

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 03-823

DISQUALIFICATION DUE TO INTEREST THAT MAY BE SUBSTANTIALLY AFFECTED BY THE OUTCOME OF THE PROCEEDING

ISSUES

Is a judge who serves as one of the co-executors of his deceased aunt's estate and as a co-trustee of a related testamentary trust for the benefit of two cousins disqualified to hear an action in which the estate would have been a class member but for being excluded from the plaintiff class as defined in a modified Order of Class Certification that conforms to an amendment to the complaint?

Answer: If the judge or a close relative will continue to have an interest that may be substantially affected by the outcome of the case, the judge is disqualified to hear the case even if neither he nor his relative is a party to the action.

FACTS

A circuit judge was assigned to hear an action alleging that the defendants had failed to make royalty payments on half of the natural gas liquids extracted from gas produced in a particular natural gas field, and also that they have been improperly charging certain costs to royalty owners. The plaintiffs sought class certification; the purported class then being all royalty and overriding royalty owners in the natural gas field.

During the class certification hearing, as he was examining an exhibit that had been introduced into evidence, the judge noticed that one of the royalty owners was a deceased aunt. The judge serves as a coexecutor of this aunt's will. Another nephew and a bank serve as the other two executors. A testamentary trust was created in the will for the benefit of the decedent's two daughters, who are first cousins to the judge. Royalties from the natural gas field are paid to the trust, of which the judge is a trustee.

The judge requested an opinion from the

Commission as to whether he was disqualified from hearing the case. In response, the Commission issued Advisory Opinion 02-801, in which it concluded that the judge was disqualified, that the disqualification could be remitted by the individual parties prior to class certification, but that, if the class was certified, each member of the class would have to remit the disqualification in order for the judge to continue with the case thereafter.

After Advisory Opinion 02-801 was issued, each of the named parties individually remitted the disqualification of the judge. Upon such remittal, the judge took under submission all issues regarding class certification. An order granting class certification subsequently was entered, and one of the defendants filed a notice of appeal which was later withdrawn. The plaintiff has now amended his complaint to change the class definition to exclude various persons, and the judge has amended the class certification order in accordance with the amendment to the complaint, as follows:

Excluded from the class are all federal and state judges, including anyone related by blood or marriage to said judge and including any judge who serves or has served as a Trustee of any Estate which is a royalty owner in the Jay-LEC Field, any employee of Exxon, and any person or legal entity who/which has already settled the underlying claims presented herein with Exxon.

DISCUSSION

Canon 3C(1)(c) provides, in pertinent part, that a judge should disqualify himself when he knows that he, individually or as a fiduciary, has a financial interest in the subject matter in controversy. Canon 3C(1)(d)(i) and 3C(1)(d)(ii) further require disqualification whenever a person within the fourth degree of relationship to the

judge is a party to the proceeding or is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding. Under Canon 3C(3)(c), “financial interest” includes “ownership of a legal or equitable interest.”

In the present case, as the class was originally certified, the judge had a financial interest in the subject matter of the case as a fiduciary (executor of the estate and trustee of the trust) (Canon 3C(1)(c)). In addition, a person within the fourth degree of relationship to the judge was a party to the proceeding (Canon 3C(1)(d)(i)), and persons within the fourth degree of relationship to the judge (his cousins) were known to the judge to have an interest that could be substantially affected by the outcome of the case (Canon 3C(1)(d)(ii)). The question presented is whether the exclusions made to the class definition remove the applicability of all of these provisions and, if so, is there any remaining reasonable question as to the judge’s impartiality that would cause disqualification under the general provision in Canon 3C(1).

A person within the fourth degree of relationship is not a party to the proceeding given the exclusions that have been made to the definition of the plaintiff class, and the judge no longer has a “financial interest” in the proceeding given those exclusions. Even if there is some possibility that the estate might benefit financially as the result of the action, such a remote, contingent possibility is not a “financial interest.” However, any such potential benefit from a case before a judge is an “other interest” requiring analysis by the judge under Canons 3C(1)(c) and 3C(1)(d)(ii). Advisory Opinions 91-434, 95-585 and 98-697.

The suit before the inquiring judge in Advisory Opinion 91-434 alleged a gas company had charged its customers excessive rates; there was a possibility that the outcome of the suit might cause a reduction in the judge’s utility rate or a refund for excessive rates paid in the past. After addressing whether remittal was an option, and noting that

class representatives could not agree to remit judicial disqualification on behalf of all class members, the Commission wrote:

As an alternative to remittal of disqualification, you may not simply exclude yourself as a member of the class as provided for in Rule 23(c)(2), Alabama Rules of Civil Procedure. By excluding yourself from the class you would not preclude yourself from receiving the benefit of any lowered rate on your gas utility in the future.

It appears to the Commission that there is likewise a possibility in the present case that the estate for which the judge serves as one of the executors and the judge’s two cousins might receive a benefit from the case even if they are not within the plaintiff class. If this is so, the judge will need to examine the facts in order to determine whether the interests of the estate and his cousins might be substantially affected by the outcome of the proceeding. Should this analysis be necessary, the judge should consider any benefit the estate or his cousins would receive if the plaintiffs are successful, whether that benefit is such that a reasonable person might question his impartiality as a result, and the remoteness of the interest and its extent and degree. Advisory Opinions 91-434 and 95-585.

If the judge, as a fiduciary, or a close relative has an interest that may be substantially affected by the outcome of the case, the judge is disqualified to hear the case even if both he and his relatives have been excluded from the plaintiff class. If the judge finds that neither the estate nor his cousins have an interest that may be substantially affected by the outcome, he is not disqualified and may hear the case.

REFERENCES

Advisory Opinions 91-434, 95-585 and 98-697.

Alabama Canons of Judicial Ethics, Canons

3C(1)(c), 3C(1)(d)(i), 3C(1)(d)(ii) and 3C(3)(c).

This opinion is advisory only and is based on the specific facts and questions submitted by the judge who requested the opinion pursuant to Rule 17 of the Rules of Procedure of the Judicial Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, P. O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; fax: (334) 353-4043; E-mail: jic@alalinc.net.