Class Actions: Establishing a More Effective Judicial Disqualification Standard

I. Introduction

Today's judiciary, although a traditional institution, faces a changing world with a multitude of ethical dilemmas unforeseen by the founders of our court system. Because of the expanding population of the United States and the increasingly litigious nature of society, judges must hear cases involving novel issues and multiple parties. The rise in popularity of the class action[1] is one trend resulting from society's increased interest in litigation. Concurrently, the judiciary must apply standards that, although sufficient for simple, two-party litigation, do not adequately address the needs of large class action litigation. One standard that judges must apply—a standard perhaps too restrictive for class actions—is Canon 3 of the American Bar Association (ABA) Code of Judicial Conduct (Judicial Code) and the corresponding federal statutes, 28 U.S.C. sections 144 and 455.[2] These provisions set forth the circumstances under which a federal judge must recuse, or disqualify, himself[3] from a case due to a conflict of interest.

Union Carbide Corp. v. U.S. Cutting Service, Inc.[4] highlights a troublesome aspect of the Judicial Code and the federal statutes. In *Union Carbide* the trial court judge in a class action circumvented the strictures of 28 U.S.C. sections 144 and 455 by curing the aspects of her case that appeared to violate the statutes. Specifically, section 455(a) mandates that a judge recuse himself whenever there is an appearance of bias, or where his "impartiality might reasonably be questioned."[5] In *Union Carbide* the district judge, while hearing a class action suit, married a man whose tax-free retirement account contained stock in two corporations that were members of the plaintiff class, which consisted of over 172,000 members.[6] The judge was unaware at the time of her marriage that her husband owned the stock and thus unknowingly fell into the scope of the statute. In the appellate court's words, this case involved an "unlikely confluence of a class action, a judge's marrying *pendente lite*, and a tax-free retirement account."[7] The judge had no actual knowledge of the connection, and as soon as she received actual knowledge, her husband sold the stocks in question. The judge ruled that by having her husband take this action she had removed any appearance of partiality and thus did not violate the statute.[8] The

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1. *See* discussion of class actions in Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 826 (1986).
2. 28 U.S.C. §§ 144, 455 (1982).
3. For simplicity, the author chooses to refer to all judges, male and female, in the masculine.
4. 782 F.2d 710 (7th Cir. 1986).
5. 28 U.S.C. § 455(a) (1974).
6. *Union Carbide*, 782 F.2d at 712. *In re* Industrial Gas Antitrust Litig., No. 80 C 3479 (N.D. Ill. Sept. 24, 1985) (WESTLAW, Federal library, Dist file) at 2.
7. *Id.* at 713.
8. *Industrial Gas*, No. 80 C 3479, at 20, 21. The judge also received advice from the Advisory Committee of the Judicial Conference of the United States. Citing Advisory Opinion 69, the Committee noted that the terms of § 455(b) are couched in the present tense, and therefore, once the judge removed her interest, she would not be in violation of the statute. *Id.*

judge's refusal to disqualify herself was upheld on appeal.[9] However, a vigorous dissent described the decision as unacceptable statutory manipulation.[10]

The purpose of this Note is to argue for reform of judicial disqualification statutes, particularly section 455. This Note will first discuss the general concept of recusal, including the legislative intent, construction, and judicial history of 28 U.S.C. section 455. Next, the Note will point out the peculiarities of class actions and the difficulties encountered in applying section 455 to complex, multi-party litigation, focusing particularly on *Union Carbide*. The Note will outline and assess some of the suggestions for and criticisms of reform, discuss the constitutional dimensions of recusal, and argue for reform that would give greater flexibility to a judge faced with a class action. Specifically, the Note will conclude that the recusal statutes should disallow recusal as a matter of course under circumstances such as those in *Union Carbide*. Furthermore, instead of having to apply inflexible standards, judges should be permitted to use more discretion and to take advantage of the peremptory challenge, the judicial panel, and the statutory amendment. Finally, the recusal statutes as they currently exist should be more narrowly interpreted in order to make adjudicating class actions less complicated and more efficient and economical. Implementation of these reforms will help restore public confidence in the judiciary by giving credibility back to judges and upholding the appearance of impartiality.

II. The General Concept of Recusal: Legislative Intent, Construction, and Judicial History

The controlling statutory provisions for recusal in federal courts are embodied in 28 U.S.C. sections 144 and 455, which are adopted from the Judicial Code. Section 144, entitled "Bias or prejudice of judge," provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affadavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
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> The affadavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affadavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.[11]

This provision, pertaining to actual conflicts of interest, is complemented by 28 U.S.C. section 455, pertaining to appearances of conflict. Section 455 sets forth the grounds upon which a judge is to recuse himself. Section 455(a) is a general provision, mandating that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[12] The legislative history of section 455(a) indicates that an objective

9. *Union Carbide*, 782 F.2d at 717.
10. *Id.* at 717 (Flaum, J., dissenting).
11. 28 U.S.C. § 144.
12. 28 U.S.C. § 455(a).

standard governs recusal "to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case."[13]

Section 455(b) is a particularized provision, pertaining to personal bias or prejudice concerning a party or personal evidentiary knowledge;[14] previous association with the matter in controversy through either private practice[15] or appearance as a material witness; previous service as a governmental employee either participating in the proceeding or expressing an opinion concerning the merits of the particular case;[16] personal or familial financial interest in the matter in controversy or "any other interest that could be substantially affected by the outcome of the proceeding;"[17] and personal or familial relationship to a party in the proceeding, a lawyer in the proceeding,[18] one holding an interest in the proceeding, or one likely to be a material witness in the proceeding.[19] Legislative history indicates that "by setting specific standards, Congress can eliminate the uncertainty and ambiguity arising from the language in the existing statute and will have aided the judges in avoiding possible criticism for failure to disqualify themselves."[20]

Section 455(b) is enforced automatically upon filing of a sufficient affadavit and requires no discretion on the part of the judge; the filing results in automatic recusal. Section 455(a), on the other hand, is executed by the judge himself and applies to all other situations not set forth in subsection (b). Section 455(a) requires the judge to decide whether "an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant

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13. H.R. REP. No. 1453, 93d Cong., 2d Sess. 5, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6351, 6354–55.

