INTERNATIONAL ASSOCIATION OF FIREFIGHTERS

AFFILIATE LEADERSHIP TRAINING SUMMIT

****

STATE OF PUBLIC PENSIONS AND ATTACKS ON BENEFITS

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I. BASIC CONSTITUTIONAL ISSUES

A. Impairment of Contract

1. Both the US and various state constitutions make pension benefits a constitutionally protected property right.

2. The degree to which legislation may affect current employees varies from state to state.

3. No federal regulation of this issue because of 10th Amendment federalism concerns.

B. Application of ERISA Standards

1. ERISA anti-cutback rules have specifically been made not applicable to state plans.

2. Congress determined that the reserved powers clause of the 10th Amendment of the constitution prevented federal regulation of this traditionally state concern.

II. A SUMMARY OF STATE CONSTITUTIONAL STANDARDS

CONSTITUTIONAL CHART
STATE CONSTITUTIONAL PROTECTIONS FOR PUBLIC SECTOR RETIREMENT BENEFITS

STATE	SUMMARY OF STATE LAW	CONSTITUTIONAL PROVISION
Alabama	Benefits are contractually protected for vested employees who are eligible to retire. Board of Trustees of Policemen's and Firemen's Retirement Fund of City of Gadsden v. Cary, 373 So.2d 841 (Ala. 1979)(pension benefits were vested for employees who had completed 20 years of service before the effective date of a statutory amendment, but were not vested for employees with less service); Calvert v. City of Gadsden, 454 So.2d 983 (Ala. 1984)(retirement benefits for members who had not yet served 20 years of service at time statute fixing retirement pay as last three years' rank had not yet vested and were not entitled to specific performance); Snow v. Abernathy, 331 So.2d 626 (Ala. 1976)(holding that where employee voluntarily elected to become member of the contributory retirement system relationship was contractual in nature giving rise to vested rights).	AL CONST., Article I, §22

Alaska	"Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired." See Municipality of Anchorage v. Gallion, 944 P.2d 436 (Alaska 1997)(ordinance permitting municipality to avoid contributions to underfunded police and firefighter retirement system if funds necessary to pay system's actuarial liability were available from total assets of system, impaired vested rights of members of fully funded plans to have the actuarial soundness of their plans evaluated and maintained separately from that of underfunded plan, and thus violated constitutional provision prohibiting impairment of accrued benefits of state employee retirement systems), but see Alford v. State, Dept. of Admin., Div. of Retirement and Benefits, 195 P.3d 118 (Alaska 2008)(recapturing early retirement benefits for retirees who returned to public service, and then retired again, pursuant to statutes in effect when employees took their first retirement that required that subsequent retirement benefits of early retirees who were reemployed be reduced by the actuarial equivalent of early retirement payments previously received, did not unconstitutionally violate anti-diminution provision; employees were receiving benefits under version of PERS statutes in effect when they took their first retirement, they still enjoyed a net increase over what they would have received under new version of the statutes, and Alaska Constitution did not give employees the right to mix and match a statutory provision from one era with that of another).	AK CONST., Article XII, §7
Arizona	"Membership in a public retirement system is a contractual relationship that is subject to Article II, §25, and public retirement system benefits shall not be diminished or impaired." See Yeazell v. Copins, 98 Ariz. 109, 402 P.2d 541, 545 (Ariz. 1965)(holding rights vest upon employment acceptance and cannot thereafter be altered without mutual assent); Op.Atty.Gen. No. I09-009, 2009 WL 4100152 (plain language of Article 29 of the Arizona Constitution prohibits reduction of benefit payments to retirees; as regards the lawful source or sources of funds to satisfy a shortfall in the System fund balance, the Plan trust fund would furnish the benefit payments of those individuals who retired on or after July 1, 1981, since those individuals now have benefits and accounts that are funded through the Plan. For those System members who retired before July 1, 1981, if there are insufficient monies remaining in the System trust fund to pay all of their guaranteed benefits, those remaining benefits would require a legislative appropriation).	AZ CONST., Article XXIX, §1

Arkansas	No explicit constitutional protection for public pension benefits, but courts provide limited protection for contributory vested pension benefits. See Jones v. Cheney, 489 S.W.2d 785 (1973)(holding that vested pension benefits funded with employee contributions are protected from impairment); compare Blackwood v. Floyd, 29 S.W.3d 691 (Ark. 2000)(holding that non-contributory pension benefits are a mere gratuity).	AR CONST., Article 2, §17
California	California caselaw now recognizes that public pension rights are governed by statute and not contract principles. Gutierrez v. Board of Retirement, 72 Cal.Rptr.2d 837 (1998); Betts v. Board of Admin., 582 P.2d 614 (Cal. 1978)("A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity."); California Ass'n of Professional Scientists v. Schwarzenegger, 40 Cal.Rptr.3d 354, 137 Cal.App.4th 371 (App. 3 Dist. 2006)(public employment gives rise to certain obligations, including pension rights, which are protected by the contract clause of the CA Constitution); County of Orange v. Association of Orange County Deputy Sheriffs, 121 Cal.Rptr.3d 151, 192 Cal.App.4th 21 (App. 2 Dist. 2011)(pension rights are obligations protected by the contract clause of the federal and state constitutions, unlike other terms of public employment which are wholly a matter of statute); but see Teachers' Retirement Bd. v. Genest, 65 Cal.Rptr.3d 326, 154 Cal.App.4th 1012 (App. 3 Dist. 2007)(public employees have vested contractual rights to pension benefits, but not every change in a retirement law constitutes an impairment of the obligations of contracts); but see San Diego City Firefighters, Local 145, AFL-CIO v. Board of Admin. of San Diego City Employees' Retirement System, 141 Cal. Rptr. 3d 860 (Cal. App. 4th Dist. 2012)(pension benefits adopted by resolution rather than ordinance were void).	CA CONST., Article 1, §9

Colorado	Courts have applied the state constitutional protection against impairment of contract in Art. 2, §11 to protect vested pension benefits. Until benefits fully vest, pension benefits can be changed. For benefits which are only partially vested, any adverse change must be balanced by a corresponding change of a beneficial nature, a change that is actuarially necessary, or a change that strengthens or improves the pension plan. If a plan amendment fails to satisfy any of these three criteria, it will be deemed an unconstitutional impairment of existing contract rights. See Police Pension & Relief Board v. Bills, 366 P.2d 581 (1961); Peterson v. Fire & Police Pension Ass'n., 759 P.2d 720 (Colo. 1988); McInerney v. Public Employees' Retirement Ass'n, 976 P.2d 348 (Colo App.1998)(in Colorado rights that accrue under a pension plan are contractual obligations protected under state and federal constitutions; retirement pay becomes a vested right when an employee has complied with the conditions imposed entitling the employee to the receipt of retirement benefits). In 2011, the state trial court in Justus v. State, Case No. 2010CV1589, distinguished between COLA benefits and base benefits in approving a unilateral reduction of the COLA formula. Reversed on contract grounds in 2012 by Court of Appeals, 2012 WL 4829545	CO CONST., Article 2, §11 (not explicit protection of public pensions; basic protection against impairment of contract)
Connecticut	No explicit constitutional protection for public pension benefits. Statutory protection exists for vested employees who satisfy eligibility requirements by becoming eligible to receive benefits. Courts have also recognized that the state's statutory pension scheme establishes a property interest entitled to protection from arbitrary legislative action under the due process provisions of the state constitution. See Pineman v. Oechslin, 488 A.2d 803 (1985). Municipal pensions are protected by CT Stat. §7-148 which provides that the "rights or benefits granted to any individual under any municipal retirement or pension system shall not be diminished or eliminated."	N/A
Delaware	Courts recognize contractual rights for vested employees who have fulfilled retirement eligibility requirements. See In re State Employees' Pension Plan, Del. Supr., 364 A.2d 1228 (1976); State ex rel. State Bd. of Pension Trs. v. Dineen, 409 A.2d 1256, 1259 (Del.Ch.1979)(holding contract rights vest upon completion of statutorily prescribed ten-year service requirement even though employee must wait until retirement age to collect). Article 15, §4 of the DE Const. also provides limited constitutional protection for elected/appointed public officers: "No law shall extend the term of any public officer or diminish the salary or emoluments after his or her election or appointment."	N/A

