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BANKRUPTCY LAW

Disqualification of Bankruptcy Judges: A Brief Overview

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Recusal of a bankruptcy judge is necessary in certain rare circumstances. The most common grounds include: questionable impartiality; personal bias or prejudice; and the existence of certain financial and familial relationships. A brief analysis of this issue follows.

Applicable Authority

Under Bankruptcy Rule 5004(a), Section 455 of Title 28 governs recusal of a bankruptcy judge. The judge must be disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstance arises or, if appropriate, disqualified from presiding over the case.

Section 455, in turn, has several subparts. Under Section 455(a), a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Under Section 455(b), a judge must disqualify himself in the following additional circumstances:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> (2) Where in private practice he served as lawyer in the matter, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding, or expressed an opinion concerning the merits of the particular case in controversy;
> (4) He knows that he…or his spouse or minor child residing in his household has a financial interest in the subject matter or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
> (i) Is a party to the proceeding, or an officer, director or trustee of a party;
> (ii) Is acting as a lawyer in the proceeding;
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
> (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Under Section 455(e), a judge cannot accept a waiver of any ground for disqualification enumerated in Section 455(b). Where the ground for disqualification arises only under Section 455(a), however, waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Under Section 455(f), if a bankruptcy judge would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery that he, his spouse or minor child residing in his household has a financial interest in a party, other than

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an interest that could be substantially affected by the outcome, disqualification is not required if the judge, spouse or minor child divests himself of the interest that provides the grounds for the disqualification.

Next, under Bankruptcy Rule 5004(b), a bankruptcy judge must be disqualified from allowing compensation to a person who is a relative of the bankruptcy judge or with whom the judge is so connected as to render it improper for the judge to authorize such compensation.

Finally, Section 144 of Title 28—which provides in relevant part that whenever a party to any proceeding in a district court files a timely and sufficient affidavit that the judge has a personal bias or prejudice either against her or in favor of any adverse party, such judge shall proceed no further and another judge shall be assigned to hear such proceeding—does not apply to bankruptcy judges. It does apply, however, to a district court judge adjudicating a bankruptcy appeal. See, e.g., *In re Mondelli*, 2008 WL 234226 at *8 (Bankr. D.N.J. Jan. 24, 2008), *aff'd*, 2009 WL 3358465 (3d Cir. Oct. 20, 2009).

Questionable Impartiality

The test for recusal under Section 455(a) is whether a reasonable layperson, with knowledge of all of the facts, would conclude that the judge's impartiality might reasonably be questioned. Thus, the test requires not *actual* bias, but merely the *perception* of bias. Further, the alleged partiality or bias generally must derive from an extrajudicial source. Therefore, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. Rather, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the proceeding do not constitute a basis for bias unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Otherwise, judicial rulings can simply be corrected on appeal. See, e.g., *In re Kensington Int'l Ltd.*, 368 F.3d 289, 301-02 (3d Cir. 2004); *Mondelli*, 2008 WL 234226 at *8.

In *Kensington*, the Third Circuit issued a writ of mandamus disqualifying a district judge presiding over certain asbestos-related Chapter 11 cases, because a reasonable person would have concluded that the judge's impartiality might reasonably be questioned, where neutral advisors, appointed by the judge to provide advice, at the same time represented a class of tort claimants in an unrelated asbestos-related bankruptcy, and because the judge, the advisers and the parties had engaged in extensive ex parte communications regarding the cases.

Likewise, in *Moody v. Simmons*, the Third Circuit vacated the actions of a district judge presiding over a bankruptcy case because the judge's appearance of impartiality could have been compromised by his daughter's employment by an unsecured creditor in the case, and by a state court lawsuit in which the judge was defended by counsel who was before the judge in the bankruptcy case. 858 F.2d 137, 143 (3d Cir. 1988).

In contrast, in *In re Marasek*, the Third Circuit recently denied a petition for mandamus review of a New Jersey bankruptcy judge's refusal to recuse himself in a Chapter 7 case, on the following grounds: (1) contrary to the movants' allegations, the judge was not a former "colleague and business associate" of the Chapter 13 trustee previously involved in the case; (2) the movants failed to provide any evidence substantiating their allegation of a partnership or improper relationship among the judge and the former and current Chapter 7 trustees appointed in the case; (3) the allegation that the judge held a financial interest in a "privately held entity that benefits from the fees generated in the bankruptcy cases over which he presides" was entirely unsupported; and (4) the mere employment of a creditor's attorney at the judge's former law firm was not a basis for recusal. 2013 WL 5314566 at **1-2 (3d Cir. Sept. 24, 2013).

Also, in *Ezekoye v. Ocwen Loan Serv. (In re Ezekoye)*, the Third Circuit dismissed an appeal from an order denying a debtor's motion for recusal of a bankruptcy judge where the debtor had argued only that he disagreed with the judge's rulings and that the judge had not yet ruled on a separate motion. 2006 WL 1683457 at *2 (3d Cir. June 20, 2006).

Finally, in *Mondelli*, a New Jersey bankruptcy judge denied a debtor's motion for recusal because the debtor failed to demonstrate specific examples of the judge's alleged bias and argued only generally that court's rulings were "unfair and biased," and because recusal at that late stage of the case would not serve judicial economy. 2008 WL 234226 at **8-9.

Personal Bias or Prejudice

To prevail under Section 455(b)(1), the movant must present facts sufficiently definite and particular to convince a reasonable person that bias exists. Conclusory allegations of bias, opinions and rumors do not suffice. See, e.g., *Raza v. Biase*, 2008 WL 682236 at **3-4 (D.N.J. Mar. 7, 2008).

Thus, in *Raza*, for example, a district court denied an appeal from an order denying a motion for recusal of a New Jersey bankruptcy judge under Section 455(b)(1), where the movants failed to provide any documentation or evidence supporting their allegations that the judge had failed to perform her duty, had engaged in obstruction of justice or had harassed the movants.

Financial and Familial Relationships

Section 455(b) has been construed to require recusal if a judge, the judge's spouse or minor children residing with the judge possess a *financial* interest in the subject matter of or if any of these individuals are parties to a controversy, regardless of the size of the interest, regardless of whether the outcome of the proceeding could have a substantial effect upon the interest, and regardless of whether the interest actually creates the appearance of impropriety. The financial interest in the subject matter must be direct, however, rather than speculative or remote. Further, ownership of a small percentage of the outstanding shares of a publicly traded corporation listed as a creditor of the debtor does not give rise to a "financial interest" in the subject matter in controversy, unless the judge has an interest that can be substantially affected by the outcome of the proceeding. Finally, if the judge, the judge's spouse, or someone within the third degree of relationship to one or both of them possesses a *nonfinancial* interest in the case, recusal will be required only if that interest could be substantially affected by the outcome of the proceeding. See, e.g., *Tare v. Bank of Am.*, 2008 WL 4372785 at **4-5 (D.N.J.

Sept. 19, 2008).

Thus, in *Tare*, a district court held that a New Jersey bankruptcy judge had correctly concluded that her mere possession of minimal stockholdings in certain non-party unsecured creditors did not require recusal under Section 455(b)(4), where the outcome of the proceedings could not have affected her stockholdings. ■