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NY Appeals Court Weighs Judicial Salary Dispute

By **Jessica Dye**

Law360, New York (January 12, 2010) -- Justices on the New York State Court of Appeals on Tuesday seemed determined to find a solution to end the decade-long impasse between the state's judicial and legislative branches over judicial pay raises, grilling counsel to find out what, if any, remedy would mend the ongoing dispute.

New York's highest appeals court heard oral arguments in three pending appeals of cases alleging the New York State Legislature improperly denied state judges pay increases since 1999 by linking legislators' salary adjustments to judges', which judicial plaintiffs allege raises constitutional alarms by subordinating one independent governmental branch to the whims of another.

The cases heard on Tuesday were *Maron v. Silver et al.*, filed in 2006 by four New York judges against then-Gov. George Pataki and State Assembly and Senate leaders; *Larabee et al. v. Spitzer et al.*, filed by four additional New York jurists in 2007; and *Chief Judge of the State of New York v. Governor*, filed in 2008 by then-Chief Judge Judith Kaye on behalf of the state court system.

The cases stem from the Legislature's failure to approve any increases in New York judges' salaries since 1999, including cost-of-living adjustments, which plaintiffs allege constitutes a de facto diminishment of judicial salaries in violation of the state's constitution.

Judge Eugene F. Pigott Jr. likened the conflict to a Peanuts comic strip character, Lucy, who repeatedly holds out a football to kick before pulling it away at the last second.

"Everyone in this room agrees that judges are entitled to a raise," Pigott said. "There's an amount in the budget every year saying this is what they get, but it's like Lucy with her football — every time it gets teed up, she pulls it away. There's a number, everyone agrees they should get paid, but in the middle, there's something missing."

Schlam Stone & Dolan LLP partner Richard Dolan, representing the governor, agreed that judges might deserve salary adjustments but disputed there was any constitutional violation, saying the courts could not go over the Legislature's head to take action.

"What the [New York] Constitution did to address this subject is say there's no better approach than to leave this to the Legislature," Dolan said.

However, his argument provoked strong reactions from some judges, who expressed some sympathy for plaintiffs' arguments that the pay freeze was affecting the New York bench's ability to attract and retain talent.

"It's sad that we're in this position after 10 years," said Judge Victoria Graffeo. "My question is, is there ever a time when judicial compensation doesn't become a

constitutional issue?"

Plaintiffs' counsel said failure to act on the pay raises subordinated the judicial branch to the Legislature, violated compensation diminishment rules and discriminated against judges compared to other state employees.

Bernard Nussbaum, a partner with Wachtell Lipton Rosen & Katz representing Chief Judge, noted New York judges currently make less than first-year associates at major law firms, creating the prospects of a brain drain.

Plaintiffs presented several possible remedies, including tapping funds already allocated for judicial pay increases, injunctive relief and declaratory judgment finding constitutional violations.

Some judges questioned whether they could release the funds without a legislative appropriation, which Nussbaum assured them they could.

New York's current chief judge, Jonathan Lippman, recused himself from Tuesday's arguments.

Former New York Judge George Bundy Smith, a partner with Chadbourne & Parke LLP representing the Larabee plaintiffs, said he thought each judge displayed a good handle on the cases.

"I think they showed concern for the judiciary and the people of the state of New York," Smith said. "They see a crisis as far as the lack of a rise in compensation for the judges."

Smith noted a decision could come as soon as February.

Previous lower court decisions in Chief Judge and Larabee have ordered the Legislature to greenlight the pay increases after finding improper linkage between judges' salaries and legislators', while a conflicting ruling in Maron in 2008 dismissed the judges' claims.

The Maron plaintiffs were represented by Steven Cohn PC.

The Larabee plaintiffs were represented by Chadbourne & Parke LLP.

The Chief Judge plaintiffs were represented by Wachtell Lipton Rosen & Katz.

The governor and Legislature were represented by Schlam Stone & Dolan LLP.

The cases are Maron v. Silver et al., index number 06-021984, in the Supreme Court of the State of New York for Nassau County; Larabee et al. v. Spitzer et al., case number 07-112301, in the Supreme Court of the State of New York; and Chief Judge of the State of New York et al. v. Governor et al., case number 08-400763, in the Supreme Court for the State of New York, County of New York.

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