NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

PAUL M. DePASCALE, Plaintiff, v. STATE OF NEW JERSEY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION-MERCER COUNTY DOCKET No.:MER-L-1893-11 CIVIL ACTION OPINION

Decided: October 17, 2011

Justin P. Walder, for the plaintiff (Walder, Hayden & Brogan, attorneys; Mr. Walder, Barry H. Evenchick and Leigh-Anne Mulrey, on the brief).

Paula T. Dow, Attorney General of New Jersey, for the defendant (Robert Lougy, Assistant Attorney General, of counsel and on the brief).

FEINBERG, A.J.S.C.

I.

BACKGROUND

A. LEGISLATION

On June 13, 2011, the Legislature introduced Senate Bill 2937 ("S-2937"). This bill was passed by both Houses of the Legislature and was signed into law by Governor Christopher J. Christie ("Governor Christie") on June 28, 2011. Recorded as P.L. 2011, c. 78 ("Chapter 78"), S-2937 made changes to the pension and health care benefits for all public employees, including judges, and is the subject of this litigation.[1]

In this litigation, plaintiff seeks declaratory judgment declaring Chapter 78, the Pension and Health Care

[1] On February 10, 2011, the Legislature introduced Assembly Bill 3796 ("A-3796") in an attempt to reform the public employee pension and health care benefits. A-3796, among other things, sought to increase the pension contribution to the Judicial Retirement System ("JRS") from 3% to 8.5% for new members of the JRS. However, the bill was not passed.

A-3796 proposed an increase to 8.5% for new JRS members. A separate section provided that the new higher rate would only be applicable for any future increases in salary for current members. The explanatory note, with respect to the proposed method of JRS contribution increases states "the increase in the contribution rate for members of the JRS is implemented in a manner to conform to a prohibition in the State Constitution against the reduction in the compensation of a judge during the judge's term of appointment." See Statement to A-3796, p. 140.

Benefits Act, signed into law by Governor Christie on June 28, 2011, in violation of N.J. Const. art. VI, § 6, ¶ 6. Defendant is the State of New Jersey.

Plaintiff is a Judge of the Superior Court of New Jersey. Appointed in 1991, his current annual salary, set by statute, is $165,000. N.J.S.A. 2B:2-4. In a certification, submitted with the complaint, plaintiff represents the following:

> In 2011, the pension deductions will increase from $3,287.44 to $5,408.86.
>
> In 2012, the pension deductions will increase from $5,408.86 to $7,530.28.
>
> In 2013, the pension deductions will increase from $7,530.28 to $9,651.70.
>
> In 2014, the pension deductions will increase from $9,651.70 to $11,773.12.
>
> In 2015, the pension deductions will increase from $11,773.12 to $13,894.54.
>
> In 2016, the pension deductions will increase from $13,894.54 to $16,015.96.
>
> In 2017, the pension deductions will increase from $16,105.96 to $18,137.38.
>
> [Pl.'s Certif. at 2.]

Plaintiff represents that, over the next seven years, his biweekly pension deduction will increase from $126.44 to $697.59.

Regarding plaintiff's contribution for health care benefits, currently plaintiff contributes 1.5% of his salary, which amounts to $2,475 annually.[2] Under the new legislation, judges will be charged at the highest rate of 35% of the premium cost to the State for applicable coverage. Moreover, plaintiff argues that health care contributions will automatically increase as premiums increase by application of the formula and the scope and quality of health care plans may be reduced by the State Health Benefits Plan Design Committee ("Design Committee").

Plaintiff seeks a finding that Chapter 78 diminishes judicial salaries in violation of Article VI, § 6, ¶ 6 of the New Jersey Constitution which provides "the Justices of the Supreme Court and the Judges of the Superior Court shall receive for their services such salary as may be

[2] Referring to the Division of Pension and Benefits, plaintiff represents: (1) premium coverage for a family is $14,945.32, a judge's contribution to that premium will become $5,230.86, a net increase of $2,755.86, representing 111%; (2) premium coverage for a husband and wife is $13,450.58, a judge's contribution to that premium will become $4,707.70, a net increase of $2,232.70, representing 90%; (3) premium coverage for a parent with a child is $8,369.40, a judge's contribution to that premium will become $2,929,29, a net increase of $454.29, representing 18%; and (4) premium coverage for a single person is $5,977.92, a judge's contribution to that premium will become $2,092.27, representing a net decrease of $382.73.

provided by law, which shall not be diminished during their term of appointment."[3]

[3] 1. § 2 - N.J.S.A. 43:6A-29 is amended to authorize The State House Commission to "modify the member contribution rate; formula for calculation of final salary; age at which a member may be eligible for and the benefits for service or early retirement";

2. § 9 - N.J.S.A. 43:6A-34.1 is amended to increase pension contributions for JRS members "an additional 9% of the salary for the judicial position held by the member phased-in in equal increments over a period of seven years";

3. § 39 - establishes health care benefit contribution amounts for public employees;

4. § 40 - provides for implementation of the rates in § 39;

5. § 45 - N.J.S.A. 52:14-17.27 is amended to create a State Health Benefits Plan Design Committee which may "create, modify, or terminate any plan or component, at its sole discretion";

6. § 47 - N.J.S.A. 52:14-17.29(j)is amended to mandate that the State Health Benefits Design Committee provide at least three levels of coverage for employees, with differing out of pocket costs, and giving the Design Committee "sole discretion to set the amounts for maximums, co-pays, deductibles, and other such participant costs for all plans in the program"; and

7. § 53 - N.J.S.A. 52:14-15.1(a) is amended to allow the creation of a "cafeteria plan," to require the Treasurer to "establish such a plan for medical or dental expenses not covered by a health benefits program," and requiring the plan to "provide for a reduction in an employee's salary, through payroll deductions or otherwise, in exchange for payment by the employer of medical or dental expenses not covered by a health benefits plan." [Pl.'s Br. at 10-11.]

B. PROCEDURAL HISTORY

On July 21, 2011, plaintiff filed a one-count verified complaint and order to show cause seeking declaratory and other relief in the Superior Court, Law Division in Mercer County. On the same day, the court signed the order to show cause, established a briefing schedule and set the return date. Plaintiff then moved before the Supreme Court for direct certification, relying on R. 2:12-1.

On July 22, 2011, plaintiff filed a motion for relaxation of R. 1:1-2. On August 15, 2011, the Supreme Court denied plaintiff's application without prejudice.

On September 2, 2011, the State moved to dismiss the complaint for failure to state a claim and filed opposition to the order to show cause. R. 4:6-2 (e). On September 16, 2011, plaintiff filed opposition and on October 3, 2011, defendant replied.[4]

[4] On September 12, 2011, three municipal Firefighters, each employed by a local municipality and two Probation Officers, employed by the New Jersey State Judiciary, Monmouth and Mercer Vicinages, respectively, filed a nine-count complaint challenging sections 39 through 44 of Chapter 78 (hereinafter referred to as "the Powell Litigation"). The Powell Litigation named as defendants, the State of New Jersey, New Jersey Department of the Treasury, New Jersey State Health Benefits Commission, Andrew P. Sidamon-Eristoff, Treasurer, State of New Jersey, New Jersey State Senate and the New Jersey State General Assembly.

Plaintiff argues that requiring judges to contribute to the JRS, N.J.S.A. 43:6A-1 to -47 (effective May 22, 1973) and the New Jersey Health Benefits Plan ("SHBP"), N.J.S.A. 52:14-17-28b (c) (2), as set forth in Chapter 78, violates Article VI, § 6, ¶ 6 which prohibits the diminution of judicial salaries.

Plaintiff seeks: (1) an order declaring Chapter 78 unconstitutional as applied to the Justices of the New Jersey Supreme Court and the Judges of the Superior Court because it diminishes their salaries; (2) immediate restoration of all funds which have been or may be deducted from plaintiff's salary and the salaries of justices and judges appointed before the enactment of the subject legislation; and (3) other relief as appropriate.

