JUDICIAL ETHICS IN THE GULF: JUDGE FELDMAN'S CONFLICTS AND DOJ MALPRACTICE

Last week Federal district court judge Matin Feldman of the Eastern District of Louisiana (EDLA), in what has become a controversial decision, overturned the six month moratorium on deepwater oil drilling imposed by the Department of the Interior. It was a legally curious decision to start with as it, on its face, appeared to be contrary to the well established standard of review.

Almost immediately from the time Judge Feldman's decision hit the public conscience, information on Feldman's undisclosed (at least on the case record at issue) financial ties to the oil and gas exploration industry started coming out of the woodwork. From Saturday's Washington Post:

> The federal judge who presided over a challenge to the Obama administration's six-month moratorium on deepwater oil drilling simultaneously owned stock in an oil company affected by the ban, according to a financial disclosure statement released Friday.
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> U.S. District Judge Martin L.C. Feldman sold the stock in Exxon Mobil 14 days after the case was filed in New Orleans by a group of oil service firms — and less than five hours before he struck down the moratorium.
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> Feldman said in a statement elaborating on the disclosure that he was unaware of his holdings in Exxon Mobil and a smaller oil company until 9:45 p.m. Monday, the day before he issued his ruling.
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> "Because he remembered that Exxon, who

> was not a party litigant in the moratorium case, nevertheless had one of the 33 rigs in the Gulf, the judge instructed his broker to sell Exxon and XTO [Energy Inc.] as soon as the market opened the next morning," according to a statement released by his chambers and reported by Bloomberg News.
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> Even before this latest disclosure, Feldman was criticized by environmental groups and others for not recusing himself from the case. The groups pointed to his 2008 disclosure form, which showed that he had invested in companies involved in offshore oil and gas exploration.

So Judge Feldman not only held numerous oil and gas interest stocks, but was trading them up to and including the morning of his fateful decision, and doing so out of an admitted realization that he had an appearance of ethical conflict. Feldman owned and was trading Exxon stock, a company whose Gulf of Mexico rigs were losing money at the rate of a half million dollars a day due to the moratorium, during the entire time he was assigned the case. Yet, failing to disclose his appearance of conflict on the record or recuse, Feldman nevertheless proceeded to issue a questionable decision clearly benefitting the oil and exploration industry he is so invested in.

Lest there be any confusion that perhaps Judge Feldman somehow put himself in the clear by suddenly selling off his holdings in Exxon on the morning of June 22 just hours before issuing his surprising opinion contrary to normal standards of review for such issues, keep in mind the subject case of *Hornbeck Offshore Services et. al v. Salazar* had been assigned to Feldman for two weeks and, significantly, the adversarial hearing the opinion resulted from actually occurred the day prior, June 21, while Feldman obviously still held the stock even he considered an ethical issue.

Even more distressing is the fact that it has now been revealed from Judge Feldman's 2009 financial disclosure, literally just filed and only released this week after demand resulting from his questionable ruling, that Feldman is *very* heavily invested in Blackrock Financial products. Blackrock is, of course, the single biggest shareholder in BP. As the New York Times put it:

> No single institution has more money riding on BP than BlackRock, the money management firm that is BP's largest shareholder.

Well that certainly sounds like reason to pause, eh? There are two sources of guidance for federal judges such as Feldman in instances like this, the statutory guidance of 28 USC 455 and the Code of Conduct for United States Judges contained within the Guide to Judiciary Policy of the US Courts. Both sets of provisions yield the same guidance, so I will focus on the statutory provision as it is more specific and would appear to take precedence; 28 USC 455 provides *inter alia*:

> **(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:**
> (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 in controversy, 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, 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;

(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.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

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

(1) “proceeding” includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

> (3) “fiduciary” includes such relationships as executor, administrator, trustee, and guardian;
> **(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:**
> **(i) Ownership in a mutual or common investment fund that holds securities is not a “financial interest” in such securities unless the judge participates in the management of the fund;**
> **(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a “financial interest” in securities held by the organization;**
> **(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a 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;**
> **(iv) Ownership of government securities is a “financial interest” in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.** (Emphasis added).

A comparison of the strictures of 28 USC 455, especially those I have highlighted, with the conduct of Judge Martin Feldman cannot lead to any conclusion other than Judge Feldman has acted in violation of his ethical obligations. The standard under 28 USC 455 is recusal if there is even a question regarding the appearance of impartiality. Common practice in Federal courts dictates that, even where there are underlying facts that may mitigate a judge’s duty to recuse, there is an affirmative duty imposed on the judge to disclose and explain on

the record.