Florida	Article I, Section 10 of the Florida Constitution provides that no law impairing the obligation of contracts shall be passed. This constitutional provision has been interpreted by the courts to protect vested pension benefits. Once an individual has attained eligibility for a retirement benefit, the benefit is afforded constitutional protection. Caselaw interprets impairment of contract protections in Art. I, §10 to only permit prospective adjustment to pension benefits. Florida Sheriff's Association v. Department of Administration, 408 So.2d 1033 (Fla. 1981); State ex rel. Stringer v. Lee, 2 So.2d 127 (1941); Anders v. Nicholson, 150 So. 639 (Fla. 1933); O'Connell v. State Dept. of Admin., 557 So.2d 609 (Fla. App. 3 Dist. Feb. 2006)(holding that benefits vested upon attainment of normal retirement eligibility). In 2012 a state court trial judge in Williams v. Scott (Case No. 2011CA1584) struck down amendments to the state retirement system which increased the employee contribution and eliminated the COLA for future years of service.	FL CONST., Article I, §10
Georgia	Article I, Sec. I, Par. X of the Georgia Constitution prohibits the impairment of contracts. This constitutional provision has been interpreted by the courts to protect retirement benefits. Swann v. Bd. of Trustees, 360 S.E.2d 395 (1987)(holding that where a statute establishes a retirement plan for government employees who contribute toward the benefits and performs services while the statute is in effect, the statute becomes part of the contract of employment so that an attempt to amend the statute violates the impairment clause of the state constitution); Georgia courts have recognized that a retirement plan for government employees becomes a part of an employee's contract of employment if the employee contributes at any time any amount toward the benefits, regardless of whether the employee vests under the plan. "[I]f the employee performs services during the effective dates of the legislation, the benefits are constitutionally vested, precluding their legislative repeal as to the employee, regardless of whether or not the employee would be able to retire on any basis under the plan." Withers v. Register, 269 S.E.2d 431 (1980).	GA CONST., Article 1, §1, ¶X
Hawaii	"Membership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired." See Kaho'ohanohano v. State, 162 P.3d 696 (Haw. 2007)(constitutional provision prohibiting impairment of accrued benefits of members of Employees' Retirement System of State of Hawai'i protects not only accrued benefits, but also, as a necessary implication, the sources for those benefits).	HI CONST., Article XVI, §2

Idaho	No explicit constitutional protection for public pension benefits, but courts recognize contractual protection for public pensions. "The rights of the employees in pension plans such as Idaho's Retirement Fund Act are vested, subject only to reasonable modification for the purpose of keeping the pension system flexible and maintaining its integrity. Since the employee's rights are vested, the pension plan cannot be deemed to provide gratuities. Instead, it must be considered compensatory in nature." Hansen v. City of Idaho Falls, 446 P.2d 634 (1968); Nash v. Boise City Fire Department, 663 P.2d 1105 (1983).	ID CONST., Article I, §16
Illinois	"Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Di Falco v. Board of Trustees, 521 N.E.2d 923 (Ill. 1988)(holding that contractual relationship is governed by terms of pension code at the time the employee becomes a member of the retirement system); People ex rel. Sklodowski v. State, 695 N.E.2d 374 (Ill. 1998)(holding that underfunding claim alleging failure to make required contributions was not actionable since state constitutional provision was intended to create contractual right to benefits, without freezing politically sensitive area of pension financing); Bosco v. Chicago Transit Authority, 164 F.Supp.2d 1040 (N.D. Ill. 2001)(participant is entitled to public employee pension based on status of system when their rights in system vested, either at time of entering system or when clause became effective, whichever is later).	IL CONST., Article XIII, §5
Indiana	Courts treat compulsory and noncontributory pensions as a mere gratuity. An employee has no entitlement to vested rights until all eligibility requirements are satisfied. See Haverstock v. State Public Employees Retirement Fund, 490 N.E.2d 357 (Ind. Ct.App. 1986)("In order for a right to vest or a liability to be incurred it must be immediate, absolute, complete, unconditional, perfect within itself and not dependent upon a contingency. Moreover, it is well settled a mere expectance of a future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right."); Bd. of Trs. of the Pub. Emps.' Ret. Fund v. Hill, 472 N.E.2d 204, 208-09 (Ind.1985)(voluntary retirement system, in contrast to mandatory retirement system, creates contractually vested property rights which are protected from impairment of contract).	IN CONST., Article 1, §24
Iowa	Campbell v.. City of Marshalltown, 235 N.W. 764 (Iowa 1931)(indicating that duty to pay police pensions is purely statutory and not contractual); City of Iowa City v. White, 111 N.W.2d 266 (Iowa 1961)(holding that pension is protected once a member applies for retirement).	IA CONST., Article 1, §21

Kansas	No explicit constitutional protection for public pension benefits, but courts provide limited protection for vested pension rights. "A public employee, who over a period of years contributes a portion of his or her salary to a retirement fund created by legislative enactment, who has membership in the plan, and who performs substantial services for the employer, acquires a right or interest in the plan which cannot be whisked away by the stroke of the legislative or executive pen, whether the employee's contribution is voluntary or mandatory." Singer v. City of Topeka, 227 Kan. 356, 607 P.2d 467 (1980).	N/A
Kentucky	Section 61.692, KY ST, recognizes that public pension rights in the state retirement system constitute an "inviolable contract" and that benefits shall not be subject to reduction or impairment by alteration, amendment, or repeal. Jones v. Board of Trustees of Kentucky Retirement Systems, 910 S.W.2d 710 (Ky. 1995)(recognizing inviolable contract between KERS members and state). Section 19 of the Kentucky Constitution provides partial protection against impairment of contract.	KY ST §61.692 provides statutory protection; KY CONST., §19
Louisiana	"Membership in any retirement system of the state of a political subdivision thereof shall be a contractual relationship between employee and employer, and the state shall guarantee benefits payable to a member of a state retirement system or retiree or to his lawful beneficiary upon his death... The accrued benefits of members of any state or statewide public retirement system shall not be diminished or impaired. Future benefit provisions for members of the state and statewide public retirement systems shall only be altered by legislative enactment." But see Louisiana Municipal Association v. State, Sup.2005, 893 So.2d 809, 2004-0227 (La. 2005)(state constitutional mandate of actuarial soundness of state and statewide public retirement systems does not dictate how that actuarial soundness is to be accomplished and does not prescribe how the retirement systems are to be funded; mechanism by which actuarial soundness is achieved is left to the discretion of the legislature).	LA CONST., Article X, §29

Maine	It appears that the Maine courts have yet to address the exact protections for public pension benefits. Nevertheless, the courts recognize an employee's legitimate retirement expectations and will likely weigh those expectations against the government's justifications for an amendment. Spiller v. State, 627 A.2d 513 (Me. 1993)(declining to imply contractual rights where no intent expressed in statutory language, but recognizing that state employees have "legitimate retirement expectations" entitling them to due process); Huard v. Maine State Retirement Sys., 562 A.2d 694 (Me. 1989)(state employees have legitimate retirement expectations); Soucy v. Board of Trustees of Maine State Retirement System, 456 A.2d 1279 (Me. 1983)(declining to address constitutional issues and holding that insubstantial changes in amount of retirement benefits did not impair retired police officers' state or federal constitutional rights); Me. Op. Atty. Gen. No. 91-6 (reasoning that Maine courts are likely to use a case-by-case approach weighing the particular alteration of the state employee's pension rights against the asserted governmental objective).	ME CONST., Article 1, §11
Maryland	No explicit constitutional protection for public pension benefits, but courts provide protection against impairment of contract rights. See Davis v. Mayor and Alderman of City of Annapolis, 635 A.2d 36 (Md. App. 1994)(recognizing that MD follows majority view that pension benefits are contractual, but "under certain circumstances the government may unilaterally modify them so long as the changes do not adversely alter the benefits, or if the benefits are adversely altered, they are replaced with comparable benefits"); City of Frederick v. Quinn, 371 A.2d 724 (Md. 1977); Andrews v. Anne Arundel County, 931 F.Supp. 1255 (D.Md. 1996)(diminution of pension benefits was a substantial impairment; county failed to make sufficient showing that means adopted to maintain actuarial soundness was least drastic available).	N/A
Massachusetts	No explicit constitutional protection for public pension benefits, but courts recognize statutory protection for contractual pension rights. See Opinion of the Justices, 303 N.E.2d 320 (1973)(holding that the government may not deprive members of the "core of reasonable expectations" that they had when they entered the retirement system); Madden v. Contributory Retirement Appeal Bd., 729 N.E.2d 1095 (Mass. 2000)(state may not deprive members of the core of reasonable expectations that they had when they entered the retirement system; this does not preclude modifications to the retirement scheme, but such modifications must be reasonable and bear some material relationship to the theory of a pension system and its successful operation).	MA ST 32 §25

Michigan	"The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38, 806 N.W.2d 683 (Mich. 2011)(reducing or eliminating the statutory tax exemption for public-pension income did not impair accrued financial benefits; the accrued financial benefit of a pension plan is the pension income itself, not any tax exemption that might at some moment in time be attached to that income).	*MI CONST., Article IX, §24*
Minnesota	No explicit constitutional protection for public pension benefits, but courts apply promissory estoppel and contract theories to protect reasonable pension expectations. Housing and Redevelopment Authority of Chisholm v. Norman, 696 N.W.2d 329 (Minn. 2005)(public employer's promise in CBA to pay retiree healthcare premiums was enforceable on contract grounds); Law Enforcement Labor Services, Inc. v. County of Mower, 483 N.W.2d 696 (Minn. 1992)(holding that upon retirement in reliance on the county's promise of pension benefits a retiree's right is vested for the life of the retiree and cannot be altered absent the retiree's express consent); Christensen v. Minneapolis Mun. Employees Retirement Bd., 331 N.W.2d 740 (Minn. 1983)(holding that promissory estoppel precludes arbitrary changes to retirement plan but recognizing that public interest in modifying pension plan needs to be considered). Courts also provide limited protection against contract impairment based on MN CONST Art. 1, §11.	MN CONST., Article 1, §11
Mississippi	No explicit constitutional protection for public pension benefits, but courts provide protection for contractual pension rights. Article 3, §16 of the Mississippi Constitution prohibits laws impairing the obligation of contracts. Note that Article 15, §273 prevents the use of the initiative process to amend or repeal the state retirement system. Public Employees' Retirement System v. Porter, 763 So.2d 845 (Miss. 2000)(holding that statute mandating that pre-retirement death benefits go to surviving spouse rather than named beneficiary, was an unconstitutional impairment of contract).	MS CONST., Article 15, §273; *Article 3, §16*

