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## Judges' Suit Seeks \$780 Million in Back Pay, Pension Benefits

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ALBANY - Several state judges have presented a bill to the Court of Claims for \$780 million—the amount, plus interest, they say the state's 1,300 judges are owed in raises and associated pension benefits for the period beginning April 1, 2005, when the judiciary first formally requested a salary hike.

The action, *Maron v. State of New York*, is a follow-up to the February 2010 ruling by the state Court of Appeals in *Matter of Maron v. Silver*, 14 NY3d 230, and two other judicial pay raise cases. The Court found that the Legislature had violated the separation of powers doctrine under the state Constitution by continually linking judges' raises with unrelated issues, such as raises for state legislators or ethics-in-government reforms ([NYLJ, Feb. 24, 2010](#)).

The Court of Appeals ordered the Legislature to make an "appropriate and expeditious" consideration of a judicial pay raise independently of other issues. However, it did not order lawmakers and the governor to approve a raise for the judiciary or say what a fair new salary would be.

Lawmakers may well argue that they have now given such consideration to the issue. Last month, they passed and the governor signed a measure to create a commission to make recommendations on judicial salaries, effective April 1, 2012.

The recommendations will become law unless the Legislature votes to overturn them, and Chief Judge Jonathan Lippman has said he anticipates the judges will receive a significant raise ([NYLJ, Dec. 1, 2010](#)).

The Court of Claims action was brought on behalf of the three plaintiffs in *Maron*: Supreme Court Justice Edward A. Maron in Nassau County, Brooklyn Supreme Court Justice Arthur Schack and former Brooklyn Supreme Court Justice Joseph A. DeMaro, as well as "on behalf of all judges and justices of the Unified Court System."

"Claimants claim damages for...breach of their constitutional rights," the action contends.

The Court of Claims exclusively hears monetary claims against the state or its agencies.

While actions in the Court of Claims are generally bifurcated, with the issue of liability decided first and then, if applicable, the question of damages, Steven Cohn, the attorney for the plaintiffs, said the Court of Appeals settled the issue of liability in *Maron* and the other two suits brought on behalf of judges seeking raises: *Larabee v. Governor* and *Chief Judge v. Governor*.

In late November, Albany Supreme Court Justice Thomas J. McNamara in *Maron v. Silver*, 4108-07, granted summary judgment to the plaintiffs on their claim that their constitutional rights had been violated by the Legislature. Justice McNamara based his finding on the Court of Appeals' ruling.

"We already won in the tort action on breach of their constitutional rights," Mr. Cohn of Carle Place said in an interview. "Now we have to pursue their damages in the Court of Claims."

Mr. Cohn's damages calculation includes the raises the judges would have received in the six fiscal years that have passed since fiscal year 2005-06, when the Legislature refused to act on judicial pay increases.

A forensic accountant retained by the *Maron* plaintiffs found that judges should have received an average of \$210,000 to \$215,000 a

year in salary based on a historic survey of the judiciary's pay in New York. When pension benefits based on that higher salary level are factored in, Mr. Cohn said the judges lost about \$130 million a year.

Mr. Cohn has asked the court to add damages for each year going forward in which the Legislature does not approve a raise.

Motion for Reargument

The plaintiffs in *Larabee v. Governor* have gone a different route.

They have asked the Court of Appeals, in a motion for reargument, to force lawmakers to give independent consideration to a pay bill, something they say it has not done.

Attorney Thomas E. Bezanson of Cohen & Gresser, attorney for the *Larabee* plaintiffs, said after adoption of the legislation creating the judicial pay commission that he would pursue the motion for reargument as a means of forcing lawmakers to approve back pay for judges to make up for the failure to grant retroactive raises.

George Bundy Smith, a former Court of Appeals judge now with Chadbourne & Parke, also represents the *Larabee* plaintiffs. He said yesterday that the Court of Claims could be one avenue to gain compensation for judges for the years they have gone without a salary increase. But Mr. Smith argued that retroactive raises should go back to 1999, the last year in which judges received a raise. He said he hopes the Court of Appeals will direct the Legislature and governor to make such a calculation, perhaps in consultation with Comptroller Thomas DiNapoli.

"I think, in any case, that there would have to be a calculation for each judge in New York state as to what she or he is entitled to," Mr. Smith said. "Certainly, we at Chadbourne are willing to make that calculation and run it by the comptroller to verify what it is the judges are due."

Another pay suit filed by Mr. Cohn, *Pines v. State of New York*, 13518-10, has yet to be acted on in Nassau County Supreme Court. It contends that \$51 million was appropriated for judges' raises in the 2009-10 state budget but that the Legislature and governor refused to release the money, saying they did not expressly authorize the raise in a statute accompanying the budget.

The chairman of the Assembly's Ways and Means Committee, Herman Farrell Jr., D-Manhattan, warned from the floor of the Assembly soon after the 2009-10 budget passed that the appropriation for judicial raises had not been properly made and was invalid ([NYLJ, April 3, 2009](#)).

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