The Court of Appeals will decide, in appeals from *Larabee v. Governor*, 880 N.Y.S. 256 (1st Dep't 2008) and *Matter of Maron v. Silver*, 58 A.D.3d 102 (3rd Dep't 2008), whether judges and justices of New York courts may sue for a salary increase.

If the response to this issue is "Yes," the Court of Appeals would likely send the cases back to the Supreme Court for trial. On remand, the first likely issue is whether, in principle, there should be a salary increase, and the second likely issue is the amount of the salary increase.

The plaintiff judges and justices made crystal clear that their demand is a hefty salary increase plus back pay for themselves, and, by extension, for their fellow and sister judges and justices throughout the state.

Larabee and *Maron*, and two other cases of the same ilk, *Chief Judge v. Governor*, Index No. 400763/08 (Sup. Ct. N.Y. Cty. 2008) and *Silverman v. Silver*, Index No. 117058 (Sup. Ct. N.Y. Cty. 2008), were filed and pursued by judges and justices in context of bemoanings by judges and justices of alleged asinine lawsuits by the peasantry. There was no judicial hesitation on the part of judges and justices to rush to court with *their* asinine lawsuits. Oxen of judges and justices were gored, so they acted as do the peasants whom they berate, and whose civil actions and proceedings they detest.

The Appellate Division opinions and Supreme Court opinions in *Larabee* and in *Maron* postulated blithely that New York judicial salaries are scandalously low. In Logic, a postulate is not proven. Instead, the truth of a postulate is deemed self evident. The postulated truth is the starting point for deductions and inferences which lead to other truths.

Empirical evidence does not support the judicial postulate. A salary of $135,000 a year is 2-3 times what New York City residents typically earn, and is worth more upstate.

Scholarship does not support the judicial postulate. Stephen J. Choi, G. Mitu Gulati and Eric A. Posner, "Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate," THE JOURNAL OF LEGAL ANALYSIS, vol. 1, no. 1, https://ojs.hup.harvard.edu/index.php/jla/article/view/3/28 (2009).

There is no New York judicial-salary scandal. Rather, the scandal is that no action was taken by the Commission on Judicial Conduct regarding the filing of *Larabee* and *Maron* and *Chief Judge* and *Silverman*. Each of the four cases is unbecoming judicial conduct, and each brings reproach to the administration of justice.

None of the plaintiff judges and justices in *Larabee*, *Maron*, *Chief Judge* and *Silverman* has yet been investigated, let alone charged, by the commission. There is no need for the commission to sit idly by, and wait for a complaint to be filed. The commission has authority to initiate complaints against judges and justices. N.Y. Jud. L. § 44; 22 N.Y.C.R.R. § 7000.2.

Though an investigation must relate solely to individual alleged misconduct, it is interesting that the New York judiciary is not a novice at litigation-based impropriety. The judiciary has a history of litigation-engendered unbecoming judicial conduct and reproach to the administration of justice. *Wachtler v. Cuomo*, No. 91/6034 (Sup. Ct. Albany Cty. 1991) (contending that governor and legislature violated constitutional obligation to provide adequate funding for judicial branch). *See Cuomo v. Wachtler*, No. 91-CV-3874 (E.D.N.Y. 1991), *Wachtler v. Cuomo*, No. 91-CV-1235 (N.D.N.Y. Nov. 21, 1991) (lawsuits about lawfulness of state litigation). A criminal milieu breeds criminality.

While Chief Judge Jonathan Lippman was Chief Administrative Judge, he wrote favorably of *Wachtler v. Cuomo* (Albany County). According to Chief Judge Lippman:

The responsibility to be a good partner [of the other branches of state government] has definite limits because the judicial branch must have the minimum resources necessary to carry out its constitutionally mandated functions. * * *

When minimally adequate resources are not forthcoming, the judicial branch must stand firm. No judiciary wants confrontation or litigation with other government branches, but each judiciary must decide for itself what tactics are appropriate based on the particular situation and political dynamics within the jurisdiction. New York's landmark experience more than a decade ago in *Wachtler v. Cuomo*, in which the chief judge brought suit against the governor based on the inherent powers doctrine, demonstrated the pros and cons of confrontation. It chilled interbranch relations in the short term but established a precedent that still resonates today, namely, that the judiciary is willing to defend its status as an independent branch.

Jonathan Lippman, "New York's Efforts to Secure Sufficient Court Resources in Lean Times," 43 *Judges' Journal* 21, 22, available at https://www.abanet.org/jd/publications/jjournal/2004summer/lippman.pdf (2004).

It is amazing that Chief Judge Lippman thinks that a money-grubbing lawsuit is a precedent which "resonates." Unfortunately, the judges and justices assigned to *Larabee*, *Maron*, *Chief Judge* and *Silverman* heard the siren song of resonance.

