

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

STATE FARM FIRE AND CASUALTY
COMPANY AND STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY

PLAINTIFFS

V.

CIVIL ACTION NO. 2:07cv188-KS-MTP

JIM HOOD, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE
STATE OF MISSISSIPPI

DEFENDANT

ORDER OF RECUSAL

This cause is before the Court on the Motion for Recusal [# 16] filed by Jim Hood in his official capacity as Attorney General of the State of Mississippi (“General Hood”). The Court, having considered the Motion for Recusal, the Response by the Plaintiffs State Farm Fire and Casualty Company and State Farm Mutual Insurance Company (“State Farm”), and the applicable authorities, being fully advised in the premises, finds that the Motion for Recusal is well-taken and should be **granted**.

BACKGROUND

The Complaint herein, filed by State Farm, is for injunctive relief which arises out of a contractual claim by State Farm against General Hood. Following Hurricane Katrina, General Hood opened an extensive criminal investigation into State Farm’s processing and payment of damage claims made by Mississippi policyholders. During the investigation, General Hood

issued several grand jury subpoenas for numerous documents related to State Farm's handling of those claims.

The investigation continued until on or about January 23, 2007, when a settlement agreement was reached between General Hood and State Farm. According to the terms of the agreement, General Hood agreed that he, the Mississippi Attorney General's Office, and the State of Mississippi:

will conclude the investigation as to State Farm, any of its current or former employees, directors, engineers, agents, counsel or adjustors and will not bring criminal charges against State Farm or any of its current or former employees, directors, engineers, agents, counsel or adjustors in connection with the investigation.

State Farm agreed to pay the costs of the investigation, and did pay \$5 million to reimburse the state for its costs. Following this agreement, the investigation by General Hood was discontinued.

On or about August 23, 2007, General Hood issued a subsequent subpoena that State Farm claims reopened the same criminal inquiry.¹ The subpoena was issued by the grand jury of Jackson County, Mississippi, and requested numerous documents related to Hurricane Katrina claims. Believing this to be a violation of its contractual obligations relative to the prior settlement, State Farm brought this Complaint for injunctive relief on September 14, 2007, along with an immediate request for a temporary restraining order. A Temporary Restraining Order [# 10] was issued by this Court.

¹The Court expresses no opinion on the merits of the underlying suit in ruling on the motion for recusal. Although the material requested and the language used in the August 23, 2007, subpoena largely tracks that used in prior subpoenas, General Hood has not yet been afforded an opportunity to rebut State Farm's substantive claim that General Hood has reopened the investigation closed by the January 23, 2007, agreement.

Prior to the hearing on the Temporary Restraining Order, the Court disclosed that it had two small Katrina-related claims that were insured by and settled with State Farm during 2005.² Neither side objected to the Court going forward with the hearing but reserved the right to raise the issue at a later time. Subsequent thereto, General Hood filed the instant Motion for Recusal.

DEFENDANT'S MOTION FOR RECUSAL

General Hood sets forth two grounds for recusal, both arising under 28 U.S.C. § 455, which states in part:

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(4) He 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;

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

²On September 13, 2007, the Court held a telephonic status conference. Prior to the start of that conference, the Court noted that it was a current State Farm policyholder. The Court disclosed that it made two claims against its State Farm policies following Hurricane Katrina. The Court further disclosed that both claims were paid by State Farm for a total amount paid of less than \$10,000. After this disclosure, neither party indicated that it would seek recusal, and a hearing was scheduled for the following day. On September 14, 2007, the Court held a telephonic hearing on the motion for a temporary restraining order. Prior to the start of that hearing, the Court made an identical disclosure regarding its status as a State Farm policyholder, and again inquired as to whether the parties would seek recusal on those grounds. The Movants indicated their desire to seek recusal, but agreed to delay moving for recusal until after the conclusion of the TRO hearing.

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual saving association, or similar proprietary interest, is a “financial interest” in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

It is also argued by General Hood that State Farm’s selection of the Hattiesburg Division shows that there is some effort being made by State Farm to forum shop. Moreover, General Hood argues that, with a pending grand jury investigation in the Southern Division, and a Defendant who resides in the Jackson Division, the choice of venue in the Hattiesburg Division is unusual.

