union's understanding that it would do so, Thorndyke did not procure an insurance policy to cover the union's health and welfare plan. Tr. at 118-19, Apr. 23, 1998; tr. at 20-22, May 13, 1998; pl. ex. 20, at 30-31.

9. In time, Dasch received numerous complaints that medical bills were not being paid. Tr. at 38, Apr. 23, 1998; tr. at 23-23, 76-77, May 13, 1998. Dasch asked Ottaviano to "try and get some of these bills paid and see what he could do." Tr. at 23, May 13, 1998. Dasch authorized Progress Bank to release account information to Ottaviano. Tr. at 82, May 13, 1998.

10. Starting in June 1996, at Ottaviano's request, participating employers sent their contributions to him.<sup>3</sup> Tr. at 84-85, 106, Apr. 23, 1998; pl. ex. 16. Ottaviano then forwarded the money to Progress Bank. Tr. at 34-35, May, 13, 1998.

11. On October 8, 1996 the trustees directed Ottaviano to stop collecting employer contributions and to cease performing any other services for the health and welfare plan. Pl. ex. 17; tr. at 33-34, May 13, 1998. Ottaviano continued to collect employer contributions. Tr. at 135, Apr. 23, 1998.

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<sup>3</sup>According to Ottaviano, Dasch requested that he act as a conduit for the contributions to determine which employers failed to remit to the health and welfare plan. Tr. at 108, Apr. 23, 1998. Dasch disputes this. Tr. at 29-35, 79-81, May 13, 1998.

12. From January 1, 1996 to November 30, 1996, the 1448 health and welfare plan paid \$187,072.02 in premiums to Thorndyke. Tr. at 116, Apr. 23, 1998; pl. ex. 2; pl. ex. 20, at 25-27.

13. Thorndyke paid \$55,135.88 in "marketing fees" to two companies – North American Marketing and RBKA – both of which were affiliated with Balice. Tr. at 118-20; pl. ex. 2; pl. ex. 20, at 25-27.

14. Balice distributed \$13,400 of the marketing fees to Ottaviano. Tr. at 93-94, 97, Apr. 23, 1998. Ottaviano did not receive any money directly from the health and welfare plan or Thorndyke. Tr. at 24, May 13, 1998.

15. The trustees of the health and welfare plan did not authorize or know about Thorndyke's payments to Balice or Balice's payments to Ottaviano. Tr. at 31-32, Apr. 23, 1998; tr. at 24, May 13, 1998.

16. Between January 1, 1996 and early July 1996, Ottaviano, as a trustee of Mid-Atlantic Trustees and Administrators, was an employer whose one employee – Harriet Foster – was covered under the union's health and welfare plan. Tr. at 105, Apr. 23, 1998; pl. ex. 21, at 70-74.

17. In early July, 1996, Ottaviano joined Local 1448. Pl. ex. 21, at 82-84. Between early July, 1996 and November 30, 1996, Ottaviano was an employee of a participating employer and a plan participant in the health and welfare plan. Tr. at 105, Apr. 23, 1998; pl. ex. 21, at 70.

### III.

#### Discussion

At issue here is Balice's payment of \$13,400 to Ottaviano, which money, according to plaintiff, originated with Local 1448, Health and Welfare Plan. The plan is an ERISA "employee welfare benefit plan" under 29 U.S.C. § 1002(1). Plaintiff trustees are ERISA "fiduciaries" of the trust under 29 U.S.C. § 1132(e)(1).

Plaintiff maintains that the \$13,400 "fee" paid Ottaviano is a prohibited transaction under ERISA, which as a matter of law must be returned to the plan. According to plaintiff, Ottaviano was either a "fiduciary" or a "party-in-interest" and, as such, was prohibited from receiving funds from the plan, excepting under circumstances not present here. See 29 U.S.C § 1106.

Ottaviano was not an ERISA "fiduciary." 29 U.S.C. § 1002(21) (defining a fiduciary as an individual who "exercises any discretionary control respecting management of such plan or . . . its assets, . . . [or who] has any discretionary authority or discretionary responsibility in the administration of such plan"). Ottaviano did not exercise and did not have the authority to exercise discretionary control over the plan. His relationship with the plan was limited to the referral of Dasch to Balice; orienting three employers as to the plan; and collecting and transmitting to the Union's bank contributions from participating employers. The referral involved neither administration nor control; federal regulations specifically reject fiduciary status

for Ottaviano's two other activities: orienting new members and collecting contributions. 29 C.F.R. § 2509.75-8.