Missouri	No explicit constitutional protection for public pension benefits, but courts provide protection based on impairment of contract principles to the extent that the vested rights are set forth in the controlling statute in effect at the time of vesting which became a part of the contract of employment. Firemen's Retirement System v. City of St. Louis, 2006 WL 2403955 (Mo. App. E.D. Aug. 22, 2006)(holding that city was required to pay the employer contributions certified by actuary and pension board); Fraternal Order of Police Lodge No. 2 v. City of St. Joseph, 8 S.W.3d 257 (Mo. App. W.D. 1999)(recognizing that governmental employees have no property rights in a pension fund except to the extent explicitly provided by statute).	MO CONST., Article 1, §13
Montana	No explicit constitutional protection for public pension benefits, but courts provide protection based on impairment of contract principles, protected by Article 2, §31 of the Montana Constitution. Baumgardner v. Public Employees' Retirement Bd. of State, 119 P.3d 77 (Mont. 2005)(holding that statute that changed the method for calculating retirement benefits was unconstitutional impairment); Gulbrandson v. Carey, 901 P.2d 573 (Mont. 1995)(recognizing that terms of pension contract are determined by the statutes in effect at the time of retirement).	MT CONST., Article 2, §31
Nebraska	"Nothing in this section shall prevent local governing bodies from reviewing and adjusting vested pension benefits periodically as prescribed by ordinance." NO CONST., Article III, §19; Calabro v. City of Omaha, 531 N.W.2d 541 (Neb. 1995)(holding that constitutionally protected contract rights vested upon acceptance of employment and that elimination of plan violated contract clause in Article 1, Sec. 10 of U.S. Constitution); but see Livengood v. Nebraska State Patrol Retirement System, 729 N.W.2d 55 (Neb. 2007)(reduction in sick leave hours in the collective bargaining agreement did not unconstitutionally impair prior contractual right).	NE CONST., Article III, §19; Article XV, §17
Nevada	No explicit constitutional protection for public pension benefits, but courts provide protection based on impairment of contract principles. The Nevada courts distinguish between "limited" and "absolute" vesting rights. When all retirement conditions are satisfied, retirement benefits are deemed to ripen into a full contractual obligation. Nicholas v. State, 992 P.2d 262 (Nev. 2000)(recognizing that pension rights become absolutely vested upon retirement at which time pension benefits are constitutionally protected against impairment); Pub. Emps.' Ret. Bd. v. Washoe Cnty., 96 Nev. 718, 615 P.2d 972, 974 (Nev. 1980) (concluding that, in "rendering services and making contributions, an employee acquires a limited vested right to pension benefits").	NV CONST., Article 1, §15

New Hampshire	No explicit constitutional protection for public pension benefits, but courts provide protection based on impairment of contract principles. McKenzie v. City of Berlin, 767 A.2d 396 (N.H. 2000)(holding that city was not permitted to force city employees into the city retirement plan after employees were enrolled in state retirement plan); State Employees' Ass'n of New Hampshire, Inc. v. Belknap County, 448 A.2d 969 (N.H. 1982)(implying waiver of sovereign immunity because legislature gave employees vested right to pension and must provide an appropriate remedy to enforce this right); Gilman v. Cheshire County, 493 A.2d 485 (N.H. 1985)(recognizing that benefits are an integral part of compensation and become vested at the time one becomes a permanent state employee);Cloutier v. State, 42 A.3d 816, 823 (N.H. 2012)(impairment of retired judges contractual rights due to application of amended statutes that modified method of calculating retirement benefits for judges was substantial if it was not offset by compensating benefit); but see In re Concord Teachers (NH. 2009) 969 A.2d 403 (application of statutory 150 percent cap on earnable compensation that was used to compute retirement annuities for those who retired early did not violate Contract Clauses of Federal or State Constitution, as cap did not operate upon collective bargaining agreement's early retirement provision retroactively because it was enacted and became effective prior to inclusion of early retirement provision within CBA).	NH CONST., Pt. 1, Article 23
New Jersey	Spina v. Consolidated Police & Firemen's Pension Fund Comm'n., 197 A.2d 169 (1964)(holding that pension benefits were not a gratuity but declined to find contractual rights because the retirement fund, to be a contract, must guarantee the solvency "We think it more accurate to acknowledge the inadequacy of the contractual concept."); New Jersey Education Ass'n v. State of New Jersey, 989 A.2d 282 (N.J. Super. Ct. App. Div. 2010)(participants do not have a constitutionally-protected right to a particular level, manner, or method of state funding of a pension system); Professional Firefighters Ass'n of New Jersey v. State, 2011 WL 3667721 (N.J.Super.A.D. Aug 23, 2011)(NO. A-3681-09T3)(legislation reducing required employer contributions does not violate the Contracts Clause of the state or federal constitution; while vested members have non-forfeitable rights to receive benefits the Legislature discretion to maintain the Plan's funds as it sees fit).	NJ CONST., Article 4, §7, P 3

New Mexico	Article XX, Section 22D of the New Mexico Constitution recognizes that public pensions give rise to vested property rights, protected by due process. Article XX, Section 22D provides that "Upon meeting the minimum service requirements of an applicable retirement plan created by law for employees of the state ..., a member of a plan shall acquire a vested property right with due process protections under the applicable provisions of the New Mexico and United States Constitutions." Pierce v. State, 910 P.2d 288 (determining that state retirement statutes created vested property rights, but not contract rights; "We decline to join those states that find a contractual relationship where one does not clearly and unambiguously exist and that proceed to justify how the legislature may nonetheless unilaterally modify this contract without the consent of the participants."); Whitely v. N.M. State Pers. Bd., 850 P.2d 1011 (1993)(determining that public employees did not have contractual right t o unconstitutional impairment of contract).	NM CONST., Article XX, Section 22
New York	After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired. NY CONST., Article V, §7. Public Employees Federation, AFL-CIO v. Cuomo, 467 N.E.2d 236 (NY Ct. App 1984)(reduction of benefits payable on death of state employees hired on or before July 1, 1976 was unconstitutional impairment of contract, inasmuch as death benefit was benefit of membership in retirement system rendered contractual in nature regardless of whether specific funds were earmarked for death benefit); but see Ballentine v. Koch, 674 N.E.2d 292 (NY Ct. App. 1996)(by defining Police Officer's Variable Supplements Fund (POVSF) to not be a pension or retirement system, and by reserving to the legislature the unilateral right to amend or repeal POVSF statutory provisions, the legislation established a benefit scheme expressly outside the purview of the pension impairment clause of the State Constitution).	NY CONST., Article V, §7
North Carolina	Wiggs v. Edgecombe County, 632 S.E.2d 249 (N.C. App. 2006)(recognizing contractual right to rely on the terms of the retirement plan when retirement rights vest); Simpson v. N.C. Local Gov't. Employees' Retirement Sys., 363 S.E.2d 90 (1987), aff'd per curiam, 372 S.E.2d 559 (1988)(holding that relationship between the retirement system and vested state employees is contractual in nature). Article I, Section 19 of the North Carolina Constitution is known as the "law of the land clause" and provides that "no person shall be ... disseized of his freehold, liberties, or privileges, or ... deprived of his ... property, but by the law of the land." N.C. CONST., Article 1, §19	NC CONST., Article 1, §19