ANALYSIS

When Congress amended 28 U.S.C. § 455(a) it made clear that judges should apply an objective standard in determining whether to recuse. A judge contemplating recusal should not ask whether he or she believes themselves capable of impartiality presiding over the case. Instead, the statute requires recusal in any case “in which the judge’s impartiality *might reasonably be questioned*.” 28 U.S.C. § 455 (2000) (emphasis added). Because of that language, every circuit has adopted some version of a reasonable, prudent person standard. *See Vieux Carre Prop. Owners v. Brown*, 948 F.2d 1436, 1448 (5th Cir. 1991). The Fifth Circuit has further stated that when the recusal issue presents a close question the court should rule in favor of recusal. *Republic of Pan. v. Amer. Tobacco Co.*, 217 F.3d 343, 347 (5th Cir. 2000) (citing *In re Chevron*, 121 F.3d 163, 165 (5th Cir. 1997)). Because the goal of recusal is to exact the appearance of impartiality, recusal may be required even though the judge is not actually partial.

Patterson v. Mobil Oil Corp., 335 F.3d 476, 484 (5th Cir. 2003).

The Fifth Circuit has further instructed that “review [of a request for recusal] should entail a careful consideration of context.” *Andrade v. Chojnacki*, 338 F.3d 448, 455 (5th Cir. 2003). In other words, claims for recusal should not be analyzed only by “comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue.” *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999). The ultimate decision of whether to recuse rests within the sound discretion of the trial judge. *United States v. Anderson*, 160 F.3d 231, 233 (5th Cir. 1998).

The exceptional circumstances of this litigation caution the Court to tread carefully in weighing the recusal issue. The parties dedicated their briefing primarily to the mandatory disqualification provision of § 455(b), which requires the judge to disqualify himself when he has a financial interest in the subject matter of the controversy. 28 U.S.C. § 455(b)(4) (2000). This Court was, and is, a policyholder with State Farm. General Hood made some effort to distinguish State Farm Mutual Automobile Company, a mutual insurance company, from State Farm Fire and Casualty Company, a stock insurance company.³ The Court believes this to be a distinction without a difference, since all of the stock in the stock company is in fact owned by the mutual company.

General Hood’s recusal argument under § 455(b) boils down to the financial interests of the Court in State Farm, which are based exclusively on being a policyholder. The exception

³A “mutual insurance company” is an insurance company which is owned by its policyholders who formed an association for the purposes of insuring one another against the possibility of fortuitous loss. Each policyholder pays a premium for his or her own policy. If at the end of the fiscal year the mutual insurance company declares a profit, the profit is shared amongst all the policyholders. If the company declares a loss, there is also provision for the policyholders to be assessed a levy to make up for this shortfall.

under § 455(d)(4)(iii) states that the proprietary interest of a policyholder in a mutual insurance company is a “financial interest” in the organization only if the outcome of the proceeding could substantially affect the value of the interest. 28 U.S.C. § 455(d)(4)(iii) (2000). State Farm has furnished an affidavit indicating that it has a policyholder surplus in excess of \$61 billion. The size of the company is not challenged. While both sides dispute the amount that is potentially in controversy in any litigation or criminal charges that would flow from a decision by the Court, an adverse effect on State Farm of \$60 million would only affect one-tenth of one percent of the reserves. Premiums paid by the Court to State Farm might necessarily be raised. Assuming total premium payments of \$10,000 per year, the resulting increase would, in theory, amount to one-tenth of one percent, or approximately \$10—hardly a substantial effect on the value of the Court’s interest.

Federal circuit courts have consistently affirmed a trial judge’s decision not to recuse in similar situations. *Robinson v. State Farm Fire & Cas. Co.*, 13 F.3d 160, 163 (5th Cir. 1994) (finding the claim that the district judge “should have recused himself because he was a State Farm policyholder borders on the trivial.”); *see also Delta Airlines, Inc. v. Sasser*, 127 F.3d 1296, 1297 (11th Cir. 1997) (finding insufficient grounds for recusal for a frequent flyer account because it was analogous to a policyholder in a mutual insurance company, and hence not a “financial interest” under § 455(d)(4)(iii)). The Court therefore finds that its interest in State Farm as a policyholder does not qualify as a “financial interest” that requires mandatory recusal pursuant to 28 U.S.C. § 455(b).

