RECENT DEVELOPMENT

Discretionary Recusal and the Appearance of Partiality Through the Eyes of the Fifth Circuit in *Republic of Panama v. American Tobacco Co.*

When then-attorney, now-Federal District Judge Carl J. Barbier took his seat as President of the Louisiana Trial Lawyers Association (LTLA), he probably had no idea that his service for the LTLA would later cause him to suffer an embarrassing blow to his judicial integrity. Six months after he finished his yearlong term as president, the LTLA filed a motion seeking permission to file an amicus brief in support of the plaintiffs in a state tobacco case.[1] Because of an unfortunate clerical error that wrongly listed him as the president of LTLA on that motion, Judge Barbier became the center of a heated debate about when it is appropriate to require a judge to recuse himself from hearing litigation related to issues about which he *may* have a personal opinion.[2]

The defendant tobacco companies in *Republic of Panama II* filed a timely motion of removal to federal court, after which the case was assigned to Judge Barbier's court.[3] The defendants then filed a motion for recusal that the judge denied by exercising his discretion as provided in 28 U.S.C. § 455(a).[4] Thereafter the judge granted the plaintiff's motion to remand the case to state court.[5] On appeal, a panel of the United States Court of Appeals for the Fifth Circuit ruled that Judge Barbier abused his discretion and reversed the decision denying recusal.[6] The panel then vacated Judge Barbier's order to remand the case to state court and sent the case back to federal district court to be assigned to a different judge.[7] The plaintiffs appealed the panel's decision and filed a petition for rehearing en banc.[8] The Fifth Circuit *denied* the petition for rehearing en banc and thereby refused to reconsider whether Judge Barbier had been properly removed for an

1. Republic of Panama v. Am. Tobacco Co., 265 F.3d 299, 301 (5th Cir. 2001) (Wiener & Parker, JJ., dissenting) [hereinafter *Republic of Panama II*].
2. *See id.* at 301-02 (Wiener & Parker, JJ., dissenting).
3. *Id.* at 301 (Wiener & Parker, JJ., dissenting).
4. *Id.* (Wiener & Parker, JJ., dissenting).
5. *Id.* (Wiener & Parker, JJ., dissenting).
6. *Id.* (Wiener & Parker, JJ., dissenting).
7. *Id.* (Wiener & Parker, JJ., dissenting).
8. *Id.* at 300 (en banc) (per curiam).

appearance of partiality and thus allowed its earlier decision[9] forcing his recusal to stand. *Republic of Panama v. American Tobacco Co.*, 265 F.3d 299, 300 (5th Cir. 2001).

An historical analysis of the concept of mandatory recusal of judges requires a long reach, back to the time of Blackstone. At that time, judges were not bound to recuse themselves from hearing cases in which they might have an interest.[10] In the newly born United States, however, federal statutes, as early as 1792, forced judges to recuse themselves if they had an interest in, or represented a party to, the litigation before them.[11] This concern that the judiciary avoid even the appearance of bias is a relatively recent phenomenon.

The general requirement of impartiality by federal judges became legally enforceable through statute in 1911 when Congress passed 28 U.S.C. § 144, which allowed parties to litigation to file an affidavit claiming bias on the part of the presiding judge.[12] The United States Supreme Court held that a judge may not decide the truth of the allegations against him, but allowed the challenged judge to retain some discretion in the matter by granting him the power to rule on the legal sufficiency of the affidavits.[13]

Congress later passed 28 U.S.C. § 455, which gave judges the power and discretion to recuse themselves from cases in which they may have a "substantial interest" in some aspect of the litigation.[14] In 1974, due to concern that the statute gave judges too much discretion in deciding their own level of potential bias or interest, Congress amended § 455 to include a more objective standard for evaluating

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9. *See* Republic of Panama v. Am. Tobacco Co., 250 F.3d 315 (5th Cir. 2001).

10. *See* 3 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 361 (Wayne Morrison ed., Cavendish Pub. 2001) (1765).