The evidence to date is that Judge Feldman neither recused nor disclosed and, in fact, was surreptitiously scurrying around selling interests after two weeks of having the case, and a day after presiding over the crucial hearing in the matter, in some kind of attempt to cleanse himself prior to the formality of making his decision public.

Even if Feldman did not learn about his stock holding in Exxon until the last minute, which appears to be his claim, the proper course would have been to recuse or delay until full disclosure could be made and waiver by the parties obtained if they were so willing. Instead, Feldman rushed to secretly sell his stock and then slammed out his decision favoring oil interests over the judgment of the responsible administration agency and the health of the environment for the Gulf of Mexico and the planet earth. This is an atrocious and unsavory set of facts on the part of Judge Martin Feldman and goes far beyond the "appearance of impropriety or conflict". It is hard to see how a reviewing court, in this case the 5th Circuit, could let this stand.

Which brings us to the second part of the title caption, the conduct of the government lawyers, notably the ever present DOJ. As I intimated in my initial post last Tuesday immediately after Judge Feldman's opinion was released to the public, the public protestations to the contrary, you have to wonder whether the Obama Administration's heart is really in defending their six month moratorium. First off, the Perry Masons at the DOJ appear to have violated one of the prime directives of trial lawyers, know your judge. If the DOJ researched Judge Feldman and knew his personal holdings in Gulf oil stocks and dependent interests, they sure did not evidence it or act accordingly. If they did not so research and know and understand Feldman's conflicts and prejudices, they are incompetent. Either way, there is a serious cloud of

questions over the government's lawyering effort in *Hornbeck Offshore Services et. al v. Salazar*.

The cloud of questions was already present as of a couple of hours after Feldman issued his ruling. In addition to the aforementioned failure to know and address their judge by the DOJ, there was the issue of how the responsible lawyers for the government permitted briefing to be submitted in Interior Secretary Ken Salazar's name misrepresenting the nature of the concurrence of the panel of seven experts that Feldman used to excoriate the government. As I explained in the earlier post linked above, that should not have been used as the basis Feldman creatively and manipulatively used it for; nevertheless it was flat out bad, if not incompetent, lawyering by the DOJ to not clean that up before arguing as their centerpiece in defending against Plaintiff Hornbeck et. al's attack.

But from almost the second Fedman's decision was issued, the issue of his conflicts was percolating as described above, and getting stronger and more egregious by the day. With this knowledge in the public sphere at least substantially by the night after Feldman's decision, the government nevertheless did not even mention it as a ground in their attempt to stay Feldman's ruling at the district court level when they filed their motion to stay at the district court level late the following day. That motion was in front of Feldman himself, so maybe you could rationalize the government not raising it at that point (although I would have posed the motion to stay to the chief judge for the district and included the conflict as grounds for relief were it me).

Having predictably received no relief in their lame request for stay from Feldman, the judge who had just hammered them (not surprising), the government put their tails between their legs and made preparations to seek a stay from the 5th Circuit. Surely the government would forcefully argue the glaringly obvious egregious

appearance of both conflict and lack of impartiality once they were free of Feldman and in the Fifth Circuit, right? No, no they didn't.

When the government filed their motion for stay in the 5th Circuit mid to late day Friday June 25, a full three days after getting hammered by oiled up Judge Feldman, and after Feldman's most recent 2009 financial disclosure had even started being released to the general public (as evidenced by the literally damning piece on it Rachel Maddow did Friday night), the government STILL did not avail themselves of the glaringly obvious argument of conflict by Feldman. Nary a peep from the fine lawyers at the DOJ on one of the most stunningly obvious arguments of judicial bias in recent memory. Furthermore, the legal eagles at the DOJ and DOI failed to effectively address and contradict Judge Feldman's reliance on the case of *Motor Vehicle Manufacturers Association V. State Farm Insurance*, 463 U. S. 29 (1983), which Feldman contorted and misapplied to wrongfully reach his result (I will likely come back to the absurdity and contorted error in Judge Feldman's decision in this regard at a later date).

Feldman was required by both statutory and ethical considerations to recuse himself; at a absolute base minimum to disclose his appearances of conflict on the record; but he did neither. Any competent standard of lawyering would mandate the government to raise the issue if they are going to competently fight Feldman's ruling; but they have not, and they have engaged in other consistently questionable lawyering on this case as well.

The public ought to be asking what in the world is going on here. On all fronts.