



A PARTNERSHIP OF PROFESSIONAL ASSOCIATIONS  
ATTORNEYS AT LAW

# 17<sup>TH</sup> ANNUAL OKLAHOMA PUBLIC FUND TRUSTEE EDUCATION CONFERENCE

TULSA, OKLAHOMA

September 27, 2013

\*\*\*\*\*

## FROM THE STATEHOUSE TO THE COURTHOUSE: LITIGATION UPDATE

\*\*\*\*\*

Presented by: Robert D. Klausner

There is no shortage of pension litigation in the United States concerning public employee retirement plans. The cases touch on bankruptcy versus state constitutional rights, collective bargaining laws versus member rights; reductions of benefits for retirees and actives; and fiduciary duties of trustees in investment matters. The following is a sampling of the complex issues which began in the statehouse and are being played out in courthouses around the country:

- A. **Ft. Worth Pension Litigation** - In late October 2012, the City of Ft. Worth cut pension benefits for all employees and retirees, except firefighters (who have one more year on their collective bargaining agreement). At the same time, the City sued the Board of Trustees of the Retirement Fund to ask for a judicial declaration that the ordinance was constitutional. On November 19, 2012 a federal suit was filed by police employees and retirees seeking to strike down the ordinance as being in violation of the U.S. and Texas Constitutions as applied to vested and retired members.

10059 NORTHWEST 1ST COURT, PLANTATION, FLORIDA 33324

PHONE: (954) 916-1202 • FAX: (954) 916-1232

[www.robertdklausner.com](http://www.robertdklausner.com)



The Fund attempted to remove the state case against it to federal court and consolidate the case with the action brought by the police officers. A different federal judge returned the matter to state court. The Fund took the position that it has authority to argue for or against the legislation and that the members, who were not named in the state court proceeding, are the real parties in interest.

The City moved to dismiss the federal case brought by the members and also moved to stay the federal action until the state court case is decided. The federal court denied the motion to dismiss but stayed the federal action until the conclusion of the state case. A motion to reconsider the stay was filed by the police officers in May and was granted by the Court.

At the same time, the Fund has moved to dismiss the state court case for failure to sue the real party in interest. The City has moved for summary judgment on the question of the validity of the ordinance. Those motions were heard by the state court on May 30 and the same day the federal court re-activated the police officers' case, the state court judge declared the ordinance valid. Because no member of the plan was party in the state court case, the decision is not binding on them.

- B. **Cincinnati Pension Litigation** - In 2012, the City of Cincinnati cut pension benefits for active employees. In addition, the balance of representation on the Board of Trustees was altered to place the City in effective control. A federal class action has been filed by vested members of the plan challenging the benefit cuts, including the alteration of the retirement board. A motion to dismiss is pending. The parties have recently entered mediation. At the same time, a ballot measure sponsored by the Arnold Foundation to close the plan will appear on the ballot in November.
  
- C. **Omaha Pension Litigation** - The Board of Trustees of the Omaha Police and Fire Retirement System has sued the City of Omaha in state court over the City's failure to observe the fiduciary independence of the Board. At issue is whether the Finance Department must follow the dictates of the Board on payment of outside counsel. The City Attorney's Office, who is ostensibly counsel for the Board, has contended that it and not the Board decides who the Board's lawyer will be. The matter is pending motions for summary judgment in a Nebraska state court.

D. **Michigan Class Action for Breach of Fiduciary Duty** - In September of 2009, the trial court certified a class action consisting of participants and beneficiaries of the Detroit Plan who are seeking to recover millions of dollars resulting from investments which “in hindsight should not have been made” (quoting from the Defendants’ brief). Eight cases were consolidated for appeal. NCPERS filed an amicus curiae brief.

NCPERS argued in its amicus brief that 1) Plaintiffs lack of standing flowed from the design of governmental DB plans; 2) Plaintiffs possessed neither a direct nor particularized injury-in-fact for constitutional standing purposes; and 3) the improper granting of standing would chill the taking of prudent investment risks, while opening the floodgates to improper litigation.

The Appeals Court issued a lengthy opinion on November 15, 2012. The Michigan Court of Appeals held as follows:

- 1) The Court agreed with Defendants and reversed the trial court as to governmental immunity/lack of PERISA standing for claims against the trustee defendants;
- 2) The Court affirmed the trial court’s ruling that plaintiffs have standing to pursue their PERISA claims against the investment advisor defendants;
- 3) Plaintiffs do not have standing to pursue a declaratory judgment action against either the trustee defendants or investment advisor defendants with regard to PERISA claims;
- 4) Plaintiffs have standing to assert their (i) common-law and statutory conversion claims; (ii) causes of action grounded in the trustee defendants’ “extravagant, unnecessary and improper trips”, and (iii) constitutional claims against trustee defendants and investment advisor defendants for violation of Art 9, Section 24 which protects “accrued financial benefits”;
- 5) Defendants’ motion for summary disposition was inappropriate at the early stage of the litigation;
- 6) The lower court correctly denied defendants’ motions for summary disposition on the basis that plaintiffs lacked standing. There is at least some independent evidence in support of the bad investment and self

dealing allegations supporting their breach of fiduciary duty and gross negligence claims;