North Dakota	No explicit constitutional protection and not much recent caselaw. It is likely that courts will provide protection against impairment of contract rights. Payne v. Board of Trustees of the Teachers' Ins. & Retirement Fund, 35 N.W.2d 553 (N.D. 1948)(recognizing that public pension plan is not a gratuity and rather gives rise to binding contractual rights and obligations upon satisfaction of all conditions); Quam v. City of Fargo, 43 N.W.2d 292 (N.D. 1950)(same); Klug v. City of Minot, 795 N.W.2d 906 (N.D. 2011)(home rule city had authority to combine police pension with city employee pension plan; defined benefit plan consists of a general pool of assets of which a plan member is entitled to a fixed periodic payment upon retirement not a claim to any particular assets).	ND CONST., Article X, §12
Ohio	No explicit constitutional protection for public pension benefits. Courts will look to pension statutes to evaluate contract claims. Herrick v. Lindley, 391 N.E.2d 729 (Ohio 1979)(public employees retirement system retirees have a statutorily created vested right to receive a retirement allowance at the rate fixed by law when such benefit was conferred); State ex rel. Horvath v. State Teachers Retirement Bd., 697 N.E.2d 644 (Ohio 1998)(public school teachers do not possess contract rights in any retirement benefit unless and until benefit vests by operation of applicable statute).	OH CONST., Article II, §28
Oklahoma	Taylor v. State Education Employees Group Insurance Plan, 897 P.2d 275 (Ok. 1995); Op. Atty. Gen. No. 96-21 (recognizing that failure to fund existing unfunded actuarial accrued liability in a public retirement system, in addition to constituting an impairment of pension rights, would violate the contract clause, unless the State can demonstrate that the contractual obligation arose under statute and the impairment was reasonable and necessary to serve an important public purpose).	OK CONST., Article X, §15
Oregon	No explicit constitutional protection for public pension benefits, but courts provide protection for contractual pension rights based on impairment of contract principles. Strunk v. Public Employees Retirement Bd., 108 P.3d 1058 (Ore. 2005)(holding that suspension of COLA benefits breached obligation of contract under OR. Const., Article I, §21); Oregon Police Officers' Ass'n v. State, 918 P.2d 765 (1996)(once employee provides services in reliance on promise to provide benefits on retirement, employer is contractually bound to honor promise); but see Goodson v. Public Employees Retirement System, 264 P.3d 148 (Or. 2011)(public Employees Retirement Board (PERB) did not unconstitutionally impair contract rights of certain retirees by reducing earnings credit for 1999 from 20% to 11.33%, where PERB lacked statutory authority to promise 20% earnings credit).	OR CONST., Article I, §21

Pennsylvania	No explicit constitutional protection for public pension benefits, but courts provide protection for contractual pension rights based on impairment of contract principles. Kelley v. State Employees' Retirement Bd., 890 A.2d 1173 (Pa. Cmwlth. 2006)(holding retirement code is in the nature of a contract for pension benefits and unilateral modifications may not be adverse to a member who has met retirement eligibility requirements), affirmed in part, reversed in part, Kelley v. State Employees' Retirement Bd., 593 Pa. 487, 932 A.2d 61(Pa. 2007)(holding that exclusion of former legislators from Class AA membership was rationally related to preventing substantial burden on retirement system); Association of Pennsylvania State College Faculties v. State System of Higher Education, 479 A.2d 962 (1984)(unilateral modifications in the retirement system may not be adverse to a member who has met retirement eligibility requirements).	PA CONST., Article 1, §17
Rhode Island	No explicit constitutional protection for public pension benefits, but courts provide protection for contractual pension rights based on impairment of contract principles. Nonnenmacher v. City of Warwick, 722 A.2d 1199 (R.I. 1999)(indicating that vested contractual rights might not be violated where the impairment caused by a change in benefits is "not substantial"); Rhode Island Council 94 v. Carcieri, 2011 WL 4198506, *1 (Trial Order)(R.I.Super. Sep 13, 2011)(statutorily-created pension system establishes a contractual relationship with the state; trial court denied defendants' motion for summary judgment after plaintiffs challenged benefit and COLA reductions).	RI CONST., Article 1, §12
South Carolina	No explicit constitutional protection for public pension benefits, but courts provide protection based on impairment of contract principles if the pension statute expressly creates a binding agreement. Layman v. State, 630 S.E.2d 265 (S.C. 2006)(holding that retirement statute created binding contract).	SC CONST., Article I, §4
South Dakota	No explicit constitutional protection for public pension benefits, but courts provide protection based on impairment of contract principles. Tait v. Freeman, 57 N.W.2d 520 (S.D. 1953)(recognizing that the state's statutory retirement system was contractual in nature); 1980 S.E. Op. Atty. Gen. 209 (indicating that accrued benefits are protected from impairment); but see Buchholz v. Storsve, 740 N.W.2d 107 (S.D. 2007)(retroactive application Uniform Probate Code provision setting forth general rule that divorce automatically revokes an ex-spouse's beneficiary designation in a retirement plan did not violate state constitution's contract clause because amendment was not a severe restriction since it did not prevent participant from maintaining ex-spouse as beneficiary, and even if it substantially impaired contractual relationship it served significant and legitimate public purposes).	SD CONST., Article 6, §12

Tennessee	No explicit constitutional protection for public pension benefits, but courts provide protection based on impairment of contract principles, holding that changes can be made to a retirement plan as long as the changes do not impair vested rights. Blackwell v. The Quarterly County Court of Shelby County, 622 S.W.2d 535 (Tenn. 1981)(holding that public pension benefits may be adjusted when necessary to protect or enhance the actuarial soundness of the plan, provided that no such modification can adversely affect an employee who has complied with all conditions necessary to be eligible for a retirement allowance); Davis v. Wilson County, 70 S.W.3d 724 (Tenn. 2002)(holding that health care benefits amounted to welfare benefits that did not automatically vest and could be altered or terminated by county at any time).	TN CONST., Article 1, §20
Texas	Article 16, §66(d) of the Texas Constitution protects against impairment or reduction of accrued pension benefits "[A] change in service or disability retirement benefits or death benefits of a retirement system may not reduce or otherwise impair benefits accrued by a person if the person: (1) could have terminated employment or has terminated employment before the effective of the change; and (2) would have been eligible for those benefits, without accumulating additional service under the retirement system, on any date on or after the effective date of the change had the change no occurred. Benefits granted to a retiree or other annuitant before the effective date of this section and in effect on that date may not be reduced or otherwise impaired." Note that state constitutional protection contains opt out for local government by referendum. Tex. Atty. Gen. Op. GA-0615, The Honorable Phil King (2008)(constitutional provision prohibits a change in the method of determining the compensation base of vested employees if it reduces or impairs retirement benefits that the employee would have been eligible to receive on or before the effective date of the change; City's 12% cap on increases in earnings used to determine the compensation base for calculating retirement benefits impairs retirement benefits).	TX CONST., Article 16, §66
Utah	No explicit constitutional protection for public pension benefits, but courts provide protection based on impairment of contract principles. Johnson v. Utah State Retirement Bd., 770 P.2d 93 (Utah 1988)(recognizing that vested rights cannot be impaired); Newcomb v. Ogden City Pub. School Teachers' Retirement Comm'n, 243 P.2d 941, 948 (1952)("Legislature may not provide for the termination of a retirement system unless a substantial substitute is provided.")	UT CONST., Article 1, §18

Vermont	No explicit constitutional protection for public pension benefits, but courts provide protection based on impairment of contract principles. Burlington Fire Fighters' Ass'n. v. City of Burlington, 543 A.2d 686 (Vt. 1988)(upholding pension amendment requiring retroactive contributions in exchange for increased benefits but recognizing that where an employee makes mandatory contributions to a pension plan, that pension plan becomes part of the employment contract as a form of deferred compensation, the right to which is vested upon the employee's making a contribution to the pension plan).	N/A
Virginia	No explicit constitutional protection for public pension benefits, but courts provide limited protection based on impairment of contract principles for fully vested employees who performed all employee obligations. Pitts v. City of Richmond, 366 S.E.2d 56 (Va. 1988)(holding that inchoate rights to retirement benefits do not vest until a member qualifies for retirement).	VA CONST., Article 1, §11
Washington	No explicit constitutional protection for public pension benefits, but courts provide protection based on impairment of contract principles. Bakenhus v. City of Seattle, 296 P.2d 536 (1956)(public pension rights are contractual in nature, based on a state promise made when the employee enters employment); Leonard v. City of Seattle, 503 P.2d 741, 747-48 (Wash. 1972)(reasoning that pension rights vest "day to day" and "year to year" giving rise to a property right which vests completely upon retirement); Retired Public Employees Council of Washington v. Charles, 62 P.3d 470 (Wash. 2003)(appropriations bill lowering employer contributions did not violate the state constitutional prohibition against impairment of public contracts, absent any indication that the lower contribution prevented the successful operation of the system or lessened the value of the retirement system).	WA CONST., Article 1, §23
West Virginia	No explicit constitutional protection for public pension benefits, but courts protect against impairment of contracts. Dadisman v. Moore, 384 S.E.2d 816 (1988)(holding that the protection of public pension rights is a constitutional and moral obligation of the state); but see Myers v. West Virginia Consol. Public Retirement Bd., 704 S.E.2d 738, 226 W.Va. 738 (W.Va. 2010)(after pension benefits are vested, the Legislature is constitutionally prohibited from reducing benefits but prospective modifications are permissible).	WV CONST., Article 3, §4

