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NY Court Upholds Decision To Increase Judges' Pay

By **Shannon Henson**

Law360, New York (June 3, 2009) -- A New York court has unanimously upheld a decision that state legislators violated the state constitution by linking judicial and legislative pay raises.

In its 5-0 decision Tuesday, the New York Supreme Court Appellate Division, First Department, told the Legislature to adjust compensation to reflect the cost of living since 1999, when judges in the Empire State last received a salary bump.

Justice Peter Tom wrote for the court that legislators violated the separation of powers doctrine by tying their own pay increases to legislation that would have ensured raises for judges as well. The bill was never approved because of a political dispute with then-Gov. Eliot Spitzer over campaign finance reform.

"We are concerned with the integrity, in a structural sense, of the judicial system as an independent institution, in that New York's constitutional architecture prohibits the subordination of the judicial branch to the other branches of government either in practice or in principle," the court said.

"More significantly, the political maneuvering by the other branches of government, by reducing the issue of judicial compensation to a tactical weapon, consequentially subordinated the status of the judiciary to that of an inferior governmental entity."

The court also said that linking legislative and judicial pay increases showed an abandonment of any pretense to an objective consideration of judicial compensation unimpeded by extraneous political considerations.

The finding affirmed a June 2008 decision by Justice Edward H. Lehner of the New York Supreme Court. The suit was filed on behalf of family court judges Michael Nenno and Susan Larabee, criminal judge Patricia Nunez and civil judge Geoffrey Wright in September 2007.

The judges' suit sought retroactive cost-of-living adjustments for Jan. 1, 2000, through the date of the suit's final judgment, as well as subsequent adjustment and a permanent injunction against the linking of legislative and judicial salaries.

George Bundy Smith, a partner with Chadbourne & Parke LLP and counsel for the judges, said the decision went a long way toward rectifying what had been "enormously bad policy."

"The judges in New York state have not had a pay raise since 1999, not even a cost-of-living pay increase," said Smith, a former associate judge of the New York Court of Appeals. "As a consequence, not only are there clerks in our courts who are making more than judges, but in some law firms first-year students or persons who have just

graduated from law school are making more than judges even though they have not passed the bar.”

Although in terms of actual numbers, New York's judges are the 12th-best-paid nationwide, when the state's high cost of living is taken into consideration, their pay ranks 48th compared with that of judges elsewhere, the suit by the judges said. The judges who brought the suit make about \$125,000, Smith said.

However, the decision Tuesday is unlikely to be the last step for the suit. Last year, the Appellate Division, Third Department, dismissed a suit making similar allegations that was brought by different judges.

Supreme Court Judges Alice Schlesinger of Manhattan, Arthur Schack of Brooklyn and Joseph DeMaro of Nassau County, as well as Nassau County District Judge Edward Maron, sued then-Gov. George Pataki, the legislature and the comptroller in December 2006.

Smith said the state's highest court, the Court of Appeals, would likely hear the cases.

A third similar case, brought by former New York Chief Judge Judith S. Kaye, is also pending at the lower court level. She filed an amicus curiae in the immediate case.

A lawyer for the state of New York did not immediately respond to a request for comment Wednesday afternoon.

The judges are represented by Chadbourne & Parke LLP and Cohen & Gresser LLP.

The state of New York is represented by Schlam Stone & Dolan LLP.

The current suit is Larabee et al. v. Governor of the State of New York, case number 4761-4761A, in the Supreme Court of New York, the Appellate Division, First Department.

--Additional reporting by Christine Caulfield and Jesse Greenspan

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