In response, defendant argues: (1) Chapter 78 does not diminish judicial salaries; the salaries are set by N.J.S.A. 2B:2-4 and Chapter 78 does not amend the statute; (2) the constitutional language only protects salaries, not

---

On the same date, plaintiffs informally requested that the Powell Litigation be consolidated with the DePascale matter. In response, the court directed counsel in the Powell Litigation to file a formal motion. On September 21, 2011, the Powell plaintiffs filed a motion for consolidation. R. 4:38-1. Thereafter, on different dates, the State and Legislative defendants, in the Powell Litigation, as well as DePascale filed opposition to consolidation. The court heard the consolidation on October 5, 2011 and denied the motion for consolidation. Thereafter, the court proceeded with the DePascale matter.

other compensation or benefits; (3) the complaint should be dismissed for failure to state a claim upon which relief can be granted.

On September 16, 2011, plaintiff filed opposition to the motion to dismiss. Plaintiff argues: (1) the terms "salary" and "compensation" are used interchangeably in common usage; (2) the Legislature was fully aware of the limitations on requiring contributions by Justices of the Supreme Court and Judges of the Superior Court on February 2011, by introducing A-3796; (3) judicial contributions to pension and health benefits are distinguishable from taxes because they are not borne by all citizens of New Jersey, and are imposed by the government acting as an employer and not a sovereign; (4) defendant's reliance on United States v. Hatter, 532 U.S. 557, 121 S. Ct. 1782, 149 L. Ed. 2d 820 (2001) is misplaced; and (5) plaintiff overwhelmingly has met its burden of showing that the legislation offends Article VI, § 6, ¶ 6.

On October 3, 2011, defendant filed a reply brief in support of its motion to dismiss the complaint. Defendant re-iterates: (1) Chapter 78 does not diminish judicial salaries; (2) plaintiff's salary is the same before and after the enactment of the legislation; (3) judicial contributions to pension and health benefits are akin to

taxes; and (4) the plaintiff has not overcome the presumption of validity of a legislative enactment.

C. THE JRS AND THE SHBP: A HISTORICAL REVIEW

The Legislature established the JRS in the Judicial Retirement System Act ("JRSA"), N.J.S.A. 43:6A-1 to -47 (effective May 22, 1973), "to provide pensions and other benefits for its members and their beneficiaries." N.J.S.A. 43:6A-5. Plaintiff is a member of the JRS.

The JRSA provides that membership in the system is a "condition for judicial service." N.J.S.A. 43:6A-5. As created by the enactment of JRSA, the JRS was a non-contributory pension system. In signing the act, former Governor William T. Cahill, in a Press Release noted, "New Jersey's Constitution, in recognition of the necessity of a strong, independent judiciary, guarantees that non-contribution pensions for Supreme Court Justices and Superior Court Judges [can] not be reduced during their term of office." Press Release, Office of the Governor, S-536 (May 22, 1973).

While the JRS was initially non-contributory, on January 11, 1982, Governor Brendan Byrne signed a package of five bills, to become effective on January 19, 1982. Two of these bills, A-3801 and A-3798, impacted judicial salaries.

A-3801, P.L. 1981, c. 473, raised the salary of the Supreme Court's Chief Justice from $65,000 to $80,000 per year, the Court's Associate Justices from $63,000 to $78,000, Appellate Division Judges from $60,000 to $75,000, Assignment Judges from 58,000 to $73,000, and all other court judges from $55,000 to $70,000 per year.

A-3798, P.L. 1981, c. 470, § 26, provided:

> There shall be deducted from the payroll of each member of the system 3% of the amount of any difference between the salary on or after January 19, 1982 for any judicial position held by the member and the salary for that position on January 18, 1982.
>
> Every judge of the several courts to whom this amendatory and supplementary act applies shall be deemed to consent and agree to any deduction from his compensation required by this act and to all other provisions of this act. Notwithstanding any other law, rule or regulation affecting the salary, pay, compensation, other perquisites, or tenure of person to whom this amendatory and supplementary act applies, or shall apply, and notwithstanding that the minimum salary, pay or other perquisites provided by law for him shall be reduced thereby, payment, less such deductions, shall be a full and complete discharge and acquittance of all claims and demands for services rendered by him during the period covered by such payment.[5]

[5] The "consent and agree" provision was also included verbatim in P.L. 1995, c. 424, § 26b.

Importantly, when the two bills were enacted, the Legislature recognized the need to ensure that, in effect, there would be no decrease to existing judicial salaries.

Assembly Bill 3293, introduced on December 18, 1995, increased the salaries of Superior Court Judges from $100,000 to $115,000. P.L. 1995, c. 424. The legislation also provided that new members of JRS, enrolled on or after January 1, 1996, would be required to contribute 3% of their full salaries in contrast to existing members for who, the contribution requirement remained 3% of the difference between the January 18, 1982 salary and the post January 19, 1982 salary for their judicial position.

The distinction between current and new members was consistent with the State Constitution which prohibits diminution of a judge's salary during the term of their appointment. Furthermore, the inclusion of the consent and agree provision from P.L. 1981, c. 470 evidenced an appreciation by the Legislature of this prohibition. See P.L. 1995, c. 424 § 26b.

The court notes that A-3796, introduced on February 10, 2011, but not adopted, was consistent with the prior legislative practice of withholding an increase in

contribution to the JRS in the absence of a companion increase in judicial salary.

On May 1, 1961, A-620 was introduced to provide hospital, medical, surgical and major medical expense benefits for State employees and providing for the procuring of such benefits. The Act created the State Employees Health Benefits Commission. The term "employee" was defined as an appointive or elective officer or full-time employee of the State of New Jersey. P.L. 1961, c. 49.

As noted heretofore, in January 1996, Governor Christine T. Whitman, signed P.L. 1995, c. 424, raising salaries by an average of approximately $19,000 for the Justices of the Supreme Court and the Judges of the Superior Court.[6] On February 5, 1996, P.L. 1996, c. 8 ("S-627"), was adopted to require, for the first time, a judicial contribution to the SHBP. The amount of funds to be deducted was not included. Plaintiff anticipated, however, that any health care deduction would be far less

[6] The salary of Judges of the Superior Court increased from $100,000 to $115,000 per year.

than the amount by which judicial salaries were increased by P.L. 1995, c. 424.[7]

Despite the legislation, at some point after February 5, 1996, unless an employee elected to retain traditional coverage, State employees did not contribute towards the cost of health benefits.[8]

Plaintiff has contributed 1.5% of base salary to the costs of health benefits provided under the SHPB since July 2007. P.L. 2007, c. 103, § 22 (amending N.J.S.A. 52:14-17.28b (c) (2)). Plaintiff submits, consistent with that payment, in 2007, the Legislature amended N.J.S.A. 2B:2-4 to increase judicial salaries for plaintiff and judges of similar rank from $141,000 to $157,000, effective January 1, 2008 and to $165,000, effective January 1, 2009. P.L. 2007, c. 350.

Chapter 78 expands upon that basic contribution schedule, calculating employee contribution based on type of coverage and salary. For plaintiff, who was an employee on the statute's effective date, the contribution schedule

[7] A contribution was not implemented until 2007 P.L. 2011, c. 103.

[8] HMOs and Horizon-Blue Cross and subsequent plans, other than traditional coverage, were provided to State employees at no cost.

established in Section 39 will be implemented over four years. Chapter 78, § 40.

D. THE EFFECT OF CHAPTER 78 ON JUDICIAL CONTRIBUTIONS

On June 13, 2011, Senator Stephen M. Sweeney introduced legislation, S-2937, to reform public employee pension and health care benefits. As noted in this opinion, Chapter 78 applies to all judges and justices without regard to when they were appointed to the bench. It will increase judicial contributions to the SHBP to 35% over four years, and increase judicial contributions to the JRS to 12% over seven years. Chapter 78, §40; N.J.S.A. 43:6A-34.1.

