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'Linkage' Challenge Raises Separation-of-Powers Issues

The "linkage" between judicial pay bills in Albany and passage of unrelated legislation is at the heart of three cases scheduled for oral argument before the Court of Appeals on Jan. 12. The Legislature and the governor will rebut attempts to mandate the first raises for judges since 1999 by arguing that linkage is just another name for the legislative process, is not unconstitutional, and has not been used to discriminate against judges.

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Editor's Note: *This article has been revised to reflect a* Correction.

ALBANY - The "linkage" between judicial pay bills in Albany and passage of unrelated legislation is at the heart of three cases scheduled for oral argument before the Court of Appeals on Jan. 12.

The Legislature and the governor will rebut attempts to mandate the first raises for judges since 1999 by arguing that linkage is just another name for the legislative process, is not unconstitutional, and has not been used to discriminate against judges.

"'Linkage' has enjoyed 'legal imprimatur' since the founding of this State," writes Richard H. Dolan in nearly identical briefs for the respondents in *Maron v. Silver*, 16, *Larabee v. Governor*, 17, and *Chief Judge v. Governor*, 18. "It has simply been known by another name: the legislative process. A pejorative label does not change the fact that the Legislature and Governor did here what they have always done, engage in the traditional give-and-take of the legislative process, in an effort (not always successful) to find a political compromise acceptable to the Senate, the Assembly and the Governor."

Pay Raise Rulings
Before The Court of Appeals:

• *Maron v. Silver*, 58 AD 3d 102 (3rd Dept. 2008): Nothing in the Constitution forbids legislators from "engaging in politics" by linking judges' pay to unrelated issues. Moreover, the Compensation Clause, which bars diminishment of judges' wages, does not protect against the erosion of judicial salaries due to inflation.

• *Larabee v. Governor*, 65 AD 3d 74 (1st Dept. 2009): Accepts the Third Department view that there has been no Compensation Clause violation. However, making judges' salary increases contingent on a legislative pay increase relegates the courts to an "inferior government entity" and violates the doctrine of separation of powers.

• *Chief Judge v. Governor*, 25 Misc. 3d 268 (St. Sup. Ct. 2009): Follows *Larabee*, holding that the governor and legislative leaders have unconstitutionally abused their power through the practice of linkage. Judges' Compensation Clause argument rejected.

Mr. Dolan, of Schlam Stone & Dolan, asks the Court not to recognize linkage as an unconstitutional tool to deprive judges of a pay raise unless it is prepared for the courts' wide-ranging involvement in the budget-making process that he said the state Constitution restricts to the other two branches of government.

"If the lower court's 'linkage' analysis were ever enshrined as a constitutional limitation on the Legislature's freedom to consider budgetary proposals, the Judiciary would find itself consumed in telling the Legislature what it was permitted to consider when making the inevitable compromises that the appropriations process necessarily entails," Mr. Dolan says.

Advocates for a judicial pay raise have generally blamed the failure of such legislation on its being tied to passage of bills unrelated to judicial salaries. In 2007, then-Governor Eliot Spitzer removed a judicial pay raise from the 2007-08 state budget because of legislators' refusal to pass stringent ethics reforms favored by Mr. Spitzer.

Privately, legislators have also said they will not pass a pay raise for judges unless lawmakers, who also have not had a salary boost since 1999, get higher pay at the same time.

The Third Department in *Maron* rejected the plaintiffs' challenge to linkage. But in *Larabee*, a First Department panel unanimously found that the separation of powers doctrine has been violated by making pay bills contingent on "extraneous political considerations" in Albany (NYLJ, June 3).

In *Chief Judge*, Manhattan Supreme Court Justice Edward Lehner (See Profile) also found linkage to be unconstitutional, as he had held earlier in *Larabee*.

Judicial Independence

In briefs in *Larabee*, which was brought by four judges, attorney Thomas Bezanson argues that the defendants would have the Court of Appeals turn a "blind eye" to unconstitutional conduct against the Judiciary "merely because such conduct is perpetrated by the political branches" of government.

"It is clear that linkage, which threatens judicial independence and subordinates the Judiciary to political wrangling between the other branches, is not a core legislative act subject to any protection under the Speech or Debate Clause," writes Mr. Bezanson of Cohen & Gresser. "To the contrary, linkage turns the constitutional separation of powers on its head."