- 7) The lower court properly dismissed the spoliation and waste counts;
- 8) The order granting class certification is affirmed. *Estes v. Adrian Anderson*, Michigan Court of Appeals (unpublished)(11/15/2012). The case is currently stayed pending the bankruptcy proceedings

E. **Arizona COLA case** - In 2011, the Arizona Legislature altered the COLA formula. The bill applied only to future COLAs and did not roll back or reduce any benefits currently being paid. A class of retired judges challenged the change in the COLA formula as it applied to persons already retired at the time the bill took effect. An Arizona trial court agreed with the retirees and declared the change in the formula unconstitutional as applied on the basis of Article XXIX, Section (1) C making pension membership a contract subject to the contract clause of the State Constitution (Article II, Section 25).

The State and the Retirement System have appealed to the Supreme Court of Arizona. NCPERS filed an amicus curiae brief on behalf of the retirees. The case has been argued and is awaiting a decision.

F. **Miami Financial Urgency Case** - The State of Florida has a law which, on its face, allows any government in a financially urgent situation to unilaterally alter an existing collective bargaining agreement after an accelerated 2 week bargaining period. The City of Miami, claiming to be on the verge of insolvency, used this statute to unilaterally alter its retirement plan for police officers and firefighters, despite an existing consent order regarding the plan.

The police union challenged the law arguing impairment of contract; that it was void for vagueness because "financial urgency" is undefined; that the bill eliminated an meaningful collective bargaining; that it denied equal protection because only public bargaining contracts could be set aside in this manner; and that it was an unconstitutional taking of property without due process of law.

The complaint survived a motion to dismiss and an emergency appeal. The case was tried in late May. A state court judge declined to invalidate the statute, finding it unfair but nonetheless constitutional. The basis for his ruling is that ultimately the matter is policy decision to be decided by the Legislature. The decision has been appealed.

- G. **Louisiana Cash Balance Litigation** - In the 2012 legislative session, the Louisiana Legislature adopted a cash balance tier for certain employees in three of the four state retirement systems, the Louisiana State Employees Retirement System (LASERS), the Teachers' Retirement System of Louisiana (TRSL), and the Louisiana School Employees Retirement System (LSRS) who are hired on or after July 1, 2013.

Louisiana law requires that every retirement bill have an actuarial note to determine if the bill creates an additional cost. If a pension bill amending an existing plan has a cost, the Louisiana Constitution requires two-thirds of the members of each house to vote in favor of adopting the bill. In 2010, Article X, Section 29 (F) of the Constitution was added to require a super majority for any legislation with an actuarial cost.

The Legislative Auditor is a constitutional officer charged with determining whether a pension bill has an actuarial cost. In the case of the cash balance tier, the Auditor found that the bill was more expensive than the traditional defined benefit plan because it permitted a significantly accelerated accumulation of wealth with an earlier payout and the need for the cash to make these payouts would have a substantial adverse effect on future investment of plan assets. The Governor, who sponsored the legislation, retained an actuary who offered a different opinion.

The legislation concerning actuarial notes makes it clear that only the Legislative Auditor's opinion was the one that determined whether a bill had a cost that would activate the two-thirds vote requirement. The House of Representatives held a procedural vote to decide that the cash balance tier was a new plan and therefore the constitutional super-majority rule did not apply. Ironically, the Governor's office, upon learning the cash balance tier, as a stand alone plan, could cost the state its Social Security exemption, filed a report under oath with the Internal Revenue Service stating the cash balance tier was not a new plan but an amendment to an existing one. The House adopted the cash balance tier, but with less than a two-third majority.

In August 2012, the Retired State Employees Association (RSEA) and several retired employees, including a former Senate Retirement Committee Chairman, sued on the basis that the law was not adopted with the required majority. Following a one day trial, the District Judge ruled that the Legislative Auditor's actuarial note was the only one that counted. As a result, the law was adopted in violation of the constitutional supermajority requirement and

therefore invalid. By striking down the law on the basis it was invalidly adopted, the Court did not reach the question of funding for any necessary implementation cost.

The State has appealed to the Louisiana Supreme Court. In late June, the Louisiana Supreme Court affirmed the decision of the trial court.