14. 28 U.S.C. § 455(b)(1). *See generally* L. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3C OF THE CODE OF JUDICIAL CONDUCT 21–22 (1986), which discusses the ABA Code, the precursor to § 455. Although Abramson discusses state court cases, state courts following the Code are held to the same standard as federal courts. Commentators point out that personal bias or prejudice is an elusive standard since it focuses on the thoughts of a judge. Only personal bias is necessary for recusal, since a judge is expected to act according to his values. As Justice Rehnquist stated in Laird v. Tatum, 409 U.S. 824, 835 (1972), proof that a judge's mind is "a complete *tabula rasa*" demonstrates lack of qualification, not lack of bias. *See* E. THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 60–62 (1973). For discussions of particular displays of personal bias or prejudice, see L. ABRAMSON, *supra*, at 22–37. In addition, the bias must arise from an extrajudicial source, not from what the judge has learned while sitting on the case. For a discussion of personal evidentiary knowledge, see L. ABRAMSON, *supra*, at 37–40.

15. 28 U.S.C. § 455(b)(2). For a case discussing previous association with a matter in controversy through private or previous practice, see United States v. Alabama, 828 F.2d 1532 (11th Cir. 1987) (disqualification mandated because as state senator and private lawyer, judge had actively participated in the very events that were at issue in the suit and involved himself in disputed evidentiary facts). *Cf.* Patterson v. Masem, 774 F.2d 251 (8th Cir. 1985) (recusal not required where party in civil rights case proposed it despite the fact that while judge practiced at his former law firm, the firm represented intervening parties in desegregation case).

16. 28 U.S.C. § 455(b)(3).

17. 28 U.S.C. § 455(b)(4). Financial interest is defined in § 455(d)(4) as "ownership of a legal or equitable interest, *however small*" (emphasis added). Headwaters, Inc. v. Bureau of Land Management, 665 F. Supp. 873, 874 (D. Or. 1987). *Cf. In re* Virginia Elec. & Power Co., 539 F.2d 357, 366–67 (4th Cir. 1976) (remote contingent possibility of sharing in consumer refund does not reach level of legal or equitable interest).

18. *See* McCuin v. Texas Power & Light Co., 714 F.2d 1255 (5th Cir. 1983) (judge must disqualify himself where relative in third degree is acting as lawyer in proceeding). *Cf.* Diversifoods, Inc. v. Diversifoods, Inc., 595 F. Supp. 133 (N.D. Ill. 1984) (judge's spouse as member of law firm representing defendant in unrelated matter not within statute).

19. 28 U.S.C. § 455(b)(5).

20. H.R. REP. No. 1453, *supra* note 13, at 6, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6351, 6355.

doubt that justice would be done in the case."[21] Taken together, subsections (a) and (b) follow the ABA's goal of maintaining and enforcing a "uniform set of ethical standards for judges and thereby preserv[ing] the integrity of the judicary."[22]

The concept of disqualification has been based historically on the right to due process. An impartial court is a fundamental prerequisite to that right.[23] The judge is expected to maintain a distance from the litigants, but as the Seventh Circuit Court of Appeals noted in *United States v. Murphy*,[24] the definition of a "reasonable" relationship between the judge and the parties to litigation "varies from time to time as ordinary conduct of lawyers and judges changes."[25] The *Murphy* court also pointed out that "[w]hen John Marshall was the Chief Justice, the Justices and many of the lawyers who practiced in the Supreme Court lived in the same boarding house and took their meals together."[26] Still, the Supreme Court has always favored judges maintaining their distance from litigating parties: "A fair trial in a fair tribunal is a basic requirement of due process. . . . To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."[27]

III. Defining an Interest: The Peculiarities Involved in Class Actions

The troublesome aspect of maintaining this ideal of impartiality is determining what constitutes an interest in the outcome of a class action suit. This determination can be difficult, time consuming, and very expensive; it may very well be impossible. A judge faced with a large class action should be granted more discretion than one hearing a two-party action in determining just how extensive his interest is. A typical class action may involve a large class of corporations, each issuing publicly held stocks of which a judge could own a small amount. Section 455(d) defines financial interest as "ownership of a legal or equitable interest, however small."[28] This section goes on to explain that the term "interest" does not include ownership in a mutual or common investment fund;[29] "an office in an educational, religious, charitable, fraternal, or civic organization";[30] a proprietary interest of a policyholder in connection with a mutual insurance company or a mutual savings association when the outcome of the proceeding will not "substantially affect the value of the interest";[31] or own-

21. Pepsico, Inc. v. McMillen, 764 F.2d 458, 460 (7th Cir. 1985).

22. L. Abramson, *supra* note 14, at 3.

23. *See, e.g., In re* Murchison, 349 U.S. 133, 136 (1955).