Black-letter law categorizes the constitutional position of the judiciary as that of an "independent branch." Chief Judge Lippman probably intended more by the term: that the judiciary is a *worthwhile* independent branch. In fact, the judiciary, like every governmental unit, is a sclerotic bureaucracy and is incapable of efficient service to the public.

The status of the judiciary in the public mind is not that of a worthwhile institution. To the public, the judiciary is possessed of the charm and efficiency of the United States Postal Service. Rightly so. Judicial delivery of adjudications is on par with USPS delivery of mail: slow, indifferent, of limited benefit, and expensive. Like mailmen, postal clerks and postal supervisors, judges and justices want more money for less and less service.

The governmental judiciary is to a private-adjudication service, such as JAMS, as the governmental post office is to a private express-delivery service, such as UPS.

To use a state-government metaphor, the judiciary, to the public, is possessed of the charm and efficiency of the Department of Motor Vehicles. Again, rightly so.

The governmental judiciary is to a private-adjudication service as registration with the governmental Department of Motor Vehicles is to registration with a private online service.

In contrast to Chief Judge Lippman, District Judge Jack B. Weinstein of the Eastern District of New York referred to the lawsuit before him (*Cuomo v. Wachtler*) as an "unseemly conflict" and as a potential "public spectacle with no benefit to the people." Joel Stashenko, "N.Y. Judiciary's 1992 Lawsuit Recalled as 'Painful Episode'," N.Y.L.J., http://www.law.com/jsp/article.jsp?id=1176800657196&rss=newswire (Apr. 8, 2007) (internal quotation marks omitted)

It is not by-the-way that fellow and sister judges and justices of the Court of Appeals judges are plaintiffs in the cases on appeal. The Rule of Necessity, which asserts that a judge or justice may hear a case though it affects him personally, will be invoked by the Court of Appeals, as it was by the Appellate Division and by the Supreme Court. That rule is judicial pretending that judicial intellectual honesty can vanquish judicial self interest. It won't, because it can't.

Just look at how the appellate opinions and trial opinions *Larabee* and *Maron* are written. All of them *started* with the *conclusion* that New York judicial salaries are scandalously low. It did not matter to the Appellate Division or to the Supreme Court that a *conclusion* should be at the *end* of a decision.

Further, it did not matter to the Appellate Division or to the Supreme Court that the merits were not at issue, or that the respective positions advanced by the plaintiff judges and justices were not proven. Judicial sentiment about the merits was and is strong, so the sentiment was proclaimed, in the Appellate Division opinions and in the Supreme Court opinions, loud enough for the deaf to hear. The risk inherent in invocation by the Court of Appeals of the Rule of Necessity is that, in a dissimulation of neutral adjudication, the Court of Appeals will echo the sentiment.

Larabee and *Maron* epitomize entrenchment of personal interests in the public sector. Judges and justices want the guaranteed salaries of judicial office, the tenure of judicial offices, and the prestige of judicial offices. On top of that, they want the very-high incomes which attend upon the entrepreneurial risks of private practice, e.g., clients dumping lawyers; clients fighting billings; breakings up of partnerships.

Griping and grumbling by judges and justices overlook payment, by the State of New York, of all their office expenses -- from rent to cleaning and maintenance, from electricity to water to telephone to Internet account, from furniture to computer, from records clerks to guards, and from secretary to law clerk. Attorneys in private practice must pay all their office expenses out of gross income.

Sniveling and puling by judges and justices overlook their immunity from suit, even if official conduct is patently illegal, even if official conduct is malicious. An attorney in private practice can be sued for malpractice no matter that he did no wrong, so he must carry hefty, expensive professional-liability insurance.

The severe attitude problem of judges and justices is not unlike the severe attitude problem of members of teachers' unions. Government-school teachers want tenure, and they want guaranteed salary and benefits advancements, within the governmental school bureaucracy. Further, they want compensation fit for the private sector. So, too, government-judiciary judges and justices want tenure, and guaranteed salary and benefits advancements, within the governmental judicial bureaucracy, and they want private-sector compensation to boot.

Judges and justices bemoan their workload, as if they were coerced into judicial service and are unable to free themselves from judicial service. In fact, there was no coercion, and freedom is gained easily. Judges and justices who feel financially constricted by judicial employment may leave it. The exodus should begin with the plaintiff judges and justices in *Larabee, Maron, Chief Judge and Silverman.*

Should there be a clearing of the benches, the plaintiff judges and justices would not have standing. None of them pleaded existence of a class. Without standing and without a class, the allegations in the complaints would not have to be attended to.

In the meantime, the Court of Appeals has to adjudicate the appeals in *Larabee* and *Maron.* The Court of Appeals should throw the money-grubbing, asinine lawsuits of the plaintiff judges and justices out of court.