Wisconsin	No explicit constitutional protection for public pension benefits, but statutory protection is set forth in Section 40.19, WI Stat., which provides that "[R]ights exercised and benefits accrued to an employee under this chapter for service rendered shall be due as a contractual right and shall not be abrogated by any subsequent legislative act." Courts also protect pension rights against impairment of contracts and on due process grounds. Wisconsin Professional Police Ass'n., Inc. v. Lightbourn, 627 N.W.2d 807 (Wis. 2001)(recognizing that all participants in the Wisconsin State Retirement System are protected by §40.19(1) from the abrogation of accrued benefits unless the benefits are replaced by benefits of equal or greater value); Association of State Prosecutors v. Milwaukee County, 544 N.W.2d 888 (Wis. 1996)(recognizing that vested employees and retirees had protectable property interest in retirement assets and thus statute permitting non-vested employees to transfer employer contributions resulted in taking of property without due process); Welter v. City of Milwaukee, 571 N.W.2d 459 (Wis. App. 1997)(holding that retirement benefits in effect when a Milwaukee police officer becomes a member of the retirement system are vested as to that officer unless the officer agrees to a change); but see Bilda v. County of Milwaukee, 713 N.W.2d 661, 668, 292 Wis.2d 212, 224, 2006 WI App 57, 57 (Wis. App. Mar 23, 2006)(ordinance that directed payment of administrative expenses from system earnings rather than dedicated expense fund did not violate takings clause).	Section 40.19, WI Stat., WI CONST., Article 1, §12
Wyoming	No explicit constitutional protection for public pension benefits, but courts provide protection for contractual pension rights based on due process principles. Peterson v. Sweetwater County School Dist. No. One, 929 P.2d 525 (Wyo. 1996)(recognizing that legitimate retirement expectations may constitute property rights that may not be deprived without due process of law); Tollefson v. Wyoming State Retirement Bd., 79 P.3d 518 (Wyo. 2003)(holding that performance based salary constituted pensionable compensation); Wyland v. Wyland, 138 P.3d 1165 (Wyo. 2006)(holding that statute which denied firefighters with less than 5 years of service a refund of their compulsory contributions was not an unconstitutional taking of property without just compensation).	WY CONST., Article 1, §35

III. WHAT HAVE COURTS HAD TO SAY WHEN EMPLOYERS TRIED TO AVOID THEIR FINANCIAL OBLIGATIONS

A. **Louisiana Municipal Association v. State**, 893 So2d.809 (La.2005)

Several cities, represented by the Louisiana Municipal Association, filed suit against the Louisiana Firefighter Retirement System requesting a declaration that the employer contribution rate to the system was statutorily fixed at 9% and seeking an injunction preventing the state and the system from demanding more than the fixed 9% contribution rate. The lower court held the statutory provisions providing for funding of the system were unconstitutional as applied. The Louisiana Supreme Court affirmed in part, reversed in part, and dissolved the injunction. The court held that employers participating in defined benefit retirement systems could not avoid their constitutional duty to fund the retirement systems according to their actuarial need. Even if the cost was a burden on the employer, the solution was in the legislature, not the courthouse.

B. **McDermott v. Regan**, 624 N.E. 2d 985 (N.Y. 1993)

The New York State Assembly passed a law changing the actuarial funding method for the state pension system. The law called for a switch from an aggregate cost method of funding to a projected unit credit method. The actuarial change eliminated $800 million in employer contributions. A "surplus" in the pension fund was created by the change in the funding methodology. The surplus was created by virtue of the fact that the former actuarial method funded the plan on a level basis and the new actuarial method did not. The surplus created by this change in methodology eliminated employer contributions for the next ten years. The plan trustee and the employees challenged the law on the basis that it impaired the contractual right to benefits. The New York Court of Appeals held that diverting accumulated pension funds through actuarial methodology changes for the purpose of meeting a financial crisis was an unconstitutional impairment of the security of the pension contract.

C. **City of Lamar v. Lamar Police Department Pension Plan**, 857 P.2d457 (Co. App. 1993)

The City of Lamar withdrew from the state fire and police pension plan. Upon setting up its own plan, the City received a transfer of both the

employee and employer contributions. The City kept the employer contributions to meet future needs of its own plan. The pension fund sued the City to get control of the former City contributions claiming that they belonged to the plan. The court held that plan monies are an asset of the trust and that the City, by virtue of transferring from a statewide plan to a city plan did not regain ownership rights in those monies. The City ordered to place transferred employer contributions immediately into pension trust.

D. **West Virginia Education Association v. Consolidated Public Retirement Board**, 460 S.E.2d 747 (W.V. 1995)

Teachers association sued governor and retirement board claiming retirement system was actuarially unsound. Also challenged transfer of retirement funds to reimburse underfunded state group employees' insurance plan. Court held that inadequate funding is illegal and violates the employees' contractual rights to a pension. During pendency of litigation, legislature passed the statute requiring funding and the court held further litigation on that issue moot. Court held that contributions, once made, are held in trust for the members. Court held that pension funds are not state or public funds and cannot be used for any purpose other than pension. Use of monies to reimburse insurance fund was held by the court to violate vested contractual rights of members and constituted illegal expropriation. The court also awarded attorney's fees for failure of public officials to do their clear public duty.

E. **Dadisman v. Moore**, 384 S.E.2d 816 (W.V. 1989)

State of West Virginia intentionally underfunded retirement system by $80 million. Governor and legislature acted in complicity to improperly transfer pension appropriations back to the general fund. Trustees failed to act to protect the fund and were accused by the Supreme Court of at worst acting in complicity and at best acting with gross negligence. Breach of fiduciary duty found even though no pension payments were missed. Unilateral reduction in employer share of pension contributions affects the integrity and security of the fund. The pension fund was found to be an independent trust and not taxpayers' money.

F. **Municipality of Anchorage v. Gallion**, 944 P.2d 436 (Alaska 1997)

The Municipality of Anchorage had three retirement plans within its police and fire retirement system and had consolidated them for

actuarial purposes. The first two plans had substantial surpluses to the extent that no further employee or employer contributions would be required for the life of the members of the plans. A third plan, which was still open was approximately 90% funded. The City passed an ordinance consolidating the plans for actuarial purposes, in essence using the surplus in the first two plans to eliminate the need for contributions in the third plan. The members of Plans I and II sued claiming that the surplus money was theirs and could not be used to offset underfunding in Plan III. The court did not reach the issue of ownership of the assets but held instead that the loss of a separate actuarial-valuation was a diminution of the constitutional, contractual right to benefits and ordered a separate valuation of each plan. The court also held that assets from one plan within a system could not be used to balance costs within another.

G. **Wisconsin Retired Teachers v. Employee Trust Funds**, 558 N.W.2d1983 (Wis. 1997)

The state attempted to shift the cost of funding a COLA benefit from general state revenue to the excess earnings of the state retirement fund. A group of retirees whose COLA benefits were paid from these excess earnings and were adversely affected by the change filed suit claiming an impairment of the pension contract. The retirees also sued the trustees claiming a breach of fiduciary responsibility for not challenging the law. The court declared unconstitutional the attempt to utilize excess assets in the plan to pay a general state obligation but relieved the trustees of liability because they sought and followed the opinion of counsel.

H. **Association of State Prosecutors v. Milwaukee County**, 544 N.W.2d888 (Wis. 1996)

Legislature passed a bill directing a uniform state retirement system. Prosecutors were changed from county employees to state employees. The bill allowed unvested employees to transfer employee and employer contributions from the county plan to the state plan. The state plan was a modified defined contribution plan and the county plan was a defined benefit plan. The transfer of the employees from the county to the state plan created an actuarial gain to the county plan. The county pension board refused to transfer the employer contributions claiming that they were part of the general actuarial benefit of the trust and were not attributable to individual members. The supreme court agreed that the law was an unlawful invasion of the pension trust and violated the exclusive benefit rule.

I. **Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System v. Barton County, 311 S.W.3d 737 (Mo. 2010)**

A state statute required the county to make payments to the retirement system. For several years, the county received incentive payments from a state agency to make the pension contributions. Once the county stopped receiving incentive payments, it voted to cease making contributions to the retirement system. A state constitutional amendment generally bars the state from mandating that counties pay for a new or increased level of activity or service, but it specifically provides that "compensation of county officers does not constitute a new or increased level of a service or activity." The court held that the phrase "compensation of county officers" included pension contributions and that the county was required to make pension contributions.

IV. COURTS HAVE NOT, HOWEVER, BEEN CONSISTENT IN THAT APPROACH AS EVIDENCED BY THE FOLLOWING CASES

A. **Jones v. Board of Trustees**, 910 S.W.2d 710 (Ky. 1995)

Legislature amended statute regarding pension board's power to set contribution rates for the employer. Temporary suspension of the board's power to set rates was provided as result of a state budget crisis. Statute stated that pension is an "inviolable contract" not subject to reduction or impairment. Retirement board challenged change in its powers. Court held that contract is for a soundly funded pension and not the methodology by which that is achieved. Court held that the essence of the contract is the benefit of the promised level, not every aspect of the management of that process. Courts upheld legislation with the warning that if funding of benefits are impaired by the temporary suspension, then the suspension of the board's power to set the contribution rate is unconstitutional.

B. **Taylor v. State in Education Employees' Group Insurance Program**, 897 P.2d 275 (Ok. 1995)

State statute transfers funds from retirement system to insurance reserve. Constitutionality of transfer is challenged. Court denies challenge finding that benefits were not impaired and actuarial soundness was not impaired. Court noted that contemporaneous

increase of tax revenue to retirement system to offset transfer to group insurance plan was a lawful "quid pro quo" and, therefore, no diminishment of benefits occurred.