Unlike the JRS, which requires all judges and justices to be members, the SHBP can be waived. However, a waiver is only permissible if the employee is covered under another health plan, which effectively makes the SHBP mandatory as well.[9]

The legislation also provides for contributions to the health benefits plan to automatically increase as premiums rise and gives the Design Committee the authority to reduce

[9] See State of New Jersey "State Employee Coverage Waiver/Reinstatement State Health Benefits Program" form HA-0780-0510p.

the scope and/or quality of health care plans presently extended to justices and judges.

II.

PRELIMINARY MATTER

A. THE RULE OF NECESSITY

Traditional canons of ethics require that a judge with a personal interest in the outcome of a case disqualify herself and follow the administrative process to assign the case to another impartial judge.[10] United States v. Will, 449 U.S. 200, 212, 101 S. Ct. 471, 479, 66 L. Ed. 2d 392, 404 (1980). However, in cases where every available judge has an interest in the case, it is well-settled law that the "rule of necessity" applies to not only allow, but require, the judge to hear the case before her. Will, supra, 449 U.S. at 213, 101 S. Ct. at 480, 66 L. Ed. 2d at 405. The rationale behind this law is that if every judge is disqualified from hearing a case, the litigant will be denied the right to have his case adjudicated. Will, supra, 449 U.S. at 214, 101 S. Ct. at 480, 66 L. Ed. 2d at 405.

The rule "has been consistently applied in this country in both state and federal courts." Will, supra, 449

[10] Neither party challenges the propriety of this court to adjudicate the matter.

U.S. at 213-14, 101 S. Ct. at 480, 66 L. Ed. 2d at 405. Specifically, there are numerous examples of courts which have applied the rule in cases impacting judicial salaries. Id. at 214 (allowing interested federal judges to determine if Congress may repeal or modify a statutorily defined formula for cost-of-living increases); Citizens Protecting Michigan Constitution v. Sec'y of State, 755 N.W.2d 147, 149-50 (Mich. 2008)(denying motion to disqualify judges based on the rule of necessity even though their salaries could be reduced by 15%); Larabee v. Governor of New York, 860 N.Y.S.2d 886 (2008) (invoking rule of necessity to determine if judges had been improperly denied an increase in compensation); Jorgenson v. Blagojevich, 811 N.E.2d 652, 659-60 (Ill. 2004)(invoking rule of necessity to determine if eliminating cost of living adjustments to judicial salaries is constitutional); Hudson v. Johnstone, 660 P.2d 1180, 1183 (Alaska 1983) (invoking rule of necessity to determine if judicial contributions to retirement system is constitutional); Schwab v. Ariyoshi, 57 Haw. 348, 353 (1976) (denying motion to disqualify judges from hearing case to determine validity of statutes that fixed their own salaries); Higer v. Hanson, 170 P.2d 411, 413-14 (Idaho 1946) (invoking the rule of necessity to determine whether judicial salary increase is constitutional).

Here, all judges in the State have a financial interest in the outcome of this matter because it directly affects their salaries. The New Jersey Supreme Court denied plaintiff's motion for direct certification, leaving the case to be heard in the trial court. If every judge in the trial court was disqualified from hearing the matter, the plaintiff would be denied his right to adjudication. Therefore, the rule of necessity dictates that this court must decide the case.

III.

STANDARD OF REVIEW

A. DECLARATORY JUDGMENT

Plaintiff commenced this action under the Declaratory Judgment Act. The Declaratory Judgment Act, N.J.S.A. 2A:16-50 et seq., authorizes courts to declare rights, status and other legal relations so as to afford litigants relief from uncertainty and insecurity.[11] U.S.A. Chamber of Commerce v. State of New Jersey, 89 N.J. 131, 140 (1982). A declaratory judgment action challenging the constitutionality of a statute is cognizable in a trial court. City of Camden v. Whitman, 325 N.J. Super. 236 (App. Div. N.J. Super. 1999).

[11] In response to the complaint seeking Declaratory Judgment, defendant moves to dismiss the complaint for failure to state a claim upon which relief can be granted. R. 4:6-2(e).

See also 338 Betancourt v. West New York, 415, 420, 424 (App. Div. 2001); R. 4:42-3.

Here, while the parties disagree as to the ultimate outcome, there are no material facts in dispute. First, plaintiff has an "interest in the litigation." Second, the challenge to the constitutionality of the newly enacted legislation presents the court with a justiciable controversy between adverse parties. Finally, plaintiff has a right to have the validity of the statute determined by this court. U.S.A. Chamber of Commerce, supra, 89 N.J. at 140.

B. CHALLENGING THE CONSTITUIONAITY OF A STATUTE

Clearly, courts undertaking the "most delicate task" of adjudicating the constitutionality of a statute do so "with extreme self restraint, and with a deep awareness that the challenged enactment represents the considered action of a body composed of popularly elected representatives." New Jersey Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 8, appeal dismissed sub nom. Borough of E. Rutherford v. N.J. Sports & Exposition Auth., 409 U.S. 943 (1972).

Therefore, the party challenging a statute must clearly "demonstrate that it violates a constitutional provision." N.J. Sports & Exposition Auth., supra, 61 N.J.

at 8. While the highest presumption of constitutional validity imposes a tremendous hurdle to a party seeking to invalidate an act of the Legislature, here, the plaintiff has met that burden.

C. MOTION TO DISMISS

When considering a motion to dismiss, the court's inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). Plaintiff is entitled to "every reasonable inference of fact." Ibid. For the reasons set forth herein, applying that standard, the motion to dismiss is denied.

IV.

ANALYSIS

A. SALARY v. COMPENSATION

The New Jersey Constitution protects Supreme Court Justices and Superior Court Judges from reductions in salary during their appointments. Specifically, the Constitution provides:

> [t]he Justices of the Supreme Court and the Judges of the Superior Court shall receive for their services such salaries as may be provided by law, which shall not be diminished during their appointment.
>
> [N.J. Const., art. VI, § 6, ¶ 6.]

The Compensation Clause of the Federal Constitution also guarantees federal judges "compensation, which shall not be diminished during their continuance in Office." U.S. Const., art. III, §1.

Defendant argues "unlike its federal counterpart, the State constitutional provision protects only salaries, not compensation," and the "constitutional protections afforded to salary extend only to salary and do not include any other benefits of public employment." Def's Brief in Opposition to Order to Show Cause and in Support of Motion to Dismiss the Complaint at 10-11. The court disagrees.

First, perhaps the best indication of drafter's intent is the 1947 Constitutional Convention proceedings ("Convention"). Addressing the Committee on the Judiciary ("Committee") during the afternoon session of the Convention on July 10, 1947, Governor Alfred E. Driscoll remarked:

> It is, as you know, the courts that have traditionally been the guardians of our constitutions . . . Without independent courts, the whole republican system must surely fail. Our primary, basis purpose in the drafting of a new Constitution is to secure beyond any question a strong, competent, easily functioning, but always independent, judiciary, and, therefore, in a position to curb any tendency on the part of the other two

> branches of government to exceed their constitutional authority.
>
> [Alfred E. Driscoll, Address to Committee on the Judiciary, 4 State of New Jersey Constitutional Convention of 1947, 427-29 (Sidney Goldmann & Herman Crystal eds., 1951)(emphasis added).]

At the Convention, Ms. Evelyn M. Seufert ("Seufert"), a member of the New Jersey Committee for Constitutional Revision, submitted a draft of the judicial article to the Committee. 4 State of New Jersey Constitutional Convention of 1947 1, 26.

