

Experts Rip Ga.'s Voting System In Election Machine Trial

By **Rosie Manins**

Law360 (September 10, 2020, 9:57 PM EDT) -- Faults in Georgia's voting system mean the Peach State can't have reliable election results, an Atlanta federal judge was told Thursday by concerned voters, election advocates and various experts during a remote trial over its electronic voting machines.

A handful of Georgia voters and the Coalition for Good Governance kicked off an evidentiary hearing before U.S. District Judge Amy Totenberg in their latest attempt to have the state replace its electronic ballot marking devices with hand-marked paper ballots. The plaintiffs, who have been fighting the state for three years over its voting system, say it is vulnerable to hacking, miscounts votes and fails the constitutional standard of being transparent, fair, accurate and verifiable.

The state's position is that it's too late for Georgia to implement a different voting system before the November election, which is 53 days away. Bryan P. Tyson of Taylor English Duma LLP, a lawyer for the state, called the litigation an "attempt to undermine the public confidence in, and the legitimacy of, the state's elections."

The hearing was marred by technical problems, including a high-pitched hum from the Washington, D.C., office of Morrison & Foerster LLP that Judge Totenberg said "is going to drive us crazy." More than 100 people were on the Zoom call, and the judge and her staff had to repeatedly interrupt proceedings to remind spectators to block their video and audio.

The court reporter often struggled to hear and see those speaking, finding an expert witness with a strong accent particularly difficult to transcribe. And at one point the hearing was stopped so parties could improve their connections.

"I'm sorry to the public that we're going up and down and having these problems," Judge Totenberg said.

David D. Cross of Morrison & Foerster, lead counsel for the plaintiffs, said unconstitutional elections should never be permissible, even if implementing a reliable voting system is difficult. He described Georgia's June 9 primary as a mess and said the presidential election in November is expected to be worse.

"The solution we're proposing is very simple," Cross said. "Hand the voter a paper ballot and a pen, and from there everything that happens is the same."

Coalition member and Jeanne Dufort, a Georgia real estate agent who reviewed and recorded absentee ballots in the June 9 primary, testified that she and other polling personnel noticed the state's machines were not counting some clearly marked ballots as valid. Dufort said that of about 150 ballots she looked at, around 20 were discounted by the machines for various ambiguities despite being obviously marked.

"I've seen enough votes uncoun ted to be very uncomfortable," Dufort said.

Several others testified that Georgia's voting system can't be trusted, its election results can't be meaningfully audited and the best method of voting is by hand marking paper ballots. They said Georgia voters can't see if machine-marked ballots accurately reflect their choices because the ballots are printed as a barcode that is then scanned.

University of California, Berkeley statistics professor Philip B. Stark said electronic ballot marking devices are vulnerable to misconfiguration, software bugs and hacking. He said that there was no practical way to detect if the devices have been hacked or are not working properly for another reason, and that even audits of election results can't detect or remedy problems .

Harri Hursti, a cybersecurity and voting system expert, said Georgia's voting machines had "multiple different kinds of irregularities and unexplained behavior" that left him in serious doubt about that could operate correctly.

"I'm strongly recommending the hand-marked paper ballots because the system can't be trusted when the chain of custody is broken under the current configuration of the machines and how they're being used," Hursti said.

Cross said no security expert had endorsed the "readily hackable" electronic voting machines and the state has done nothing to remedy issues identified.

Bruce P. Brown of Bruce P. Brown Law LLC, another plaintiffs' lawyer, said that the Nov. 3 election would be the most controversial and chaotic in the country's history and that Georgia won't have accountable results without switching to hand-marked ballots.

"The evidence and the science and the law is undisputed. All that remains is the noise that you will hear from the defendants," Brown said. "What's crippling Georgia now is the complexity of the system."

Tyson, a lawyer for the state, urged the court not to force Georgia to implement a different system via a "trial by ambush" that he said comprised "incomplete, rushed and untested evidence." Absentee ballots for the election are about to be sent to Georgia voters, and early voting begins in about a month, he said.

"This case has been going for three years, and now it's a case challenging every piece of election technology plaintiffs can think of," Tyson said. "This is a critically important case, and this court should not grant any relief in this attempt to undermine the public confidence in, and the legitimacy of, the state's elections."

Tyson said Georgia voters are not harmed or burdened by the state's voting system, which gives voters a chance to verify ballots before they are scanned. He said Georgia would be one of a handful of states to conduct a "risk limiting audit" before certifying its election results.

"There's no harm here," Tyson said. "Voters can also choose to mark a paper ballot and drop it in a drop box."

The hearing is set to resume Friday morning.

The coalition and voters are represented by David D. Cross, John P. Carlin, Lyle F. Hedgecock, Mary G. Kaiser, Robert W. Manoso and Veronica Ascarrunz of Morrison & Foerster LLP; Halsey G. Knapp Jr. and Adam M. Sparks of Krevolin & Horst LLC; Bruce P. Brown of Bruce P. Brown Law LLC; Robert A. McGuire III of Robert McGuire Law Firm; Cary Ichter of Ichter Davis LLC; and John Powers and David Brody of the Lawyers' Committee for Civil Rights Under Law.

The state is represented by Vincent R. Russo, Josh Belinfante, Carey A. Miller, Alexander Denton and Brian E. Lake of Robbins Ross Alloy Belinfante Littlefield LLC; and Bryan P. Tyson, Bryan F. Jacoutot, Diane F. LaRoss and Loree A. Paradise of Taylor English Duma LLP.

The case is Curling et al. v. Raffensperger et al., case number 1:17-cv-02989, in the U.S. District Court for the Northern District of Georgia.

--Editing by Peter Rozovsky.