C. **Hughes Aircraft Company v. Jacobson**, 525 U.S. 432 (119 S.Ct. 755)(1999)

The U.S. Supreme Court has reversed a Ninth Circuit Court of Appeals opinion in the private sector and has held that members of a defined benefit plan have a right only to their accrued benefit and have no claim to surplus assets even if those assets are partly attributable to the investment growth of their contributions. The Court held that a plan's actual investment experience does not affect a member's statutory entitlement to benefits but instead reflects the employer's risk. Since the employer has an obligation to make up any actuarial shortfall in the plan, members have no claim to any particular asset that composes a part of the general asset pool. Instead, members have a non-forfeitable right to accrued benefits which cannot be reduced below the guaranteed amount. The Court further held that if a plan becomes over-funded (assets exceed the actuarial or present value of accrued benefits) the employer may reduce or suspend its contributions. The Court also permitted excess contributions to be used to fund new participants in the plan who were participating in a non-contributory structure.

D. **State Ex. Rel. Dadisman v. Caperton**, 413 S.E.2d 684 (W.V. 1991)

In Dadisman v. Moore (1989) state supreme court ordered an actuarial review of the state retirement system to determine the extent of damage from intentional underfunding. The legislature resisted placing additional funds into the plan. In 1990, the legislature eliminated the two divisions of the state system for accounting purposes (the state employees' division and the local government division). Assets had always been pooled for investment purposes. Local government division members claim that their side had a surplus while the state division was underfunded. The court rejected claims of a separate right to trust funds claiming that the plan was actually unified. A merger of assets was held not to impair the pension contract. Assets held to belong to the system. The net effect was to permit surplus investment on behalf of local government employees to be used to offset intentional underfunding by state government.

E. **Sklodowski v. State**, 695 N.E.2d 374 (Ill. 1998)

A group of employees sued the State of Illinois and various pension boards of trustees claiming a failure to adequately fund the retirement system. The employees claim that the boards and the state breached their fiduciary responsibility by failing to seek sufficient actuarial appropriations. The employees also claim that their pension contracts had been impaired and the state constitutional provisions protecting against diminution of pension plans was also violated.

The trial court dismissed the claims but they were reinstated by an appeals court. In reversing the appeals court and again dismissing the claims, the Illinois Supreme Court held that the employees have a right to receive a payment, not to a particular level of funding. Absent a constitutional guarantee of funding, there could be no breach of fiduciary responsibility.

The Supreme Court noted that there was an absence of factual allegations that the failure to properly fund the plan had immediately imperiled the payment of benefits. Although the court did not reach the issue, it also hinted that the judiciary may lack the authority to order the legislature to appropriate money based on separation of powers.

F. **Koster v. City of Davenport**, 183 F.3d 762 (8thCir. 1999)

In the first Federal case addressing the rights of public employees in an overfunded plan, the U. S. Court of Appeals for the 8th Circuit held that a group of Iowa firefighters and police officers had no constitutionally protected right in the excess assets in their former local plans. In 1992,the State of Iowa merged its local police and fire pension plans into a single statewide system. The resulting merger left a number of cities with surplus assets from their former plans. The statute gave the cities the option of using the surplus fro their future contributions to the state system of giving those assets to members for their future contributions. The cities all opted to use the assets for themselves. The members claimed an ownership right in the assets and sued. The court held that no contractual right in the assets existed, only the defined benefits. The Court's analysis centered on that fact that since the employer takes the actuarial risk, that it should enjoy the benefits of overfunding.

G. **Walker v. City of Waterbury, 2010 WL 114186 (2nd Cir. 2010)**

The Union and The City of Waterbury ("the City"), negotiated terms of a new collective bargaining agreement ("CBA"). In the CBA, the Union made substantial concessions: pension benefits now accrued at 2% instead of 2.5%, the new CBA required 25 years of service before receiving full benefits, instead of 20 years, and firefighters who retired after the effective date of the new CBA had to make contributions to their health care premiums, whereas previous CBAs provided medical care at no cost. In return for these concessions, the Union received a promise that none of its members would be laid off during the term of the agreement and also procured a $4,000 lump sum payment to each firefighter over and above their normal salaries. A group of active firefighters and members of the Union claimed that the new CBA deprived them of benefits that vested under the previous CBA, which stated that each employee shall vest in his pension after ten years of service regardless of the reason for termination of employment. All of the firefighters reached ten years of service either under the previous CBA or in the interim between the expiration of that agreement and the ratification of the new CBA. The firefighters claimed that the denial of allegedly vested benefits violated the substantive component of the due process clause of the U.S. Constitution. The court granted the City's motion for summary judgment and the firefighters appealed. In order to sustain a substantive due process claim, a plaintiff must demonstrate that he was deprived of a fundamental constitutional right by government action that is arbitrary or that shocks the conscience. The firefighters argued that they enjoy a fundamental right to the specific pension benefits enumerated in the old CBA. They contend that, because they have "risked their lives in service of the public good," the pension benefits they expected to receive under that agreement were "fundamental in our society's understanding of the proper order of things." However, the court found that it is well-established that substantive due process protections extend only to those interests that are implicit in the concept of ordered liberty, and rights so rooted in the traditions and conscience of our people as to be ranked as fundamental. Generally, interests related to employment are not protected. Simple, state-law contractual rights, without more, are not protected by substantive due process. The court concluded that the firefighters did not enjoy a fundamental right to the pension benefits they received pursuant to an ordinary employment contract.

H. **City of San Diego v. San Diego City Employees' Retirement System, 111 Cal. Rptr. 3d 418 (Cal. Ct. App. 2010)**

The City of San Diego established a program that allowed employees to purchase service credit in certain situations. It was undisputed by the parties that the program was intended to be cost-neutral to the city. After the board implemented the program, the city made retroactive benefit enhancements to the retirement plan, which effectively caused an increase in the value of prior service credit. However, the board failed to increase the cost of purchasing prior service credit. Several years later, in an effort to remedy the plan's growing actuarial liability, the board voted to charge the city for the unfunded liability. The court ruled that because the legislation authorizing the program provided that it would be cost-neutral to the city, the board exceeded its authority when it voted to charge the city for the underfunding.

I. **New Jersey Education Ass'n v. State of New Jersey, 989 A.2d 282 (N.J. Super. Ct. App. Div. 2010)**

A teachers' union filed a lawsuit against the state due to the state's failure to make appropriations for several years to fund the teachers' retirement system. Because state law requires the state to fund the pension system and the state failed to do so, the union argued that the state's failure to fund the system amounted to an unconstitutional impairment of contract. In rejecting the union's argument, the court held that union members do not have a constitutionally-protected right to a particular level, manner, or method of state funding of a pension system.

J. **Professional Firefighters of New Jersey v. State, 2011 WL 3667721 (N.J. Super Ct. App. Div. 2011)**

In a follow up to the NEA case, the New Jersey appeals court rejected a suit by firefighters and police officers contending that the intentional underfunding of the retirement system resulted in an impairment of their constitutional rights. The Court held that while vested benefits are protected, the manner in which the State chooses to fund those benefits is outside of the constitutional contract protections.

V. THE BATTLE OF BALTIMORE - ANATOMY OF CURRENT STRUGGLE

The City of Baltimore, effective July 1, took unilateral action to reduce employee and retiree pension benefits. Claiming that the funding requirements of the City's retirement plans were too great a burden on the City budget, the City took the extraordinary step of splitting the work force benefits into two tiers for active employees and also eliminated a variable COLA benefit, replacing it with a fixed rate COLA at a level which is lower than the average of the variable benefit which has been in place for over 28 years.

City Council Bill 10-519, which addresses the police and fire retirement system, contains 12 detailed factual findings. Among other things, the findings refer to recommendations from an independent actuary and independent financial consultant, who apparently describe the plan as unsustainable given the City's structural budgetary deficit. The last finding indicates that the amendments are necessary to implement recommendations "in a manner that minimizes diminution of benefits." This assertion is debatable. Evidence that the amendments are "necessary" is belied by the fact that the City was entertaining benefit enhancements for elected officials. Furthermore, an amendment on third reading to the final enrolled version of 10-519 increases the new minimum benefit for spouses from the original proposed floor of $12,000 to $16,000. The reductions are as follows:

Coverage and effective date: Generally, City Council Bill 10-519's amendments do not apply to members who are eligible for normal service retirement or "have acquired 15 or more years of service credit as a contributing member of the system" on or before June 30, 2010. Accordingly, as far as I can tell the only part of 10-519 that applies to existing retirees is the COLA amendment. The ordinance takes effect on June 30, 2010.

Delayed normal retirement benefit: Replaces 50 & 10 (or 20 and out) with 55 & 10 or (25 & out).

Actuarially reduced early retirement benefit: Replaces the current unreduced benefit at age 50, regardless of years of service, with:

> Actuarially reduced early retirement benefit upon attaining the earlier of age 50, regardless of years of service, or 20 and out (for members hired before 7/1/03);

Actuarially reduced early retirement benefit upon attaining the earlier of 50 and 10, or 20 years of service with at least 10 in the F&P plan (for members hired after 7/1/03).

Delayed DROP 2 eligibility: Changes DROP 2 eligibility from 20 years to 25 years.

Longer averaging: Changes average final compensation from average of 18 consecutive highest months to an average of 36 consecutive highest months.