24. 768 F.2d 1518 (7th Cir. 1985).

25. *Id.* at 1537.

26. *Id.* (citing White, *The Working Life of the Marshall Court, 1815–1835*, 70 Va. L. Rev. 1 (1984)).

27. *In re* Murchison, 349 U.S. 133, 136 (1955).

28. 28 U.S.C. § 455(d)(4). *See Virginia Elec.*, 539 F.2d at 367.

29. 28 U.S.C. § 455(d)(4)(i). However, if the judge participates in the management of the funds, he will be deemed to have an interest. *Id. But see* NEC Corp. v. Intel Corp., 654 F. Supp. 1256 (N.D. Cal. 1987), *appeal dismissed*, 835 F.2d 1546 (9th Cir. 1988) (disqualification of judge not warranted where investment club to which he belonged had limited membership and was subject to majority vote).

30. 28 U.S.C. § 455(d)(4)(ii).

31. *Id.* § 455(d)(4)(iii).

ership of government securities as long as the outcome will not "substantially affect the value of the securities."[32]

A. Union Carbide Corp. v. U.S. Cutting Service, Inc. *and Section 455(b)*

Congress failed to include in the section 455(d) exemptions the situation in which a judge's holdings in a corporation are a very small percentage of his total investments, and the corporation is only one of several thousand class members in a class action. This situation characterizes the facts of *Union Carbide*, a 1980 class action over which Judge Susan Getzendanner presided for more than two years before marrying a man whose retirement account contained some $100,000 worth of stock in IBM and Kodak.[33] Neither of these corporations were named as parties to the litigation,

> nor would it have seemed likely to a person without a technical background—a person who did not know for example that liquid nitrogen is used by both companies for supercooling in various technical processes—that either company would be a member of the plaintiff class, limited as it was to buyers of oxygen, nitrogen, and argon.[34]

In addition, there was no class list available when the judge got married.[35]

In 1985, five years after filing the case, Union Carbide moved for Judge Getzendanner's recusal under section 455(b)(4), which provides that a federal judge shall disqualify himself when "[h]e knows that he . . . or his spouse . . . has a financial interest . . . in a party to the proceeding."[36] Union Carbide informed Judge Getzendanner of this interest,[37] and she immediately ceased ruling on any motions while the parties prepared briefs on the issue of her possible recusal.[38] In the meantime, Judge Getzendanner's husband sold the stock, and she thereafter resumed control of the case.[39] During the interim, all motions were referred to another judge or a magistrate.[40] The result was as if she had recused herself during the time her husband held the interest and then was reassigned to the case after the financial interest had been removed.[41]

The Seventh Circuit Court of Appeals upheld Judge Getzendanner's actions, finding:

> Since the statute forbids only the knowing possesion of a financial interest, since Judge Getzendanner relinquished control of the case as soon as she found out about the financial

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32. *Id.* § 455(d)(4)(iv).

33. Union Carbide Corp. v. U.S. Cutting Serv., Inc., 782 F.2d 710, 713 (7th Cir. 1986).

34. *Id.*

35. Judge Getzendanner stated that "[a] computer printout of the 172,001 names and addresses of the class is kept under seal by the plaintiff's counsel, and has never been filed with the court." *Industrial Gas*, No. 80 C 3479, at 2.

36. 28 U.S.C. § 455(b)(4).

37. Counsel for defendant Union Carbide notified the judge by letter that IBM and Kodak were members of the class and that her husband held stock in them. *Industrial Gas*, No. 80 C 3479, at 3.

38. *Id.* at 1.

39. *Union Carbide*, 782 F.2d at 713. Judge Getzendanner noted that she and her husband suffered no adverse tax consequences from the sale since the stocks were held in a retirement account. *Industrial Gas*, No. 80 C 3479, at 4. After the sale, the judge and her husband sold all of his stocks because of her belief that such stock ownership was inconsistent with her position in the federal judiciary. *Id.* at 13.

40. *Industrial Gas*, No. 80 C 3479, at 21 n.1.

41. *Union Carbide*, 782 F.2d at 714.

> interest, and since she did not resume control until the financial interest was eliminated, at no time was she in literal violation of the statute.[42]

The court pointed out that "[m]any, probably most, federal judges . . . own, either directly or through spouse or children, securities in individual corporations."[43] Failure to exempt these interests, therefore, can result in effectively disqualifying "many, probably most" federal judges from hearing these cases. The court also stated that in many class actions, the identities of all members of the class are unknown until well into the litigation, and therefore, a strict application of the statute would require all judges who own securities in individual corporations to recuse themselves from any class actions involving corporations.[44] "Class action judges would be drawn from the subset of judges that happen not to own such securities," a reading of the statute that the court believed was not intended by Congress.[45]

The House of Representatives, in response to such concerns, stated that a "judge is free to invest. He should invest in companies which are not likely to become litigants in his court. If that should happen, then he must disqualify himself."[46] Although this sounds like an acceptable solution, one commentator has pointed out a flaw in the House's reasoning. He said of the House of Representatives' proposal:

> [It] appears to be either disingenuous or naive; whichever its character, it makes no sense in the real world. How can a judge anywhere in the federal court system be "free to invest" in the largest corporations of America when those companies are repeatedly present in every circuit, if not district, in the country? Contrary to the committee report's language, strict application of this statute means that a judge or his family is definitely not free to invest in any of the so-called "blue chip" securities that are traditionally considered among the best investments. If he cannot invest in his local companies and he cannot invest in national companies, in what can he invest? I suppose real estate on the other side of the country is a possibility.[47]

The most recent call for judicial pay raises[48] underscores the importance of relaxing the recusal standard under the proper circumstances. Federal judges earn significantly less than do attorneys in the private sector,[49] and those private sector

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42. *Id.*

43. *Id.*

44. *Id.* at 714–15.

