

# New York Law Journal

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## Kaye Sues State Over Judicial Salaries

Chief Judge Judith S. Kaye today filed a lawsuit to force the state Legislature and the governor into granting state judges their first pay raise since 1999. Former White House counsel Bernard W. Nussbaum filed the suit, *Kaye v. Silver*, in Manhattan Supreme Court on the chief judge's behalf. Mr. Nussbaum, a litigation partner at Wachtell Lipton Rosen & Katz, is representing Chief Judge Kaye pro bono.

Joel Stashenko and Daniel Wise

04-11-2008

ALBANY - Stymied for a fourth straight fiscal year in securing a pay raise for state court judges, Chief Judge Judith S. Kaye sued the Legislature and Governor David A. Paterson yesterday to force the first judicial salary increase in New York since 1999.

At about the time attorney Bernard W. Nussbaum was filing the complaint in Supreme Court in Manhattan at 60 Centre Street, Chief Judge Kaye and Chief Administrative Judge Ann Pfau ([See Profile](#)) sent a message to the 1,300 judges saying that the exclusion of a pay raise in the budget adopted in Albany on Wednesday was the last straw.

"At this point, we are left with no choice but to take legal action to address this intolerable situation," the judges said. They called the need to file a suit, first threatened by the chief judge in April 2007 but often cited by her since then as a last resort, as "regrettable."

The complaint, *Kaye v. Silver*, names the chief judge and the Unified Court System as plaintiffs. The defendants are Assembly Speaker Sheldon Silver, Senate Majority Leader Joseph Bruno, Mr. Paterson and the State of New York.

State Attorney General Andrew M. Cuomo has decided to stay out of the case, his chief of staff Steven Cohen said yesterday. At any one time, the attorney general represents all the parties in the suit, Mr. Cohen said, as well as appearing daily in state courts presided over by the Judiciary.

"The most rational and reasonable approach is for us not to represent any of the parties," he said in an interview. "The potential conflicts here are obvious and unavoidable."

The suit asks the court to order the state comptroller to pay judges raises back to April 1, 2005, the start of the first fiscal year in which the governor and Legislature failed to enact a pay increase proposed by Judge Kaye. Such raises, linking the salary of state Supreme Court justices to those given U.S. District judges, would cost the state \$148 million.

In a letter to Supreme Court Justice Edward H. Lehner ([See Profile](#)) accompanying the complaint, Mr. Nussbaum asked that a trial be scheduled on or about May 14. Mr. Nussbaum, who is representing Chief Judge Kaye and the judiciary pro bono, wrote that "a prompt trial is needed because the judicial-pay impasse has risen to the level of a constitutional crisis."

Mr. Nussbaum, a partner at Wachtell, Lipton, Rosen & Katz, said he would call the chief judge to the stand to testify about the negative impacts that nine years without a pay increase have had on the judiciary. He said he would also seek to call Messrs. Bruno, Silver and Paterson as witnesses to ask them why pay hike bills have repeatedly foundered at the Capitol.

"They must be made to explain their insistence that judicial pay increases (which all agree are warranted) be held hostage to the desire of legislators to increase their own salaries, or the desire of the Executive to push through other initiatives resisted by the Legislature," Mr. Nussbaum wrote in his letter.

Mr. Nussbaum requested that the case be assigned to Justice Lehner, who is familiar with the basic issues in the case, having decided *Larabee v. Spitzer*, 112301/07, one of two other suits filed by judges or judicial organizations seeking higher judicial pay.

### Causes of Action

Mr. Nussbaum's complaint cites three causes of action. It argues that the lack of a pay raise is a violation of separation of powers and of the independence of the judiciary in two ways: because the governor and Legislature have a constitutional duty to adequately fund the judiciary and because judicial pay bills have repeatedly failed when linked to issues unrelated to the Judiciary.

