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'Rule of Necessity' Could Be Invoked in Judicial Pay Suits

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ALBANY - The six associate judges of the state's highest court, who normally are expected to recuse themselves in cases where the outcome would affect them personally, now face the prospect of invoking a "rule of necessity" to consider whether they and the state's other judges must be given a raise.

The Court of Appeals has determined that there is an appeal as of right in two judicial pay cases, *Maron v. Silver*, 58 AD 3d 102, and *Larabee v. Governor*, 880 N.Y.S. 256. But if the Court is disqualified from hearing the issues involved, there apparently would be no other forum for their resolution, and the litigants would be left in limbo.

Chief Judge Jonathan Lippman has said he will recuse himself from the pay cases because he is the plaintiff in a third case, *Chief Judge v. Governor*, 400763/08, which was launched by his predecessor, Judith S. Kaye. Ms. Kaye also said before her retirement that she would recuse herself but that the rest of the Court could hear the matter under the rule of necessity.

"It is the quintessential rule of necessity case," Ms. Kaye, now of counsel to Skadden, Arps, Slate, Meagher & Flom, said in an interview last week.

While not codified in state law, the rule of necessity has developed within the judiciary in New York and elsewhere as a last resort to having cases adjudicated when there are no other courts to turn to.

While seldom used by the Court of Appeals, the rule has been invoked in some of the more memorable cases in the past quarter century.

They include *Matter of Morgenthau v. Cooke*, 56 NY2d 24 (1982), in which Manhattan District Attorney Robert M. Morgenthau challenged former Chief Judge Lawrence H. Cooke's program of temporarily reassigning judges to state Supreme Court benches in New York City, and *Maresca v. Cuomo*, 64 NY2d 242 (1984), in which the Court of Appeals upheld the constitutionality of state mandatory retirement rules for judges.

Former Court of Appeals Judge Joseph Bellacosa said his memories are particularly vivid of the *Morgenthau* case, which was decided when Mr. Bellacosa was clerk to the Court.

The case was "extraordinary" in that the six Court of Appeals judges who decided the matter were being asked whether the actions of the chief judge, who recused himself, were improper because Judge Cooke had not consulted with the four presiding justices of the Appellate Division or obtained the approval of the Court of Appeals for the reassignment plan.

At the outset, the six judges dismissed in a footnote any "speculation" that they should recuse themselves because they had a personal stake in the outcome. Indeed, the judges insisted that they were required to hear the case by the rule of necessity, which mandates, in the words of a 1929 treatise on jurisprudence, that "although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise."

In a per curiam ruling, the Court's six associate judges then ruled that their chief judge had acted without constitutional or statutory authority.

"They made their ruling and told me, 'Now, you go tell him,'" Mr. Bellacosa said in an interview. "So I walked across the hall and

said, 'Judge, you lost.' You couldn't print what his response was."

Mr. Bellacosa remembers then-Court of Appeals Judge Hugh R. Jones as being the chief architect of the ruling in the judge reassignment case and of being in general a believer in the propriety of the high court judges invoking the rule of necessity when the situation merited it.

Judge Jones "was just the classic puritan in terms of the way he dealt with the Court's institutional powers and authority," Mr. Bellacosa said. "He would say, 'Well, we can do this and people will have to trust that we are doing this clean and we are doing this with a kind of intellectual discipline when we are wrangling with a conflicted matter.'"

Judge Jones was still on the court in 1984, when the judges invoked the rule to hear *Maresca*, the case challenging the state's mandatory retirement rules for judges. Judge Jones joined in the 6-0 ruling that found the rules constitutional and held that the governor and the Legislature were the proper forums for making changes in retirement rules.

The Court handed down its ruling in *Maresca* on Dec. 31, 1984. Judge Jones was forced into retirement at midnight that day because he had reached age 70. The judge who wrote *Maresca*, Matthew J. Jasen, was retired from the court at the end of 1985, the year in which he turned 70, and Judge Bernard S. Meyer, who was also on the ruling, had to retire from the Court at the end of 1986.