45. *Id.* at 715.

46. H.R. REP. No. 1453, *supra* note 13, at 7, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6351, 6357.

47. Levy, *Judicial Recusals*, 2 PACE L. REV. 35, 41 (1982).

48. ABA President Robert Raven pointed to "judicial salaries of 20 years ago to demonstrate a 30 percent decline in purchasing power as contrasted to the growth of comparable salaries in other fields," and Attorney General Richard Thornburgh noted that "more federal judges left the bench between 1969 and 1986 than 'during the preceding 182 years of the Republic.'" *Judicial Pay-Raise Fire Storm*, A.B.A. J., Apr. 1989, at 19. "The ABA believes that a quarter of the country's more than 1000 federal judges may choose to step down for financial reasons." *Give Them a Raise*, L.A. Daily J., Apr. 17, 1989, at 6, col. 1.

49. While federal judicial salaries now range from $89,500 for a district judge to $115,000 for the chief justice of the Supreme Court, private-sector legal salaries have skyrocketed. Major law firms in Los Angeles currently pay their partners more than half a million dollars a year, and at big city firms across the country, some first-year lawyers earn more than $80,000.

Give Them a Raise, L.A. Daily J., Apr. 17, 1989, at 6, col. 1.

attorneys have fewer restrictions on their investments.[50] Although federal judges "certainly don't expect to get rich on the bench,"[51] federal judges deserve to live at a "level that neither deters entry nor forces premature departure; a level that allows individuals short of old age, from modest backgrounds, and with family responsibilities, to accept the challenge of judicial service; a level that does not progressively penalize those dedicated individuals who choose to continue to serve."[52] Some commentators assert that financial restrictions on federal judges could limit unacceptably the pool of qualified judges to the point where federal judgeships will be limited to "the narrow band of lawyers who are independently wealthy, personally ascetic, ideologically driven, or insufficiently competent."[53] Because many qualified judges and judicial candidates are being driven from the bench due to financial considerations, a careful relaxation of the recusal statute—one that would not mandate recusal in cases where a judge has a minimal financial interest in a corporate party to a class action—could help enlarge the pool of interested judicial candidates and retain current judges.

B. Union Carbide *and Section 455(a)*

Nonetheless, owning stocks that are in any way involved in a suit, regardless of the size of the class and the size of the judge's investment, constitutes an appearance of partiality as set forth in section 455(a). Advocates of the current requirement that the judge's impartiality not reasonably be questioned assert that this strict standard resolves the tension between a judge examining and weighing his own interest and a judge merely applying the objective standards in section 455(b). Thus, as one commentator argues, it is "unnecessary to probe deeply the facts concerning the challenged judge, reach conclusions about the likelihood of actual injustice, or describe the judge as biased."[54] In other words, the presumption of bias eliminates the need to determine whether there actually is bias.[55] Congress intended section 455(a) to apply to both actual conflicts and appearances of conflicts. This means that in order for the statute to achieve its purpose of promoting public confidence in the judiciary, it "does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew."[56]

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50. General insider trading sanctions include the following: Rule 10b-5 of the 1934 Securities Act; Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264 (1984), codified in § 21(d)(2)(A) through (C) of the 1934 Act; Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (1988), codified at § 20A and § 21A, and amended §§ 15(f), 21(d), and 32(a) of the 1934 Act. *See* Dirks v. SEC, 463 U.S. 646 (1983); Chiarella v. United States, 445 U.S. 222 (1980); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (en banc), *cert. denied*, 394 U.S. 976 (1969).

51. *Judicial Pay Raises*, Nat'l L.J., Dec. 26, 1988, at 12, col. 1.

52. *Id.* (quoting Judicial Conference of the United States).

53. *Id.*

54. Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 278 (1987). *See* Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 149–50 (1968); Allinson v. General Council of Medical Educ. & Regis., [1894] 1 Q.B. 750 (C.A.); Note, *Disqualification of Judges Because of Bias and Prejudice*, 51 YALE L.J. 169, 172, 175 (1941).

55. Rex v. Justices of Sunderland, [1901] 2 K.B. 357, 371–73 (C.A.).

56. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 (1988).

The Seventh Circuit in *Union Carbide* recognized the merits of this reading of the statute, deeming its straightforward application to be appealing since it "spares the judge from having to make decisions under an uncertain standard apt to be misunderstood."[57] The court also recognized, however, that this reading can lead to "occasional silly results."[58] After determining that the objective criteria of section 455(b) were not violated, the court applied section 455(a). Union Carbide argued that because Judge Getzendanner's husband was forced to incur a brokerage fee and a loss of potential future earnings by selling the stock, the judge "might be sore at Union Carbide, or, at least, . . . a reasonable person might think she would be sore."[59] Addressing this contention, the court stressed that "it is one thing to assume that judges are human beings with the usual human emotions and another to attribute to them a malevolent, a calculating vindictiveness."[60] Therefore, the court found that even the broader standard of section 455(a) was not met and upheld the judge's refusal to recuse herself.