Ottaviano is, however, a party-in-interest. He testified that the plan covered his employee and also, eventually, himself as an employee. See 29 U.S.C. § 1002(14)(C),(H) (defining a "party-in-interest" as "an employer any of whose employees are covered by such [employee benefit] plan" or an employee covered by such employee benefit plan).

Any transaction between a party-in-interest and an employee benefit plan is prohibited by 29 U.S.C. § 1106(a)(1), unless exempted by § 1108. See Landwehr v. DuPree, 72 F.3d 726, 734 (9th Cir. 1995) ("Parties in interest . . . are subject to liability under 29 U.S.C. § 1106(a) and 1132(a)(3) for engaging in prohibited transactions."); Reich v. Compton, 57 F.3d 270, 287 (3d Cir. 1995) (nonfiduciaries are liable under 29 U.S.C. § 1106(a)(1)); see also Mertens v. Hewitt Assocs., 508 U.S. 248, 262, 113 S. Ct. 2063, 2071-72 (1993) (ERISA plaintiff may obtain equitable relief from service providers that engage in prohibited transactions). Once plaintiff demonstrates a violation of 29 U.S.C. § 1106(a), then defendant has the burden of justifying the transaction under § 1108. See N.Y. State Teamsters Council Health & Hospital Fund v. DePerno, 18 F.3d 179, 182 (2d Cir. 1994) (quoting Nedd v. United Mine Workers of Am., 556 F.2d 190, 210 (3d Cir. 1977)).

The moneys paid to Thorndyke were plan assets, albeit they were contributions from employers. The distributions by

Thorndyke to Balice and, in turn, by Balice to Ottaviano are at least traceable to the plan and, arguably, constitute indirect transfers of the plan's assets. See 29 U.S.C. § 1106(a)(1)(D) (prohibiting a direct or indirect "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan"). However, it is unnecessary to decide that question here. The distribution to Ottaviano comes within the general purview of § 1108(b)(2), which permits any "reasonable arrangements with a party in interest for . . . services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." Whether compensation is reasonable "depends on the particular facts and circumstances of each case." 29 C.F.R. § 2550.408c-2(b)(1).

Ottaviano's "finder's fee" – \$13,400 – represented seven percent of the total premiums remitted to Thorndyke. Ottaviano's referral of Dasch to Balice was instrumental in setting up the plan. He also arranged the first face-to-face meeting between Balice and Dasch and later spoke with several employers about the program. Tr. at 74-75, 130-31, Apr. 23, 1998. According to Ottaviano, Balice usually paid an eight percent finder's fee on all premiums received. Tr. at 93, Apr. 23, 1998. Based on his knowledge of the industry and discussions with Balice, Ottaviano believed his commissions would significantly drop after the first year. Tr. at 100-02, Apr. 23, 1998. Plaintiff did not offer any

evidence that a seven or eight percent commission is contrary to customary business practices or was otherwise unreasonable.<sup>4</sup>

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<sup>4</sup>Although set forth in the complaint, plaintiff does not now contend that Thorndyke's apparently improper conduct relative to the plan "permeates" the entire transaction and is, therefore, a basis for recovery against Ottaviano. There is no evidence here as to the amount of the loss, if any, sustained by the plan's participants or the union, and no theory of "disgorgement" has been considered against Ottaviano other than as discussed in this memorandum. Any other contention is deemed to have been abandoned.

#### IV.

##### Conclusions of Law

1. Jurisdiction exists over the parties and the subject matter of this action.
2. Defendant Ron Ottaviano participated in a prohibited transaction by accepting the \$13,400 commission from Michael Balice.
3. The \$13,400 commission was a reasonable payment for helping to establish the plan.
4. Defendant Ron Ottaviano is not liable to plaintiff. An order accompanies this decision.

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Edmund V. Ludwig, J.

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THORNDYKE INTERNATIONAL, INC.,	:	
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and RON OTTAVIANO	:	NO. 97-cv-5718

**ORDER UNDER FED. R. CIV. P. 52(a)**

AND NOW, this 26th day of October, 1998, a decision is entered in favor of defendant Ron Ottaviano and against plaintiff I.B.E.W. Local 1448 Health and Welfare Fund.

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Edmund V. Ludwig, J.