State Law Issues Only

Former Court of Appeals Judge George Bundy Smith said the Court will invoke the rule of necessity when there are no other proper forums for a case. He was on the panel that heard *Matter of New York State Association of Criminal Defense Lawyers v. Kaye*, Mo. No. 1226 (2000), in which the Court rejected a request that four members recuse themselves from a case challenging a state reduction of the fees of attorneys representing defendants in capital cases.

Mr. Smith, who is helping represent judicial plaintiffs in the *Larabee* litigation, said that only issues of state law were involved in the attorney's fees case, precluding it from being shifted to federal court. The Court of Appeals judges heard the case after rejecting the alternative of Appellate Division justices being designated to sit on the Court of Appeals in the regular judges' places, Mr. Smith said.

Larabee and the other judicial pay cases also are concerned only with questions of state law and cannot be heard by federal courts, said Mr. Smith, now a partner at Chadbourne & Parke.

"I don't think that a judge who may be [self] interested in a case should approach that case any differently than a case in which he or she did not have a financial interest," Mr. Smith said. "I think judges are sworn to uphold the law. I think that they have to put their personal interests aside and they've got to decide the case strictly on the merits and that is what I think any judge on the Court of Appeals would do."

Sol Wachtler, a former chief judge, became embroiled in a suit against then-Governor Mario M. Cuomo over cuts to the judiciary budget that appeared headed to the Court of Appeals in 1992 before the two men finally reached an accommodation.

Mr. Wachtler said in an interview that Mr. Cuomo openly questioned how fair a hearing the governor would get in state court in a suit that was brought by the state judiciary.

"Mario Cuomo said, 'How in the world can I get a fair trial before New York state judges when it was New York state judges bringing the action?'" Mr. Wachtler remembered. "I replied, 'Where do you want me to bring it, in Maine?'"

Mr. Wachtler, who was on the Court during the *Maresca* and *Morgenthau* cases, said the integrity of the Court speaks for itself.

"It might not be totally credible to an outside observer, but the Court of Appeals is extraordinarily true to following the law in these matters, even if it's against their own self-interest as persons," Mr. Wachtler said.

Former Court of Appeals Judge Howard Levine, who was on the court during the capital defense attorney's fee case, said he knew the Court's decision would be under an especially bright spotlight in that case.

"I surely found that it would be closely scrutinized by the media, by the public and the bar to see whether or not there was any evidence of a preconceived result," Mr. Levine said. "So, I think surely there was an attempt to be very meticulous to show that the precedents supported that outcome."

Status of Pay Cases

Appellants' briefs in *Maron v. Silver* and *Larabee v. Governor* are due Aug. 31 and respondents' briefs Oct. 15. Each case would likely be calendared for oral arguments in November or January.

The Court has not officially invoked the rule of necessity, but it is widely expected to do so.

The Appellate Division, First and Third departments, both rejected the plaintiffs' claim that allowing the judges' pay to fall behind inflation unconstitutionally diminished their compensation.

The Third Department also rejected the argument that the Legislature had breached the separation of powers by linking judges' pay to unrelated issues (NYLJ, Nov. 14, 2008). However, the First Department accepted that argument as well as Justice Edward Lehner's decision ordering a raise (NYLJ, June 3).

In *Chief Judge v. Governor*, Bernard W. Nussbaum of Wachtell, Lipton, Rosen & Katz asked the Court last week to directly hear an appeal of Justice Lehner's latest decision upholding in part and rejecting in part the chief judge's argument that a raise has been improperly denied to judges by the governor and Legislature (NYLJ, June 16).

Mr. Nussbaum wants the Court to address *Chief Judge v. Governor* at the same time it considers the other pay cases. Lawyers for the governor and Legislature have sought to appeal to the Appellate Division, First Department.

The state's 1,200 judges, including those on the Court of Appeals, have not received raises since Jan. 1, 1999.

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