C. *Other Class Actions and Section 455(a)*

Other courts have verbalized the shortcomings of the "appearance of partiality" standard of section 455(a). The district court judge in *In re Cement & Concrete Antitrust Litigation*[61] expressed his frustration with this standard when after recusing himself pursuant to the statutory mandate, he questioned how there can possibly be a conflict or even an appearance of impropriety when a judge is not even aware of his financial holdings.[62]

The "appearance" standard must have limits. Some judges have been confronted with parties who asserted not that there was an actual appearance of bias but that there was a possible appearance of unfairness.[63] For example, in *Diversifoods, Inc. v. Diversifoods, Inc.*[64] a party litigant attempted to have the judge disqualified due to the possible appearance of unfairness. In this case the plaintiff filed a motion for recusal based on the fact that the judge's husband was a member of the law firm that represented the defendant in matters other than the pending litigation.[65] The judge held that recusal was inappropriate when neither the judge's husband nor his law firm was acting as a lawyer in the matter; that recusal was inappropriate when the law firm did not have a financial or other substantial interest in the proceeding or the defendant; and that there was therefore no appearance of impropriety.[66]

Other courts have found the litigant's "possible appearance of unfairness" argument to border on the absurd. In *In re National Fire Insurance Co. of Pitts-*

57. *Union Carbide*, 782 F.2d at 714.
58. *Id.*
59. *Id.* at 715.
60. *Id.* at 716.
61. 515 F. Supp. 1076 (D. Ariz. 1981).
62. *Id.* at 1081.
63. *See In re* National Union Fire Ins. Co. of Pittsburgh, 839 F.2d 1226 (7th Cir. 1988).
64. 595 F. Supp. 133 (N.D. Ill. 1984)..
65. *Id.* at 134.
66. *Id.* at 137–40.

burgh[67] a party litigant attempted to have the trial judge removed from the case on the basis that the judge's son represented the party's bank in a short-lived credit transaction for a fee of less than $10,000.[68] The Seventh Circuit Court of Appeals held that this fact did not affect the judge's ability to be impartial, absent a suggestion that the bank hired the attorney to appease the judge, that the fee was unusually high, that the credit transaction entailed future engagements, or that the bank took the initiative in establishing the attorney-client relationship.[69] The court stated that there "either is or is not an appearance of impropriety; a 'possible appearance'—an appearance of an appearance of impropriety?—is not a basis for disqualification."[70] A judge cannot be expected to "bend over backwards" to disqualify himself at the mere expression of dissatisfaction about his rulings in the case.[71]

Not only is the strict standard subject to misguided interpretation by parties, but it is also subject to abuse, and although no standard is faultless, the abuses of this standard can be quite costly and time consuming. For instance, in *SEC v. Drexel Burnham Lambert*[72] the defendant attempted to have Judge Louis Pollack recuse himself because of his wife's sale of part of her family assets to Bain Venture Capital, a party unrelated to the defendant. As part of the sale contract, Bain was to "use its best efforts to obtain the financing necessary for the consummation of the transactions."[73] The defendant, pointing to its relationship with Bain as general consultant, alleged:

> [H]ypothetical decisions hereafter might be made by the Judge which would be favorable to Drexel, albeit deservedly, and would be perceived by reasonable members of the public to have been made because of the sale of [the family assets] to Bain Venture Capital. It is suggested that Drexel would not want to bear the burden of such success. Or, on another speculation, were there to be unfavorable decisions the reasonable public perception would ascribe to them the failure of the stock sale to happen.[74]

Judge Pollack found such allegations to be "far-fetched," "ludicrous," and "mischievous"—"hardly a basis for a Judge to step aside," especially after hearing the case for more than fifteen months.[75] Although the judge did not have to recuse himself based on section 455, much litigation resulted from the recusal motion and the requisite consideration given to it. Meanwhile, time and money were wasted while the decision on the merits of the case was sidetracked.

Given the difficulty of applying section 455(a) to single-party litigation, fulfilling this standard borders on the impossible in a class action in which a multitude of parties are involved, all of whom carry potential conflicts. *United States v. Studien-*

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67. 839 F.2d 1226 (7th Cir. 1988).
68. *Id.* at 1227–28.
69. *Id.* at 1229–30.
70. *Id.* at 1230 n.*.
71. *Id.*
72. [1988–89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,051 at 90,913 (S.D.N.Y. 1988).
73. *Id.*
74. *Id.* at 90,915 (emphasis added).
75. *Id.*

gesellschaft Kohle, m.b.H.[76] involved an antitrust suit in which the judge was faced with the possibility of recusing himself because of a stock interest held by his wife. That interest could have provided her a gain of thirty-six cents per year if the judge ruled in favor of that corporation.[77] In *In re Cement & Concrete Antitrust Litigation*[78] Chief Judge Muecke was forced to recuse himself upon plaintiff's motion after he had entered seventy-five percent of the pretrial orders and had ruled on many motions, and after he had sat on the case for more than five years.[79] The reason for the recusal was that the judge's wife owned shares of stock in seven of the 210,000 class members, the list of whom was on microfiche and was never viewed by the judge. The court found that the most Judge Muecke's wife could possibly have gained from a plaintiff's victory was between four and thirty dollars.[80] Nonetheless, the judge was compelled to recuse himself despite the fact that he felt no conflict and saw no appearance of impropriety. He expressed his frustrations:

> Given the number of participants in a large class action, it is not an easy matter to determine whether a *per se* conflict exists. . . . In a complex multidistrict class action, the litigation may be well underway before a comprehensive class list can be compiled. To switch judges in mid-stream not only wastes judicial time and energy, but can constitute a substantial administrative burden. . . . To transfer five and one-half years of work and paper to a new judge seems unfair, not only to the parties, but to the unlucky transferee and will in all likelihood be the occasion for delay.[81]

These criticisms are not trivial. Section 455 as applied to class actions cannot adequately fulfill its purpose of maintaining confidence in the impartiality of the judiciary. Instead, a mass of litigation results which appears more hypertechnical than practical.