That draft contained the same prohibition of diminution as the final version of the Constitution:

> The chief justice, the associate justices of the supreme court and the judges of the general court shall, at stated intervals, receive for their services such salaries as may be provided by law which shall not be diminished during the term of their appointment. They shall hold no other office, or position, of profit under the government of this state or of the United States or of any instrumentality or political subdivision of either of them. Any justice or judge who shall become a candidate for an elective public office shall thereby forfeit his judicial office. The justices and judges shall not, while in office, engage in the practice of law or other gainful occupation. [N.J. Const. Draft art. II, § V, ¶ 6 (emphasis added).]
>
> [4 State of New Jersey Constitutional Convention of 1947 1, 29.]

Seufert further submitted a formal explanation of the draft to the Committee, which commented on the independence and responsibilities of the judges:

> The independence, responsibility and efficiency of the judicial branch depend on several constitutional factors, including the organization, administration, and powers of the courts; and the provisions concerning the selection, terms, retirement, removal, and compensation of the judges.
>
> [4 State of New Jersey Constitutional Convention of 1947 1, 578 (emphasis added).]

While the draft contained the term "salaries," Seufert's explanation of how to maintain independence used the term "compensation." It is clear that Seufert did not intend to make a distinction between the two terms.

It is also clear that Seufert did not intend to make a distinction between the two terms when she maintained that ensuring an independent judiciary required attracting competent judges with adequate "salaries" or "compensation":

> Independence of the judiciary is the fundamental principle of our American court systems. How to achieve that independence is a problem still unsolved in the 48 states. The first step, all agree, is to find the right method of selection of judges which will insure a bench free from the

> influence and control of party politics, individuals, or pressure groups.
>
> [2 State of New Jersey Constitutional Convention of 1947 1631.]
>
> . . . .
>
> Adequate salaries are a necessary part of any plan to keep competent [people] in the courts. Membership in the Judiciary is an honor, but honor alone cannot compensate; it is more a question of economic competition. If [people] of worth and capacity are to be induced to accept and to continue in judgeships, there must be an available monetary compensation sufficiently attractive to the caliber of [people] desired.
>
> [2 State of New Jersey Constitutional Convention of 1947 1631, 1640(quoting How to Get and Keep Competent and Independent Judges, 31 A.B.A. J. 631 (December 1935) (emphasis added).]

When talking to the Committee about the importance of life tenure for judges, George S. Harris ("Harris"), Dean of Rutgers Law School, indicated that "a safeguard should be put around the court in every possible way to induce the best [people] possible to take positions on it, and not have to leave it for a more lucrative practice because of salary." 4 State of New Jersey Constitutional Convention of 1947 1, 29, 183 (emphasis added). Harris' intent was not to restrict the safeguards to a fixed monetary figure when

he explicitly stated that every possible safeguard should be put into place.

Beyond the Convention, the legislative history also shows the intent to protect judicial salaries in compliance with the Constitutional provision. It is significant that not only were the JRS and SHBP initially non-contributory, but all amendments to them prior to Chapter 78 requiring judicial contributions were also accompanied by an increase in salary greater than the amount of the contributions. See P.L. 1981, c. 473, P.L. 1981, c. 470, § 26, P.L. 1995, c. 424 and P.L. 1996, c. 8.

Five months before Chapter 78 was introduced, A-3796 proposed that the contribution increase would only apply to new members of the JRS, and existing members would be required to contribute at the higher rate only for any future salary increases. See n.1.

Even more telling is the legislative statement that accompanied A-3796 which states "[t]he increase in the contribution rate for members of the JRS is implemented in a manner to conform to a prohibition in the State Constitution against the reduction in the compensation of a judge during the judge's term of appointment." Ibid.

Unfortunately the Legislature, clearly aware of the prohibition, elected to ignore same when it adopted Chapter 78.

Defendant argues that the 1844 New Jersey Constitution used the word "compensation" in the clause prohibiting diminution of judicial salaries, and that by changing it to "salaries" in 1947, the drafters specifically intended to limit the protection to the monetary figure set by the statute. The court disagrees.

At the Convention, and in enactments by the Legislature, the terms "compensation" and "salary" have been used interchangeably. For example, the Police and Firemen's pension statute enacted closest in time to the Constitution defines "compensation" as "base salary." N.J.S.A. 43:16A-1(26)(a)(effective 1944). Furthermore, neither party challenges the notion that the intent of the constitutional provision was always to ensure the independence of the judiciary.

Inasmuch as "salaries" were specifically discussed at the Convention as one means to ensure that independence, it is highly unlikely that the drafters intended to limit that protection. Instead, the drafters intended to give the judges complete protection and every possible safeguard.

Second, a review of dictionary definitions of the terms demonstrate that "salary," "compensation," and "emolument" are synonyms. According to the American Heritage Dictionary, "salary" is defined as "a fixed compensation periodically paid to a person for regular work or services," and its synonym, "pay," is defined as "wages, salary, or stipend." American Heritage Dictionary of the English Language (4th ed. 2006) (emphasis added).

Merriam-Webster defines "salary" almost identically to mean "fixed compensation paid regularly for services," and its synonyms include emolument, hire, pay, paycheck, pay envelope, payment, wage, and stipend. Merriam-Webster's Collegiate Dictionary (11th ed. 2008) (emphasis added).

Black's Law Dictionary definition is "[a]n agreed compensation for services – esp. professional or semiprofessional services – usu. paid at regular intervals on a yearly basis, as distinguished from an hourly basis." Black's Law Dictionary (8th ed. 2004) (emphasis added).

Turning to "compensation," American Heritage defines the term as "something given or received as an equivalent for services, debt, loss, injury, suffering, lack, etc.; indemnity." American Heritage Dictionary of the English Language (4th ed. 2006). Similarly, Merriam-Webster's definition is "payment, remuneration." Merriam-Webster's

Collegiate Dictionary (11th ed. 2008). Finally, Black's defines the term as "[r]emuneration and other benefits received in return for services rendered; esp. salary or wages." Black's Law Dictionary (8th ed. 2004).

"Emolument" is defined in American Heritage as "profit, salary, or fees from office or employment; compensation for services," and its synonyms include earnings, pay, recompense, stipend, and honorarium. American Heritage Dictionary of the English Language (4th ed. 2006). Merriam-Webster defines "emolument" as "the returns arising from office or employment usually in the form of compensation or perquisites," listing wage, hire, pay, paycheck, pay envelope, payment, salary, and stipend as synonyms. Merriam-Webster's Collegiate Dictionary (11th ed. 2008). Black's definition is "[a]ny advantage, profit, or gain received as a result of one's employment or one's holding of office."

Third, when interpreting the meaning of a constitutional provision, "a court must first look to the precise language used by the drafters." State v. Trump Hotels & Casino Resorts, 160 N.J. 505, 527 (1999). "Clear and unambiguous" words "must be given their plain meaning." Ibid. Applying common usage and the dictionary definition,

"salary is fixed compensation paid regularly for services." Merriam-Webster's Collegiate Dictionary (11th ed. 2008).

Fourth, while the court finds the language clear and unambiguous, if a word or words are susceptible to more than one interpretation, courts may consider sources beyond the instrument itself to ascertain its intent and purpose. Id. at 527-28. A review of our statutory provisions discloses that the Legislature itself defines the word compensation to mean either base or contractual salary in every pension provision in the State. [12]

Fifth, the consent and agree waiver provision, included in P.L. 1981, c. 470, § 26 and P.L. 1995, c. 424, § 26 is important for two reasons. First, by stating "every judge . . . shall be deemed to consent and agree to any deduction from his compensation required by this act," the language confirms that the Legislature made no distinction between the terms "compensation," "salary," or "payment."

[12] This includes Police and Firemen's Retirement System, the Teachers' Pension and Annuity Fund, the Public Employees' Retirement System and State Police Retirement System. See N.J.S.A. 43:16A-1(26)(a)(defining compensation in the context of the Police and Firemen's Retirement System to mean "base salary."); N.J.S.A. 18:66-2(d)(1) (defining compensation in the Teacher's Pension and Annuity Fund to mean "contractual salary"); N.J.S.A. 43:15A-6 (r)(1)(defining compensation in the Public Employees" Retirement System to mean "base or contractual salary"); N.J.S.A. 53:5A-3(u)(1)(defining compensation in the context of the State Police Retirement System as "base salary").