11. *See, e.g.*, Liteky v. United States, 510 U.S. 540, 544 (1994) (discussing history of judicial recusal in England and the United States).

12. *See* Shawn P. Flaherty, Note, Liteky v. United States: *The Entrenchment of an Extrajudicial Source Factor in the Recusal of Federal Judges Under 28 U.S.C. § 455 (a)*, 15 N. ILL. U. L. REV. 411, 413-14 (1995).

13. *See* Berger v. United States, 255 U.S. 22, 32-36 (1921).

14. Flaherty, *supra* note 12, at 414-15. The language of 28 U.S.C. § 455, before it was amended in 1974, stated:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

Liteky, 510 U.S. at 546 (quoting 28 U.S.C. § 455 (1970)).

whether a judge should step down, and § 455(a) was thereby born.[15] The objective standard introduced by § 455(a) codified a concept introduced in 1968 by the Supreme Court, which warned judges to "avoid even the appearance of bias."[16]

In a case where the allegedly interested judge claimed he had no knowledge that he might have a personal interest in the litigation before him, the Court reasoned that the judge's knowledge had no bearing on whether a reasonable person may perceive an appearance of partiality.[17] In *Liljeberg*, the Supreme Court considered a § 455(a) motion to recuse filed by respondents in Federal District Judge Robert Collins' courtroom.[18] Judge Collins heard the dispute before him without realizing until after the verdict was filed that his position as a trustee of Loyola University in New Orleans gave him personal knowledge, and a personal interest, in the outcome of the litigation.[19] Judge Collins claimed that he forgot that he had been privy to negotiations between the Loyola Board of Directors and the defendant and was therefore unaware of any potential conflict.[20] The Court held that even though Judge Collins' failure to recuse himself was the result of a "lapse in memory," a violation of § 455(a) had occurred because "an objective observer would have questioned [his] impartiality."[21]

The Court clearly stated the obvious extension of the *Liljeberg* holding in *Liteky v. United States*, when Justice Scalia wrote that all cases under § 455(a) must "be evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance."[22] The appearance of partiality standard is a high hurdle to leap for a judge asked to consider his own impartiality under § 455(a). A judge retains the discretion, however, to evaluate whether the claim of partiality is reasonable and can choose to continue presiding over a case if she believes that no reasonable person would question the appearance of impartiality.[23]

The objective standard, while avoiding the problem of automatic dismissal that can give parties unlimited "judge-shopping" power,

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15. See Flaherty, supra note 12, at 415-16. Section 455(a) provides, "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1994).

16. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968).

17. *See* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 859-60 (1988).

18. *Id.* at 850.

19. *See id.* at 855-58.

20. *See id.*

21. *See id.* at 861.

22. Liteky v. United States, 510 U.S. 540, 548 (1994).

23. *See* Trust Co. v. N.N.P., Inc., 104 F.3d 1478, 1491 (5th Cir. 1997).

takes away from the judge the unique perspective she has on the issue of recusal and forces her to use a less sophisticated standard for evaluating this sensitive situation.[24]

After a judge receives a motion for recusal, she may decide that the effects of making a decision in the case are too "ubiquitous and . . . indirect to require disqualification."[25] In *New York City Housing Development Corp. v. Hart*, the United States Court of Appeals for the Seventh Circuit reasoned, upon appeal of a judge's decision not to recuse himself in light of a § 455(b)(4) motion,[26] that the possibility that a judge's decision may affect the value of some bond funds in which he had a personal interest would not have a significant enough affect on the market to require recusal.[27]

Around the same time, the Fifth Circuit relied on the appearance of partiality standard to apply § 455(a) to a case where the judge had allegedly engaged in business dealings with counsel for one of the parties.[28] While the court decided that the issue had become moot because the affected counsel had since withdrawn from the case, it went on to say that because the affected counsel had played a "virtually nonexistent" role in the litigation, the appearance of partiality did not survive that counsel's withdrawal and the statute had not been violated.[29]