Arguments against statutory reinterpretations, such as those presented in *Union Carbide*, have merit. Judge Flaum, dissenting in *Union Carbide*, stressed that section 455(b) could not be satisfied merely by curing the financial interest. He reasoned that section 455(b) does not provide a "sell or disqualify" option, that courts should not be allowed to manipulate statutory language, and that had Congress intended the courts to read the language so liberally, it would have made that clear in the statute.[82] More generally, some commentators assert that "school must keep"[83] since today's federal court system has a much higher number of judges than ever before. They argue that the recusal standard should thus remain as it is or become even more strict,

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76. 426 F. Supp. 143 (D.D.C. 1976), *rev'd*, 670 F.2d 1122 (D.C. Cir. 1981).

77. Lempert, *Rigid Disqualification Statute Goes Too Far*, Legal Times Wash., Feb. 1, 1982, at 10, col. 1 (discussing *Studiengesellschaft Kohle*). Because the party attached to the interest (Conoco) was not a party to the action, the judge did not have to recuse himself. However, had Conoco been a party, the judge would have been required under the statute to recuse himself, even though his wife would have possibly gained only thirty-six cents per year.

78. 515 F. Supp. 1076 (D. Ariz. 1981).

79. *Id.* at 1081.

80. *Id.* at 1080.

81. *Id.* at 1076.

82. *Union Carbide*, 782 F.2d at 717–18 (Flaum, J., dissenting).

83. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 44 (1970).

since in most districts or circuits a large number of judges is available to replace one who has, or appears to have, a conflict.[84]

IV. Suggestions for and Criticisms of Reform

Critics of the present system stress consideration of revisions, such as an addition to the statute, which would allow a judge who has devoted substantial time to a case to be allowed to consider whether "the public interest in avoiding the cost of delay of reassignment outweighs any appearance of impropriety arising from his continuing with the matter to completion."[85] Further, these critics assert that a judge should be allowed to consider what his or her potential gain would be in the event of a favorable disposition, the cost of educating a new judge, the amount of financial risk involved, and the length of delay,[86] while at the same time remembering that "to perform its high function in the best way 'justice must satisfy the appearance of justice.' "[87]

Although it may appear to be straightforward, the statute has some crippling vagaries when applied to class actions. For instance, when filing the affadavit required by section 144, what constitutes "timely and sufficient," which is the prerequisite for relief through disqualification? How does one effectively determine what constitutes bias?[88] Surely an insignificant dollar amount is not enough to create a sufficient basis for recusal from a large, complex, and lengthy case. Instead of assuming that a judge is automatically biased whenever there is a financial stake in one member of the class, litigants should put more faith in the judiciary and allow the judge to determine whether his interest is large enough to create actual or apparent partiality. Blackstone has said that "the law will not suppose a possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."[89] This reasoning has been statutorily proposed in the past when applied to all types of litigation.[90]

Questions such as what constitutes bias and who decides the degree of bias are important. Also, one can argue that merely questioning the judge's partiality results

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84. *See, e.g., Id.*

85. *Cement & Concrete Antitrust*, 515 F. Supp. at 1081. Chief Judge Meucke cites draft legislation for a possible § 455(f), reading as follows:

> Notwithstanding the foregoing provisions, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance, after the matter was assigned to him, of a party in which he individually or as a fidiciary, or his spouse or minor child residing in his household, has a financial interest (other than an interest that could be substantially affected by the outcome), a waiver of disqualification may be accepted from the parties; in the absence of waiver, disqualification is not required if the judge determines that the public interest in avoiding the cost of delay of reassignment outweighs any appearance of impropriety arising from his continuing with the matter to completion.

Id. at 1081.

86. *Id.* at 1080–81.

87. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864 (1988) (citing *In re* Murchison, 349 U.S. 133, 136 (1955)).

88. *See, e.g.*, Comment, *Disqualification of Federal District Judges—Problems and Proposals*, 7 Seton Hall L. Rev. 612 (1976) (discussing the difficulty in actually determining when a judge is biased).

89. 3 W. Blackstone, Commentaries *361, *quoted in* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820 (1986).