N.J.S.A. 43:6A-34.1(b)(emphasis added). Second, while ineffective for the purposes for which it was enacted – a legislatively enacted consensual waiver of a constitutional right, it leaves no doubt that the Legislature understood that the "salary of Justices of the Supreme Court and Judges of the Superior Court . . . "shall not be diminished during their term of appointment." N.J. Const. art. VI, § 6, ¶ 6.

Sixth, the Legislature also evidenced its intent to protect judicial "salaries" as synonymous with "compensation" when it provided that:

> Each judge of the Tax Court shall receive annual compensation and other benefits equal to that of a judge of the Superior Court and which shall not be diminished during the term of appointment.
>
> [N.J.S.A. 2B:13-8(a).]

Although the Legislature used the term "compensation" to protect the Tax Court Judges, it specifically equated those judges to the Judges of the Superior Court, whose "salaries" are protected by the Constitution. Thus, we can infer that the Legislature intended to protect them both

equally and that the terms "salary" and "compensation" are equivalent.[13]

Seventh, while the State cites Article VI, Section 8, Paragraph 1 for the proposition that neither the costs nor details of health benefits are a component of judicial salaries, the court disagrees. Article VI, Section 8, Paragraph 1, entitled "State funding of judicial system, in part, provides that judicial costs means the costs incurred by the county for funding the judicial system, including but not limited to the following costs: salaries, health benefits and pension payments of all judicial employees. . . ." N.J. Const. art. VI, § 8, ¶ 1.

This provision recognizes that judiciary employees receive, as part of their compensation, salaries, health benefits and pension payments. Clearly, as it pertains to Justices of the Supreme Court and Judges of the Superior Court, the New Jersey Constitution provides that these may

[13] See N.J.S.A. 2B:13-1 ("[a] Tax Court is hereby established as a court of limited jurisdiction pursuant to Article VI, Section 1, paragraph 1 of the New Jersey Constitution"); N.J.S.A. 2B:13-7 ("[t]he judges of the Tax Court shall be retired upon attaining the age of 70 years, upon the same terms and conditions as judges of the Superior Court, and shall have the same pension rights and other benefits as judges of the Superior Court"); N.J.S.A. 2B:13-8(a)("[e]ach judge of the Tax Court shall receive annual compensation and other benefits equal to that of a judge of the Superior Court and which shall not be diminished during the term of appointment").

not be diminished during their appointment. N.J. Const. art. VI, § 6, ¶ 1.

Eighth, courts look to case law that has interpreted the meaning of words. The precise issue in this case, whether "salary" as applied to judges includes pension and health benefits, is one of first impression in New Jersey. However, one New Jersey case addressed whether "salary" includes vacation, sick, and personal days for a public employee whose "salary" is protected by statute. Hyland v. Twp. of Lebanon, 419 N.J. Super. 375 (App. Div. 2011).

In Hyland, plaintiff was appointed the tax collector. In 2008, five years after plaintiff's appointment, the Township determined that plaintiff should not have been granted paid leave for vacation, sick and personal days where a collective bargaining agreement ("CBA") only granted such compensation to persons who worked 20 or more hours per week. Plaintiff only worked 19 hours per week.

N.J.S.A. 40A:9-165, in part, states:

> Salaries, wages or compensation as fixed by ordinance may, from time to time, be increased, decreased or altered by ordinance. No such ordinance shall reduce the salary of, or deny without good cause an increase in salary given to all other municipal officers and employees to, any tax assessor, chief financial officer, tax collector or municipal clerk during

> the term for which he shall have been appointed.
>
> [Hyland, supra, 419 N.J. Super. at 382 (emphasis added).]

The Township maintained: (1) it made a mistake in agreeing to pay plaintiff for vacation, sick and personal time; (2) the agreement was in conflict with the collective bargaining agreement; and (3) the elimination of such compensation did not violate N.J.S.A. 40A:9-165. The trial court held it had jurisdiction to entertain plaintiff's claims, the plaintiff was not a member of the union covering municipal workers and the New Jersey Public Employee Relations Commission did not have jurisdiction. Id. at 379.

Finally, most important to the case at bar, the trial court held: (1) the statute "precludes a municipality from reducing the 'salary' of a tax collector during the term in which the tax collector has been appointed"; and (2) "sick days and other financial benefits are a form of compensation akin to salary for purposes of the statute." Ibid (emphasis added).

The Appellate Division accepted the finding by the trial court that applying the statutory bar to vacation days, sick and personal days was consistent with the

Legislative purpose in enacting the law. Clearly, the law was designed to protect Hyland from economic discrimination regardless of whether it was politically motivated. Id. at 384-85.

In recognizing the relationship between the term salary and direct and indirect forms of compensation, the Appellate Division held:

> Although the statutory bar applies specifically to "salary" rather than to "salaries, wages or compensation," there is no indication that the Legislature intended to limit the statutory bar to the base salary paid to the four named officers and to exclude from its scope other forms of compensation such as payments for vacation days, sick leave and personal time, particularly when such compensation directly related to the amount of salary paid to these officers.
>
> [Id. at 384.]

The Appellate Division determined that the legislative purpose of the statute was to protect officials from "economic discrimination"; to allow them to be "free from political pressure" and "retaliation from municipal officials" as long as they performed their jobs "honestly and completely." Id. at 383-84 (quoting Ass'n of Mun. Assessors v. Twp. of Mullica, 225 N.J. Super. 475, 481-82 (Law Div. 1988)). Thus, the court affirmed the trial

court's ruling and held that revoking the plaintiff's vacation, sick, and personal days was a diminution of salary in violation of the statute. Id. at 385.

Importantly, unlike the statutory protection afforded in Hyland, N.J.S.A. 40A:9-165, the Justices of the Supreme Court and the Judges of the Superior Court are protected from a diminution of salary by Article VI, Section 6, Paragraph 6 of the New Jersey Constitution.

The purpose of protecting judicial salaries is the same as protecting the tax assessor's salary in Hyland – to allow them to be "free from political pressure" and "retaliation" of the legislative branch. Hyland, supra, 419 N.J. Super. at 383-84. It is consistent with that intent to protect all forms of salary, including a deduction for JRS and SHBP contributions.

B. DIMINUTION OF SALARY UNDER CHAPTER 78

Adopted in 1947, the New Jersey Constitution represented the culmination of sixty-nine years of legislative efforts to reform the New Jersey judiciary. See generally William W. Evans, Constitutional Court Reform in New Jersey, 7 Newark Univ. Law. Rev. 1, 6 (1941). Up until June 28, 2011, the effective date of Chapter 78, the State adhered to what the drafters intended.

Despite the presumption of validity afforded laws enacted by the legislature, the pension and health care contributions set forth in Chapter 78 diminish the salaries of Justices of the Supreme Court and Judges of the Superior Court in contravention of our State Constitution. N.J. Const. art. VI, § 6, ¶ 6.

Importantly, Chapter 78 provides that there shall be a deduction or contribution expressed as a percentage of salary from each member's payroll. Id. at §§ 9, 40. The clear and unambiguous language of Chapter 78, regarding the JRS, provides: "there shall be deducted from the payroll of each member of the system . . . an additional 9% of the salary for the judicial position held by the member phased-in in equal increments over a period of seven years." Chapter 78, § 9.

Regarding the SHBP, the legislation further provides:

> [P]ublic employees of the State . . . shall contribute, through the withholding of the contribution from the pay, salary, or other compensation, toward the cost of health care benefits coverage for the employee and any dependent provided under the State Health Benefits Program . . . in an amount that shall be determined in accordance with section 39.
>
> [Id. at § 40a.]