The Fifth Circuit also applied the appearance of partiality test to vacate what the court felt was an excessive sentence for wire fraud and

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24. *In re* Mason, 916 F.2d 384, 386 (7th Cir. 1990). Judge Easterbrook articulated concern with the objective standard when applied by the allegedly partial judge:

> An objective standard creates problems in implementation. Judges must imagine how a reasonable, well-informed observer of the judicial system would react. Yet the judge does not stand outside the system; as a dispenser rather than a recipient or observer of decisions, the judge understands how professional standards and the desire to preserve one's reputation often enforce the obligation to administer justice impartially, even when an observer might be suspicious.

Id.

25. N.Y. City Hous. Dev. Corp. v. Hart, 796 F.2d 976, 979 (7th Cir. 1986).

26. 28 U.S.C. § 455(b)(4) (1988). Section (b) of § 455, unlike the "catch all" provision of section (a), includes a listing of specific situations in which a judge should disqualify himself from hearing a case. Subsection (b)(4) requires recusal if

> [the judge] knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

Id.

27. *See Hart*, 796 F.2d at 979-80.

28. *See In re* Placid Oil Co., 802 F.2d 783, 786 (5th Cir. 1986).

29. *Id.*

money laundering.[30] The Fifth Circuit held that the sentence Judge Harmon imposed upon the defendant after her conviction for wire fraud and money laundering, totaling forty-five years in prison, would cause an objective observer to question the court's impartiality.[31] The court's concern was based in ensuring and retaining public confidence in the judicial system so the appearance of partiality became the court's paramount consideration.[32]

In *Republic of Panama I*, the Fifth Circuit applied the appearance of partiality test to determine whether Judge Barbier should be removed from hearing the tobacco litigation before him.[33] The court held that because a reasonable person may doubt his impartiality, he should be removed from the case.[34] And while the court recognized that the § 455(a) analysis did not present a clear indication that disqualification was appropriate, it relied on Fifth Circuit precedent, which "held that if the question of whether § 455(a) requires disqualification is a close one the balance tips in favor of recusal."[35] The court went on to vacate without addressing the merits Judge Barbier's remand order and his denial of the motion to stay the proceedings until the defendant's motion to transfer, which was pending before the panel on multidistrict litigation, was decided.[36]

In determining that Judge Barbier's neutrality could be reasonably questioned, the court relied on a Fifth Circuit decision in which the court held that Judge Jim Vollers should have been disqualified from hearing the underlying Texas Court of Criminal

30. United States v. Jordan, 49 F.3d 152, 155-60 (5th Cir. 1995). The defendant in the case, Betty Jordan, owned and operated a trucking company based in Houston, which had, several years before charges were brought against Ms. Jordan, been placed into receivership under Mr. Michael Wood. *Id.* at 154-56. Mr. Wood, his wife, Judge Harmon (the presiding judge in *Jordan*), and her husband all went to law school together and remained close friends after graduation. *Id.* at 156. During the period of time that Mr. Wood was acting as receiver of Ms. Jordan's business, an extremely contentious relationship developed between them, and at one point Ms. Jordan's daughter pressed charges against Mr. Wood for assault. *See id.* Not coincidentally, Judge Harmon's husband, Mr. Wood's friend and former law partner, handled the assault charge on Mr. Wood's behalf. *See id.*

31. *Jordan*, 49 F.3d at 157-59.

32. *See id.* at 155-56. Judge Garza emphasized the crucial importance of avoiding the appearance of impartiality stating: "Put simply, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself." *Id.*

33. Republic of Panama v. Am. Tobacco Co., 217 F.3d 343, 347 (5th Cir. 2000) [hereinafter *Republic of Panama I*].

34. *Id.*

35. *Id.* (citing *In re* Chevron U.S.A., Inc., 121 F.3d 163, 165 (5th Cir. 1997)).