90. *See, e.g.*, dissenting view of Congressman David W. Dennis upon proposal of the current § 455 in H.R. Rep. No. 1453, *supra* note 13, at 15, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6351, 6362–63.

in judicial hostility toward the moving litigant or an emotional trial upon denial of the motion for recusal.[91]

Supporters of the current statute reject suggestions for statutory reform on the theory that a judge will be forced to examine and weigh his own interest and to determine if the size of his financial interest (or the cost of divesting it) is substantial relative to his entire worth. Supporters argue that the judicial economy resulting from this introspective approach is not worth the inadequacies of an uncertain statutory standard.[92]

However, in the class action, the congressional goal of promoting public confidence in judicial impartiality may be accomplished by actually giving the judiciary at least some discretion to operate free of externally imposed standards. For example, in *Cement & Concrete Antitrust* Judge Muecke advocated adding a section 455(f), which would allow a judge to remain on a case if in the public interest "the cost of delay of reassignment outweighs any appearance of impropriety arising from his continuing with the matter to completion."[93] Although previously rejected by Congress, Judge Muecke's proposal should be viable if limited to class action recusal situations, in which the cost in dollars, time, and judicial administration is much higher than in single-party cases. Justice Frankfurter believed in placing more faith in the integrity of the judiciary:

> There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted.[94]

Although Justice Frankfurter supported recusal where reasonable persons would find bias, given his faith in the judiciary, he surely would not have gone so far as to say that a judge who is unaware of his financial interest in a member of a class should recuse himself.

Two congressmen who opposed enacting section 455 questioned, on a philosophical and utilitarian level, how one may legislate judicial integrity. In a situation in which a judge owned a small number of stocks, whether by inheritance or investment,

> by legislative enactment, we could have a true Daniel come to judgment—or a Learned Hand upon the bench . . . [and] he absolutely could not sit, even though both parties to the cause preferred him—because of his expertise, learning, and integrity—to any and all other available members of the judiciary.[95]

Neither critics nor supporters of the current system have contended that a judge always starts from "dead center" when he sits on a case. Justice Cardozo believed

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91. *See* Comment, *Disqualifying Federal District Judges Without Cause*, 50 WASH. L. REV. 109, 126–27 (1974).

92. *Union Carbide*, 782 F.2d at 718 (Flaum, J., dissenting). *See* H.R. REP. NO. 1453, *supra* note 13, at 6, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6351, 6355.

93. *See supra* note 74.

94. Public Util. Comm'n v. Pollack, 343 U.S. 451, 466–67 (1952).

95. H.R. REP. NO. 1453, *supra* note 13, at 15, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6351, 6363.

that judges are shaped by "the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man. . . . The great tides and currents which engulf the rest of men do not turn aside in their course, and pass the judges by."[96] Accordingly, many courts support a judge's refusal to recuse if the movant bases a recusal motion solely on the judge's philosophical position.[97] They realize that judges "are not fungible."[98] One judge, focusing on the misplaced priorities section 455(b) can give, noted that the "absolutist quality of the standard is a false one" in that it appears to insulate the judge from improper influence, while in reality it leaves stronger interests such as the judge's interest as a citizen, a voter, or a taxpayer to the less stringent standard of section 455(a).[99]

V. Constitutional Dimensions

Critics and supporters of the current system have argued that maintaining the current standard in class action suits rises to a constitutional level. That is, in ruling on recusal motions the federal judge "should regard himself as bound by the fundamental fairness doctrine of the Due Process Clause" as well as by federal statutes.[100] Supporters of the current statute contend that subjecting a party's liberty or property to the judgment of a judge having a direct, personal, substantial, pecuniary interest in the outcome of a case arguably violates the fourteenth amendment.[101] However, what constitutes a "substantial interest" is not provided in section 455(b), and the Supreme Court has held that "only in the most extreme of cases would disqualification . . . be constitutionally required."[102]

The other side of the constitutional argument is that limiting the pool of available judges actually restricts effective due process:

> The impact of recusals on the large corporation is both obvious and subtle. Obviously, recusals limit the pool of judges available to hear a case. The stricter the ethical standards the more recusals and the smaller the pool of judges. More subtly, some recusals affect the type of judge left in the pool. For example, recusal standards which penalize intelligent investors . . . may well eliminate the types of jurists most able to comprehend the position of the large corporation.[103]

Thus, the strict standard as applied to class actions which affect investors can deny class member companies access to "as full, balanced and representative a range of judges as is available to other small litigants."[104] Furthermore, in the class action, constitutional constraints are weakened. When a judge holds stock making up a very small percentage of the total class, he reaches a point where the biasing influence will

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96. B. Cardozo, The Nature of the Judicial Process 167–68 (1921).

97. *See, e.g.*, Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 137 (1970) (Douglas, J., dissenting); American Cyanamid Co. v. FTC, 363 F.2d 757, 764 (6th Cir. 1966); *In re* Linahan, 138 F.2d 650, 652 (2d Cir. 1943).

98. *Chandler*, 398 U.S. at 137.

99. *See* Lempert, *supra* note 77.

100. *In re* Virginia Elec. & Power Co., 539 F.2d 357, 369 (4th Cir. 1976).

101. Tumey v. Ohio, 273 U.S. 510, 523 (1927).

102. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821–22 (1986).

103. Levy, *supra* note 47, at 36.

104. *Id.* at 37.

be too remote and insubstantial to violate the due process clause.[105] One who possesses a tenuous interest through stock ownership in one or a few class members, without knowledge of that interest, does not impinge on fair adjudicative process.