In a case decided over one hundred years ago by the Court of Appeals in New York, the town of Fort Edward challenged a lower court decision that struck down legislation which abolished the constitutional office of the justice of the peace. The court held:

> When the main purpose of a statute, or of part of a statute, is to evade the Constitution by effecting indirectly that which cannot be done directly, the act is to that extent void, because it violates the spirit of the fundamental law. Otherwise the Constitution would furnish frail protection to the citizen, for it would be at the mercy of ingenious efforts to circumvent its object and to defeat its commands.
>
> [People v. Howland, 155 N.Y. 270, 280-81 (1898).]

In Howland, the court recognized that the object of a written Constitution is to regulate, define and limit the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers.

The Federal Constitution and State Constitutions across the country include constitutional prohibitions against the diminution of judicial salaries during continuance in office.

We begin with litigation by a plaintiff judge seeking a refund of income taxes paid under protest. Evans v. Gore,

253 U.S. 245, 40 Sup. Ct. 550, 64 L. Ed. 887 (1920). In Evans, the District Court entered judgment in favor of the defendant and the judge appealed. On review, the court reversed the judgment because the tax imposed upon the judge was contrary to the prohibition on the diminishment of judicial compensation contained in U.S. Const. art. III, § 1.

In Evans, the Court reasoned that "a tax upon the net income of a United States District Judge . . . operates to diminish his compensation, in violation of the Constitution and is invalid." Id. at 255. Evans was partially overturned eight decades later in Hatter, supra, 532 U.S. 557, 567, 121 S. Ct. 1782, 1790, 149 L. Ed. 2d 820, 831-32 wherein the Supreme Court recognized the authority of Congress to apply a generally nondiscriminatory tax to the salaries of federal judges, whether or not they were appointed before the enactment of the tax.

Perhaps, most importantly, the central premise of Hatter was that judges should not be held "immune from sharing with their fellow citizens the material burden of government." Id. at 570 (quoting O'Malley v. Woodrough, 307 U.S. 277, 282 (1939). Here, the State is not asking plaintiff to share in the material burden of government, which he already does through the payment of taxes, but

rather that he shoulder an increased share of the burden of paying for the pension and health care benefits to which he has been entitled since his appointment to the bench.

Clearly, the pension and health contribution paid by plaintiff is dramatically different than a general tax, paid by all citizens in Hatter, supra, 532 U.S. at 571, 121 S. Ct. at 1792, 149 L. Ed. 2d at 834, or a state tax, paid by all citizens who reside in a particular State. Long v. Watts, 110 S.E. 765 (N.C. 1922).

In Long, the Supreme Court of North Carolina held a tax levied on plaintiff's official salary amounted to a diminution, and was therefore unconstitutional. N.C. Const. art. V, § 3. While the decision in Hatter in 2001 reversed the decision as it relates to income tax, North Carolina continues to prohibit the diminution of a judge's salary while in office.

In Long, the Supreme Court of North Carolina understood, all too well, the importance of maintaining the independence of the judiciary. "The legislative, executive and supreme judicial powers of the Government ought to be forever separate and distinct from each other." Id. at 103.

Justice Clark, in a concurring opinion stated:

> It was the evident purpose and intent of the people, when they inserted this clause in the Constitution, to prohibit any and every kind of diminution, direct or indirect, by taxation or otherwise. The Legislature is completely divested of the power to diminish salaries of the judges in any manner of form whatsoever. Any other construction would do violence to the plain purport of the language employed and render the clause meaningless. The prohibition is general in its terms, and contains no excepting words.
>
> [Id. at 107.]

In an interesting case, eleven years later, O'Donoghue v. United States, 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356 (1933), plaintiffs, two justices, challenged a ruling by the Comptroller General of the United States that the justices from the District of Columbia were legislative courts and not constitutional courts whose judges were entitled to the protection of Article III, § 1 of the Constitution. In part, that provision provides "the Judges both of the Supreme Court and Inferior Courts shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." U.S. Const. art. III, § 1.

As a result of the Comptroller General's ruling, plaintiffs sought to recover sums withheld from their

respective salaries. The Supreme Court of the United States held that the compensation of justices from the District of Columbia could not be lawfully diminished during their continuance in office because the courts of the District were constitutional courts of the United States.

In reaching its decision in O'Donoghue, the Court recognized the inherent potential for discord among the three branches by stating:

> The anxiety of the framers of the Constitution to preserve the independence especially of the judicial department is manifested by the provision now under review, forbidding the diminution of the compensation of the judges of courts exercising the judicial power of the United States.
>
> . . . .
>
> In framing the Constitution, therefore, the power to diminish the compensation of the federal judge was explicitly denied, in order, inter alia, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support.
>
> [Id. at 531.]

The propriety and necessity of the independence of judges is evident. Judges decide between government and the people, as well as between contenting citizens:

> These considerations make it very plain, as we think, that the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accordance with its spirit and the principle on which it proceeds.
>
> [Id. at 533.]

Significantly, and relevant to the issue in DePascale, is the notion that diminution can occur both directly and indirectly. In O'Donoghue, the Supreme Court recognized that diminution could occur in different ways:

> Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been

> promised by law for his services must be regarding as within the prohibition. Nothing short of this will give full effect to its spirit and principle.
>
> [Ibid.]

Once again, while the decision in Hatter in 2001 reversed the decision as it relates to income tax, the Federal Constitution still prohibits the diminution of federal judges' salary while in office. U.S. Const. art. III, § 1.

Clearly, while the judiciary must maintain its independence, the judiciary is dependent on both the executive and legislative branches with respect to appointments, tenure, and compensation of individual judges, as well as personnel and fiscal support at the institutional level.

In Gordy v. Dennis, 176 Md. 106 (1939), the court held that the salary of the chief judge of the city was not subject to the state income tax. In Maryland, the State Constitution, adopted in 1837, protected the judges from diminution of their salaries by an income tax, whether operating directly or indirectly. The court stated that the purpose was to "preserve the independence of the judiciary and that if judges were subservient upon either the legislative or executive branches of the government, the

central unit, balance and harmony of the government would be destroyed." Id. at 114.

Although the court partly relied on Evans, it relied more heavily on the Maryland Constitution, and explicitly stated that Maryland law was in accordance with Evans. Id. at 122-23. The court declared that diminution of the judge's salary "shall not be directly and purposely done by the General Assembly; and surely, what is prohibited, and therefore, cannot be directly done, can never be accomplished by any contrivance or indirect movement." Id. at 123. Hatter, despite defendant's insistence otherwise, does not change these basic principles and should be limited in its interpretation to state and federal taxes. Hatter, supra, 532 U.S. at 571, 121 S. Ct. 1793, 149 L. Ed. 2d at 834.

While Hatter addressed federal taxes, in Martin v. Wolfford, 107 S.W.2d 267, 270 (Ky. 1937), the Court of Appeals of Kentucky held that a State income tax applied to judges was constitutional because it applied to all citizens of the state. By following decisions from other States, the Court concluded that Evans and other federal cases had no application to the Kentucky Income Tax.[14]

[14] State v. Nygaard, 150 N.W. 513, 516 (Wis. 1915); Taylor v. Gehner, 45 S.W.2d 59 (Mo. 1932); Poorman v. State Bd. of

Instead, the intention of the Legislature "was to carry out the spirit of the Constitution in treating all of its citizens alike." Id. at 271. In reaching this decision, the Court distinguished between a tax that applied to all citizens of the State, and a deduction that applied to only the public official. In the later case, the Court held it would have been unconstitutional.

In 1976, in a case almost identical to the case before the court, the General Assembly in the State of Delaware amended the State Judiciary Pension Act by requiring an increased contribution rate for participation in the judicial retirement system. The Judges of the Superior Court filed a lawsuit alleging that the 1976 amendment, as applied to them, violated the Delaware Constitution. Stiftel v. Carper, 378 A.2d 124 (Del. Ch. 1977).