Increased member contribution: Raises 6% employee contribution to 7% on 7/1/10 and annually thereafter by 1% per year, to cap at 10%, beginning 7/1/13.

Reduces interest rate on member contributions: Lowers the interest rate on member contributions from 5.5% to 3%. This affects members who separate prior to vesting, certain duty and non-duty death benefits, and DROP 2 benefits.

Replaces variable benefit with delayed, fixed COLA: The current variable benefit provides as follows: it applies to eligible retirees and beneficiaries when investment performance exceeds 7.5% as of June 30; it applies in the same percentage for all eligible retirees and beneficiaries; it is paid beginning the next January; retirees must be in receipt of benefits for 2 or more years as of June 30 to be eligible.

The proposed COLA provides as follows: 1% annual COLA for members and beneficiaries who are age 55; 2% annual COLA for members and beneficiaries who have attained age 65; retirees and beneficiaries *must now meet the age requirements on their own*; members and beneficiaries less than age 55 receive no increase; *no increase is paid for January 2011*; continues requirement that must be in receipt of benefit for two or more years as of June 30 to be eligible; transfers the current variable benefit assets and liabilities to the general account.

The City action is of particular concern in light of the fact that Baltimore has specific contract protection language in its City Charter:

Section 42 of Article 22 states as follows:

> "Upon becoming either a Class A, a Class B or a Class C member of the Employees' Retirement System, or upon becoming a member of the Fire and Police Employees' Retirement System, established under this Article 22, such

> member shall thereupon be deemed to have entered into a contract with the Mayor and City Council of Baltimore, the terms of which shall be the provisions of this Article 22, as they exist at the effective date of this ordinance, or at the time of becoming a member, whichever is later, and the benefits provided thereunder shall not thereafter be in any way diminished or impaired."

In addition, Maryland has a long history of case law supporting member and retiree rights.

The employees have filed suit challenging the changes and the legal battle has been on going since 2010. The federal court hearing the case has decided that the City can alter future accruals of benefits for persons not eligible to retire, as long as they benefit reductions are not retroactive. The Court did find that the reductions in the COLA as applied to persons already retired was a substantial impairment of contract. Following a trial in 2012, the Court struck down the COLA reduction but reaffirmed its order upholding the prospective changes for persons with less than 15 years of service and new hires.

Both sides have appealed to the U.S. Court of Appeals for the 4th Circuit

VI. COLA's COME UNDER ATTACK

In beginning in 2010, a number of states lowered or eliminated cost of living provisions in an effort to improve the funding level of financially stressed retirement systems. The reductions were challenged by members and retirees as impairing the obligation of contract and depriving members of their property rights without due process of law. In a pair of detailed trial court decisions issued in June 2011, courts in Minnesota and Colorado rejected the constitutional challenge.

The Minnesota case, Swanson v. PERA, was decided using an analysis of Minnesota's promissory estoppel theory which calls for a balancing of legitimate state interests and the rights and expectations of retired plan members. In finding that the reduction of the COLA was not unconstitutional, the Court noted that the legislative history of the COLA provisions indicated that it was intended to be a variable and, therefore, amendable provision. At the same time, however, the Court made it clear that the base benefit was not subject to alteration based on constitutional contract and property principles. The decision was not appealed.

Reaching the same result for surprisingly similar reasons, a Colorado trial court rejected a challenge to a Colorado law altering the COLA provisions of the state retirement system. The Court found that the COLA had been an ever-changing process, unlike the base retirement which the Court found to be protected from diminution or impairment. In a bright spot, the Colorado Court of Appeals reversed that dismissal in 2012. The details are explained in the next section of this outline.

By 2012 Legislative, at least 40 states considered similar reductions. The most highly publicized was the reduction by the New Jersey Legislature. The provision is particularly controversial in that it creates a committee to decide if the COLA should be reinstated once the retirement plan meets a certain funding benchmark.

As states and cities continue their struggles with diminished tax revenues, these constitutional challenges to attacks on the "fringes" of the base retirement benefit will continue.

VII. COURTS TAKE AN UNEVEN PATH ON RETIREE ISSUES

A. Rhode Island Council 94 v. State of Rhode Island, 705 F. Supp.2d 165 (D. R.I. 2010)

The state terminated a collective bargaining agreement pursuant to its termination clause and enacted legislation reducing the amount the state would spend on retiree health benefits. Labor union sued and argued that the state's actions violate the state and federal constitution impairment of contract clauses and takings clauses. The court ruled that the there was no contractual relationship after the valid termination of the collective bargaining agreement and that there was no intent for the relevant provision of the agreement to survive termination of the agreement since the plain language of the agreement required an employee to take the affirmative step of retiring in order for the provision to apply. The court further held that in order for legislation to be considered contractual in nature, it must be completely unambiguous that the legislature intended for there to be a contractual obligation. The court determined that such unequivocal intention had not been shown. Therefore, the court ruled in favor of the state and determined that there was no unconstitutional impairment of contract. The court additionally held that there was no violation of the takings clauses because there was no property right in the impaired benefits

B. Retired Employees Association of Orange County, Inc. v. County of Orange, 266 P.3d 287 (Cal. 2011)

The issue was whether an implied contract can be created between a California county and its employees that confers vested rights to health benefits on retired county employees. For many years in the past, Orange County calculated health insurance premiums separately for active employees and retirees. However, in 1985, the county began grouping active employees and retirees together into a single unified pool for health insurance purposes. "The single unified pool thus had the effect of subsidizing health insurance for retirees, in premiums above their actual costs." The County paid a large portion of active employee premiums, but retirees were responsible for paying the majority of their own premiums. Therefore, the pooled arrangement worked to the substantial economic advantage of the retirees.

In 2007, the County passed a resolution that would effectively split active employees and retirees into two separate pools for purposes of health insurance premiums, resulting in an increase in retiree premiums. As a result, an association of retired county employees filed suit in federal court in California against the county challenging the resolution. The association took the position that the "County's action constituted an impairment of contract in violation of the federal and state Constitutions, in that [the] County's long-standing and consistent practice of pooling active and retired employees, along with [the] County's representations to employees regarding a unified pool, created an *implied* contractual right to a continuation of the single unified pool for employees who retired before January 1, 2008."

The U.S. District Court found that the county could not be liable for any obligation that it did not explicitly undertake pursuant to resolution. On appeal to the U.S. Court of Appeals for the 9th Circuit, the federal appeals court for California, which generally does not decide questions of state law, asked the California Supreme Court to decide the question of whether a contract for retiree health care could be implied even absent an express agreement under state law. The California Supreme Court ultimately held that in the absence of a legislative prohibition, "under California law, a vested right to health benefits for retired county employees can be implied under certain circumstances from a county ordinance or resolution." The U.S. Court appeals accepted the decision and sent the matter back to the federal trial court on December 19th to reconsider its prior ruling in favor of the County, with an admonition to expedite the final determination. The matter rests currently with federal trial court.

C. Carlucci v. Demings, 31 So. 3d 245 (Fla. Dist. Ct. App. 2010)

An employer implemented a written policy to defray the cost of health insurance for long-tenured retirees by agreeing to pay health insurance premiums for retirees with more than twenty years of service. The written policy specifically stated that the employer "expressly reserves [the] exclusive right to unilaterally amend or cancel written directives." When the employer revoked the policy, employees filed a class action lawsuit alleging that rescission of the policy constitutes an unconstitutional impairment of contract. The court held that the rescission of the policy is not an unconstitutional impairment of contract because the policy is not considered a contract when the plain terms of the policy allowed for the employer's unilateral rescission.

D. Arken v. City of Portland, 263 P.3d 975 (Or. 2011)
Goodson v. PERS, 264 P.3d 148 (Or. 2011)

In a pair of decisions the Supreme Court of Oregon approved the recoupment of certain overpayments to retirees. The first case (Arken), involved the Public Employee Retirement Board's (PERB) effort to recoup overpayment of benefits made based on a 20% earnings rate applied in 2000 which should have been slightly more than 11%. PERB offered to allow retirees to repay in a lump sum or have a small amount deducted monthly. COLA benefits were also recalculated based on the corrected number. The Board was legislatively authorized to withhold COLA payments until the overpayment was recovered. The retirees sued on a variety of grounds including detrimental reliance, lack of notice, and breach of contract. The Supreme Court of Oregon rejected the claims finding that retirees were not entitled to keep benefits not accurately reflected by the statute. Moreover, the Court applied general trust principles on the issue of recoupment. The Court did determine that the COLA freeze was not an authorized method of recovering overpayments. While the Fund could defer COLA increases until recoupment was completed, the law did not authorize a complete freeze in COLA benefits.

In a separate decision (City of Portland) arising from the first case, and decided the same day, the Supreme Court addressed the claim of a due process violation in that PERB did not give individual notice to affected retirees that a challenge to the 20% interest credit was pending that ultimately resulted in a downward adjustment in benefits. The Court rejected the due process argument on the basis that the affected retirees had no legal right to the challenged benefits based on

the erroneous calculation and therefore had no protected property interest being taken without proper notice. In other words, an overpayment does not constitute a protected property right.