Mr. Bezanson also claims that the long pay drought has violated judges' rights under the Compensation Clause of the Constitution, which prohibits the diminishment of a judge's pay during his or her term, because judicial pay has essentially lost 30 percent of its value due to the effects of inflation since the Legislature last gave judges raises in 1999.

Mr. Bezanson is representing *Larabee* plaintiffs along with attorneys at his former firm Chadbourne & Parke, including former Court of Appeals Judge George Bundy Smith.

The plaintiffs in *Larabee* are Manhattan Family Court Judge Susan Larabee (See Profile), Cattaraugus County Family Court Judge Michael Nenno (See Profile), Manhattan Civil Court Judge Geoffrey Wright (See Profile) and Manhattan Criminal Court Judge Patricia Nunez (See Profile).

Salaries Diminished

Bernard Nussbaum, the lead attorney for Chief Judge Jonathan Lippman and the court system in *Chief Judge*, makes many of the same constitutional arguments as Mr. Bezanson.

Mr. Nussbaum's briefs include statistical comparisons of how the value of judicial salaries has tumbled for decades against the buying power of the American dollar. According to Mr. Nussbaum, the $25,000 that Supreme Court justices made in New York City in 1936 is the equivalent of $389,625 today.

Unlike the linkage challenge, the compensation argument has gained little traction in the lower appellate courts. It was rejected by both the First and Third departments.

Mr. Nussbaum also contends that the Legislature and governor are violating the Constitution by not providing judges with an adequate salary.

"Sadly it has fallen to this Court to bring about a final resolution to this seemingly unending crisis involving judicial compensation," Mr. Nussbaum writes. "Plaintiffs recognize this case may present sensitivities, particularly at a time when the State and so many New Yorkers are facing financial challenges. But whatever the prevailing sensitivities, '[i]t is emphatically the province and duty' of this Court 'to say what the law is.'"

Appropriation Cited

The plaintiffs in *Maron*, a case brought by three judges that was dismissed by the Third Department (NYLJ, Nov. 14, 2008), make an argument not made by the plaintiffs in the other two cases.

They are urging the Court to recognize that a $69.5 million appropriation that was included in the 2006-07 state budget for pay raises was valid and that the Court need only direct the state comptroller to distribute the money to judges.

"By deciding this appeal on the ground that the 2006 Act is a final, effective and complete grant of a pay increase for the judges, this Court would not need to resolve the serious constitutional issues posed by these appeals and could grant relief to the judges without having to order the Legislature and the Governor to enact legislation, a type of relief that courts may be reluctant to grant," attorney Steven Cohn of Carle Place writes in his brief on behalf of the *Maron* plaintiffs.

The Third Department in *Maron* rejected the argument that the 2006 judicial pay appropriation was self-executing and that it could

go into effect without passage of specific authorizing language by the Legislature. Lawmakers passed no such enabling legislation that year.

The *Maron* plaintiffs are Supreme Court Justice Edward A. Maron (See Profile), Supreme Court Justice Arthur Schack of Brooklyn (See Profile) and former Supreme Court Justice Joseph A. DeMaro of Brooklyn.

The Fund for Modern Courts, the New York County Lawyers' Association, Mayor Michael Bloomberg's Advisory Committee on the Judiciary for the City of New York, the Atlantic Legal Foundation and the Partnership for New York City have filed amicus curiae briefs supporting a judicial pay raise or joined other groups in briefs.

Judge Lippman has announced that he will recuse himself because he is a plaintiff in one of the suits, which was originally filed in 2008 as *Kaye v. Silver* by then-chief judge Judith S. Kaye.

The other judges on the Court will hear the matter by invoking the "rule of necessity," under which judges who would otherwise exempt themselves from matters involving their own personal interests, hear cases because there is no other forum to resolve the issue (NYLJ, July 21).

Messrs. Cohn, Bezanson and Nussbaum are all scheduled to argue for the plaintiffs on Jan. 12, and Mr. Dolan will appear to oppose the pay raise suits.

Arguments begin at 2 p.m. and are streamed live on the Internet on the Court's Web site at http://www.courts.state.ny.us/ctapps/.

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