ISSUE OF KATRINA RELATED CLAIMS

This Court must also consider the related issue of disqualification by virtue of having Katrina related claims that were satisfactorily settled with State Farm. Most homes in south Mississippi received some damage from Hurricane Katrina, and the Court's properties were no different. But the fact that homes in Hattiesburg and McComb were damaged, and that the claims were satisfactorily resolved in 2005, does not create even the appearance of impropriety, as no reasonable person could honestly question the Court's independence by virtue of the fact that the claims were made and settled. *See Sensley v. Albritton*, 385 F.3d 591, 599 (5th Cir. 2004) (holding that recusal cannot be based on the "hypersensitive, cynical, and suspicious person"). The Court finds that the fact that the claims were settled is not cause for recusal and this argument has no merit.

CHOICE OF DIVISIONS

However, the choice of the Hattiesburg Division by State Farm gives the Court some concern. Under 28 U.S.C. § 1391(b)(1), venue is properly laid in "a judicial district where any defendant resides, if all defendants reside in the same state." Because General Hood is the only Defendant, the fact that he resides in the Southern District of Mississippi makes the selection of the Southern District proper under the venue statute.⁴

When laying venue in the Southern District of Mississippi, plaintiffs must also select a division within that district for their suit. The Southern District of Mississippi is composed of

⁴The venue provisions of 28 U.S.C. § 1391 only speak in terms of judicial districts, and do not proscribe rules for the choice of divisions within a district.

five separate divisions, including: the Jackson Division based in Jackson; the Eastern Division based in Meridian; the Hattiesburg Division based in Hattiesburg; the Western Division based in Vicksburg; and the Southern Division based in Gulfport. Out of these options, the Plaintiff State Farm selected the Hattiesburg Division and this Court.

The Plaintiff has argued and, without question, has legitimate reasons for not filing the complaint in the Southern Division. Certain judges have standing orders of recusal in that division which would apply to this case. Because the motion for a temporary restraining order required swift action by the Court, a recusal and subsequent reassignment could have delayed the Court from quickly resolving that issue. The fact that the case was not filed in the Southern Division, therefore, has some reasonable justification.

But the choice of Hattiesburg, among the remaining divisions, piques the Court's interest. While venue is proper in any division of the Southern District, the Defendant General Hood resides in and maintains his office in Jackson. The case has no known factual relationship to Hattiesburg. Although venue is still procedurally permissible in the Hattiesburg Division, the case is a better fit in the Southern Division or the Jackson Division of the Southern District.⁵

The Court does not imply any improper motives or attempts at forum shopping on behalf of either party. Indeed, both State Farm and General Hood are frequently before this Court and are well-familiar with this Court's efforts to uphold its oath of impartiality. Also, this Court is well aware of its obligation not to recuse if not necessary, as well as its obligation to recuse if

⁵28 U.S.C. § 1404(a) permits a district court to transfer a case *sua sponte* to another district or division where the case could have been brought. The district court exercises this power "in the interest of justice," and considers such factors as the convenience of the parties, the possibility of delay and prejudice, the availability of witnesses, and the amount of deference afforded to the plaintiff's choice of venue.

indicated.⁶ But with no obvious ties to the case, the decision to lay venue in Hattiesburg, while jurisdictionally proper, colors the appearance of partiality in a unique way with this Court.

The standard set forth by all circuits is whether a reasonable person informed of the circumstances might reasonably question the judge's impartiality. The Fifth Circuit's requirement, that in a close question recusal is appropriate, is applicable to the exceptional circumstances of this case. Therefore, the Court finds that in order to avoid even the appearance of partiality, that it should recuse itself and, pursuant to the standing order in this district, transfer the case to the docket of Judge David Bramlette.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the undersigned judge does hereby recuse himself and transfer this case for all purposes to the docket of Honorable David Bramlette, United States District Judge.

SO ORDERED this, the 10th day of October, 2007.

s/Keith Starrett
UNITED STATES DISTRICT JUDGE

⁶*See In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988) (“A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is.”).