**Retired State Employees Ass'n v. State**, 2013 WL 3287132 (La. 6/28/13)

- H. **Baltimore Pension Litigation** - In 2010, the City of Baltimore cut prospective retirement benefits to police officers and firefighters with less than 15 years of service. It also altered a long standing variable COLA that had yielded an average of 3% per year and restricted COLA benefits to retirees over the age of 60 and at a lower rate. The City absorbed a \$400 million COLA reserve set aside for the former COLA to be used toward the City's obligations to the plan.

A class of retirees and the three public safety unions sued in federal court claiming impairment of contract and taking of property without due process of law. After trial, the Court upheld the changes made for active employees on the basis that employees did not vest until eligible to retire. It ruled against the City on the COLA issue and directed the reinstatement of the former COLA plan. The Court found that the City impaired the pension contract and that the replacement for the variable COLA was neither reasonable or necessary to achieve protection of the public welfare.

Both sides have appealed to the U.S. Court of Appeals for the 4<sup>th</sup> Circuit. All briefs have been filed and the case is awaiting a date for oral argument.

- I. **Florida State Pension Litigation** - In 2011, the Florida Legislature enacted legislation that converted the statewide Florida Retirement System from a non-contributory to a contributory system, requiring all current members to contribute 3% of their salaries and eliminated future cost-of-living adjustments. The Legislature also prospectively eliminated the plan's COLA for all active members. Members of the system challenged the legislation and prevailed at the trial court. The trial court found that the legislation violated Florida's constitutional right to collectively bargain, the constitutional protection against impairment of contract, and the constitutional prohibition on taking private property for public use without just compensation. The state appealed and the case was certified as a question of great public importance, fast tracking the case to the Florida Supreme Court. In January 2013, the Florida Supreme Court issued its ruling and reversed the trial court. The Florida Supreme

Court ruled that because the changes to the plan were prospective, they did not violate constitutional protections. The court held that “the preservation of rights statute was not intended to bind future legislatures from prospectively altering benefits for future service performed by all members of the FRS.”

**Scott v. Williams**, 107 So. 3d 379 (Fla. 2013)

- J. **Detroit Bankruptcy and Related Litigation** - The City of Detroit has sought protection from creditors in the largest municipal bankruptcy action to date. The Detroit case is of particular significance in that Michigan has an express provision in its state constitution which makes pensions a contract between the employee and public employer. The City and the bondholders contend that the federal law overcomes this state constitutional provision. The retirement funds and two separate group of plan participants have contended in a state court proceeding that the Governor lacked the authority under state law to authorize the bankruptcy because of the constitutional protection. On July 18, 2013, a state judge in Lansing, the state capital, held that the constitutional provision expressly prevents the Governor from authorizing Detroit’s emergency financial manager from seeking bankruptcy protection. On July 23, the Michigan Court of Appeal stayed the state court order pending appeal, which has been expedited for consideration on the merits.

In this early stage of the proceedings, there is as yet no definitive answer on this state versus federal authority question. It will, however, almost assuredly develop into the central legal question surrounding the future of Detroit’s 30,000 pension members and beneficiaries.

A hearing on whether the City is eligible under state law to file for bankruptcy is set for October 15<sup>th</sup>. The parties are also simultaneously engaged in mediation.

- K. **Jacksonville (Fla) Pension Litigation** - The City of Jacksonville and the Police and Fire Pension Fund were sued by a class of police officers and firefighters in federal court to declare their rights under a contract between the City and the Fund.

In the early 1990s litigation between the City and the Fund resulted in a settlement agreement outlining the terms of the plan and the relative role of the City and the retirement board in management of the system. The agreement was amended numerous times to address contributions and benefit enhancements, As a result, the City and its unions did not negotiate

pension benefits directly, having agreed to leave that issue to the City and the Fund.

In 2012, the City disclaimed its obligations under the agreements and demanded that the unions bargain. The employee suit sought to clarify the rights of the parties. The Fund, in response to the City position, cross claimed against the City to enforce the agreements. The federal court ordered mediation and the parties reached a settlement preserving the current tier of benefits; creating a second tier for new hires with a later retirement date and lower benefits. The City and the unions agreed to waive any demand to bargain or take unilateral action until September 30, 2030, the expiration date of the existing agreements.

The Retirement Board tentatively approved the settlement, as has the Mayor. The agreement is pending City Council ratification. In the interim, however, the local newspaper has filed suit to set aside the settlement claiming that it should have been negotiated in an open meeting, despite federal and state law exempting court ordered mediation from disclosure. Motions to dismiss that action are pending

**IF YOU HAVE ANY QUESTIONS OR COMMENTS CONCERNING THIS PRESENTATION, CONTACT ROBERT D. KLAUSNER, ESQUIRE, KLAUSNER, KAUFMAN, JENSEN & LEVINSON, 10059 NW 1<sup>ST</sup> COURT, PLANTATION, FLORIDA 33324, (954) 916-1202, FAX (954) 916-1232, WEBSITE, [www.robertdklausner.com](http://www.robertdklausner.com).**