36. *Id.*

Appeals case.[37] Judge Vollers sat on the panel that denied the defendant's appeal from a burglary conviction, but had also been the Texas State Prosecuting Attorney at the time of the appellee's conviction.[38] The Fifth Circuit in *Republic of Panama I* paid special attention to the fact that Judge Vollers' name appeared on the brief initially filed against the appellee in his trial.[39] The Fifth Circuit in 1986 disregarded Judge Vollers' claims that his name appeared on the brief merely as a formality and held that he should have recused himself.[40] The Fifth Circuit then applied *Bradshaw* in assessing Judge Barbier's name on the LTLA's request to file an amicus brief and held that there existed an appearance of partiality.[41]

Having held that Judge Barbier should have recused himself from hearing *Republic of Panama I*, the Fifth Circuit considered the judge's decision to remand and his denial of the defendant's motion to stay the proceedings while waiting for a decision on the defendant's motion for recusal.[42] Generally, 28 U.S.C. § 1447(d) removes from appellate review a district court's remand order.[43] If, however, the appellate court determines that the lower court judge should have recused himself, the issue of remand need not be reached and will be vacated upon removal of the judge.[44] The *Republic of Panama I* court thus vacated Judge Barbier's order remanding the case to state court, thereby returning the proceedings to the Eastern District of Louisiana to be heard by a different judge.[45]

Upon appeal of the decision in *Republic of Panama I*, the Fifth Circuit declined to review the decision en banc; Judges Wiener and Parker, joined by Judges King, Higginbotham, Davis, and Dennis, filed a vigorous dissent.[46] The dissent distinguishes the only precedent the *Republic of Panama I* panel relied on in its factual analysis, *Bradshaw v. McCotter*, by highlighting crucial differences in the factual basis for that decision.[47] First, the dissent emphasizes that the

37. *See id.* (citing Bradshaw v. McCotter, 785 F.2d 1327, 1328-29 (5th Cir. 1986), *rev'd on other grounds*, 796 F.2d 100 (5th Cir. 1986)).
38. *Id.*
39. *Id.*
40. *Bradshaw*, 785 F.2d at 1329.
41. *Republic of Panama I*, 217 F.3d at 347.
42. *Id.*
43. *See id.* at 346.
44. *See id.* at 347 (citing Tramonte v. Chrysler Corp., 136 F.3d 1025, 1028 (5th Cir. 1998)).
45. *Republic of Panama I*, 217 F.3d at 347-48.
46. *Republic of Panama II*, 265 F.3d 299, 300-06 (Wiener & Parker, JJ., dissenting).
47. *See id.* at 302-03 (Wiener & Parker, JJ., dissenting).

judge in *Bradshaw* had been correctly listed as prosecutor on the State's brief.[48] Next, and more importantly, the judge was scheduled to hear an appeal of the same case, with the same criminal defendant, he had prosecuted before he became judge.[49] The dissent then lists several other differences of significance: the judge's name in *Bradshaw* appeared on a state brief, not an amicus; it was a criminal case; and it implicated a substantive pleading, not a procedural motion.[50] The dissent then dismisses *Bradshaw* as irrelevant to the panel's decision to remove Judge Barbier in the noted case.[51]

The dissent principally highlights three cases the panel should have relied upon, all of which tip in favor of retaining the implicated judge.[52] The Supreme Court was presented with a very similar issue in a case from which then-Associate Justice Rehnquist declined to disqualify himself for making statements, before his elevation to the Supreme Court, about the very case at issue.[53] The respondents who requested that Justice Rehnquist decline to hear the case argued that the fact that the Justice had expressed an opinion publicly about how the law should be interpreted in *Laird* should be enough to disqualify him.[54] The dissent in the noted case found Justice Rehnquist's response to that charge compelling "[p]roof that a Justice's mind at the time he joined the court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."[55]