E. In Re Request of Advisory Opinion, 806 N.W.2d 683 (Mich. 2011)

Michigan has traditionally exempted state and local government retirement benefits from state income taxation. The Legislature altered the state tax code in 2011 and abolished the exemption, substituting a new exemption for all tax payers based on age and household income. The Governor requested an opinion from the state supreme court as to the constitutionality of the change. Specifically, Michigan has an express contract protection for accrued retirement benefits in its state constitution. The Court found that no such protection existed regarding the tax exemption. The justices reasoned that a tax exemption does not accumulate over time as does a pension benefit based on labor. While the amount of the pension is clearly protected from reduction, the treatment of that payment for tax purposes had no such protection.

F. Justus v. State, 2012 COA 169 (Colo. App. 10/11/2012)

The Colorado Court of Appeals has reversed an order dismissing a state court action challenging the elimination of a variable COLA in the Colorado PERA. The appeals court found that under Colorado law, pension benefits are a contract and that contract included the COLA. The court returned the case to the trial court to determine in light of its finding that the state law impaired the pension contract, whether the state's action should be allowed as being "reasonable and necessary" to protect the public welfare.

G. Washington Education Ass'n v. State Retirement Systems, Thurston County Superior Court, Case No. 11-2-02213-4.

In an order dated November 9, 2012, a state trial court in Olympia issued an order striking down a 2011 law repealing COLA in the state employees' and teachers' retirement plans. The court held that a state cannot reserve the right to repeal vested benefits. Once granted, such a repeal can only be permitted if replaced with a substantially equal new benefit. It is likely that the state will appeal the decision to the Washington Supreme Court.

VIII. MUNICIPAL BANKRUPTCY

Several high profile bankruptcy cases filed by municipal governments have sharply focused the effect of Chapter 9 of the Bankruptcy Code on pension obligations.

The City of Prichard, Alabama became the first city in American history to completely default on its employee pension obligations. Prichard sought protection under Chapter 9 of the Bankruptcy Code relating to municipal debt obligations. The automatic stay prevented pursuit of a number of actions by the city's creditors including its employees. The bankruptcy petition was dismissed as not meeting the state law test under Chapter 9 and the City has since made some partial pension payments since the automatic stay was dissolved. Later, the Alabama Supreme court held that Prichard was able to declare bankruptcy under state law and the bankruptcy case was refiled. Active employees who lost everything have filed a claim in that latest proceeding.

Vallejo, California received judicial approval to abrogate its collective bargaining agreements in its on-going bankruptcy proceedings. As Vallejo is a participant in the California Public Employees Retirement System (CalPERS), it has local retirement plan. The unanswered question from the Vallejo decision is whether a city that rejects a collective bargaining agreement under the *Bildisco* standard can also avoid its pension obligations. *Bildisco* was a private sector case setting the standards for an employer covered by the National Labor Relations Acts to avoid contract obligations through bankruptcy. Given the factual intensity of such examinations, the question is likely to be addressed on a case by case basis.

In 2011, Central Falls, Rhode Island retirees agreed to take a cut in their retirement benefits as a part of that city's bankruptcy proceedings. It is believed to be the first voluntary reduction of retiree benefits in this circumstances, but may act as an example for other troubled cities to use.

In 2012, the Cities of Stockton and San Bernardino filed for bankruptcy protection. These cases are focused on whether bankruptcy can relieve a city of its contribution obligations to the California state retirement system, CalPERS. The focus will be on the federal law which controls bankruptcy and state's reserved rights under the federalism protections of the 10th Amendment to run its own retirement programs. The insurer for the municipal bond holders and CalPERS are battling to see who will bear the brunt of the loss. This stands a high likelihood of setting nationwide precedent.

A Florida trial court will hear arguments in 2013 concerning that stat's financial urgency law. This is a provision in the state public bargaining law which allows a city with a "financially urgent situation" to unilaterally alter labor agreements. The term "financial urgency" is not defined in the law and appears to run counter to the state constitutional provision which makes public bargaining, except for the right to strike, a fundamental constitutional right.

IX. WHAT EFFECT WILL LOSS OF A DEFINED BENEFIT PLAN HAVE ON JURISDICTIONS EXEMPT FROM SOCIAL SECURITY?

Under the Social Security statute, a number of employers who have been exempt from OASDI are creating new tiers in their retirement programs, including DC plans.

The governing statutes require a retirement plan which is "comparable" with the OASDI benefit in order to retain the exemption. The law, however, is internally contradictory on what is comparable. A plan must provide at least a 7.5% contribution which must be held in trust. The contributions, and a "reasonable" rate of interest can constitute the benefit.

The problem is that there is no true definition of "comparable," particularly with a DC plan. In many of the new DC tiers, contributions are at risk to the market, meaning employees could be left with next to nothing at retirement. The IRS has authority to decide what a "retirement plan" is, but not whether the plan is "comparable."

The potential issues are as follows:

1. If the IRS is asked to bless the minimal plans being created, will that lead to a loss of the Social security exemption and undermine the long standing DB exemption? If it does, and employers and employees pick up a Social Security contribution where one did not exist before, how will that affect cash-strapped employers and employees whose wages may be frozen or reduced? Will it hasten further closure or termination of DB plans?

2. If no challenge is made to these minimal plans, many employees will be left with no real pension AND no Social Security coverage. This is currently the case in Alaska for police and fire hired after the state closed its DB plan in 2006. Most of the DC participants lost a significant portion of their contributions and the employers' contributions in the market downturn. At the same time, these

employees are still deemed exempt from OASDI. We are studying whether there is a cause of action to force the state to reimburse the lost contributions and provide some guaranteed "reasonable" rate of interest. It is our view that the plan cannot be comparable if the employee and employer contributions are at risk to the market.

X. HIGHLIGHTS OF THE LEGISLATIVE ACTIONS AROUND THE COUNTRY[1]

Alabama Act 377

Created a new tier for employees hired after 1/1/13 with lower employee contributions; highest 5 year average rather than highest 3 years; extended retirement age by 2 years; eliminated 25 year normal retirement; and lowered multipliers for both safety and non-safety employees by 15%.

California AB 340

New tier for persons hired on or after 1/1/13. Employees will pay 50% of normal cost; Changes retirement age by 2 years; requires highest 3 year AFC; limits benefits to 415 limit; limits benefits to base pay; limits post retirement employment; prohibits purchase of airtime and retroactive application of benefit increases. Prohibits employers from taking contribution holidays. Contributions may not be less than full normal cost. Added a felony forfeiture provision.

Kansas Chapter 171, laws of 2012

Closed DB plans to new members and created a hybrid cash balance DB plan. Guaranteed investment return; no risk of member to the market; lifetime annuity based on account balance.

Louisiana Chapter 483, Laws of 2012

Closed certain classes of LASERS and TRSL to current plan. Created a Hybrid cash balance DB tier with guaranteed investment return; no market risk to members; and lifetime annuity based on account balance or partial lump sum with reduced annuity.

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[1] Material for this Section was drawn from Snell, "Highlights of State Pension Reform," National Conference of State Legislatures and from various system websites.

New York Chapter 18, Laws of 2012

Created a new tier for state and New York City retirement plans effective 1/1/13. Tiered contributions of 3%-6% depending on salary. Multiplier tiered to encourage 30 years of service; 5 year AFC; increased retirement age by one year.

South Carolina Act 278

Increased current member contributions; Extended retirement ages for new hires; eliminated service only retirement; increased vesting to 8 years; Caps COLA at $500 per year.

Virginia Act 702

Establishes hybrid DB-DC plan for new hires (except public safety). 1% DB multiplier and 5% employee contribution to DC plan with partial employer match. Age and other plan factor for retirement are unchanged.

Virginia Act 822

Requires increase in employee contributions, to be offset by mandated salary increases equal to the amount of the contribution increase.

Wyoming Chapter 107, Laws of 2012

Prohibits COLA until System fully funded. Current COLA discretionary.

Wyoming Chapter 108, Laws of 2012

Applies to person hired on or after 9/1/2012; increases retirement age; lowers multiplier by 10% for all except firefighters; FAC from 3 years to 5 years.

XI. AS IF THAT WASN'T ENOUGH.....

The following matters are currently pending around the country:

A. **Ft. Worth Pension Litigation** - In late October, 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, 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. Our office is representing the Plaintiffs in the federal suit.

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. Our office is part of a the legal team representing the class.

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. We are working with the local counsel for the Board. At the same time, the Police Association may sue the Board and the City to remedy the City's longtime underfunding of the plan.

D. **Florida Retirement System** - The speaker-designate of the Florida House of Representatives has stated his intention to file legislation closing the Florida Retirement System to new members, all of whom will be placed in a DC plan. This will have effect, among other things, of exacerbating the State's recent practice of intentional underfunding the plan. NCPERS may wish to assist in organizing opposition to the bill and in providing expert testimony and educational assistance as to ill-advised nature of this proposal. A state supreme court consideration of a constitutional challenge to the last pension reform law remains pending a decision.

E. 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 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 spoilation and waste counts;

8) The order granting class certification is affirmed. *Estes v. Adrian Anderson,* Michigan Court of Appeals (unpublished)(11/15/2012)

XII. STRATEGIES IN CHALLENGING TIMES

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