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**Wednesday, July 02, 2008**  
**Self-funding judiciary: part two**  
*Mechanics of proposed user fee would shield incentive for presiding judges to favor enormous awards*

By CARY ICHTER, Special to the Daily Report

Any match for "Cary Ichter" is highlighted below in bold red type.



(Amy Certain/Daily Report)

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undoubtedly would represent less than 1 percent of all cases; and each judge would receive less than one-tenth of 1 percent of each dollar paid into the system. Therefore, the outcome of a case would not and could not have a direct effect on the compensation of judges.

Gary J. Leshaw, in his response, "Fee-paid judiciary presents constitutional problems" (June 5, 2008), cited the decision of the U.S. Supreme Court in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), for the notion that my proposal violates concepts of due process and would be rejected by the courts. I disagree with Leshaw's conclusions. The test announced by Ward was "whether the ... situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof ... or which might lead him not to hold the balance nice, clear and true between the State and the accused.'" As is indicated above, the notion that any matter would be of sufficiently significant size to present any such temptation is simply implausible.

There is an even more practical, and therefore more compelling, argument to be made against this notion that judges would be motivated and moved by personal interest within a self-funding judiciary. The submerged premise of the "self-interest" argument is that adequately paid judges will violate their oath of office in order to make more money. I reject this notion entirely, but were it true, the question remains: Which system threatens justice more? Is justice more threatened in a system in which adequately paid judges are likely to be motivated by the possibility of receiving a de minimis share of a de minimis contribution into a large pool of money? Or should we be more worried about an environment in which scandalously underpaid, and reasonably outraged judges are presiding over cases involving huge sums of money?

If we start with the notion that our judges can be corrupted, our present system presents fertile field, tilled and fertilized each year by the other branches of government, within which to cultivate corruption. I reject the idea that judges will be corrupted. I suspect that the best of them are more likely to simply quit. As they do, how then will due process and justice fare?

My recent suggestion within these pages that the Georgia judiciary be self-funding ("A self-funding judiciary," May 28, 2008) has incited some thoughtful comment. As I have been proposing funding the judiciary through users fees and other self-generated sources for several years, most typically over cocktails, the content of the responses is familiar and anticipated, though more coherently (soberly) composed than I am used to.

The element of my idea for self-funding that always draws the most fire is that civil litigants would pay a post-litigation user fee that is based upon the dollars exchanged between the parties as a consequence of the litigation. The first, and most obvious, criticism of this idea is that the imposition of such a user fee would create an incentive for judges to favor dispositions representing enormous awards. I have a number of responses:

First, this criticism misunderstands the mechanics of my proposal. I propose that the judiciary, acting through, for example, the Judicial Council of Georgia or Administrative Office of the Courts, and under the supervision of the Supreme Court of Georgia, establish salaries and benefits for the courts on an annual basis based upon reasonable market factors, not based upon revenues collected the previous year. I do not propose that judges would receive a raise simply because a surplus might be generated in any particular year. Rather, surpluses would simply result in a downward adjustment the following year in the size of the user fee applied to each award that is collected. Hence, higher awards would have no effect on judicial compensation.

Second, the notion that any matter, no matter how significant, would involve dollar amounts so large that it would influence the activities of a presiding judge is improbable in the extreme. There are two enormous dilution points that must be considered in examining the influence the outcome a single case could have on the compensation paid to the judge who presides over it. The first dilution point is the relative size of any single judgment relative to the universe of all judgments or settlements paid in a single year.

While I have no data to support this assumption (a fact that makes me all the more certain of my assertion), I would hazard to guess that there has never been a case in the history of the state in which the amount in controversy exceeded less than 1 percent of the aggregate amount in controversy in all cases pending in the state. I have practiced law for nearly 25 years, and I cannot recall any case that would satisfy that criteria. Any case even remotely close to involving such an amount would be the subject of intense scrutiny from all quarters. The suggestion that due process could be corrupted in such notorious and conspicuous surroundings strains credulity.

The second dilution point is the share of any such judgment or settlement any single judge might collect relative to the size of the entire judiciary. Under my proposal, the user fees collected from litigants would go into a pool from which all judicial salaries and benefits would be paid. Hence, every dollar would be split among the hundreds of judges who sit in the state. In the end, the user fee would represent a small percentage of any collected judgment or settlement; each case would represent less than 1 percent of all cases; and each judge would receive less than one-tenth of 1 percent of each dollar paid into the system. Therefore, the outcome of a case would not and could not have a direct effect on the compensation of judges.

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Edward J. Henning added his voice to the debate on June 12, "Judicial system needs overhaul to loosen ties to executive, legislative branches." Henning, not surprisingly, suggests that we should use alternative dispute resolution more liberally to bring private resolution to private disputes. This leads one to wonder whether Leshaw's observations concerning self-interest were read by Henning.

Regardless, Mr. Henning's public pondering as to why the public should pay for the civil justice system has been answered by nearly every judge I have appeared before who has explained jury service to a newly empanelled jury. We finance a public civil justice system so that private civil disputes do not evolve into public criminal cases. Neighbors helping neighbors resolve their disputes has a long, proud and effective tradition. When societies become more complex, so too do the systems by which neighbors assist each other in the resolution of their disputes.

Henning's notion that private litigants should finance the entire cost of the judicial disposition of their disputes is wholly unworkable. Such an approach would plainly close the doors of the courthouse to litigants of modest means. While the idea of funding the costs of civil litigation for indigents is laudable, it fails to address the needs of persons of modest means. Plaintiffs in automobile accident, product liability, consumer fraud and similar cases would have little hope of having their cases heard if they were required to absorb a pro rata share of the costs of running the courts, particularly if defendants had the ability, as they currently do, to run up the costs of the process.

Henning's proposals regarding changes to the criminal justice system are beyond the scope of this commentary.

The good news is that all of the commentary generated by my initial column agreed on this much: the current system is broken and needs to be changed. When the men and women who administer justice in this society are converted to political footballs, when they are compensated on par with the upper echelons of first-year lawyers, when our best judges are compelled to leave the bench to provide for themselves and their families, change is imperatively demanded.

Whether change comes in evolutionary or revolutionary increments is of less concern than that it comes and that it comes soon. Clearly, the Legislature and the executive have made plain that the integrity, independence and quality of the judiciary is not a priority to them. Perhaps those branches sense an advantage in having control over the purse-strings of the courts. Whatever the motivation of the Legislature and the executive, the maintenance of a co-equal branch of government requires that steps be taken to restore the independence of the judiciary, and the first step in that direction is to eliminate the need for the judiciary to annually approach the other branches for its allowance. The judiciary must provide for its own financial independence if it is to maintain any sense of real independence.

GARY ICHTER, *Special to the Daily Report*