The stagnant pay situation also violates the state Constitution's prohibition against judges' pay being reduced once their terms have begun, the complaint claims. By failing to approve any pay increases, the governor and Legislature have effectively cut judges' pay by about 27 percent, the amount their salaries have lost to inflation since 1999, Mr. Nussbaum contended.

"In the last decade, judges salaries have declined by 27 percent while the pay of state employees has increased by 24 percent," Mr. Nussbaum said yesterday on the courthouse steps at 60 Centre St. after filing the action. "This is an awful and outrageous situation that at some point becomes unconstitutional and that is what has happened."

Chief Judge Kaye declined comment past her electronic mail to state judges yesterday about the suit, Court of Appeals spokesman Gary Spencer said.

At a news conference last week in Albany at which she urged legislators to raise judges' pay, the chief judge spoke with exasperation of being repeatedly assured in recent years that a pay hike was just over the horizon, only to be disappointed when bills never won final passage (NYLJ, April 1).

Twice in 2007, the Senate approved bills raising judges' pay and creating a commission to authorize future pay increases. But twice the Assembly did not take up the measures as Democratic members balked at hiking judges' pay without also being allowed to increase their own salaries.

Traditionally in Albany judges' and legislators' pay have been linked. Legislators also have not had an increase in their \$79,500-a-year base pay since 1999.

The filing of the suit harkened back to the 1991 litigation filed by then-Chief Judge Sol Wachtler against Governor Mario Cuomo (NYLJ, April 17, 2007). *Wachtler v. Cuomo* was designed to invalidate the \$77 million reduction Mr. Cuomo made in a \$966 million budget submission by the Judiciary.

After a year of poisonous relations between the courts and the governor, Mr. Cuomo restored the funding in the next budget cycle and Mr. Wachtler agreed to drop the litigation. Chief Judge Kaye had said since last year that she delayed filing her suit because of the chill it was likely to bring to the Judiciary's relations with the other two branches of government.

#### **Last Resort**

Albany County Family Court Judge W. Dennis Duggan ([See Profile](#)) said the impasse over pay had become intolerable.

"I think the law suit is supported by virtually the entire judiciary," Judge Duggan said in an interview. "We all believe it is a meritorious claim that will prevail and we have a high degree of confidence in Bernard Nussbaum. It is sort of the last resort. There was nothing else that we could do."

Fund for Modern Courts Chairman Victor A. Kovner also said yesterday that Chief Judge Kaye essentially had no choice but to file her suit.

"I think every person who practices law in the state is saddened that it has come to this, but it is quite clear that at this point it was appropriate to commence the litigation," Mr. Kovner said.

He said members of his group would study Mr. Nussbaum's papers and may consider filing an amicus curiae in support of the Judiciary.

Mr. Bruno blamed the Assembly for the failure of judicial pay bills.

"Judges don't need to sue to get a pay raise, they need to step up pressure on the state Assembly to act on either of two judges' salary increase bills already approved by the state Senate," Mr. Bruno said in a statement released by his office.

Mr. Silver's spokesman, Dan Weiller, said the speaker has long favored a pay raise for judges along with state legislators and commissioners in the executive branch. Mr. Weiller said the inclusion of the \$48 million appropriation in the budget, though it was a "dry" one, showed that Mr. Silver is sympathetic to judges' quest for more money.

Mr. Paterson's communications director, Risa B. Heller, said the governor "personally believed that a pay increase is warranted" for judges.

"However, these issues should be addressed through the normal legislative process, and not through litigation," Ms. Heller said. "We will continue to work with the Legislature and the Judiciary to address this issue."

*Larabee v. Spitzer* is on appeal to the Appellate Division, First Department, while the other pay suit, *Maron v. Silver*, 4108/07, is being appealed to the Third Department. In both cases, trial judges rejected the plaintiffs' claim that stagnant judicial pay violated the Constitution's prohibition against judicial pay being diminished during judges' terms.

But Justice Lehner and Acting Albany County Supreme Court Justice Thomas J. McNamara ([See Profile](#)) allowed the judges' suits to go forward on separation-of-power claims.

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