Plaintiffs, members of the Superior Court of the State of Delaware, brought a declaratory judgment action against the State and argued the 1976 Amendment violated Article XV, § 4 of the Constitution of the State of Delaware. The court below, as to each plaintiff, addressed whether the 1976 Amendment "diminished his salary or emoluments after

---

Equalization, 45 P.2d 307, 312 (Mont. 1935)(holding that if the tax had been applied only to a public official, then it would have been unconstitutional).

his employment." Carper v. Stiftel, 384 A.2d 2, 14 (Del. 1977). The Court held it did.

A specially constituted Supreme Court agreed: (1) the 1976 amendment violated Article XV, § 4 of the Delaware Constitution; (2) the pension contributions by judges diminished their "salary or emoluments" in violation of the Delaware Constitution; and (3) both direct and indirect changes in compensation are a violation of the constitution. Consistent with common usage; to wit, using the terms "salary" and "emoluments" interchangeably, the Delaware Constitution made no distinction between the two. Id. at 2.

In United States v. Will, 449 U.S. 200, 101 S. Ct. 471, 66 L. Ed. 2d 392 (1980), the Court held that salary diminution violated the Compensation Clause of the Federal Constitution, Article III, § 1, prohibiting the diminution of federal judges' compensation during their continuance in office. At issue in Will were appropriations for four consecutive fiscal years which purported to forbid pay raises for federal judges.

The facts are interesting and recognize the difference between judges and other employees. On October 1, 1976, the first day of fiscal year 1977, the President signed a bill that contained a prohibition on judicial pay raises. On

July 1977, the President signed a similar bill that forbade judicial pay raises for fiscal year 1978, which was to begin on October 1, 1977. On September 30, 1978, the President signed analogous legislation to repeal a judicial salary hike for fiscal year 1979, which was to begin the next day (October 1, 1978). Finally, on October 12, 1979, the President signed legislation that reduced the amount of a judicial pay raise for fiscal year 1980, which had begun on October 1, 1979.

More than a dozen federal district judges filed class actions challenging all four of these measures. The Court concluded that the judicial pay raises for years 1977 and 1980, "had taken effect, since [they were] operative with the start of the month – and the new fiscal year." Id. at 225. This was true for fiscal year 1977 even though the appropriations bill had become law just a few hours into the budget period, on October 1. The bill purported to repeal a salary increase already in force.

The Court held that a salary increase vests for purposes of the Compensation Clause only when it takes effect as part of the compensation due and payable to Article III judges. Under the statute that governed judicial compensation at the time, salaries became effective on October 1, the first day of the fiscal year.

As a result, the fiscal year 1977 pay raise had gone into effect and could not be revoked later in the day. In addition, the fiscal year 1980 increase had been effective for nearly two weeks when Congress tried to eliminate it.

The Court held, however, a rescission that takes effect even on the very last day of the previous fiscal year can prevent a judicial salary increase from taking effect at the start of the new fiscal year. That is why the fiscal year 1979 rider was permissible. The fiscal year 1978 measure was even more clearly permissible because it had been adopted nearly three months in advance of the compensation hike's effective date.

Interestingly, while the fiscal year 1977 and fiscal year 1980 riders also applied to congressional and executive salaries, the other officials did not enjoy the protection against salary reduction that the Compensation Clause affords to the judiciary.

In Will, the Court reiterated the notion that compensation and salary clauses have their roots in the long-standing Anglo-American tradition of an independent judiciary. As a result, in drafting constitutions to protect the independence of the Judiciary, the drafters sought to create a Judiciary free from control by the Executive Branch and the Legislature to ensure that claims

decided by judges are free from potential dominion by the other branches of government. Id. at 217-88, 407-08.

Similar to Carper, Alaska's constitution provides in part that "[c]ompensation of justices and judges shall not be diminished during their terms of office." Alaska Const., art. IV, § 13. The Supreme Court of Alaska declared that a statute requiring judges to contribute to a pension system was constitutional only for judges appointed after the enactment of the statute. Hudson, supra, 660 P.2d at 1182.

In Hudson, the court held:

> Were the legislature to implement a contributory judicial retirement system by exacting salary deductions from justices and judges during their terms of office, it would clearly run afoul of the compensation clause of Article IV, Section 13. Requiring a judge to contribute via a salary deduction to a retirement system diminishes a judge's compensation.
>
> [Id. at 1182 (emphasis added).]

Here, similar to other cases that address deductions, the Court made no distinction between "salary" and "compensation" and, in fact, applied them interchangeably.[15]

[15] The Court noted, however, that nothing precluded legislation providing that "each justice and judge appointed after July 1, 1978, shall contribute seven percent of the base annual salary received by the justice or judge to the judicial retirement system." Id. at 1181.

As noted heretofore, in Hatter, the Government sought review of the judgment of the United State Court of Appeals for the Federal Circuit. The Court of Appeals held that the Compensation Clause, U.S. Const. art. III, § 1, prevented the Government from collecting certain Medicare and Social Security taxes from a small number of federal judges who held office before Congress extended the taxes to federal employees in the early 1980s.

On appeal, the Supreme Court held that the Compensation Clause did not forbid Congress from enacting a law imposing a nondiscriminatory tax upon judges, whether those judges were appointed before or after the tax. While the court reversed, the Court held:

> We also agree with Evans insofar as it holds that the Compensation Clause offers protections that extend beyond a legislative effort directly to diminish a judge's pay, say by ordering a lower salary.
>
> . . . .
>
> Nonetheless, we disagree with Evans' application of Compensation Clause principles to the matter before it - - a nondiscriminatory tax that treated judges the same way it treated other citizens.
>
> [Hatter, supra, 532 U.S. at 569-70(citing Evans, 253 U.S. at 254).]

The Hatter opinion is replete with references to Evans and emphasizes the need to protect the independence and integrity of the judicial branch of government. Most significantly is the limited scope of Hatter, "there is no good reason why a judge should not share the tax burdens borne by all citizens." Id. at 571.

The parties do not dispute that judges' salaries are subject to federal and state income tax. However, defendant argues that benefits are akin to taxes, and maintains that the contributions are nondiscriminatory because they apply to all public employees, including judges. Defendant further argues that the extension of the Medicare tax in Hatter was constitutional as applied to judges because it was extended to all federal employees and not just judges [so that federal employees were sharing a more equitable cost of their benefits].

Defendant incorrectly states that the tax was not extended to all citizens. Ibid. In fact, United States citizens were already paying Medicare tax, and Hatter simply included federal employees in that class. Hatter, supra, 532 U.S. at 567. In Hatter, the government was acting as a sovereign when it imposed the tax, not as an employer. Justice Scalia highlights this difference in his concurring opinion:

> This distinction between Government action affecting compensation and Government action affecting the *value* of compensation was the basis for our statement in O'Malley, supra, at 282, 59 S. Ct. 838, that "to subject [judges] to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government . . . ." I agree with the Court, therefore, that Evans was wrongly decided -- not, however, because in Evans there was no discrimination, but because in Evans the universal application of the tax *demonstrated* that the Government was not reducing the compensation of its judges but was acting as sovereign rather than employer, imposing a general tax.
>
> [Id. at 584.]

Here, the government is acting as an employer by requiring its employees to contribute to pension and health benefits. It is not imposing the contributions on all citizens, or even a class of citizens that are not in its employ. The affected class is solely employees of the government.

Clearly, when faced with adverse economic conditions courts have recognized the importance of honoring their state constitution in spite of the conditions. Jorgenson supra, 811 N.E. 2d at 652. Jorgenson held that eliminating cost of living adjustments ("COLAs") from judges' salaries

as provided by law was a violation of the Illinois constitution, which provided in part: "Judges shall receive salaries provided by law which shall not be diminished to take effect during their terms of office. All salaries and such expenses as may be provided by law shall be paid by the State." Id. at 654.