VI. PROPOSALS

Some commentators have suggested allowing peremptory challenges to federal judges.[106] Upon filing an affadavit, regardless of its sufficiency or showing of actual bias, a party would be assigned a replacement judge automatically, as a matter of administrative procedure. In addition, a party would only get one peremptory challenge per suit. Thereafter, the litigant must accept the newly assigned judge or else show good cause for recusal. Allowing litigants to receive only one peremptory challenge per suit would take the judge-shopping aspect away from using peremptories. In this way, the challenger need not give reasons for his belief in the judge's impartiality.[107] In addition, filing the peremptory challenge in the affadavit should be timely—a particularly important feature for complex and potentially lengthy class action suits. That is, peremptories must be limited to the earliest stage of trial.[108] This measure avoids discussion of bias, whether actual or apparent; it is merely an expression of preference by the movant; it protects the judge's reputation since no one need look into the sufficiency of the allegations; and disqualification becomes an administrative matter and is therefore quicker.[109]

Critics of peremptory challenges in this context argue that this measure would allow judge shopping and erosion or undercutting of the concept of an independent judiciary. They point out that peremptories undermine the integrity of federal judges, who already survive investigations by the ABA, the FBI, and the Senate Judiciary Committee.[110] The criticism is well founded. However, the alternatives for a class action can mean exponential costs in terms of time, money, and judicial administration. On the facts of *Union Carbide*, by examining the judge's disclosed financial records, the moving party could have estimated whether any stock holdings of the judge (that is, IBM and Kodak) could potentially have been involved. In turn, the movant could have raised a peremptory challenge, even if the judge had no reason to know of the potential conflict. Although this alternative may not be helpful in cases in which class membership is unknown until well into the litigation, it can help in situations in which at least the character of the class member is known.

Another suggestion has been to appoint a panel of disinterested judges whose task would be to determine whether the recusal motion should be granted or

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105. *See, e.g.*, Marshall v. Jerrico, Inc., 446 U.S. 238, 243 (1980). This case involved a motion to disqualify a regional administrator on the grounds that the administrator was biased towards plaintiff and therefore should recuse himself. The court held that since a regional director is more akin to a prosecutor than to a judge, the disqualification statute is not applicable. Therefore, despite showing an interest in the parties, the plaintiff failed to show a strong enough interest to violate due process.

106. *See* Frank, *supra* note 83, at 65–67; Comment, *supra* note 88, at 633.

107. Leubsdorf, *supra* note 54, at 273.

108. *See* Comment, *supra* note 88, at 641. It is suggested that the United States Supreme Court define "earliest."

109. *See generally*, Comment, *supra* note 88.

110. *See, e.g.*, Bartels, *Peremptory Challenges to Federal Judges: A Judge's View*, 68 A.B.A. J. 449 (1982).

denied.[111] This solution would result in less chance of judicial hostility upon filing if the panel found no bias, thereby vindicating the judge from any improper allegations. The litigant would probably be satisfied with the panel findings since the panel would be comprised of disinterested judges. An affadavit filed before such a panel should be in hypothetical form to prevent the panel from identifying the judge or the parties. The panel would be freed from the uncomfortable position of having to find partiality in a specific colleague.[112] Although creating a judicial panel appears to involve more bureaucracy and tax dollars, in the long run both administrative effort and money will be saved. Thus, in future cases similar to *Union Carbide* and *Cement & Concrete Antitrust*, judges can first defer to the impartial panel in lieu of spending innumerable hours hearing arguments and drafting opinions on the issue of their impartiality. In turn, judges would be free to spend more time and effort deciding the more substantive issues of the case or clearing the docket to hear more substantive cases.

Finally, Congress should reconsider Judge Muecke's proposal for a section 455(f). As with the judicial panel and the peremptory challenge, administrative time and money would be saved by maintaining a practical perspective on recusal motions. If a judge and the parties have expended years of work on a matter, "undoing" their accomplishments should be allowed only after weighing the cost of delay of reassignment with any appearance of impropriety that would result from the judge's remaining on the case.

VII. Conclusion

There exist a number of feasible solutions that would make complex class actions more manageable when a party moves for recusal based on a judge's financial interest in a class member. Although the existing statutes have been successful in managing simple litigation, the peculiarities of class action suits demand special attention. Judge Getzendanner's solution in *Union Carbide* of curing her interest was very effective,[113] although much time and effort was spent disposing of the issue. Instead of requiring the judge to formulate sophisticated means around the system, the system should provide him with a simpler and far more effective standard. Congress should consider the following possibilities: Allowing a peremptory challenge under limited circumstances; establishing a disinterested judicial panel for hearing questions of bias; setting a minimum dollar amount on the interest based on the relative size of the interest and the number of class members; permitting a statutory provision allowing waiver when a judge has spent significant time on the

111. *See* Comment, *supra* note 88, at 633–41.

112. *See id.*

113. On occasion, similar results occur from divesting stock ownership. *See, e.g.*, Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 324 F. Supp. 1371 (S.D. Tex. 1969), *aff'd*, 441 F.2d 631 (5th Cir.), *cert. denied*, 404 U.S. 941, *reh'g denied*, 404 U.S. 996 (1971) (trial judge's wife owned one hundred shares of stock of defendant corporation, yet judge not required to recuse himself).

case;[114] and providing that a judge may remove or cure his interest by disposing of it in order to remain on the case. Implementing these standards would reduce the number of hours spent rehearing cases and educating newly assigned judges to replace the recused judges. Many dollars would be saved in precluding unnecessary and protracted litigation. Most importantly, these standards would help restore public confidence in the judiciary by allowing judges to exercise their discretion and in turn upholding the appearance of impartiality.

Diane C. Boniface

114. Although the ABA Code has a waiver provision based on financial grounds, as does § 455(a), § 455(b) does not. *See* H.R. REP. No. 1453, *supra* note 13, at 7, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6351, 6357.