



---

Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | [www.law360.com](http://www.law360.com)  
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | [customerservice@law360.com](mailto:customerservice@law360.com)

---

## NJ Justices Avoid Tumult By OK'ing Recall Of Retired Judges

By **Martin Bricketto**

Law360, Newark (July 30, 2015, 8:14 PM ET) -- New Jersey's wide use of retired judges to address vacancies can continue thanks to a state Supreme Court decision Thursday finding the law authorizing the practice is constitutional, a ruling observers say underscores the tough task of overturning statutes and prevents a quagmire of worsened case backlogs.

Writing for a 5-1 majority of the court, Chief Justice Stuart Rabner rejected a criminal defendant's challenge to the law allowing the temporary recall of judges who have reached a constitutionally mandated retirement age of 70. Justice Barry T. Albin was the lone dissenter, arguing that recall judges play an important role but run afoul of clear language in the state's 1947 constitution.

Chief Justice Rabner put the issue to bed at the conclusion of a comprehensive, 54-page opinion, by reiterating that the laws have a strong presumption of validity and that the court must find a law clearly repugnant to the constitution beyond a reasonable doubt before striking down the law as unconstitutional.

"Defendant has not met that burden — because there is no such proof," the opinion said. "To the contrary, we find ample evidence that the recall statute is consistent with both the language and the history of the modern state constitution."

James Buckner, who was hoping to overturn a nine-year prison sentence for robbery, aggravated assault and attempted theft, unsuccessfully argued that constitutional language that "justices and judges shall be retired upon attaining the age of 70 years" clashes with the 40-year-old statute that empowers the chief justice to order recalls. The recall judge who presided over Buckner's trial was 73 at the time.

The case represented the first attempt to shake the state's recall system, according to Thursday's opinion. Lawmakers in 1973 passed legislation that allowed for the temporary use of retired judges under the age of 70, and updated the law two years later to include judges over the retirement age.

"The court majority seemed persuaded by the fact that the recall practice had been codified by statute for the past 40 years without challenge," said Peter Verniero, a former state Supreme Court justice now with Sills Cummis & Gross PC. "The decision reminds us that the burden in overturning a state statute is great."

Recall judges serve an important stop-gap function. As of July 1, there were 46 vacancies among 443 Superior Court judgeships authorized by statute, Justice Albin noted. Of the 72 judges serving on recall, 55 are above the mandatory retirement age, according to Justice Albin.

"Had we as lawyers lost recall judges, it clearly would have created an additional backlog that in turn would further anger litigants who believe the system does not process their cases quickly enough," Jeffrey S. Mandel of Cutolo Mandel LLC said.

Because of the possible ramifications, the New Jersey State Bar Association got involved in the case as an amicus participant and argued that any decision striking the recall system should apply prospectively and leave past rulings intact.

In a statement Thursday, NJSBA President-Elect Thomas H. Prol of Laddey Clark & Ryan LLP wasn't disappointed that those issues proved to be moot.

"This will ensure the proper and orderly operations of the state's judiciary as well as the entire state community including private, business and government matters," Prol said. "There can no longer be any doubt that the recall statute was designed to provide relief where judicial appointments have not kept up with judicial vacancies."

The state Appellate Division last year also upheld the recall statute as constitutional, but a dissenting judge on the panel triggered the Supreme Court's review.

Lawmakers can fill in the blanks when the constitution doesn't clearly prohibit something, and while the constitution spells out a mandatory retirement age for judges, it's silent on the issue of recalls, Chief Justice Rabner said.

"Nothing in the historical record suggests the framers wanted to ban recall," he said.

Chief Justice Rabner added that the retirement age is distinct from the concept of temporary recalls, which don't provide tenure or unwind a judge's retirement.

The ruling was welcomed by the state.

"The recall system furthers the framers' intent to achieve efficiency and fairness in our judicial system," New Jersey Deputy Attorney General Jeffrey Mongiello said.

An attorney for Buckner declined to comment.

The constitution's silence on recalls meant something different for Justice Albin, who said the drafters would have been aware that voters had rejected an earlier proposed constitution that explicitly allowed recalls.

"Nevertheless, the majority conjures a hidden meaning in the simple, clear and declarative words, 'judges shall be retired upon attaining the age of 70 years' — a meaning authorizing the Legislature to pass a law that allows the New Jersey Supreme Court to recall judges without any age limit," he said.

In Justice Albin's view, using judges over the age of 70 requires a constitutional amendment. He would have preserved the decisions of recall judges and allowed the system to continue for six months to give lawmakers time to act.

Justice Albin did say that recall judges have helped a system "beset with chronic judicial vacancies due to a dysfunctional political process."

"By failing to timely fill the many judicial vacancies, the political branches have created the urgent need for and the judiciary's dependency on the recall system," the dissent said. "However effective the recall system may be, politically created exigencies and pragmatic considerations cannot excuse the use of unconstitutional means to achieve a desirable end."

Chief Justice Rabner offered a more pragmatic approach, according to John North of

Greenbaum Rowe Smith & Davis LLP. There's nothing the court can do to change current political realities, from Gov. Chris Christie running for president — and vacancies potentially not being a priority for him — to the repeated difficulties that the governor and the state Senate have had with advancing judicial appointments anyway, North said.

"If you take 70 recall judges out of circulation and say to the governor and the Legislature 'Now you have to play nice,' it's just unrealistic," North said. "We would wind up with an even worse backlog, and of course with the constitutional right to a speedy trial in the criminal arena, it would be civil litigation that, as it always does, would bear the brunt of it."

Still, the ruling might represent a lost opportunity to pressure lawmakers to act on reforms such as increasing the retirement age for judges, according to Michael S. Stein of Pashman Stein PC.

"I do think that we're gaining momentum to raise the retirement age in any event, but for sure that momentum would have been increased at warp speed," Stein said about Justice Albin's position. "We shouldn't be so reliant on the recall system, and but for the dysfunction and the relatively low mandatory retirement age, we wouldn't be."

In September, the state Assembly Judiciary Committee advanced a proposed constitutional amendment that would increase the retirement age for judges to 75, but the state Senate so far hasn't moved on an identical measure. State senators are the ones who approve the governor's judicial nominations and can exercise the powers of "senatorial courtesy" to review and tie up nominations from their home counties.

A primary sponsor of the Assembly measure, Assemblyman John McKeon, D-Essex, said Thursday that changing the retirement age still makes sense.

"A judge's stock and trade is wisdom and that comes with experience," said McKeon, a partner with Hardin Kundla McKeon & Poletto. "We're losing a lot of talent based on what is an antiquated rule."

Buckner is represented by Brian F. Plunkett.

The state is represented by Jeffrey P. Mongiello of the New Jersey attorney general's office.

The NJSBA is represented by Thomas Hoff Prol of Laddey Clark & Ryan LLP.

The case is *New Jersey v. Buckner*, case number 074390, in the Supreme Court of the State of New Jersey.

--Editing by Chris Yates and Edrienne Su.

---

All Content © 2003-2015, Portfolio Media, Inc.