The court acknowledged the economic conditions and the budgetary restraints facing the government, stating that the judiciary makes "every effort to economize whenever and however we can," but that "[o]ne thing we cannot do, however, is ignore the Constitution of Illinois." Id. at 669. The court further noted:

> This court did not set the salaries judges receive, nor did we make COLAs a component of those salaries. The salaries, including their COLA component, were provided by law in the manner described earlier in this opinion. Now that those salaries have been implemented, the constitution demands that they be paid. No principle of law permits us to suspend constitutional requirements for economic reasons, no matter how compelling those reasons may seem.
>
> [Ibid.]

In another case, Stilp v. Pennsylvania, 905 A.2d 918 (Pa. 2006), the state supreme court rebuffed an effort to roll back a pay raise four months after it had gone into effect. The Pennsylvania Constitution contains a clause

that judges' compensation "shall not be diminished during their terms of office." Id. at 940. In finding for the judges, the court held the challenged measure quite clearly "reduced judicial compensation during [the] judges' term of office." Id. at 939. Here, like in all the cases cited, the terms "salary" and "compensation" are used interchangeably. Furthermore, the court recognized that withdrawing the pay raise would reduce the salary of judges.

In Stilp, the court stated:

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resource on the occasional grants of the latter.
>
> [Id. at 940 (citing The Federalist No. 79 at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).]

Article VI, Section VI, Paragraph 6 of the New Jersey Constitution provides, "the Justices of the Supreme Court and the Judges of the Superior Court shall receive for their services such salary as may be provided by law, which

shall not be diminished during their term of appointment." N.J. Const., art. VI, § 6, ¶ 6. The salary of every judge and justice in this State is set forth in N.J.S.A. 2B:2-4.

Unlike the Powell Litigation, MER-L-2284-11, in which this court denied the application for consolidation, plaintiff does not rely on allegations of impaired contracts or a violation of due process. Quite simply, the salaries of New Jersey Justices and Judges during their term of appointment may not be diminished in any way for any purpose.

Clearly, plaintiff's salary is being diminished – not by a tax imposed on all citizens of the State of New Jersey, but by legislative action that mandates higher pension and health care contributions in contravention of the Constitution of the State of New Jersey.

While the recently enacted legislation may be a response to the present economic conditions, nonetheless, it does not amend, nullify or otherwise negate the mandate of the New Jersey Constitution. Instead, the importance of its protection and enforcement is enhanced under the present circumstances.

As noted heretofore, contributions to pension and benefits which are deducted from a judge's paycheck directly relate to the amount of salary paid to that judge.

These contributions are no different than paid vacation, sick, and personal time off.

The Constitution, in distributing the powers of government, created three distinct and separate departments - the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Nowhere is the functional independence of the judicial branch more evident than in its role as arbiter in disputes between the other two branches of our government.

C. JUDICIAL CONTRIBTUION TO JRS

Inasmuch as Chapter 78 results in a diminution of salary to Justices of the Supreme Court and Judges of the Superior Court appointed prior to its effective date, it is unconstitutional. Therefore, the contribution by judges to JRS is limited to the law in effect prior to the enactment of Chapter 78.

D. JUDICIAL CONTRIBUTION TO SHBP

In 1961, the Legislature enacted the State Health Benefits Act, P.L. 1961, c. 49 and thus established the SHBP. N.J.S.A. 52:14-27.25 to 33. The State Health Benefits Commission, N.J.S.A. 52:14-17.29(b) is authorized under the Act to make coverage determinations. The SHBP, administered by the Division of Pension and Benefits in the

Department of Treasury, provides public employees health care coverage.

Under Chapter 78, Section 39 increases the required contribution for justices and judges for family, individual, and member with child or spouse coverage, or their equivalents, from 1.5% of their base salary to 35% of the premium cost of the State's coverage. Section 45 creates a Design Committee which may "create, modify or terminate any plan or component, at its sole discretion" and Section 47 mandates at least three levels of coverage.[16] N.J.S.A. 52:14-17.27.

[16] § 39 establishes health care benefit contribution amounts for public employees;

§ 45 - N.J.S.A. 52:14-17.27 is amended to create a Design Committee which may "create, modify, or terminate any plan or component, at its sole discretion";

§ 47 - N.J.S.A. 52:14-17.29(j)is amended to mandate that the Design Committee provide at least three levels of coverage for employees, with differing out of pocket costs, and giving the Design Committee "sole discretion to set the amounts for maximums, co-pays, deductibles, and other such participant costs for all plans in the program"; and

§ 53 - N.J.S.A. 52:14-15.1(a) is amended to allow the creation of a "cafeteria plan," to require the Treasurer to "establish such a plan for medical or dental expenses not covered by a health benefits program," and requiring the plan to "provide for a reduction in an employee's salary, through payroll deductions or otherwise, in exchange for payment by the employer of medical or dental expenses not covered by a health benefits plan." [Pl.'s Br. at 10-11.]

Regarding coverage, co-pays and deductibles, Chapter 78 provides:

> N.J.S.A. 52:14-17.29(j) is amended to mandate that the Committee provide at least three levels of coverage for employees, with differing out of pocket costs, and giving the Committee "sole discretion to set the amounts for maximums, co-pays, deductibles, and other such participant costs for all plans in the program."
>
> [Chapter 78, § 47.]

During oral argument on October 5, 2011, the court questioned counsel regarding the proposed coverage under Chapter 78 and the related costs. For example, will the coverage be the same and, if not, what coverage will be provided and at what cost? The parties acknowledged that, as of October 5, 2011, the answer was not available.

In order to respond to the court's inquiry, the court provided counsel the opportunity to simultaneously submit supplemental briefs on or before October 12, 2011 and to submit replies on or before October 14, 2011. The court has reviewed these submissions.

Defendant argues that previous amendments have been made to the SHBP that have changed the nature of benefits offered and the State's obligation to pay for them. To support this, the State refers to amendments in 1964, 1972, 1989, 1996 and 2007. However, the amendments cited changed

very little in terms of benefits or costs.[17] Most importantly, as it applies to judges, the 1.5% contribution under P.L. 2007, c. 103 was accompanied in the same year with an increase in judicial salaries. P.L. 2007, c. 350.

The record reflects that on Wednesday, October 12, 2011, the State Health Benefits Commission approved numerous plans and components of those plans, differentiated by out-of-pocket costs to employees including co-payments and deductibles, as previously established by the Design Committee. Among the plans to be offered to State employees for calendar year 2012 is the

[17] For example, in 1964, the Legislature allowed local employers to participate in the Program, P.L. 1964, c. 125; in 1972, the Legislature changed the name of the statute, P.L. 1972. c. 75; P.L. 1989, c. 6 amended the Act to grant the Commission authority to determine by regulation what services were to be included and excluded so long as the benefits were substantially equivalent to those available on October 1, 1988, or as modified by a collective negotiations agreement made on behalf of the State; P.L. 1996, c.8 expressly permitted the Program to offer managed care plans and allowed the State to determine its obligations to pay premium or periodic charges for health benefits coverage through the collective negotiation process; and authorized the Commission to establish a cafeteria plan in order to provide for favorable treatment of employee health care expenses under federal tax law; and P.L. 2007, c. 103, established for all State employees for whom there is no majority representative for collective negotiation purposes - - including Judges of the Superior Court and Justices of the Supreme Court - - an obligation to pay 1.5% of the cost of coverage. (See also P.L. 2007, c. 350 that increased judicial salaries).

current plan (NJ Direct15) and the current HMOs (Aetna, Cigna).

It is impossible to know, at this juncture, what choices will be offered to State employees, including Justices of the Supreme Court and Judges of the Superior Court. Suffice it to say, in light of the constitutional protections afforded Justices of the Supreme Court and Judges of the Superior Court, they must be provided with the same or comparable level of benefits, at the same cost, during their terms of appointment in the absence of an increase in salary.

IV.

CONCLUSION

Declaratory Judgment, and the relief sought, is granted in favor of the plaintiff. The motion to dismiss is denied. Counsel for plaintiff shall submit an order consistent with this opinion. This court does not retain jurisdiction.