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U.S. Supreme Court Weighs in on Judicial Recusal in Light of Campaign Donations

By John D. Hadden

Following the tragic West Virginia coal mining explosion earlier this year at a facility owned by Massey Energy, the company's CEO, Don Blankenship, appeared in the media defending its dedication to safety notwithstanding the worst U.S. mining disaster in 40 years.[i] Most observers were undoubtedly unaware, however, that Blankenship was also recently at the heart of a massive debate over judicial campaign funding and judicial recusal that ultimately led the U.S. Supreme Court to take up the issue of recusals on federal Due Process grounds.

In 2002, a West Virginia jury returned a $50,000,000 verdict against Massey Energy subsidiary A.T. Massey Coal Company, of which Blankenship was chairman, president and CEO at the time, in a case involving tortious interference with contract. Before the case went up on appeal, Blankenship personally contributed over $3,000,000 to an organization that then ran a powerful campaign to unseat an incumbent West Virginia Supreme Court justice and replace him with a new justice, Brent Benjamin. Benjamin was successful in his bid, and he later cast the deciding vote overturning the verdict against A.T. Massey, rejecting calls from the plaintiff that he recuse himself because of Blankenship's monetary support.

The U.S. Supreme Court granted *certiorari* in the case, and held that the Due Process clause of the U.S. Constitution requires a judge to recuse himself when "the probability of actual bias" is unconstitutionally high.[ii] Justice Kennedy, writing for the majority that remanded the case for rehearing, noted that "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when — without the consent of other parties — a man chooses the judge in his own cause."[iii] In dissent, Justices Roberts and Scalia decried the "vast uncertainty" that the decision created for lower courts that would almost certainly be faced with recusal challenges based on relationships such as "friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation and countless other considerations."[iv]

This decision adds another layer of considerations on top of the existing law governing judicial recusal. Under the Georgia Code of Judicial Conduct, a judge is required to recuse himself "in a proceeding in which his impartiality might reasonably be questioned."[v] Moreover, the code also "mandates that judges avoid not only actual impropriety, but that they avoid even the appearance of impropriety."[vi]

Despite this strong language, the bar is high in Georgia for a finding of

bias necessary to disqualify a judge. Such bias must come from an extra-judicial source, rather than information obtained during the pendancy of the case,[vii] and a showing of bias necessarily is a fact-intensive question. Moreover, concerns over "judge shopping" have prompted the Georgia Supreme Court to note that "[i]t is as much the duty of a judge not to grant the motion to recuse when the motion is legally insufficient as it is to recuse when the motion is meritorious."[viii]

The procedural requirements for a motion to recuse are found in Uniform State/Superior Court Rule 25. Recusal motions, which are required to be filed within five days of the date the party discovered the basis for the motion, must be accompanied by an affidavit setting forth the party's basis for bias or prejudice, which must be as specific as possible. Upon the filing of the motion, the trial judge must halt the proceedings on the merits to determine whether the motion is procedurally proper and, if so, determine whether the facts contained in the affidavit, if proven true, would be sufficient to warrant recusal. If the judge finds himself in the affirmative, the motion is transferred to another judge for a factual consideration of the allegations contained in the affidavit.[ix] If the judge hearing the motion finds that recusal is appropriate, a replacement judge is selected under the procedures set forth in Rule 25.

The fact-intensive nature of a recusal inquiry is demonstrated in the following examples. In *Eastside Baptist Church v. Vicinanza*, the Georgia Court of Appeals held that a judge's position on the Board of Directors of a defendant university "is exactly the type of situation in which a judge's impartiality might reasonably be questioned."[x] On the other hand, the Court of Appeals held that where a trial judge made several telephone calls to a party's attorney that raised questions as to the attorney's quality of representation, recusal was not warranted because any potential bias was not "of such a nature and intensity that it would impede the exercise of impartial judgment."[xi]

Although Justice Kennedy described the situation in *Caperton* as an "extreme" case, the decision at a minimum focuses additional attention on the issue of judicial elections, which take place in 39 states, and the impact of donations made to or on behalf of candidates by parties or attorneys who may appear before them. The issue has also been considered by the Georgia legislature. In 2007 and 2009, bills were introduced that would require recusal where a party or its counsel donated $500 or more (the 2007 bill) or in excess of the amounts allowed by O.C.G.A. § 21-5-41.[xii] Neither bill was successful, but the issue is likely to be raised again in the future, especially in light of the perceived uncertainty following *Caperton*.[xiii]

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Notes

[i] Special acknowledgment is given to Georgia State law students Jeff Kuntz, Shane Peagler, and Bruce Sarkisian for their report on this subject presented at the April 12, 2010 meeting of the Logan E. Bleckley Chapter of the American Inns of Court.

[ii] *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

[iii] Id. at 2265.

[iv] Id. at 2268 (Roberts, CJ, dissenting).

[v] Ga. Code of Jud. Cond. § 3(E).

[vi] Ga. Code of Jud. Cond., Canon 2.

[vii] *Carter v. State*, 246 Ga. 328 (1980).

[viii] *Hampton Island Founders v. Liberty Capital*, 283 Ga. 289, 297 (2008).

[ix] Uniform Superior Court Rule 25.3 – 25.6.

[x] 269 Ga. App. 239, 241 (2004).

[xi] *Adams v. State*, 290 Ga. App. 299, 303 (2008).

[xii] H.B. 97 (2007) and H.B. 601 (2009).

[xiii] Alyson M. Palmer, *Federalist Society Debates Recusal*, Fulton County Daily Report, Sept. 30, 2009, at 1.