The United States Court of Appeals for the Third Circuit, in a case very similar to the noted case, declined to remove a judge from hearing litigation that contained similar facts and issues to another case in which that judge had represented a tobacco company while in private practice.[56] The court reasoned that a ruling removing the judge would send a message that the only judges qualified to hear a case would be those who, while lawyers, were the most ill-prepared and least-informed attorneys in the field.[57]

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48. *See id.* (Wiener & Parker, JJ., dissenting).
49. *See id.* (Wiener & Parker, JJ., dissenting).
50. *See id.* (Wiener & Parker, JJ., dissenting).
51. *See id.* (Wiener & Parker, JJ., dissenting).
52. *See id.* at 303-05 (Wiener & Parker, JJ., dissenting).
53. *See* Laird v. Tatum, 409 U.S. 824, 839 (1972).
54. *Id.* at 824-26.
55. *Republic of Panama II*, 265 F.3d at 304 (Wiener & Parker, JJ., dissenting) (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972)).
56. *See* Cipollone v. Liggett Group, Inc., 802 F.2d 658, 659-60 (3d Cir. 1986).
57. *Id.*

In place of *Bradshaw*, the dissent would have relied upon a Fifth Circuit case in which a practicing attorney (later a judge), who "served as president of a racially segregated bar association" was assigned to hear charges that the Alabama Bar Association racially discriminated in its bar examination.[58] The court declined to remove the judge from hearing the case because "[t]he claim of bias is general or impersonal at best."[59] The dissent argues that the facts in *Parrish* more closely reflect the facts in the noted case than do those in *Bradshaw*.[60]

The dissent in the noted case avoids making any suggestions as to why the Fifth Circuit made such an unusual decision and forced the recusal of a lower court colleague. The answer lurks under the surface of the panel's decision. The conservative Fifth Circuit, in an apparent attempt to help the defendants avoid state court, searched for a way to overturn Judge Barbier's ruling, and found one. A motion to remand under 28 U.S.C. § 1447(d) is not reviewable on appeal,[61] unless it is followed by a district court's erroneous ruling on recusal.[62] If the appellate court finds that the district court erred in refusing to grant a motion to recuse, it can reverse the recusal decision and vacate a remand order made by the lower court judge.[63] Because the *Republic of Panama I* court read *Tramonte* to allow the appellate court, after reversing a lower court judge's denial of a motion for recusal (thus requiring the judge to step down), to overturn the judge's remand order, it avoided being hamstrung by the insulation from review that remand orders enjoy under 28 U.S.C. § 1447(d).[64]

Because the Fifth Circuit was so anxious to vacate the remand order given by Judge Barbier, it stretched precedent further than it was intended to reverse the judge's refusal to step down. The noted case solidifies binding case law in the Fifth Circuit allowing appellate courts to review a judge's discretionary decision to recuse for the most

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58. *See Republic of Panama II*, 265 F.3d at 303 (Wiener & Parker, JJ., dissenting) (quoting Parrish v. Bd. of Comm'rs, 524 F.2d 98, 103-04 (5th Cir. 1975) (Wisdom, J., dissenting)).

59. Parrish v. Bd. of Comm'rs, 524 F.2d 98, 101 (5th Cir. 1975).

60. *Republic of Panama II*, 265 F.3d at 303 (Wiener & Parker, JJ., dissenting).

61. 28 U.S.C. § 1447(d) (2000). The language of section (d) provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Id.

62. *Republic of Panama I*, 217 F.3d at 345-46.

63. *Id.*

64. *See id.*

tenuous reason: the judge may have had an opinion on an issue similar to the one asserted in his courtroom. The broad sweep of this decision could result in the removal of many judges from cases they are qualified and capable to hear. This decision casts a pall over the oath to be impartial that every judge takes when appointed to the bench[65] and allows attorneys to manipulate the system to guarantee their clients what they perceive to be the most favorable forum. It is unfortunate that the Fifth Circuit has facilitated potential abuse of both the federal court system and the integrity of judges whose impartiality can now be called into question with unprecedented ease.

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65. 28 U.S.C. § 453 (2000).